SUPREME COURT OF QUEENSLAND

CITATION:	*Wong v Jani-King Franchising, Inc* [2014] QCA 76
PARTIES:	**WONG EE WAUR CARL JASON** (appellant) **v** **JANI-KING FRANCHISING, INC** (respondent)
FILE NO/S:	Appeal No 6592 of 2013 SC No 6822 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2014
JUDGES:	Holmes and Muir JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to adduce fresh evidence is refused.** **2. The appeal is dismissed with costs.**
CATCHWORDS:	PRIVATE INTERNATIONAL LAW – JURISDICTION – SUBMISSION TO JURSIDICTION – BY APPEARING OR TAKING STEPS IN PROCEEDING – BY APPEARANCE OR OTHER STEP BY DEFENDANT – where the respondent obtained judgment on a claim against the appellant for a debt owed pursuant to a judgment given by a Texas court – where the judgment was not registrable under Part 2 of the *Foreign Judgments Act* 1991 (Cth) – where the appellant was not a resident of Texas – where the appellant contended that he had not submitted to the jurisdiction of the Texas court – where the appellant participated in various aspects of the Texas proceeding while reserving his right to challenge the court's jurisdiction – where the appellant opposed the joinder of an additional defendant on the basis that it would delay the trial – where s 11 of the *Foreign Judgments Act* did not apply – where the primary judge found that the appellant could not make out a defence that the Dallas court lacked jurisdiction – where the primary judge dismissed the appellant's application to have the default judgment set aside – whether the appeal should be allowed APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE –

IN GENERAL – where the appellant sought to tender as new evidence rule 120a of the *Texas Rules of Civil Procedure* and two decisions of Texas courts – whether the fresh evidence should be admitted

Foreign Judgments Act 1991 (Cth), s 11
Uniform Civil Procedure Rules 1999 (Qld), r 290

de Santis v Russo [2002] 2 Qd R 230; [2001] QCA 457, cited
Jani-King Franchising Inc v Jason [2013] QSC 155, related

COUNSEL: The appellant appeared on his own behalf
D P de Jersey for the respondent

SOLICITORS: The appellant appeared on his own behalf
HopgoodGanim for the respondent

[1] **HOLMES JA:** The appellant appeals against the dismissal of his application to have a default judgment set aside under r 290 of the *Uniform Civil Procedure Rules* 1999. The primary judge observed that the appellant had not demonstrated that he had a satisfactory explanation for his failure to file a defence; but his principal reason for refusing the application was the appellant's failure to demonstrate a *prima facie* defence on the merits.[1]

Background

[2] The respondent obtained judgment on a claim against the appellant for a debt owed pursuant to a judgment given by the District Court of Dallas County, Texas in the United States of America. The Dallas court's judgment could not be registered under Part 2 of the *Foreign Judgments Act* 1991 (Cth) because that court was not a prescribed court under the Act. The appellant's argument was that effect should not be given to the Dallas court's judgment, because that court did not have jurisdiction over him, a non-resident of Texas, and he had not submitted to its jurisdiction. That claimed want of jurisdiction was his proposed defence to the action brought in Queensland; the primary judge found it could not be made out.

[3] Section 11 of the *Foreign Judgments Act*, which applies to judgments not registrable under Part 2 of the Act, is relevant as to what amounts to submission to jurisdiction. It provides:

> "For the purposes of proceedings brought in Australia for the recovery of an amount payable under a judgment given in an action *in personam* by a court of a country, not being a judgment to which Part 2 applies, the court is not taken to have had jurisdiction to give the judgment merely because the judgment debtor:
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> (a) entered an appearance in proceedings in the court; or
> (b) participated in proceedings in the court only to such extent as was necessary;
>
> for the purpose only of one or more of the following:
>
> ...
> (d) contesting the jurisdiction of the court;
> ..."

[1] *Jani-King Franchising Inc v Jason* [2013] QSC 155.

[4] Upon being served with the Texas proceedings, the appellant had filed a "special appearance": an application for the dismissal of the proceedings on the basis that Texas courts had no jurisdiction over him. That application was denied in March 2006. However, the judge who heard it was later apprised of some authority which affected her decision. In May 2006, she vacated her order, instead ordering that the issue was to be reconsidered by the court at the conclusion of "limited jurisdictional discovery", which the respondent was to complete on or before 7 November 2006. The order recognised the parties' agreement that the appellant's participation in that discovery process would not have the effect of waiving his special appearance.

[5] In 2010, the respondent sought to join another individual as a defendant in the action, a step which the appellant opposed on bases unrelated to the contesting of jurisdiction. The Texas action went to trial in April 2011. The appellant did not appear. The trial court in Dallas found that he had notice of the trial date and that

> "by failing to request and obtain a hearing on his special appearance, [he] has waived his special appearance and thereby submitted himself to the jurisdiction of the Court."

The Dallas court gave judgment against the appellant and two other defendants.

The application to adduce further evidence

[6] The appellant here sought to adduce evidence of the law of Texas which was not put before the court at first instance. The respondent objected to the admission of that evidence on a variety of grounds which it is unnecessary for me to consider. For reasons which will emerge later in this judgment, the evidence should not in my view be admitted because it could have made no difference to the primary judge's conclusions.

[7] One of the documents which the appellant sought to tender as new evidence was rule 120a of the *Texas Rules of Civil Procedure*. The respondent had adduced evidence from its Texas lawyer, an expert in litigation in that State, who deposed that once the appellant had filed a special appearance contesting the court's jurisdiction, he had the burden of negating all bases of jurisdiction and obtaining an order from the court allowing his jurisdictional challenge. It was incumbent on him not only to make a timely request for a hearing, but to draw the court's attention to it and secure an adjudication of the special appearance before the trial. The appellant complained that the lawyer had failed to bring rule 120a to the primary judge's attention.

[8] Rule 120a provides for "a special appearance…for the purpose of objecting to the jurisdiction of the court…". The rule goes on to provide that the special appearance is to be made by sworn motion, but that document may contain "any other plea, pleading or motion", and such a plea, pleading or motion may be filed subsequently without waiving the special appearance. Similarly, various forms of process may be issued without waiving the special appearance. However, the rule also provides that the motion to challenge the jurisdiction must be heard before any other motion, plea or pleading can be heard.

[9] The appellant also sought, by way of new evidence, to tender two decisions, one of the Supreme Court of Texas, the other of the Court of Appeals of Texas: *Dawson-Austin v Austin* 968 S.W. 2d 319 (1998) and *Silbaugh v Ramirez* 126 S.W. 3d 88 (2002). In *Dawson-Austin*, the Supreme Court held that a lower court had made an

error in regarding various motions filed by the petitioner, Dawson-Austin, as having amounted to a general appearance simply because they were not expressed to be subject to the special appearance. That was, the court said, contrary to rule 120a, which made "matters in the same instrument and subsequent matters subject to the special appearance without an express statement to that effect for each matter". A later application for an adjournment "did not request affirmative relief inconsistent with Dawson-Austin's assertion that the district court lacked jurisdiction", which the court noted was "the test for a general appearance". There is nothing remarkable or of significance for the determination of the present case in those observations.

[10] In *Silbaugh*, the appellant who had filed a special appearance subsequently filed a motion to oppose the intervention of a party. That motion, because it was based solely on an assertion of the Court's lack of jurisdiction over her, was not held to amount to a waiver of special appearance. That was not what occurred in the present case; and the conclusion in *Silbaugh* consequently has no import for the argument here.

The primary judge's conclusions

[11] As the primary judge noted, the appellant participated in various aspects of the Texas proceeding while reserving his right to challenge the court's jurisdiction. However, his Honour considered that the appellant's opposing of the joinder application showed that he had engaged with the court and had gone "beyond 'merely' entering an appearance to contest the jurisdiction of the court." Section 11 of the *Foreign Judgments Act* therefore did not apply.

[12] The primary judge also observed that the appellant's

> "failure to request the Texas court to reconsider his application has not been explained in any of the submissions by him either written or oral. This was at a time when Mr Wong was still represented by a United States lawyer".[2]

He went on to conclude:

> "Mr Wong has only relied upon the jurisdictional argument with respect to the Texas court. He provided no argument on the merits of the case against him in Texas. Mr Wong has failed to demonstrate that he has a satisfactory explanation for the failure to file a defence or that he has a prima facie defence on the merits."[3]

Submission to jurisdiction by opposing joinder

[13] The appellant made a number of arguments concerning the primary judge's conclusion that his opposition to the joinder of another defendant in the Texas action went beyond entering an appearance for the purpose of contesting the court's jurisdiction. The first was that the trial judge had wrongly referred only to s 11(a) and (d) of the *Foreign Judgments Act* and thus considered only whether his appearance was entered for the purpose of contesting the court's jurisdiction, and not (under s 11(b)) whether he had participated in proceedings only to the extent necessary to contest the court's jurisdiction. Next, the appellant argued that his Honour had wrongly had regard to the fact that he had not reserved his rights in

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2 At [32].

3 At [33].

his response to the joinder motion, whereas rule 120a permitted subsequent motions, pleas and pleadings to be filed without waiving the special appearance.

[14] Finally, the appellant advanced an argument that his resistance to the motion to join a further defendant was consistent with his objection to the court's jurisdiction. His reasoning was that if the proposed defendant, who was also a non-resident of the United States, were joined, it could be expected that he would object to jurisdiction and apply for a special appearance, leading to further delay of the hearing of the appellant's special appearance. The respondent objected to that line of argument, pointing out, correctly, that the proposition that the appellant's opposition to joinder was based on the prospect of delay in the hearing of the special appearance had not been the subject of evidence anywhere.

[15] But, in any event, that argument and the argument concerning the effect of rule 120a fall away when one considers what was actually contained in the document which the applicant filed in the District Court by way of submission on the joinder application. Headed "Defendant's Response to Plaintiff's Motion for Leave to Add [the Further Defendant]", it argued that the parties had agreed to deadlines by way of an "agreed scheduling order", and that if the respondent were allowed to add another defendant, all of the pre-trial deadlines would have to be extended; the trial date, which had been set for 13 September 2010, would be delayed by several months. The prospect of the trial's being unreasonably delayed was reiterated a number of times in the submission. The submission also took issue with the respondent's assertion, by way of justification for the late application, that it did not know of the prospective claims against the further defendant. Nowhere in the document was there any reference to the special appearance or any question raised about the court's jurisdiction; it was entirely directed to the arguments that the respondent's motion should be denied because it had not explained its delay in applying and because the joinder would force an unreasonable delay of the trial.

[16] The appellant is correct in saying that s 11(b) of the *Foreign Judgments Act* was relevant, but it is of no consequence that the primary judge did not specify the provision. His finding was that

> "this part of the proceedings (the response to the joinder motion) was unrelated to [the appellant's] claim for a 'special appearance'".

That was, effectively, a finding that the appellant's participation in the proceedings went beyond what was necessary to contest the court's jurisdiction, and it was unquestionably correct. It was not simply a matter of the appellant's failing to make any reference in the response to the special appearance; his stance in opposing the joinder of another defendant went beyond anything that was needed to contest the court's jurisdiction. To the contrary, his opposition to the joinder on the basis that it would delay the trial of the matter is only consistent with an acceptance that the trial was to proceed with him as defendant; indeed, an insistence that it do so on the designated date.

Remaining arguments

[17] That conclusion must lead to the dismissal of the appeal. However, for completeness' sake, I will deal with the appellant's remaining arguments. The first concerned his Honour's observation that the appellant had not explained his failure to seek reconsideration of his special appearance application. The appellant pointed to an affidavit affirmed by him on 16 April 2013 and read before his Honour, in which he

asserted that he was unable to proceed with the special appearance because the respondent protracted the discovery process long after 7 November 2006, the date stipulated in the order. Indeed, he said, the respondent had taken so long that in August 2010 he had been forced to dispense with his lawyers' services because he could no longer afford them.

[18] It is by no means clear that his Honour did overlook that evidence, as opposed to considering that it did not amount to an explanation. Certainly, it does nothing to explain why the appellant did not renew his special appearance motion immediately the date set by the court for the expiration of discovery had passed, that is to say, in November 2006; which was, as the primary judge observed, a time when he was still represented by a United States lawyer. Nor would his inability to continue funding lawyers explain why he personally took no steps and allowed the matter to proceed to judgment.

[19] More broadly, the appellant argued that the effect of the Texas rule was that once he had filed a special appearance, it was clear that he was taking issue with the court's jurisdiction and, whether or not he ever took any step to have the question resolved, he could not be taken to have voluntarily submitted to the jurisdiction. That seems an improbable reading of the rule. It contemplates that a defendant making a special appearance will take steps to have the issue resolved; no hearing of any other plea, pleading or motion may be undertaken until it is. It follows that there is an onus on a defendant to take the necessary steps to that end, and a failure to do so over an extended period (four years in this case) culminating in judgment might well amount to evidence of waiver. The primary judge drew an analogy with a failure in this jurisdiction to act on leave to file a conditional appearance amounting to abandonment of it. The Texas rule does not suggest that his Honour in doing so misled himself as to what might amount to waiver in Texas litigation.

[20] The appellant argued that the primary judge should not have referred to the text in the Dallas court's finding of submission to jurisdiction because it was irrelevant; the question of whether the foreign court had jurisdiction was to be determined according to Queensland's jurisdictional rules: *de Santis v Russo*[4]. But the Dallas court's conclusion was simply a matter of history. His Honour specifically noted that its finding, while important, did not resolve the issue of jurisdiction. The facts that the appellant had not sought to have the application reconsidered, and had not satisfactorily explained the failure to do so, were relevant to the learned judge's consideration of whether the appellant had submitted to the jurisdiction of the Dallas court.

[21] The appellant complained that the trial judge had not made a finding that he had voluntarily submitted to the jurisdiction of the Dallas court, but the inference of such a finding is inevitable: his Honour identified the appellant's proposed defence as relating solely to the issue of jurisdiction and concluded that the appellant had failed to demonstrate that the defence existed.

[22] Finally, the appellant suggested that the learned judge, in the sentence "he provided no argument on the merits of the case against him in Texas", had applied the wrong test, because the merits of the case were irrelevant. Given that his Honour did no more than state a fact and, elsewhere in his judgment, clearly identified that jurisdiction was the question in issue, that argument is not viable.

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4 [2002] 2 Qd R 230.

[23] The appellant plainly submitted to the jurisdiction of the Dallas court when he opposed the joinder of the additional defendant on the basis that it would delay the trial. The learned primary judge was right to find that he could not, accordingly, make out a defence that the Dallas court lacked jurisdiction, and to dismiss the application accordingly.

[24] I would refuse the application to adduce fresh evidence and dismiss the appeal with costs.

[25] **MUIR JA:** I agree that the appeal should be dismissed with costs for the reasons given by Holmes JA.

[26] **DOUGLAS J:** I also agree that the appeal should be dismissed with costs for the reasons given by Holmes JA.