SUPREME COURT OF QUEENSLAND

CITATION:	*Jin & Anor v Passiontree Velvet Pty Ltd & Anor* [2019] QCA 148
PARTIES:	**SEUNGWAN JIN** (first appellant) **WOODY L PTY LTD** ACN 613 792 126 (second appellant) v **PASSIONTREE VELVET PTY LTD** ACN 149 468 600 (first respondent) **EMMANUEL LAWYERS PTY LTD** ACN 160 621 287 (second respondent)
FILE NO/S:	Appeal No 14060 of 2018 DC No 3086 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – Unreported, 21 November 2018 (Koppenol DCJ)
DELIVERED ON:	30 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2019
JUDGES:	Morrison and McMurdo JJA and Boddice J
ORDERS:	**1. Leave to appeal granted.** **2. Appeal allowed.** **3. Set aside the orders made on 21 November 2018 and in lieu thereof dismiss the application.** **4. The first respondent is to pay the plaintiffs' and second defendant's costs of the application in the District Court.** **5. The first respondent is to pay the appellants' and second respondent's costs of the application for leave to appeal and the appeal.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PARTIES AND REPRESENTATION – PROPER OR NECESSARY PARTY AND STANDING – where the second appellant (the Franchisee) executed a franchise agreement with the first

respondent (the Franchisor) – where the first appellant is a director of the Franchisee – where the Franchisee and the first appellant instituted proceedings against the Franchisor seeking damages for unconscionable conduct and misleading or deceptive conduct, and against the Lawyers (Emmanuel Lawyers) for breach of duty – where the Franchisor filed an application seeking that the proceedings be stayed and service of claim set aside for want of jurisdiction, and that the District Court of New South Wales was the appropriate jurisdiction to determine the matters in the proceedings – where the primary judge made the declaration and granted the stay on the basis of a clause in the franchise agreement that stated that "the parties hereby submit to the jurisdiction of the Courts of New South Wales" – where the first appellant is not a party to the franchise agreement – whether it is difficult to understand any basis upon which it could be said that the first appellant was bound by the jurisdiction clause – whether the appeal should be allowed

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COMMENCING PROCEEDINGS – SETTING ASIDE ORIGINATING PROCESS OR SERVICE THEREOF – where in the District Court and before this Court, the Franchisor contended that the jurisdiction clause was an exclusive jurisdiction clause under which the parties to the franchise agreement could only litigate in New South Wales, and nowhere else – where the relief sought is for damages only – where the claim in the District Court does not seek to enforce the franchise agreement, nor does it seek relief under it – where the claim does not even seek to have the franchise agreement varied as part of the relief for misleading or deceptive conduct – where though the primary judge recorded in his reasons that the claim was for damages, it seems to have been simply assumed that such a claim would be caught by the jurisdiction clause – where, as is evident from the pleaded case in the Queensland proceedings, the claim was not based on the contract and had nothing to do with the enforcement of the terms of the contract – whether the appeal should be allowed

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – DENIAL OF NATURAL JUSTICE – where, in the course of argument in the District Court, Counsel for the Lawyers commenced submissions on the application – where, after further submissions, the primary judge ruled that the Lawyers did not have an interest in being heard or making submissions – whether the Lawyers should not have been denied the opportunity to make submissions

Pickering v McArthur [2005] QCA 294, cited

COUNSEL: R G Bain QC, with R Hii, for the appellants
J R Dupree for the first respondent
D de Jersey for the second respondent

SOLICITORS: Sung Do Lawyers for the appellants
Cartwrights Lawyers for the first respondent
Barry.Nilsson. Lawyers for the second respondent

[1] **MORRISON JA:** On 22 December 2016, at Robina in the state of Queensland, the second appellant[1] executed a franchise agreement with the first respondent.[2] The agreement was executed in the offices of the second respondent, Emmanuel Lawyers.[3] A guarantor under the agreement was one Boram Ju, the wife of the first appellant.[4] Mr Seungwan is a director of the Franchisee.

[2] The Franchisor is a company based in New South Wales. It operated Passiontree Velvet franchises, which consisted of Passiontree Velvet cafes providing food and beverage services. The franchise in this case operated at Robina in the State of Queensland.

[3] On 24 August 2018 the Franchisee and Mr Seungwan instituted proceedings in the District Court of Queensland seeking the following relief:

(a) as against the Franchisor, damages for unconscionable conduct and misleading or deceptive conduct under ss 20 and 21 of the *Australian Consumer Law*,[5] s 51 ACB of the *Competition and Consumer Act* 2010 (Cth), and s 17 of the *Competition and Consumer (Industry Codes – Franchising) Regulations* 2014 (Cth); and

(b) as against the Lawyers, damages for breach of duty.

[4] It was contended in those proceedings that the Lawyers acted for the Franchisor in the franchise transaction but also owed a duty to the Franchisee and Mr Seungwan.

[5] The Franchisor filed a Conditional Notice of Intention to Defend, disputing "the jurisdiction of this Court to entertain the Plaintiff's claim against [the Franchisor]". Two of the central reasons advanced for that challenge were:

(i) that the proceedings "relate, in part, to an agreement entered into between the [the Franchisor] and the [the Franchisee]"; and

(ii) Clause 19.6 of the franchise agreement contained an exclusive jurisdiction clause in these terms: "19.6. This Agreement shall be governed by the laws of New South Wales and the parties hereby submit to the jurisdiction of the Courts of that State and Courts competent to hear appeals therefrom."

[6] The Lawyers filed the defence responding to all of the allegations made against them. It was denied that they were the legal representative of the Franchisor, and

---

1 To which I will refer as "the Franchisee".
2 To which I will refer as "the Franchisor".
3 To whom I will refer as "the Lawyers".
4 In these Reasons I will refer to them respectively as Ms Boram and Mr Seungwan.
5 Schedule 2 of the *Australian Competition and Consumer Act* 2010 (Cth).

that they owed any duty to the Franchisee. Importantly it was pleaded in paragraph 23:[6]

> "Further and in the alternative, in so far as the second defendant may be liable to the plaintiffs for damages as a result of a breach of duty, which is denied, the second defendant says that:
>
> (a) The subject matter of the claim is economic loss within the meaning of section 28(1)(a) of the *Civil Liability Act* 2003 (Qld) (CLA);
>
> (b) The claim against the second defendant is an apportionable claim within the meaning of section 28 of the CLA;
>
> (c) The first defendant is a concurrent wrongdoer in relation to the claim within the meaning of section 30 of the CLA on the basis of the matters pleaded in the statement of claim against the first defendant; and
>
> (d) The second defendants liability (if any) in respect of the claim is limited in accordance with section 31 of the CLA."

[7] On 8 October 2018 the Franchisor filed an application in the District Court seeking declaratory relief, orders for the proceedings to be stayed and service of the claim set aside.[7] The declarations sought were as follows:

> 1. that the plaintiffs claim and statement of claim filed in this Honourable Court (the "Proceedings") has not, for want of jurisdiction, been properly started;
>
> 2. that the District Court of New South Wales is appropriate jurisdiction to determine the matters in the proceedings.

[8] That application was heard on 21 November 2018 and the primary judge made a declaration that the claim and statement of claim as against the Franchisor "has not for want of jurisdiction been properly started".[8] His Honour ordered that the proceedings against the Franchisor be stayed, and also ordered the Franchisee and Mr Seungwan to pay the Franchisor's costs of the application and the action on an indemnity basis.[9]

[9] The Franchisor and Mr Seungwan seek leave to appeal against the decision and orders on a variety of grounds, including:

(a) the declaration and stay related only to the action against the Franchisor, but that claim had to be tried and determined by the Queensland District Court in any event because of the Lawyers having given notice that the claim was an apportionable claim;

(b) the pleaded claims against the Franchisor were not under or in reliance on the franchise agreement but, rather, for damages for unconscionable conduct or

---

6 Appeal Book (**AB**) 39.
7 AB 40.
8 AB 13 lines 6-8.
9 AB 16.

misleading or deceptive conduct, constituted by a breach of Commonwealth statutes;

(c) the determination of the claim against the Lawyers would necessitate a very substantial overlap with the claim against the Franchisor;

(d) Mr Seungwan was not a party to the franchise agreement and therefore clause 19.6 could not ground a stay against his claim; and

(e) clause 19.6 was not an "exclusive jurisdiction" clause.

Reasons of the primary judge

[10] The primary judge commenced his reasons by noting that the substantive claim was for damages for alleged unconscionable conduct and misleading or deceptive conduct, based on representations leading to the execution of the franchise agreement.[10] His Honour then referred to clause 19.6, reciting its terms. Having announced that the application by the Franchisor would be successful, his Honour then set out the reasons for that:[11]

> "In respect of the subject agreement, the parties have expressly agreed to submit to the jurisdiction of the courts of New South Wales. There is no cross application before this Court by the plaintiffs for a declaration that the most appropriate forum for these proceedings is Queensland or some other jurisdiction. In many cases where an application is made for a stay, the Court does consider whether some other Court should be the appropriate forum. One such example was the decision of Philippides J in *World Firefighters Games Brisbane v World Firefighters Games Western Australia Inc* [2001] QSC 164.
>
> However, in the present case the Court has before it one application only. It is an application for a stay of proceedings in Queensland. It is based upon the parties' express agreement that their franchise agreement is governed by the laws of New South Wales and that they submit to the jurisdiction of the courts of that state. That is the state in which any relevant action should be commenced. Absent any other application having been made for other declaratory relief, it is appropriate, in my opinion, to grant [the] application for a stay of the Queensland proceedings."

[11] His Honour made the declaration in terms of paragraph 1 of the application, declaring that the claim and statement of claim as against the Franchisor "has not for want of jurisdiction been properly started". His Honour then made orders staying the proceedings against the Franchisor.

[12] Counsel for the Franchisor sought indemnity costs "because of the nature of the submissions that were made to your Honour and my earlier submission that the submissions I was asked to meet simply didn't address the point that your Honour was asked ultimately to determine".[12] His Honour gave reasons for ordering indemnity costs as follows:[13]

---

10 AB 12.
11 AB 12 lines 29-44.
12 AB 13 lines 19-22.

> "Then it comes to the detailed nature of the argument. It must be remembered that in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, Barwick CJ said (at 130) that the jurisdiction to terminate an action summarily for want of a cause of action was not reserved for cases where argument was unnecessary to evoke the futility of the plaintiff's claim. His Honour added that:
>
> > "Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed".
>
> By application of that principle and having regard to the cases that were cited by Mr Hii and Mr de Jersey (which did not grapple with the point that Mr Dupree argued throughout-namely that this was a stay application and not an inappropriate forum application), I think that indemnity costs are appropriate".

Discussion

[13] For a number of reasons I have reached the conclusion that leave to appeal should be granted, and the appeal allowed. I shall deal with the question of leave to appeal later, first examining what I regard as the principal errors with the decision below.

Position of Mr Seungwan

[14] The franchise agreement lists three parties, the Franchisor, the Franchisee and Ms Boram as guarantor.[14] The recitals record that the Franchisor had agreed to grant a franchise "to the Franchisee on the terms and conditions set out in this agreement". Items 2 – 4 in the schedule to the franchise agreement[15] lists the Franchisor, the Franchisee and the Principal, namely Ms Boram. Mr Seungwan is not a party to the agreement.

[15] Clause 19.6 provides:

> "**19.6 Governing Law**
>
> This Agreement will be governed by the laws of New South Wales and the parties hereby submit to the jurisdiction of the Courts of that State and Courts competent to hear appeals therefrom."

[16] The primary judge made the declaration and granted the stay on the basis that in respect of the franchise agreement "the parties have expressly agreed to submit the jurisdiction of the courts of New South Wales".[16] The reference to "the parties" was to the parties to the District Court proceedings, which necessarily includes Mr Seungwan as he is the first plaintiff in the claim. So much is true, but Mr Seungwan is not party to the franchise agreement. It is difficult to understand any basis upon which it could be said that Mr Seungwan was bound by clause 19.6. None was articulated in the reasons of the primary judge, who seemed to deal with him on the basis that he was caught merely by being a party to the proceedings.

---

13 AB 14 lines 13-26.
14 AB 80.
15 AB 125.
16 AB 12 line 29.

[17] It is evident that Mr Seungwan's appeal must succeed on that ground alone.

Was the claim caught by clause 19.6?

[18] In the District Court and before this Court, the Franchisor contended that clause 19.6 was an exclusive jurisdiction clause under which the parties to the franchise agreement could only litigate in New South Wales, and nowhere else. I doubt that is the correct construction, as the clause does not say that the parties submit to the "exclusive jurisdiction" of the Courts in New South Wales, or contain any other formulation to like effect. However, it is unnecessary to determine that question because the claim brought in the District Court would not be caught by such a clause in any event.

[19] The relief sought is for damages only. The first basis is the claim against the Franchisor which is expressly pleaded on the basis of unconscionable conduct in the formation of the agreement and at its renewal. Paragraphs 27–30 of the statement of the claim[17] pleads a case of unconscionable conduct in breach of sections 20 and 21 of the *Australian Consumer Law*. The same basis of statutory relief is pleaded in respect of the renewal, in paragraphs 31-33 of the statement of claim. The second part of the claim against the Franchisor is for damages for misleading or deceptive conduct under the *Australian Consumer Law*, by reason of breaches of s 51ACB of the *Competition and Consumer Act* and s 17 of the *Competition and Consumer (Industry Codes – Franchising) Regulations*. That claim is articulated in paragraphs 34-37 of the statement of claim.[18] It is true that paragraph 37 of the pleading alleges that had the Franchisee been aware of the non-disclosures pleaded in paragraph 22, "it would not have entered into the Agreement", but the only relief sought is for damages. The claim in the District Court does not seek to enforce the franchise agreement, nor does it seek relief under it. The claim does not even seek to have the franchise agreement varied as part of the relief for misleading or deceptive conduct.

[20] Though the primary judge recorded in his reasons that the claim was for damages, it seems to have been simply assumed that such a claim would be caught by clause 19.6. It is not. How it could have been thought to be caught is a conundrum. One answer to that conundrum might lie in what his Honour was told in the course of argument. Counsel for the Franchisor told his Honour that his client was "being sued on the agreement" and that the case "has to do with enforcement of the terms of the contract".[19] As is evident from the pleaded case in the Queensland proceedings, the claim was not based on the contract and had nothing to do with the enforcement of the terms of the contract.

[21] The claim against the Lawyers is for breach of fiduciary duty. The relief sought is damages. Because Counsel for the Franchisor eventually disclaimed relief against the Lawyers,[20] the declaratory relief was limited to the claim against the Franchisor. Likewise, it was only the claim against the Franchisor that was stayed. But if that followed because of a recognition that the Lawyers were not party to the franchise agreement, it is difficult to understand how Mr Seungwan, who was also not a party to the agreement, had his proceedings declared to be improperly commenced, and stayed.

---

17 AB 27.

18 AB 27-28.

19 AB 225 line 32 and AB 236 line 26 and AB 248 line 29. That was a submission pursued in this Court: Appeal transcript T 1-6 line 38 and 1-7 lines 12-13.

20 For the first time in the course of submissions by Counsel for the Lawyers: AB 237 lines 20-23.

Effect of splitting the proceedings

[22] Even if clause 19.6 was an exclusive jurisdiction clause, it would catch only the Franchisee and Franchisor and neither Mr Seungwan nor the Lawyers. The effect of the primary judge's order was this:

(a) Mr Seungwan's claim in Queensland was stayed, meaning that he could only seek relief by instituting new proceedings in New South Wales;

(b) Mr Seungwan's claim against the Lawyers was not stayed, and would therefore proceed in Queensland;

(c) the Franchisee's claim against the Franchisor could only proceed if new proceedings were instituted in New South Wales;

(d) the Franchisee's claim against the Lawyers would proceed in Queensland; and

(e) the Lawyers would still join the Franchisor as a party to the Queensland proceedings in order to have the apportionable claim under the *Civil Liability Act* determined.

[23] The claim against the Lawyers was for breach of duty to each of Mr Seungwan and the Franchisee. The claim alleged that the Lawyers prepared the Disclosure Document which omitted the material information at the heart of the alleged unconscionable conduct by the Franchisor, and the Franchisor's misleading or deceptive conduct.[21]

[24] The inevitable consequence of the orders made below was that the same issues would be litigated in two jurisdictions. That also meant that relevant witnesses such as Mr Seungwan, Ms Boram and relevant officers of the Franchisor[22] would have to give evidence twice. That result follows from the fact that the Lawyers' defence in the Queensland proceedings asserts that the claim against them is an apportionable claim within the *Civil Liability Act*, and that the Franchisor was a concurrent wrong-doer. In order to adjudicate on that question, both claims would have to be effectively determined by the one judge.

[25] Therefore, even if it were right that Mr Seungwan and the Franchisee were compelled to commence fresh proceedings in New South Wales, and even if the Lawyers did not join the Franchisor to the Queensland proceedings, the Lawyers' assertion of an apportionable claim under the *Civil Liability Act* would force a consideration in New South Wales of what was the most appropriate forum. Material touching on that question was filed in the District Court proceedings.[23] That material included an affidavit from Mr Matthew Kim[24] in which he deposed that: the substantive law of contract in Queensland was essentially the same as in New South Wales, as was the relevant law relating to the *Australian Consumer Law*; Mr Seungwan, Mr Boram and Mr Jacob Kim (the relevant solicitor employed by the Lawyers) all resided in Queensland; the principal officer of the Franchisor responsible for overseeing the Queensland division of Passiontree Velvet franchises

---

21 Paragraphs 22, 29-30, 31-33, 34-35 and 39 of the statement of claim.

22 Particularly Mr Richard Kim who participated in telephone conversations with Mr Seungwan: see, for example, paragraphs 6, 7 and 8 of the statement of claim, AB 22-23.

23 For example, an affidavit by Mr Joshua Kim at AB 68.

24 AB 136.

was Mr Joshua Kim, who travelled to Queensland frequently; and Mr Richard Kim resided at Helensvale in Queensland.[25]

[26] All of those considerations might suggest that Queensland was the more appropriate forum. It is unnecessary to finally determine that issue. It is one to which no consideration was given by the primary judge. Therefore any discretion as to whether to make the declaration or grant the stay was completely unaffected by consideration of that factor.

Refusal to hear the second respondent's submissions

[27] In the course of argument in the District Court Counsel for the Lawyers commenced submissions on the application. Counsel for the Franchisor interrupted to advance a submission that because the suit against the Lawyers was "in no way connected with the suit against [the Franchisor]", the Lawyers should not be heard on the application.[26] After some further submissions the primary judge ruled that the Lawyers did not have an interest in being heard or making submissions.[27] As a consequence the Lawyers were unable to advance their contentions opposing the application. Those submissions included a response to the second declaration sought in the application, namely that the District Court of New South Wales "is appropriate jurisdiction to determine matters in the Proceedings". The submissions also addressed the reasons why the proceedings should not be split between two States, why clause 19.6 was not an exclusive jurisdiction clause, and why the proceedings were not caught by that clause in any event.[28]

[28] As the discussion above reveals, the Lawyers had an interest in being heard on the application and had they been permitted to make submissions the significance of their pleading of an apportionable claim under the *Civil Liability Act* might have drawn attention. They should not have been denied the opportunity to make submissions.

Leave to appeal

[29] The test to be applied to the grant of leave is that laid down in *Pickering v McArthur*:[29]

> "Leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant, and there is a reasonable argument that there is an error to be corrected."

[30] In my view, the questions raised on the appeal are of sufficient importance to warrant the grant of leave. There was no want of jurisdiction for the Franchisee's claim and no basis to stay that proceeding. Further, the effect of the declaration and stay is inconsistent with the statutory purpose and operation of the *Civil Liability Act* 2003, which permits the joinder of concurrent wrongdoers so that a claimant will advance a claim "against all persons the Claimant had reasonable grounds to believe may be liable for the loss and damage": s 32(1) of the Act. Finally, there was a denial of natural justice by the refusal to hear the Lawyers.

---

25 Paragraphs 20-25 of the affidavit, AB 139-141.
26 AB 236 lines 24 – 39.
27 AB 246.
28 Second defendant's outline at first instance, AB 53.
29 [2005] QCA 294 at [3]; internal citations omitted.

[31] As the discussion above shows, there were a number of errors that need correction, and the order preventing the continuation of the Franchisee's and Mr Seungwan's regularly instituted proceedings worked a substantial injustice upon them.

Conclusion

[32] I propose the following orders:

1. Leave to appeal granted.
2. Appeal allowed.
3. Set aside the orders made on 21 November 2018 and in lieu thereof dismiss the application.
4. The first respondent is to pay the plaintiffs' and second defendant's costs of the application in the District Court.
5. The first respondent is to pay the appellants' and second respondent's costs of the application for leave to appeal and the appeal.

[33] **McMURDO JA:** I agree with Morrison JA.

[34] **BODDICE J:** I agree with Morrison JA.