FEDERAL COURT OF AUSTRALIA

Rodgers Reidy (Qld) Pty Limited v Google Australia Pty Limited (No 2)

[2017] FCA 903

File number:	NSD 126 of 2017
Judge:	**BROMWICH J**
Date of judgment:	9 August 2017
Catchwords:	**COSTS –** consideration of competing applications for costs of urgent application – where proceedings commenced with little notice – whether first respondent properly joined as a party
Legislation:	*Federal Court of Australia Act 1976* (Cth), ss 37M, 37N, 37P
Cases cited:	*Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1; 249 CLR 435
Date of hearing:	Determined on the papers
Date of last submissions:	5 April 2017
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Category:	Catchwords
Number of paragraphs:	43
Solicitor for the Applicants:	Polcynski Lawyers
Solicitor for the First Respondent:	Allens

ORDERS

NSD 126 of 2017

BETWEEN:	**RODGERS REIDY (QLD) PTY LIMITED ACN 117 655 973** First Applicant
	RODGERS REIDY (NSW) PTY LIMITED ACN 089 898 813 Second Applicant
	RODGERS REIDY (VIC) PTY LIMITED ACN 112 011 321 Third Applicant
	RODGERS REIDY (INTERNATIONAL) PTY LIMITED ACN 124 647 696 Fourth Applicant
AND:	**GOOGLE AUSTRALIA PTY LIMITED ACN 102 417 032** First Respondent
	GORDON CRAVEN Second Respondent

JUDGE: **BROMWICH J**

DATE OF ORDER: **9 AUGUST 2017**

THE COURT ORDERS THAT:

1. The applicant and the first respondent each pay their own costs in respect of the dispute between them.

THE COURT NOTES:

2. That upon the above determination being made, the proceedings are dismissed by reason of orders made on 23 May 2017.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMWICH J:

1 On 1 February 2017, the applicants brought before me, as duty judge, an "*urgent application before start of a proceeding*" seeking removal of a particular "*Google Adwords*" advertisement that had been paid for by the second respondent, Mr Gordon Craven. Following an ex parte hearing of the application, I granted that relief on an interlocutory basis against Mr Craven and the first respondent (**Google** Australia Pty Limited). The next day, 2 February 2017, the applicants filed an originating application seeking final relief, primarily against Mr Craven. I made further orders restraining Mr Craven from publishing the relevant advertisement until further order.

2 On 23 May 2017, the restraint on Mr Craven was discharged on the basis that the applicants, by that time, did not press for final relief against either respondent. Orders were also made that, upon the determination of costs between the applicants and Google, the proceedings are to be dismissed. These reasons are therefore confined to the question of costs. The parties have provided written submissions for the determination to be carried out on the papers.

Background

3 The applicants are a group of companies engaged in a number of associated, but legally separate, accountancy practices that trade under the name "*Rodgers Reidy*". Relevantly, that includes state-based practices in Queensland and New South Wales, as well as elsewhere in Australia and overseas.

4 There has been a long-running dispute between the Queensland Rodgers Reidy practice company (**Queensland Rodgers Reidy**), the first applicant, and the second respondent, Mr Craven. That dispute arose out of the administration of Mr Craven's bankruptcy by a partner of the Queensland practice, Mr David Hambleton. The details of that dispute are not relevant for present purposes. It suffices to say that Mr Craven has apparently created a website by which he outlines his grievances, some of which are the subject of litigation in the Queensland District Court. Importantly, the applicants maintain that the representations on Mr Craven's website contain or comprise malicious falsehoods and/or constitute misleading or deceptive conduct. I have read the representations which are in evidence. They are certainly of a grave nature, with the potential to cause harm to the applicants, whether they are true or untrue.

5 In the advancement of his grievances, Mr Craven had paid the first respondent, Google, for an Adwords listing of his website for Google searches of the trading name "*Rodgers Reidy*". Such a listing is offered by Google as part of a commercial business, "*Google Adwords*", whereby a business or individual may pay for advertising copy, including a link to their website, to be featured in a Google search of specific words or phrases.

6 At some point shortly before 1 February 2017, the second applicant, the New South Wales Rodgers Reidy practice company, became aware that it was about to be appointed as the voluntary administrator of a well-known chain of retail clothing stores. I infer that the New South Wales practice company became aware of this impending appointment shortly beforehand by reason of the usual sudden nature of such appointments. The appointment, which ultimately took place on 1 February 2017, gave rise to concerns about the impact that Mr Craven's website, to which internet traffic would be directed by his Adwords listing, would have on the confidence that creditors, employees and other affected persons would have in the administration of the relevant companies if they were to do a Google search of the trading name, *Rodgers Reidy*. The applicants were concerned about the Adwords listing because it would give Mr Craven's website prominence that it would otherwise lack.

7 It is unclear on the evidence the exact degree to which the applicants had been aware of Mr Craven's Adwords listing in advance of the events that unfolded in the immediate lead up to 1 February 2017. While the applicants had been aware of Mr Craven's website previously, it was submitted that it was not until they became aware it was linked with a Google ad, to appear as the first result on a Google search, that the need for action in respect of the website became urgent. However, it should be noted that on the applicants' evidence, the Adwords listing was at least known to Mr Hambleton of Queensland Rodgers Reidy from about 17 January 2017, when he was sent an email from a director of the Melbourne practice touching upon what might be done about Mr Craven's publications. In any event, it appears that the attention of the New South Wales practice company was drawn specifically to the website and the Adwords listing on 30 January 2017, when it received an email from Mr Craven regarding the publication.

8 At 11.13 am on Tuesday, 31 January 2017, the Sydney solicitors for the applicants sent a letter by email to Mr Craven requesting that he undertake in writing to remove the Adwords listing and cease publishing the representations made on his website. By the time of swearing an affidavit the next day in support of the urgent application, the applicants' solicitor had not

received a response from Mr Craven. In those circumstances, they had little alternative but to proceed with court action unless either they were prepared to take the risk in relation to the retailer administration or Google was prepared to take down the Adwords listing.

9 At approximately 12.00 noon on 31 January 2017, the applicants' solicitors also sent a letter to Google by way of hand delivery to its registered office, being the Sydney office of Baker & McKenzie Lawyers. The **31 January 2017 letter** to Google demanded, in effect, that the Adwords listing be removed by no later than 5.00 pm the same day. While the letter was not expressed as clearly as that, there is no reason to doubt that Google would have understood what was being sought. The letter further advised that if the undertakings sought were not provided as demanded, the applicants' solicitors had instructions to commence proceedings seeking urgent interlocutory relief without further notice. No response was provided by the deadline. Nor does it appear that any response by or on behalf of Google was provided before the proceedings came before the Court the following afternoon, almost 24 hours after the deadline, and over 28 hours after hand-delivery of the letter.

10 On the same day, 31 January 2017, the applicants' solicitors also made telephone enquiries of Baker & McKenzie Lawyers as to who could be spoken to in relation to the matters raised in the letter. They were given the name of two lawyers at the firm, and subsequently left voicemail messages for both of them.

11 At 8.06 am the following morning, 1 February 2017, more than eight hours before the initial application before me as duty judge, an email was sent by the applicants' solicitors to the two lawyers at Baker & McKenzie Lawyers who had been suggested as the relevant persons to contact. At about 10.20 am, an employed solicitor acting for the applicants spoke to one of those two lawyers, a senior partner at Baker & McKenzie Lawyers, who advised that he had been trying to find out who at Google was responsible for this sort of issue, was waiting to hear back from his contact, and that it should not be assumed that they held any instructions to act for Google in relation to this issue. He was told that while his position was understood, the solicitors for the applicants would like to discuss the issue with someone to see if it could be resolved before they took any further action. At the time that the affidavit in support of the urgent application was sworn on 1 February 2017, no further communication had taken place.

Interlocutory relief granted by this Court

12 At 4.40 pm on 1 February 2017, the solicitors for the applicants brought an ex parte "*urgent application before start of a proceeding*" with a supporting affidavit before me as duty judge. The orders made consequent upon that application were as follows:

> 1. Until further order of the Court, the second respondent, Gordon Craven, cause, before 10.00 am on Thursday, 2 February 2017, the advertisement titled "Rodgers Reidy – David Hambleton gets sued – pleading.com.au" or similar, to be removed or de-linked from Google Adwords, such that a link to the advertisement, or the advertisement itself, or anything identifying the advertisement, does not appear when an Internet search of any kind is conducted for the words "Rodgers Reidy" or any other words.
>
> 2. Until further order of the Court, the first respondent, Google Australia Pty Limited, cause, before 10.00 am on Thursday, 2 February 2017, the advertisement titled "Rodgers Reidy – David Hambleton gets sued – pleading.com.au" or similar, to be removed or de-linked from Google Adwords, such that a link to the advertisement, or the advertisement itself, or anything identifying the advertisement, does not appear when an Internet search of any kind is conducted for the words "Rodgers Reidy" or any other words.
>
> 3. Pursuant to r 1.39 of the *Federal Court Rules 2011* (Cth), the time for service of the originating application, urgent application before start of a proceeding and the affidavit of Stephen Michael Polczynski sworn 1 February 2017 (all filed today), and a copy of these orders be shortened to 9.30 pm on Wednesday, 1 February 2017.
>
> 4. Pursuant to r 10.24 of the *Federal Court Rules 2011* (Cth), service be effected on the second respondent, Gordon Craven, by email to the addresses: qahjim@gmail.com and Gordon@getmail.com.au.
>
> 5. Pursuant to r 10.24 of the *Federal Court Rules 2011* (Cth), service be effected on the first respondent, Google Australia Pty Limited, by:
>
>   a. in the first instance, by email to the addresses: patrick.fair@bakermckenzie.com and adrian.lawrence@bakermckenzie.com; and
>
>   b. by physical service to the offices of Baker McKenzie as the address of the registered office of the first respondent, Google Australia Pty Limited, at the earliest available time on Thursday, 2 February 2017.
>
> 6. The matter be listed before Justice Bromwich as Duty Judge at 2.15 pm on Thursday, 2 February 2017 for any further hearing of the application for interlocutory relief and initial case management of the proceedings.
>
> 7. Costs reserved.

13 At 8.11 pm on 1 February 2017, the applicants' solicitors sent a copy of the Court's orders and the relevant documents by email to the two partners at Baker & McKenzie Lawyers who had been suggested as the relevant points of contact. No further contact was had until

11.55 am the following day, when the applicants' solicitor made a telephone enquiry of one of the partners as to whether the orders had been complied with. At that point, the partner repeated that he did not have instructions to act for Google, but he would pass the message on to his contact (presumably at Google).

14 At approximately 1.00 pm that day, a solicitor at Allens advised the applicants' solicitor by phone that they had instructions to act for Google in relation to the matter and that the orders had been complied with and the Adwords listing disabled at around 9.00 am. It was indicated that counsel would appear for Google at the listing of the matter that afternoon.

15 The matter returned before me at 2.18 pm with senior counsel appearing for Google. By way of an affidavit, Mr Craven indicated that he had cancelled the Adwords listing the previous day because the budget he had allocated for the advertisement had reached its capacity. He was not able to be contacted and did not appear. Accordingly, the primary objective of bringing the application before the start of a proceeding had been achieved, at least on an interlocutory basis. In any event, Google supplied an affidavit to the effect, perhaps inconsistent with what was indicated by Mr Craven, confirming that it had taken down the Adwords listing at 9.00 am that day, being about 45 hours after the letter from the applicants' solicitor had been hand-delivered to its registered office. Order 2, made on 1 February 2017 against Google, was therefore no longer required. Mr Craven, while indicating by way of his affidavit that he did not wish to renew the Adwords listing at that time, reserved his "*right*" to republish. It was therefore unclear at that time whether the applicants would have the need to press for permanent injunctive relief, or at least until the voluntary administration had passed its initial critical period.

16 The affidavit filed on behalf of Google also deposed to the effect that, very promptly upon Google having receiving notice of the concerns raised in the letter sent by the applicants' solicitors on 31 January 2017, the advertisement was "*elevated*" and then removed for non-compliance with Google's policies. Google's position was that it had done what order 2, made on 1 February 2017, was directed to, in that the advertisement had been disabled in the Google Adwords system and, accordingly, that order could be discharged. There was no objection to that course. It was pointed out that there was no longer any basis for final relief as against Google and therefore no need for Google's continuing involvement in the matter, save as to costs.

17 Google expressly reserved its position on costs and advised that it was likely that it would like to make a submission on the basis that the proceedings had been unnecessarily commenced against Google without notice. Again, it should be noted that, given the contents of the letter that is in evidence, it is at best inaccurate to say that the proceedings were commenced without notice. I assume that senior counsel appearing for Google was not aware of the contents of the letter, or had misread it or missed that part of it. It is true, however, that not very much notice was given, nor more specific notice, albeit that any such notice would presumably have been delayed in its communication to a responsible person at Google in the same way as the 31 January 2017 letter.

18 The following orders were made on 2 February 2017, and the matter adjourned for three months with liberty to apply, during which time it was hoped (in vain as it turned out) that the outstanding issue between the applicants and Google as to costs might be able to be resolved between the parties:

> 1. Further to Order 1 of the Orders made on 1 February 2017, until further order of the Court the second respondent, Gordon Craven, is restrained from publishing or causing to be published the advertisement titled "Rodgers Reidy – David Hambleton gets sued – pleading.com.au" or similar, or anything identifying that advertisement, which appears when an Internet search of any kind is conducted for the words "Rodgers Reidy" or any other words.
>
> 2. Order 2 of the Orders made on 1 February 2017 in respect of the first respondent is discharged.
>
> 3. The proceedings are stood over for a case management hearing at 9.30 am on 2 May 2017 before Justice Bromwich.
>
> 4. Costs reserved.

The costs dispute

19 Competing written submissions as to costs have been made on behalf of the applicants and Google. The applicants seek a lump-sum costs order in their favour in the sum of $31,000, which is said to be approximately 70% of their total costs, and a "*logical, fair and reasonable order*". Google seeks a lump-sum costs order in the sum of $22,449.97, or alternatively 70% of that amount, being $15,715.98. There is almost no common ground between the parties beyond the objective facts.

20 Before considering the parties' submissions, it is important to observe that the originating application dated 2 February 2017 was principally focused on Mr Craven in seeking that he be permanently restrained from publishing what were contended to be serious untrue

representations. Orders requiring removal of the Adwords listing by Google, whether on an interlocutory or final basis, were sought in support of that relief. Importantly, however, no allegation was made that Google had falsely published the material advanced on Mr Craven's website, or that it was responsible for its content. Accordingly, references to a cause of action against Google should be understood in the limited sense that relief was sought from the continuation of the Adwords listing, rather than any substantive relief as to the contents of Mr Craven's website, to which the Adwords listing would direct an internet user who searched the term "*Rodgers Reidy*".

21 The applicants relied upon three affidavits from their solicitors. By those affidavits, they sought to establish that Google was a necessary party, joined as a defendant to ensure that all matters in dispute could be completely determined and adjudicated upon, citing various authorities to that effect. It was submitted that Google's cooperation was undoubtedly required to enforce judgment and, in particular, to remove the Adwords listing. It was submitted that Google's rights and interests were directly affected because it had contractual arrangements with Mr Craven pursuant to which it had agreed to provide the Adwords listing. It was said that Google held the power to grant that aspect of the relief sought by the applicants, notwithstanding any failure by Mr Craven to comply with any orders of the Court. It may be observed that there was always a real risk that Mr Craven would not comply with a court order. That was a risk that the applicants were entitled to consider was unacceptable.

22 The applicants asserted that they took "*extensive*" steps to resolve the matter with Google before issuing proceedings seeking urgent interlocutory injunctive relief, referring to the written and telephone contact which took place on 31 January 2017 and 1 February 2017, and relying on the fact that no response was received prior to the matter being brought before the Court on the afternoon of 1 February 2017. It was asserted that the 31 January 2017 letter had come to the attention of Google, because that letter had been received by the partner at Baker & McKenzie Lawyers at 8.22 am on 1 February 2017. It was asserted that notwithstanding the receipt of the letter and the urgency of the matters raised in the letter, no attempts were made by Google to contact the applicants' solicitors, despite having more than seven hours to do so on 1 February 2017. It was asserted that a positive response (presumably reflecting action taken by Google as requested) at any time between its receipt of the letter and the listing of the matter before me would likely have avoided the need for any application in the first place.

23 The applicants' submissions then referred to the correspondence that took place after the orders were made on 1 February 2017, and to the asserted fact that, notwithstanding that Google had complied with the relevant order, no one on behalf of Google had communicated to the applicants the fact of that compliance. It seems that Google's actions in removing the Adwords listing flowed from the letter, which contained the threat of legal proceedings, rather than from the Court's order. In those circumstances, the applicants had continued to prepare for the second court appearance on the afternoon of 2 February 2017 on the basis that Google, and Mr Craven, had not complied with the orders.

24 The submissions for the applicants asserted that the urgent need for an application to this Court arose on 30 January 2017 due to the impending appointment of partners of the New South Wales practice as voluntary administrators, those appointments taking place on 1 February 2017. While the applicants had been aware of Mr Craven's website previously, it was submitted that it was not until they became aware it was linked with a Google ad to appear as the first result on a Google search that the need for action in respect of the website became urgent. It was asserted that this timing coincided with the impending appointment of the voluntary administrators. In this regard, it should be observed that on the applicants' own evidence, it is clear that at least Mr Hambleton of Queensland Rodgers Reidy was aware of the Adwords listing from 17 January 2017.

25 The applicants also relied upon what was said to be an admission in an affidavit relied upon by Google that the Adwords listing breached its own policies, asserting that, in those circumstances, Google should never have permitted the Adwords listing in the first place. It was submitted that if Google had complied with its own policies, the applicants' application would not have been necessary. It was submitted that had Google at any time after receiving correspondence from the applicants' solicitors reviewed the Adwords listing, it would have identified that it did not comply with its own policies and would have informed the applicants that it was withdrawing the listing without the need for the urgent application. It was asserted that Google had not provided any reason for its failure to do so.

26 For all of these reasons, the applicants contended that Google should pay their costs of the urgent application before start of a proceeding dated 1 February 2017. A lump-sum costs order was sought to save the costs and delay of taxation.

27 Google opposed any order that it pay the applicants' costs and instead sought an order that the applicants pay a lump-sum in respect of its costs of the proceedings up to 3 April 2017,

including in relation to the application for urgent interlocutory relief filed on 1 February 2017, the originating application filed on 2 February 2017, the directions hearing on 2 February 2017 and the costs of the present dispute regarding costs. It too relied upon affidavit evidence, which mainly differed in its characterisation of events rather than the substantive content of what had occurred.

28 The submissions for Google described as misconceived the contention that it was a necessary or proper party to the proceedings or that it had failed to respond to correspondence delivered to its registered office forcing the proceedings to be commenced on an urgent basis. Google submitted that the applicants had no cause of action against Google and did not submit otherwise, asserting that this was conceded at the hearing on 2 February 2017. I pause to observe that I have read the transcript on 2 February 2017 and do not understand that there was any concession to the effect that it was not proper to join Google as a party. The passage referred to in the transcript on 2 February 2017 (T4.45, words spoken incorrectly attributed to me) did not contain any concession that it was improper to join Google in the first place, but rather that it was not necessary to maintain these proceedings against Google in circumstances where the Adwords listing had been removed earlier that day, unbeknownst to the applicants or to the Court.

29 It was contended further that the applicants could not have sustained a substantive cause of action against Google, citing the High Court decision in *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1; 249 CLR 435, especially at 459-460 [70]. With respect, that point appears to be entirely without substance when proper regard is had to the nature of the relief that was being sought by the applicants. Critically, it was not alleged that Google was a publisher of the impugned representations, in the sense of having responsibility for the truth of the contents of Mr Craven's website, but rather that it had the means to discontinue the Adwords listing. If Google's submissions were intended to convey the suggestion that Google can maintain Adwords listings for anything else that appears on the internet with impunity and not be amenable to any court order to prevent that from happening or continuing, then that proposition is rejected.

30 It was submitted on behalf of Google that it had disabled the Adwords listing for breach of policy before it was aware that proceedings had been commenced and, therefore, without the Court's intervention. That submission contains more than a hint of sophistry. First, the removal of the listing was apparently only taken by Google upon receipt of the 31 January

2017 letter, which referred to the applicants' intention to commence proceedings. Secondly, the fact that Google had taken action to remove the listing was not communicated to the applicants before the application was made or, indeed, even after Google had received notice of the proceedings and of the orders made. While the period of notice may not have been lengthy, notice was still given and should have been taken seriously. It should have been acted upon if Google wanted to avoid proceedings being commenced against it, as clearly referred to in the 31 January 2017 letter. That notice and inaction is clearly relevant on the question of costs.

31 Google submitted that the applicants could have – and, I infer, should have – commenced proceedings solely against Mr Craven in the "*usual way*", seeking an order that he deactivate the Adwords listing, over which he had control. It was said that, if it had been necessary, a copy of that order could have been provided to Google, submitting that Google routinely removes content identified in court orders against third parties. It was not explained how Google's approach might be publicly known, or how an ordinary citizen might know that this outcome would be swift and inevitable. It also does not explain how and why a court should respond to such an asserted state of affairs. The submission also pays no heed to the need for urgency that may sometimes be present, as was the situation in this case.

32 Google also submitted that it should not be deprived of its costs in circumstances where the proceedings were brought for the applicants' benefit and without a cause of action against Google. In this regard, it is said that Google's position is analogous to that of a third party respondent to a preliminary discovery application or subpoena, who is ordinarily entitled to their costs. I reject that analogy. Google is not a passive third-party. It is a business enterprise that relevantly advances its commercial interests through advertising with the potential to affect the interests of individuals or businesses such as the applicants. Such a business will always carry a substantial risk that at least some of the listings will direct readers to websites containing false and even highly illegal material.

33 Google cannot simply wash its hands of what will, from time to time, arise from its commercial activities. That is not to make Google responsible for the content of what is published on the internet. However, having regard to the potential consequences that its commercial activities may have, Google would be wise to be sensitive to such a possibility and have in place systems and procedures that are responsive to requests that such listings be removed, avoiding, where possible, the need for resort to a court. If Google chooses not to

conduct its business in that way, it must accept the ordinary and predictable consequences. It is not to the point that, as it transpired, there was no such need to institute proceedings, because that was not communicated to the applicants or to the Court.

34 Although not altogether clear, the submissions for Google seemed to suggest that before any proceedings can be brought against it in relation to something like an Adwords listing, proceedings must first be commenced against another party and Google later joined. If that is what was being suggested, I respectfully disagree. It is not to the point that such proceedings may be commenced and conducted without a third party facilitator such as Google being joined. While it may well be the case that in many situations it will not be necessary to join a facilitator such as Google in the first place if there is no urgency involved, I reject the proposition that in all cases that is what must take place. In particular, I reject the proposition that it was at all or in any way unreasonable for Google to have been joined to these proceedings for the purposes of seeking interlocutory and, if necessary, final relief in relation to the Adwords listing. That is not to say that final relief would necessarily have been granted, but on the balance of convenience, that would and indeed did occur on an interlocutory basis.

35 Google submitted that the alleged urgency of the matter was of the applicants' own making, emphasising that the applicants had been aware of Mr Craven's website for a couple of months and aware of the advertisement (insofar as Mr Hambleton and the other participants in the 17 January 2017 email were) since at least 17 January 2017. While there is some force to the suggestion that the applicants lacked foresight in addressing the issue of Mr Craven's website, regard should also be had to the particular circumstances that rendered the application urgent, being the imminent appointment of Rodgers Reidy New South Wales as voluntary administrator of the relevant companies. It is true that the applicants did not give Google a lot of notice to respond to the 31 January 2017 letter. On this point, however, I reject Google's complaint that the letter was not received until the morning of 1 February 2017. With respect, that delay is not the applicants' fault. Google chooses to have as its registered office the Sydney office of Baker & McKenzie Lawyers. The letter was hand-delivered to its registered office at about midday on 31 January 2017. It therefore had received notice on and from that time, even if he did not have in place proper procedures to ensure that an appropriate person at Google received such correspondence.

36 The submissions for Google also point out that once the applicants' letter was received, it was forwarded to the policy team for review in accordance with Google's Adwords policies, following which the Adwords listing was deactivated. However, Google would have had more notice had its own systems and procedures for dealing with mail to its registered office been adequate, which, on the evidence before me, they were not.

37 Google submitted that the applicants failed to take adequate steps beforehand to seek redress from Mr Craven, being the author of the article (website) and the advertiser who placed the advertisement in the Adwords system. It was submitted that such an advertiser can, at any time, start, pause, or remove their campaign from the Adwords system, which will stop the advertisement from showing. This information is said to be publicly available. That submission fails to have regard to the realities of the situation, whereby Mr Craven, or anyone in his position, may not have been willing to remove such material voluntarily, let alone quickly, or to stop an Adwords listing quickly or at all. It is simply not good enough for Google to contend that it can sit back and wait until every other process has been exhausted, irrespective of the harm that may take place in the meantime.

38 Google submitted that it had no obligation under the Court's orders of 1 February 2017 to inform the solicitors for the applicants that the relevant order had been complied with. Google submitted that, in the circumstances, it had no choice but to appear on 2 February 2017. That is a high-handed and unacceptable attitude to adopt. The question is not whether there was any legal obligation to advise the applicants of compliance with their demand or with the Court's orders, but rather who bears the responsibility for additional costs being unnecessarily incurred. Google had the option of advising both the applicants' solicitors and the Court that the Adwords listing had been removed and that a submitting appearance would be filed save as to costs. That would have preserved Google's position and at least avoided the costs of the appearance. Instead, no contact was made with the applicants' solicitors until approximately 1.00 pm on 2 February 2017, when it was indicated that the advertisement had been disabled at 9.00 am that morning and counsel would be appearing at the listing at 2.15 pm. This unresponsiveness is not conduct to be encouraged, let alone to be encouraged by way of a costs order. It is entirely contrary to the letter and spirit of ss 37M, 37N and 37P of the *Federal Court of Australia Act 1976* (Cth).

39 Google denied the assertion that it breached its own policies. Rather, it said that the policies applied to advertisers who use the Adwords system and who are responsible for the content

of the advertisements. Google requires that advertisers comply with all applicable laws and regulations, as well as its policies. It was submitted that while Google and its affiliates have in place a number of systems to review advertisements for certain policy violations before they are allowed to be displayed on the Adwords system, the volume of new content continuously added to Adwords by advertisers means that it is not practicable for Google to "*proactively*" monitor each and every advertisement for compliance. Various other submissions were made to the effect of violations not being obvious. It was submitted that Google enables anyone to flag an advertisement if they think it is in breach of policy or illegal, and when this is brought to its attention, Google may remove the offending advertisement and, in cases of repeated or egregious violations, stop advertisers from advertising with Google.

40 The problem with all of those submissions is that it effectively requires anyone with a problem with an advertisement to address it in the way that suits Google. That is simply not the legal position. The applicants were entirely within their rights to raise their concerns by sending a letter by hand-delivery to the registered office of Google. As has already been observed, the fact that Google did not, on the available evidence, have in place adequate procedures to ensure that was communicated to the responsible person at Google is not the applicants' fault. To repeat, it is incorrect to suggest that Google was not given notice until the letter hand-delivered to its registered office was forwarded to the appropriate person at Google on 1 February 2017. It was on constructive notice of the contents of the letter from the moment it was hand-delivered at about midday on 31 January 2017.

41 In my view, it was not unreasonable for the applicants to press for interlocutory relief in circumstances in which Google had not responded to the demands in the 31 January 2017 letter. The concerns of the applicants' were prima facie serious and legitimate. Based on the evidence before me, the arrangements that Google had in place to address such concerns were plainly inadequate. Had Google put in place procedures both for an appropriate person to receive communications received at its registered office and to address concerns of this kind, the proceedings, in all likelihood, would not have been necessary.

42 However, that is not the end of the matter. The notice given by the applicants was particularly short, recognising also that, to some degree, the urgency of the application was of the applicants' own making. When a choice is made to bring a late application, especially against a third party, that may have costs consequences. Moreover, it should be observed that

much of the costs incurred after the initial application, particularly those in relation to 2 February 2017, would have been incurred in any event because of the need to continue the interlocutory relief against the primary respondent, Mr Craven, to which the relief against Google was collateral. It was the applicants' choice not to seek costs from Mr Craven, albeit that this may have been a pragmatic acceptance of the possibly poor prospects of recovery against any such order.

43 Weighing up all the competing considerations, I am unable to conclude that it would be just to make either costs order sought. Both applications for costs must therefore be dismissed, with each party to pay their own costs of these costs applications.

I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich.

Associate: 

Dated: 9 August 2017