Supreme Court
New South Wales

Medium Neutral Citation:	**X v Twitter Inc [2017] NSWSC 1300**
Hearing dates:	15 September 2017
Date of orders:	28 September 2017
Decision date:	28 September 2017
Jurisdiction:	Equity
Before:	Pembroke J
Decision:	See paragraph [55]
Catchwords:	EQUITY – final injunctions 'everywhere in the world' – foreign defendants – extra-territorial reach – jurisdiction and discretion EQUITY – confidential information – claim against Twitter as recipient of information –cause of action separate from claim against persons responsible for original 'leak' INJUNCTIONS – form of orders – onerousness – width – suggested difficulty of performance – principles applicable INJUNCTIONS – utility – likelihood of compliance – relevant considerations – social responsibility of Twitter DISCOVERY - identity disclosure orders – relevant considerations – necessary to enable plaintiff to bring claim against persons responsible for original leak STATUTE – Court Suppression & Non Publications Orders Act, 2010 (NSW) – whether suppression of identity of defendants justified – no reasonable likelihood of prejudice to plaintiff
Legislation Cited:	Court Suppression & Non-Publication Orders Act, 2010 (NSW)
Cases Cited:	Attorney General v Punch Limited [2003] 8 AC 1046 Australian Broadcasting Commission v Parish (1980) 43 FLR 129 Australian Competition & Consumer Commission v Air New Zealand Ltd (No 3) [2012] FCA 1430 Computershare Ltd v Perpetual Registrars Ltd (2000) VR 626 Curro v Beyond Productions Pty Ltd (1993) 30 NSWLR

	337 Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim (2012) 83 NSWLR 52 McLean v Burns Philp Trustee Co Pty Ltd (1985) 2 NSWLR 623 Macquarie Bank v Berg [1999] NSWSC 526 Maggbury Pty Limited v Hafele Aust Pty Limited (2001) 210 CLR 181 Norwich Pharmacal Co v Customs & Excise Commissioners [1974] AC 133 Rinehart v Welker [2011] NSWCA 403 Streetscape Projects (Australia) Pty Ltd v City of Sydney [2013] NSWCA 2 X v Y & Z [2017] NSWSC 1214 Y & Z v W [2007] NSWCA 329 Wright, Layman & Umney Ltd v Wright (1949) 66 RPC 149
Texts Cited:	I C F Spry, The Principles of Equitable Remedies, 9th ed (2014)
Category:	Principal judgment
Parties:	X – plaintiff Twitter Inc – first defendant Twitter International Company – second defendant
Representation:	Counsel: J R Williams and Ms B Ng – for the plaintiff No appearance for the defendants Solicitors: Ashurst Australia – for the plaintiff No appearance for the defendants
File Number(s):	2017/271185

JUDGMENT

Introduction

1 This is a claim for final injunctions against the defendants relating to the unauthorised publication of the plaintiff's confidential information. The publication occurred in the form of 'tweets' on the defendants' micro-blogging service known as Twitter. The nature and content of the information that was published, and the accompanying remarks and threats in the tweets, provide a clear inference of malice. The identity of the author of the tweets is so far unknown but it is clear that he or she has access to some of the plaintiff's financial records.

2

The two defendants are foreign corporations. Twitter Inc is a Delaware corporation whose head office and principal place of business are in California. Twitter International Company is an Irish corporation whose principal place of business is in Dublin. The former appears to be responsible for operations in the United States and the latter appears to be responsible for worldwide operations outside the United States. This is to some extent borne out by the fact that the Australian Twitter entity – Twitter Australia Holdings Pty Limited - which is not a party, is a wholly owned subsidiary of the Irish corporation. And it is reinforced by the Twitter Private Policy, which states explicitly that if the user lives outside the United States, 'the data controller responsible for your information' is the Irish corporation.

3 With one qualification, the defendants stayed away from the court, chose not to appear, and did not participate in the proceedings. The qualification relates to an email from 'support@twitter.com' sent on 8 September to the plaintiff's solicitors. The email contained information, submissions and objections. The anonymous sender requested that the communication be brought to the court's attention. It was – and I have taken it into account.

4 The substantial issues for determination concern the jurisdiction to grant injunctive relief against foreign defendants who do not appear; the appropriateness of injunctions expressed to operate 'everywhere in the world'; whether there should also be orders requiring the defendants to disclose to the plaintiff the name, address, contact details and IP address of the account holder and author of the tweets; and whether an appropriate balance between fairness to the plaintiff on the one hand, and the public interest in open justice on the other hand, justifies an order suppressing the identity of the defendants, as well as that of the plaintiff.

The Offending Tweets

5 There could be no argument about the confidentiality of the financial information disclosed in the tweets. Nor could there be any argument about the strict obligations of confidence owed to the plaintiff by the person or persons who disclosed that information. All partners and employees of the plaintiff were and are bound by clear and express contractual obligations to keep confidential the very sort of information that has been revealed. The contractual obligation, and a correlative equitable obligation, subsist during partnership or employment, and continue after the cessation of partnership or employment.

6 The first offending tweets appeared between 16 and 19 May. The author of the tweets used a twitter handle that falsely adopted the name of the plaintiff's CEO. It was manifestly dishonest conduct. On 19 May, the plaintiff's solicitors wrote to Twitter Inc drawing attention to the tweets, the offending information contained in them and the user's impersonation of the plaintiff's CEO. They requested Twitter Inc to remove the offending material from the Twitter website; to deactivate the 'fake' user's account; to take all other steps available to it to prevent the user from publishing further confidential

information on the Twitter website; and to provide the identity and contact information of the user. Twitter responded promptly, stating that it had 'removed the reported account for a violation of Twitter Rules (https://twitter.com/rules), and specifically our rules regarding impersonation on Twitter (https://support.twitter.com/articles/18366-impersonation-policy)'.

7 On 30 May, the plaintiff's solicitors wrote again to Twitter Inc, noting that the account from which the offending material had been published had been deactivated, but adding that the circumstances gave rise to a cause of action against the user for breach of confidence, and repeating their request for information relating to the identity and contact details of the user. The response from Twitter Inc was brief and negative: 'Per our Privacy Policy, Twitter does not release user information *except as required by valid legal process'* (emphasis added).

8 On 13 June, another offending tweet appeared, using a twitter handle also based on an impersonation, but of a different senior officer of the plaintiff. The followers of this tweet were substantially identical to the followers of the first group of tweets. The plaintiff's solicitors wrote again to Twitter Inc, which again responded promptly. It stated that 'the account in question has been permanently suspended' and added that 'if you would like to request information about the Twitter account and user associated with the suspended account, please complete our Privacy Form'.

9 In August, the venomous tweets continued. This time the user adopted a twitter handle that was not based on the impersonation of an officer of the plaintiff, but simply utilised a provocative descriptive noun indicative of the nature of the conduct being undertaken. Eleven tweets appeared on 27 August. Like the earlier tweets, some contained precise financial information about the plaintiff that was only explicable on the basis that someone with knowledge of the plaintiff's internal affairs had breached his or her duty of confidence. Other tweets were clearly suggestive of a malicious intention to harm the plaintiff.

10 The plaintiff's solicitors complained again. This time the response from Twitter Inc was unsatisfactory. It stated that because there was no impersonation, the tweets did 'not violate our Terms of Service'. This was clearly wrong. The Twitter User Agreement incorporates its Terms of Service, Privacy Policy and Twitter Rules. The Twitter Rules outline what is prohibited on Twitter's services. The stated limitations on the type of content that may be published are not limited to impersonations. They also include the following:

> You may not use our service for any unlawful purposes or in furtherance of illegal activities. International users agree to comply with all local laws regarding online conduct and acceptable content.
>
> You may not publish or post other people's private and confidential information…without their express authorization and permission.

11 The Rules conclude with the stipulation that 'Accounts created to replace suspended accounts will be permanently suspended.'

12

On 3 September, the barrage of tweets continued. Another seventeen were posted from the same twitter handle that had been used on 27 August. The posts were increasingly bold and threatening. The restricted and confidential nature of the posted information, and the intention to harm the plaintiff, were pellucid. The following day, the plaintiff's solicitors lodged another complaint but the response from 'support@twitter.com' was formulaic and unsatisfactory. It stated:

> Thank you for letting us know about your issue. We understand that you might come across content on Twitter that you dislike or find offensive. However, after investigating the reported content, we found it was not in violation of Twitter's private information policy (https://support.twitter.com/articles/20169991).

13 The plaintiff's solicitors took the matter up with Mr Burman, the Head of HR and Communications at Twitter Australia. He was sympathetic but hamstrung. He stated that he had 'pinged the emergency escalations team to review ASAP' and advised that he had 'pushed it as far I'm able to with Support who make ultimate decision here'.

14 On 6 September, the plaintiff commenced these proceedings. On the same day, Stevenson J. granted the initial interlocutory injunctions. They included orders that the defendants be restrained from publishing the Offending Material (as defined); cause it to be removed from the Twitter platform and their web sites; and suspend the accounts of the user of the three accounts from which the posts had emanated. On 8 September, I made further interlocutory orders extending and refining the injunctions.

15 On 9 and 10 September, a fourth round of offending tweets appeared, cheekily adopting a twitter handle that was a subtle variation of that used on 27 August and 3 September, and stating among other things: 'We are back up!' Upon complaint, and in the light of the orders made on 6 and 8 September, Twitter quickly shut down the account. By 10 September, four separate handles had been used to publish the plaintiff's confidential information on the Twitter platform.

16 On 15 September, in the absence of the defendants, I conducted the final hearing and heard evidence and submissions from the plaintiff's legal representatives. The defendants were on notice of the hearing and the relief claimed but elected not to appear. It was a strategic decision. They made a point of stating that they were not submitting to the jurisdiction. The evidence suggests that they were receiving advice from the Sydney office of the international law firm known as Baker McKenzie.

The Plaintiff's Claim

17 The jurisprudential basis of the plaintiff's claim against the defendants is uncontroversial. There is no necessity to prove that Twitter was 'knowingly concerned' in the user's breach of duty as against the plaintiff. The cause of action against Twitter is direct. It operates independently of the claim against the person originally responsible for the 'leak'. Where a third party such as Twitter comes into possession of confidential information and is put on notice of the character of the information and the circumstances in which it was unlawfully obtained, it becomes subject to an equitable obligation of confidence. It is liable to be restrained from publishing the information.

18 The following expositions of the equitable principle, which were adopted in *Streetscape Projects (Australia) Pty Ltd v City of Sydney* [2013] NSWCA 2 at [153] - [157], represent a compelling explanation of the legal basis of the plaintiff's claim against the defendants:

> 'A third party coming into possession of confidential information is accordingly liable to be restrained from publishing it if he knows the information to be confidential and the circumstances are such as to impose upon him an obligation in good conscience not to publish.'
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> See Bingham LJ in *Attorney-General v Guardian Newspapers Ltd* [1990] 1 AC 109 at 216 (Court of Appeal).
>
> 'Like most heads of exclusive equitable jurisdiction, its rational basis does not lie in proprietary right. It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.'
>
> See Deane J in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 at 438.
>
> '…a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice…that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.'
>
> See Lord Goff of Chieveley in *Guardian Newspapers* at 281 (House of Lords).

19 The equitable principle applies whether the recipient of the information is an individual, a newspaper, a magazine, a television channel, a radio station or an online news and social networking platform such as Twitter. And it is equally applicable to Facebook, Instagram and any other online service or social networking web site that could be used to facilitate the posting of confidential information or private images belonging to another person.

Jurisdiction

20 Equally uncontroversial is the jurisdiction of this court to entertain the plaintiff's claim. In a case such as this, a defendant's presence in New South Wales is not a prerequisite to jurisdiction. When the circumstances stipulated in the Rules of court apply, it is unnecessary to serve the writ on the defendant within the territory of the state - which is the common law's ancient formula. The categories of case where the court may allow service out of the state, and by doing so acquire statutory jurisdiction over a foreign defendant, include where the claim is for 'other relief in respect of a breach of a contract,' or 'an injunction to compel or restrain the performance of any act in Australia,' or when the 'claim is founded on a cause of action arising in Australia,' or any combination of the above. Among other things, the injunction sought to compel or restrain the performance of certain conduct by the defendants everywhere in the world. That necessarily includes Australia. It follows that whether the defendants 'submit' or not is beside the point, at least as far as jurisdiction is concerned.

21 Nor does it matter, for the fact of jurisdiction, that the primary relief sought against the defendants includes injunctions intended to restrain their conduct outside Australia. The issue is one of discretion, not power. I explained the basis on which this court is entitled

to grant such injunctions in my interlocutory judgment: X v Y & Z [2017] NSWSC 1214 at [20] – [22]:

> [20] The fact that courts of equity have long exercised jurisdiction to make in personam orders restraining foreign defendants from breaching duties to a plaintiff is exemplified by numerous decisions. One of those is *Australian Competition and Consumer Commission v Chen* [2003] FCA 897 in which Sackville J referred at paragraph [40] to:
>
> > the well-established proposition that, apart from a few exceptional cases such as those relating to title to foreign land... a court of equity will not consider itself to be debarred from interceding, if it is otherwise appropriate to do so, merely because it appears that the property to which the claims of the plaintiff relate is situate abroad or that the acts he seeks to have performed or enjoined, as the case may be, will, if they take place at all, take place outside the jurisdiction.
>
> [21] Sackville J also added reference to the observations of Brooking J in *National Australia Bank Ltd v Dessau* [1988] VR 521 at 522, who said:
>
> > The jurisdiction is grounded not on any pretension to the exercise of judicial power abroad but on the circumstance that the defendant, being amenable to the Court's jurisdiction, can be personally directed to act or not to act.
>
> [22] More recently, the Full Federal Court in *Humane Society International Inc v Kyodo Senpaku Kaisha Limited* [2006] FCAFC 116 at [16] had no difficulty with this well-known proposition. The Chief Justice and Finkelstein J said:
>
> > There are many cases where parties out of the jurisdiction have been subjected to an injunction regarding their conduct abroad. The cases to which we have referred show that if a person is properly served in accordance with the court's exorbitant jurisdiction, that person (so far as the jurisdiction of the court is concerned) is in the same position as a person who is within its territorial jurisdiction.

22 To those authorities, one can add *Spry's Equitable Remedies,* 9th ed. (2014) at 38, which states that '…a court of equity will not consider itself debarred from interceding… merely because…the acts that [the plaintiff] seeks to have performed or enjoined, as the case may be, will, if they take place at all, take place outside the jurisdiction'.

23 In contrast to that well-established line of equitable authority, the 8 September email from Twitter stated, somewhat heroically, that *Macquarie Bank v Berg* [1999] NSWSC 526 at [12] – [14] is authority for the proposition that 'the Court can only restrain a party to ensure compliance with the laws of NSW' and that therefore a restraint of publication of offending material outside NSW 'exceeds the proper limits of the use of the injunctive power of the court'. There is no such principle. In any event, *Macquarie* was a defamation case, attracting special considerations. It involved an attempt to superimpose the statutory defamation law of New South Wales 'on every other state, territory and country of the world'. The judge did not doubt the power of the court to restrain conduct occurring or expected to occur outside the territorial boundaries of the jurisdiction but held that the proposed injunction was inappropriate as a matter of discretion.

24 Among other reasons, Her Honour noted that the law of defamation of New South Wales was different from, and certainly not co-extensive with, the defamation law of other states and countries. And she observed at [14]: 'It may very well be that,

according to the law of the Bahamas, Tajikistan, or Mongolia, the defendant has an unfettered right to publish the material. To make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of the court'.

The Orders

25 Nonetheless, given the international reach and broad formulation of the final orders sought by the plaintiff, this case does raise some issues relating to the appropriate exercise of the court's discretion in granting injunctive relief. The Twitter email summarised the defendants' practical objections as follows: 'Twitter has over 300 million active users who post an enormous amount of content. It is simply not feasible for Twitter to proactively monitor user content for Offending Material. Accordingly, Twitter is very concerned at the breadth of order 2, but is committed to promptly investigating any specific reports of Offending Material that are brought to Twitter's attention…'

26 The 'order 2' referred to was that made by Stevenson J on 6 September. My subsequent interlocutory orders on 8 and 15 September followed the same pattern. The effect of the first part of the order was to restrain publication of and to require the removal of the 'Offending Material', and to suspend the relevant accounts from which it emanated. The Offending Material was defined to mean, first, the 'information contained in or referred to in' the specified tweets that had emanated from the particular Twitter handles adopted by the person or persons responsible. I see no problem in principle with the breadth of that part of the order, which operates in relation to historical and clearly identified information.

27 However, the final part of the definition of 'Offending Material' meant that the order also related to 'any further tweets posted on the Twitter platform or the defendants' websites by any person who is the user of one or more of the accounts' with the same Twitter handle as had been used for the previous tweets… 'including any new account opened by such a person'. This part of the order is in a different category. It operates in relation to any future tweets by the user or users responsible for the previous tweets, as well as any new account that may be opened by such a person. The intended objective is understandable but this part of the definition of 'Offending Material' operates prospectively and is unlimited as to time or subject-matter.

28 The proposed final orders sought by the plaintiff take the matter a step further. The definition of Offending Material includes, first, 'the information contained in or referred to in the tweets' that were published on the Twitter platform or the defendants' websites between 16 May and 10 September; second, 'any further tweets posted…by any person or persons who are the user or users of one or more of the accounts' that were used for the previous tweets; third, 'any new account opened by such person or persons'; and fourth, 'the names or handles' used for the tweets published on 27 August and 3, 9 and 10 September (being those not based on the impersonation of an officer of the plaintiff).

29 Hinging off that definition of Offending Material, the substance of the plaintiff's proposed final injunctive orders requires that the defendants:

(a) be restrained from publishing the Offending Material anywhere in the world on the Twitter platform, their websites or otherwise;

(b) cause the Offending Material to be removed everywhere in the world from the Twitter platform and their websites;

(c) remove everywhere in the world the accounts held by any person or persons who are the user or users of one or more of the Offending Accounts (namely those used for the offending tweets) 'to the intent that such person or persons, to the extent known by the defendants, be prevented from operating any account with the defendants';

(d) be restrained from notifying the users of the Offending Accounts 'of the removal of the accounts'.

Discretion

30 There is a question as to whether these orders constitute an appropriate exercise of the Court's discretion. The question involves issues of form, onerousness and practical utility. It is often said that injunctive orders should not be 'exorbitant' in form or effect, and that the court should do only the minimum necessary to achieve justice. A related and familiar principle is that any order should be formulated 'with the greatest precision' so as to make clear what the defendant is required to do or not to do. See *Y & Z v W* [2007] NSWCA 329 at [69]-[72], citing *Attorney General v Punch Limited* [2003] 8 AC 1046 at 1073. But as the New South Wales Court of Appeal explained almost a quarter of a century ago, in a case of which I have fond memories, the principle is 'a counsel of perfection rather than a mandatory standard, and there are limits to its application: *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 at 349.

31 There are many judicial statements that recognise the practical limitations in the application of the principle. In *Maggbury Pty Limited v Hafele Aust Pty Limited* (2001) 210 CLR 181 at 220, Callinan J observed that 'Excessively narrow formalisation in framing the injunction may wreak its own injustice'. And in *Y & Z v W*, Ipp JA said at [73] that 'The facts of a particular case may be such that justice may require an order to be made in terms that may, in some circumstances, give rise to uncertainty'.

32 The best encapsulation of the answer to the trial judge's dilemma was given by Lord Greene MR in *Wright, Layman & Umney Ltd v Wright* (1949) 66 RPC 149 at 152:

> … It has been said many times that it is no part of the function of this Court to examine imaginary cases of what the defendant could or could not do under this form of injunction. The best guide, if he is an honest man, is his own conscience; and it is certainly not the business of this Court to give him instructions or hints as to how near the wind he can sail. Honest men do not attempt to sail near the wind.

33 And as *Spry* points out (at 387):

> It must be remembered that, should difficulties of compliance subsequently arise, *further applications may be made to the court, so as to lead to* a resolution of ambiguities and to *the surmounting of difficulties of compliance or enforcement*; and accordingly it is not generally appropriate, in preparing an order, to take account of difficulties that are remote.

(emphasis added)

34 A defendant's right to return to the Court applies whether the injunction is final and perpetual, or merely interlocutory: *Spry* at 395. Having regard to those considerations, and subject to the other matters with which I deal below, I am satisfied that it is appropriate to make the injunctive orders sought substantially in the form proposed by the plaintiff, despite the objections of the defendants. The malicious intent and apparent determination of the person or persons responsible for the tweets are obvious. That person or persons has behaved dishonestly and in flagrant breach of his or her duty of confidence. The real concern for the plaintiff is the prospect of future tweets of confidential information emerging from the same source, utilising new user accounts and different handles. The defendants are on notice of that prospect. The author of the tweets has already used four different handles. I should do what I reasonably can to prevent any repetition of the damaging tweets that were posted between 16 May and 10 September. Orders confined to historical information or conduct or existing accounts might be of limited practical utility to the plaintiff.

35 I have taken into account the assertion in the Twitter email that it is 'not feasible to proactively monitor user content for Offending material'. But the defendants chose not to put any evidence before the Court to explain their systems and processes or the factual basis for their contention. As counsel for the plaintiff stated 'Unfortunately, we just don't have the defendants here to explain what is involved' and 'That's a deficit brought about by the position taken by the defendants'.

36 I accept the plaintiff's submission that there must be a mechanism to filter information on the Twitter service. Content relating to issues of national security and classified intelligence is an obvious example. In the absence of evidence and submissions from the defendants, and in the circumstances of this case, I do not consider it unreasonable or inappropriate to make orders that impose a requirement for the 'application of some degree of filtering, or checking, to ensure that the information either does not get posted or, if it is posted, it is removed'.

37 Nor do I regard it as unreasonable that the proposed orders in relation to future tweets and future accounts are not subject to limitation as to subject matter; or that they apply to any accounts 'held by any person or persons who are the user or users of one or more of the Offending Accounts'. Those responsible for the offending tweets to date have already demonstrated their malevolent credentials. It could not be assumed safely that the content of any future tweets from the same source will be innocuous. The inference is that it would not be. And although the first part of the proposed order is directed at the further publication of 'the information contained in or referred to in' the original offending tweets – and theoretically requires a process of filtering or checking – the major part of the proposed order is directed to future tweets. It requires an objective decision about the origin (as distinct from content or subject matter) of future tweets. The focus is on 'the person or persons who are the user or users of one or more' of the Offending Accounts.

Utility

38 A further issue concerns the utility of making worldwide orders against Twitter in circumstances where compliance with the proposed orders cannot necessarily be guaranteed by a proved legal right of enforcement in other countries, states or territories where the Twitter platform is available. In this case, I do not regard proof of the means of ensuring compliance in foreign jurisdictions as a pre-requisite to the grant of the injunctions. The absence of such proof does not negative the utility of making the proposed orders.

39 First, as the aphorism goes, 'Equity acts in personam'. The plaintiff's right derives from the unconscionability, in the circumstances, of the exercise by the defendants of their legal rights. The proposed orders are a personal direction to perform or abstain from performing particular acts. They do not affect the proprietary rights of the defendants; they are not declaratory by nature; and they do not affect any question of title. As I have explained, there is a long history of courts of equity making in personam orders that are intended to operate extra-territorially.

40 Second, the high profile and size of Twitter give me confidence in the utility of making the proposed orders. Twitter is a responsible worldwide organisation of significant influence and financial strength. Its directors, shareholders and stakeholders have an undoubted commercial interest in ensuring that Twitter complies with the laws, and the orders of courts, in those countries in which its services are provided. While it may be assumed that some foreign defendants would seek to avoid compliance with orders of this Court, Twitter is in a different category. Although Twitter publicly disclaims any responsibility for user content, the success of its business model depends in part on ensuring that the Twitter platform is not used by dishonest persons who seek to damage others. There are many statements in Twitter Inc's most recent annual report filed with the United States Securities & Exchange Commission – to which I will return – that reflect Twitter's recognition of its social responsibility.

41 Third, Twitter's conduct to date in responding to the plaintiff's complaints, and the interlocutory orders of this court, serves to re-affirm my confidence in the utility of the proposed orders. I have no doubt that Twitter will use its best endeavours to give effect to the proposed orders, despite its objection that it is not feasible to pro-actively monitor user content. And as I have explained, the gist of the orders in relation to future tweets and future accounts, relates not to content but to user identity. They do not require 'pro-active monitoring' of content. They are directed to future tweets published, and new accounts opened, by those responsible for the historical offending tweets, as well as by certain names or handles previously used. The clear objective is to prevent further conduct on the Twitter platform by persons who have demonstrated a determination to act in breach of the law and to use the Twitter platform for the purpose of damaging the plaintiff. And there is a qualification to the orders that operates favourably to Twitter.

The obligation to remove everywhere in the world accounts held by persons who are the users of one or more of the accounts that were used for the offending tweets, is limited to the extent that such person or persons is known by the defendants.

42 Fourth, there is a public interest in making the proposed orders; in demonstrating that wrongful conduct will be remedied as effectively as can be achieved; and in ensuring that the plaintiff's rights are respected to the extent that it is possible to do so. The plaintiff should not be left without a remedy. Furthermore, the second defendant, Twitter International Company is the sole shareholder of the Australian Twitter entity and therefore has assets in the jurisdiction that may be sequestrated, if it becomes necessary to do so.

43 Finally, there are features of the latest filed Twitter Inc annual report that fortify me and reinforce the desirability and utility of making the proposed orders. The report states, among many other things, that Twitter is continually seeking to improve its ability to eliminate spam accounts from the calculation of active users, resulting in the suspension of a large number of accounts. It adds that it regularly reviews and adjusts its processes for calculating its internal metrics. The report also acknowledges that Twitter is subject to federal, state and foreign laws regarding privacy and that it has established an information security program designed to protect non-public consumer information. And finally the report warns that one of the business risks that Twitter faces is that 'there are user concerns related to privacy and communication, safety, security … or other hostile or inappropriate usage'. These are all indications that directly or indirectly suggest a corporate incentive on the part of Twitter to act responsibly. They support the likelihood that Twitter will comply with, and would wish to be seen to be complying with, orders of this Court relating to the unauthorised publication on the Twitter platform of the plaintiff's private and confidential information.

Identity Disclosure Orders

44 In addition to the injunctive orders, the plaintiff also seeks identity disclosure orders to facilitate its claim against the person or persons responsible for the offending tweets. The substance of the orders is that the defendants provide to the plaintiff's solicitors, in relation to the accounts with the four separate handles that were used for the offending tweets, and to the extent to which the information is available to or is retained by the defendants:

(a) - the subscriber information for those accounts;

(b) - the name or names of all users of those accounts;

(c) - the IP address or addresses and associated information relating to each of those accounts;

(d) - all phone numbers associated with any user or users of those accounts;

(e) - the location of all users of those accounts and the location of any IP address or addresses associated with those accounts;

(f) - any Twitter or other accounts which 'are or were at any time' used by any user of the above accounts or which 'have or at any time had' the same phone number or email address as any of those accounts.

45 The defendants were on notice that the plaintiff would seek such orders and elected not to put submissions against them. Twitter's objection is qualified by the phrase 'except as required by valid legal process'. And its Privacy Policy preserves the right to disclose a user's information 'if we believe it is reasonably necessary to comply with a law, regulation, legal process … [or] to address fraud …'. With the exception of the last category of information, I do not regard the orders as unreasonable or onerous. Either the defendants have the information or they do not. Notably, the Twitter Privacy Policy stipulates that a user must provide 'name, username, password, email address or phone number'. A user may also choose to provide additional information, including by uploading and syncing its address book or by facilitating location information, among other things.

46 In the circumstances of this case, the proposed orders readily satisfy the requirements for the making of a 'Norwich order' – an appellation that refers to the decision of the House of Lords in *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133. Those requirements were explained and applied in *Computershare Ltd v Perpetual Registrars Ltd* (2000) VR 626 and *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 at 645.

47 They may be summarised as follows: first, the party from whom discovery is sought has become 'mixed up' in the subject matter for which discovery is required. For example, in *Norwich Pharmacal*, discovery was permitted against the Commissioner of Customs on the basis that the Commissioner had unknowingly participated in the alleged wrong (infringement of patent) and knew the identity of the putative wrongdoer (the importer), which identity was unknown to the plaintiff; second, the plaintiff has established that there has been wrong-doing; and third, the plaintiff has established that it needs the discovery in order that it not be denied justice.

48 I have concluded that the exercise of the discretion to make a *Norwich* order is amply justified in this case for the following reasons:

(a) The offending tweets contained the plaintiff's confidential information. That information is highly commercially sensitive and was required to be kept confidential by the partners and employees of the plaintiff. The disclosure of the information would provide the plaintiff's competitors with a substantial commercial or competitive advantage over the plaintiff;

(b) The plaintiff's confidential information has been published through at least four accounts on the Twitter platform and websites. Those publications were made without the knowledge, consent or authorisation of the plaintiff. An inference is available that the user or users of the four accounts is the same;

(c) The plaintiff does not know the identity of the person or person's responsible for the offending tweets and therefore cannot yet restrain them from further publishing its confidential information. It is unable to commence proceedings against that person or those persons for breach of confidence;

(d) The defendants will have, at least, the name, contact details and IP address of the person or persons who established or held the accounts from which the offending tweets emanated; and

(e) If the person or persons responsible are not themselves restrained from further publishing the plaintiff's confidential information, there is a foreseeable risk that the plaintiff may suffer significant and irreparable damage.

Suppression Orders

49 The plaintiff also seeks orders pursuant to Sections 8(1)(a) and (e) of the *Court Suppression & Non-Publication Orders Act, 2010* (NSW). It wishes to prevent the publication of information tending to reveal the identity of the parties, the summons, the orders of the Court and certain confidential affidavits and exhibits. The rationale for the suppression orders is that they are necessary to prevent prejudice to the proper administration of justice and that the public interest in making the orders significantly outweighs the public interest in open justice.

50 I have no difficulty in this case in accepting that it is appropriate to make suppression orders in relation to any information that tends to reveal the identity of the plaintiff. If that were not so, the protection that the plaintiff seeks in relation to its private and confidential information right be undone. I should not permit an indirect opportunity for competitors and other persons to have access to the very information that was published on the Twitter platform in breach of the user's duty to the plaintiff.

51 As Bowen CJ said in *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129 at 134:

> It is in the interests of the administration of justice that the very proceedings before the court should not be permitted to destroy or seriously depreciate the value of such confidential information. If it were otherwise, not only might the parties and members of the public consider the court was not paying proper regard to confidentiality but also it might open the way to abuse.
>
> See also *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 (CA) and *Rinehart v Welker* [2011] NSWCA 403.

52 Suppression orders whose object is to preserve the confidentiality of trade secrets are routinely made. See, for example, *Australian Competition & Consumer Commission v Air New Zealand Ltd (No 3)* [2012] FCA 1430 at [35]. In other cases, it is obvious that the disclosure of the identity of one or possibly both parties, might render nugatory the object which the Court's orders are intended to achieve. In this case, the evidence established the ease with which the plaintiff's confidential information could be located by undertaking an appropriate search – once the identity of both the plaintiff and Twitter were known.

53 However, neither the evidence nor the plaintiff's submissions revealed a sound, rational basis for any reasonable likelihood that the mere identification of the names of the defendants, including the use of the word 'Twitter', would be likely to have the same consequence and cause the same prejudice. I am satisfied that even if I permit the disclosure of the names of the defendants, the effect of the suppression orders will

adequately protect the plaintiff's confidential information. And there is a public interest in general awareness of the facts and circumstances of this case; knowledge of the identity, role and liability of Twitter arising out of those facts and circumstances; and an understanding of the nature of the orders that I have made against Twitter. The public interest in open justice favours transparency as far as possible. Among other things, judgments of the Court, including the reasoning and orders, help guide the conduct and commercial decisions of other members of the community.

Costs

54 Costs should follow the event. It matters not that the defendants chose not to appear. A defendant's liability to costs is the usual, salutary and important consequence of a plaintiff succeeding in this Court. It is one of the significant risks that a defendant takes when it chooses not to contest, or not to appear in, proceedings in this Court. And, as I have mentioned, there are assets in the jurisdiction, whether or not, given the non-appearance of the defendants, a monetary judgment for costs in favour of the plaintiff is enforceable in California or the Republic of Ireland.

Orders

55 For those reasons, I make orders substantially in accordance with the orders sought by the plaintiff. I have summarised their broad effect in these reasons. The actual orders will necessarily be confidential and remain subject to the suppression orders that I will also make.

Decision last updated: 28 September 2017