SUPREME COURT OF QUEENSLAND

CITATION:	*Dawson v Jewiss; Thompson v Jewiss* [2004] QCA 374
PARTIES:	**STUART BEVAN DAWSON** (plaintiff/respondent) **v** **HENRY WILLIAM JEWISS also known as HARRY JEWISS** (defendant/appellant) **ERNEST ROY THOMPSON** (plaintiff/respondent) **v** **HENRY WILLIAM JEWISS also known as HARRY JEWISS** (defendant/appellant)
FILE NO/S:	Appeal No 4260 of 2004 Appeal No 4729 of 2004 Appeal No 4261 of 2004 Appeal No 4731 of 2004 DC No 4056 of 2002 DC No 3441 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Applications – Civil General Civil Appeals
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	4 October 2004
JUDGES:	Williams JA and Jones and Chesterman JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application 4260 of 2004 struck out** **2. Application 4261 of 2004 struck out** **3. In Appeal No 4279 of 2004 – appeal dismissed with costs to be assessed** **4. In Appeal No 4731 of 2004 – appeal dismissed with costs to be assessed**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – DISTRICT COURTS — CIVIL JURISDICTION – PRACTICE – TRIAL AND JUDGMENT – where appellant failed to appear when trials were called on for hearing –

where learned trial judge gave judgments against appellant in default of appearance – where appellant contended that he was unable to appear due to illness – where appellant did not apply for adjournment of the trials – whether any basis shown for setting aside judgments against appellant

COUNSEL: The appellant appeared on his own behalf
L D Bowden for the respondents

SOLICITORS: The appellant appeared on his own behalf
Walsh Halligan Douglas for the respondent in Appeal No 4260 of 2004 and Appeal No 4729 of 2004
Creswicks for the respondent in Appeal No 4261 of 2004 and Appeal No 4731 of 2004

[1] **WILLIAMS JA:** The appellant, who appeared in person by telephone from Adelaide, appeals against two judgments given against him in default of appearance at trial: rule 476(1) of the UCPR.

[2] The Dawson matter was called on for trial shortly after midday on 4 May 2004, and there was no appearance of the appellant when called. Thereafter evidence was led in support of the respondent's case and ultimately judgment was given against the appellant in the sum of $101,029.00 (inclusive of interest of $13,500.00) with costs to be assessed. The Thompson matter was called on for hearing on 6 May 2004 at 10.00am, and there was no appearance for the appellant when called. Thereafter the respondent led evidence in support of his claim and judgment was ultimately given against the appellant in the sum of $117,983.71 (inclusive of interest of $28,602.11) with costs to be assessed.

[3] By the Notice of Appeal in each matter the appellant sought an order setting aside the judgment in each case on identical grounds, namely:-

1. That the learned judge erred in refusing an application to join the defendant's (intending appellant) indemnity insurer – Allianz Australia Insurance Ltd.

2. That the learned judge erred in making the order for summary judgment against the defendant (intending appellant) because of the defendant's ill-health, extreme anxiety exacerbating the defendant's heart problems.

3. That the learned judge erred in proceeding notwithstanding that the defendant's (intending appellant) health did not permit him to travel to the trial.

4. That the learned judge erred in the circumstances making an order for costs against the defendant (intending appellant).

[4] In the Dawson matter, the claim and statement of claim of the respondent was filed on 3 October 2002 and it was subsequently amended on 27 February 2003. The appellant filed a Notice of Intention to Defend and Defence on 3 March 2003; that was prepared by the appellant himself. The respondent alleged the retainer of the appellant, the giving of advice which was negligent or in breach of contract, and loss consequential thereon. In para [2] of his defence the appellant admitted that he was retained by the respondent "as his accountant in or about June 2001", but the

appellant denied that the retainer was "to provide advices as to tax minimisation and investment advice". It is not necessary for present purposes to refer to other issues raised by the pleadings in that matter.

[5] In the Thompson matter, the claim and statement of claim was filed on 15 August 2002 and the defence filed on 18 November 2002. The respondent alleged the retainer of the appellant, the giving of advice which was negligent or in breach of contract, and loss consequential thereon. The appellant admitted in his defence that he "did provide some accounting service" to the respondent. Again it is not necessary for present purposes to refer to the issues raised by the pleadings in that matter.

[6] The trials were initially set down for hearing in the week commencing 11 August 2003. The history of adjournments of the trial between then and 4 May 2004 is set out in the reasons for judgment of this court in the appeal heard on 4 May 2004: [2004] QCA 144.

[7] There is no doubt that the appellant was aware that the matters were set down for trial commencing 4 May 2004, the one matter to follow the other. On 19 April 2004 the appellant applied for an adjournment of each trial to enable him to join Allianz Australia Insurance Ltd as a third party. Because of the lateness of the application the judge who was to hear the trials refused to adjourn them on that ground. It was pointed out to the appellant that he could, if he wished, commence a separate proceeding against Allianz claiming indemnity pursuant to his professional liability insurance policy.

[8] The appellant sought leave of this court to appeal against the orders refusing that adjournment. That appeal was heard at 10.15am on 4 May 2004. The appellant then appeared by telephone link from Adelaide and argued his case. He asserted that he was indigent and in ill-health; he claimed that his state of health prevented him from travelling to Brisbane although there was no up-to-date medical evidence supporting that contention.

[9] This court refused leave to appeal in each case for the reasons given on that date: [2004] QCA 144.

[10] The District Court judge before whom the trials had been listed had the matter of Dawson called on for hearing "just after midday" on 4 May; that would be about an hour after the Court of Appeal had handed down its decision. There was no appearance of the appellant, and no application was then made for the adjournment of the trial, by telephone or otherwise. The learned trial judge noted that the previous Friday a woman had telephoned on behalf of the appellant saying that the hearing in the Court of Appeal was listed at 10.15am on 4 May. She was informed that the trial would proceed not before 11.00am on 4 May "subject to anything the Court of Appeal decided to the contrary."

[11] It is sufficient to repeat that the learned trial judge then received evidence in support of the respondent's claim and he then gave reasons for finding that the claim had been made out.

[12] As already noted, the Thompson matter was called on for hearing on 6 May 2004. There was no appearance on behalf of the appellant, and no application made for an adjournment by telephone or otherwise. As already noted the learned trial judge

then received evidence from the respondent and he ultimately gave reasons finding that the respondent had made out his case.

[13] The first ground of appeal cannot be sustained. It was effectively determined by the judgment of the Court of Appeal delivered on 4 May 2004. There was no application for an adjournment to enable the joinder of Allianz other than the application made on 19 April which was the subject of that Court of Appeal decision. No application for an adjournment was made on either 4 or 6 May.

[14] From time to time the appellant has placed before the courts material as to his state of health. Frequently that has not been up-to-date and nothing in that material has established that the appellant could not safely travel to Brisbane for a trial if he was minded to. It is interesting to note that in an affidavit filed in connection with the hearing of these appeals the appellant referred to a medical certificate of his general practitioner, Dr Jonathan Cook. That certificate is exhibited and it says that the appellant is "unfit for work/school from 30/09/04 to 5/10/04 inclusive" yet in a letter to the Registrar of the court also exhibited to that affidavit he asserts that due to his health he would be unable to attend a hearing of the appeal until "after the 15th October 2004."

[15] As is demonstrated by the reasons of this court delivered on 4 May 2004, and the material subsequently relied on by the appellant in connection with these appeals, the appellant was given ample opportunity to make arrangements to be in Brisbane for the trial of these matters. The conclusion seems inescapable that he has relied on his state of health in an endeavour to frustrate the trials.

[16] In those circumstances I am not persuaded that there is any substance in grounds 2 and 3 in each of the Notices of Appeal.

[17] It was pointed out to the appellant during the hearing of these appeals that he was endeavouring to set aside judgments obtained in default of appearance at trial and that in consequence it was incumbent upon him to show, at least, that he had an arguable defence on the merits. Nothing said during the hearing of the appeals indicated that the appellant had such a defence.

[18] The policy of insurance with Allianz was exhibited to an affidavit before the court. There is a dispute as to whether that policy extends to cover advice of the type given by the appellant to each of the respondents; that is apparently why to date the insurer has disputed liability. There is, of course, nothing to stop the appellant having that dispute resolved in appropriate litigation; that may lead to his being indemnified by Allianz with respect to the judgments obtained against him by each of the respondents.

[19] No basis has been established for setting aside either of the judgments and the appeals should be dismissed.

[20] Prior to lodging the Notices of Appeal in each matter the appellant lodged with the Registry in each matter a document headed "Application to Court of Appeal"; those documents did not conform with the rules but were given the numbers 4260 of 2004 in the Dawson matter and 4261 of 2004 in the Thompson matter. Those documents became superseded once the proper Notices of Appeal were lodged; but to finalise the record the applications being 4260 of 2004 and 4261 of 2004 should be struck out.

[21] The formal orders of the court should therefore be:

(i) Application 4260 of 2004 struck out;
(ii) Application 4261 of 2004 struck out;
(iii) In Appeal No 4279 of 2004 – appeal dismissed with costs to be assessed;
(iv) In Appeal No 4731 of 2004 – appeal dismissed with costs to be assessed.

[22] **JONES J:** I have read the reasons for judgment of Williams JA and I agree with those reasons and the orders proposed.

[23] **CHESTERMAN J:** I agree that the appeals should be dismissed for the reasons given by Williams JA.