

- Assuming the dispute was governed by NZ law, the defendant had not established that Victoria was a clearly inappropriate forum to try the dispute. Geographical proximity, similarities between legal systems and legislation for the determination of some trans-Tasman litigation meant Victoria was potentially an appropriate forum. The Court ordered that Justice Harper's orders be set aside and the defendant's original summons be dismissed with costs.

## APPEARANCE

An appearance is a document, prepared by the defendant or its solicitor, which is filed in the court registry and then served on the plaintiff or the plaintiff's solicitor. It signifies to the plaintiff that the defendant intends to defend the proceedings brought against it, and that any further steps in the proceeding can be taken only on notice to the defendant.

The appearance document must give the defendant's address for service and the name, address, telephone number and facsimile number of the defendant's solicitor (r 8.06). Filing an appearance prevents the court giving a default judgment in favour of the plaintiff without notice to the defendant.

Filing an appearance has significant consequences in the conduct of the proceeding. An appearance, once filed, cannot be withdrawn without leave of the court. An appearance can be either 'unconditional' or 'conditional':

- An unconditional appearance filed by the defendant, acknowledges the court's jurisdiction and waives any irregularity in the service of the proceedings.
- A conditional appearance does not waive procedural irregularities, but allows the defendant to raise arguments about lack of jurisdiction and/or service irregularities.

**NOTE:** but one or the other form of appearance must be filed to prevent the risk of default judgment being entered against the defendant.

### **Appearance before Taking Step:**

In general, filing an appearance is a precondition to the defendant taking any step in a proceeding (r 8.02). The general rule is subject to certain qualifications. First, prior to filing an appearance, a defendant may by summons apply under r 8.09 to stay a proceeding by objecting to the court's jurisdiction, or by applying to the court to set aside an originating process for being invalid or invalidly served. Secondly, a defendant may apply to have a default judgment entered against them set aside in proceedings commenced by writ.

### **8.02 Appearance before taking step**

Except as provided by Rule 8.08 or 8.09 or by leave of the Court, a defendant shall not take any step in a proceeding unless the defendant has first filed an appearance.

**NOTE:** the defendant may proceed before entering an appearance in its application to set aside the originating process or its service: r 8.09.

### **8.09 Setting aside writ or originating motion**

Notwithstanding Rule 8.08, the Court, on application made by the defendant before filing an appearance, whether conditional or not, may exercise its jurisdiction to –

- (a) set aside a writ or originating motion or its service;
- (b) make an order under Rule 46.08; or
- (c) stay a proceeding.

### **Rules Regarding Appearance:**

In general, only a defendant is permitted to file an appearance. The few permissible exceptions occur:

- in admiralty actions in rem where persons with a proprietary interest in the ship, such as the owner of the vessel, may enter appearances and become defendants to the claim (*Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976));
- where a person in possession of land and having an interest in it, or a tenant, may enter appearance in actions for recovery of land (ACT, NSW, QLD, TAS, WA);
- in an ejectment action against a tenant where the landlord strictly defined, or broadly defined to include anyone how can claim an interest in the land including the mortgagee or devisee in trust, may file an appearance and defence and become a defendant in order to protect the interest in the land not vested in the tenant.

### **8.03 Who to file appearance**

- (1) Except as provided in Rule 15.02, a defendant may file an appearance by a solicitor or in person.
- (2) A corporation may file an appearance by any person duly authorised by it to so act.

*Johnsen v Duks* [1963] NSW 730:

#### **Facts:**

- Proceedings were brought to eject a husband and wife in possession by a vendor of the property claiming rescission of the contract of sale.
- Service of the summons was regularly effected upon the wife but not the husband.
- The process server left the summons at the house with the wife but the husband was only notified when the wife handed him the summons.

#### **Held:**

- A judgment in default against the husband was set aside on the basis of irregularity of service, while judgment against the wife was set aside without regard for the merits of the case.

#### Defendant Files an Appearance Through Solicitor or in Person:

If the defendant is a corporation it may file an appearance by a solicitor, or by an officer of the corporation (r 8.03). Partners, whether sued personally or in the name of a partnership, enter appearance in their own name. Only one partner need be served, however, if more than one is served, time runs from the time the last was served.

The exception to the provision under the rules that defendants may file an appearance either personally or by a solicitor is that persons under a disability and corporations are not able to file appearances personally. A person under a disability is defined in r 15.01 must file an appearance but a litigation guardian, who shall act by a solicitor. Corporations file appearances through duly authorised persons.

If the defendant does not give notice of appearance, then only a legally qualified person or a person authorised by the defendant if they are filing a notice prepared by the defendant, may do so.

#### **Time for Appearance:**

The time limit for filing an appearance is set out in r 8.04. During these periods of time between the service of the originating process and the defendant's filing of a notice of appearance, the plaintiff may take no further procedural step. After the time period has expired if the defendant has entered no appearance, the plaintiff may enter a default judgment under the rules.

If an originating process requires an appearance to be entered the rules require it to show the time limited for the entry of such appearance, and, if it does not show, the originating process is irregular.

By r 8.04 the time allowed to the defendant to file an appearance will depend on the jurisdiction in which the process is to be served. The plaintiff to proceedings issues in a Victorian court must state:

- to a defendant served in Victoria that they have up to 10 days after service to respond;
- to a defendant served in another State or Territory of Australia that they have 21 days;
- to a defendant served in Papua New Guinea that they have 28 days;
- to a defendant served in New Zealand that they have either 30 days, or a greater or lesser period as ordered by the court empowered by the Act; and
- to a defendant located anywhere else that they will have 42 days to respond.

#### **8.04 Time for appearance**

Unless the Court otherwise orders, the time stated in the writ or originating motion for the defendant to file an appearance shall be –

- (a) where the originating process is to be served in Victoria, not less than 10 days after service;
- (b) where the originating process is to be served out of Victoria and in another part of Australia, 21 days after service;
- (c) where the originating process is to be served in Papua New Guinea, not less than 28 days after service;
- (d) where the originating process is to be served in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth –
  - (i) 30 working days (within the meaning of that Act) after service; or;
  - (ii) if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, not less than 42 days after service.

#### **An Unconditional Appearance:**

The filing of an unconditional appearance has the following effect:

- I. It waives any objection that the defendant may have had with respect to the jurisdiction of the court to hear and determine a matter;
- II. It waives any irregularities in the originating process itself;
- III. It waives any irregularities as to commencement; and
- IV. It waives any irregularities as to service.

Whilst an unconditional appearance constitutes a submission to the jurisdiction, it does not confer on the court a subject matter jurisdiction it otherwise does not have.

An unconditional appearance waives technical breaches of rules such as ‘stale’ or ‘expired’ writs. It must be noted that an error in beginning a proceeding or an error at any stage of a proceeding is an irregularity and does not nullify the proceeding or any step in the proceeding. It cannot be assumed however, that all errors in the beginning of proceedings are mere irregularities. Some errors can amount to a ‘nullity’ in which case the filing or an unconditional appearance will not and cannot ‘cure’ or waive that error.

## 2.01 Effect of non-compliance

- (1) A failure to comply with these Rules is an irregularity and does not render a proceeding or any step taken, or any document, judgment or order in the proceeding, a nullity.
- (2) Subject to Rules 2.02 and 2.03, where there has been a failure to comply with these Rules, the Court may –
  - (a) set aside the proceeding, either wholly or in part;
  - (b) set aside any step taken in the proceeding, or any document, judgment or order in the proceeding;
  - (c) exercise its powers under these Rules to allow amendments and to make orders dealing with the proceedings generally.

*Thomson Australian Holdings v Trade Practices Commission* (1981) 148 CLR 150:

### Facts:

- The Trade Practices Commission alleged that the defendants were unlawfully offering liquor for sale at predetermined prices in contravention of the s 45 of the *Trade Practices Act 1974* (Cth). The defendants both gave undertakings to the Commission to refrain, and consented to injunctions to prevent them, from continuing to make the offers.
- The plaintiff was the publisher of the liquor price guide. The plaintiff sought and was granted leave to intervene in the case. IT argued that the court's orders exceeded its jurisdiction, and that it could neither impose injunctions, nor accept undertakings, to regulate conduct captured by s 45 by affecting activities that were not within the reach of s 45.

### Held:

- The Court held that the consent of the parties to the court's jurisdiction could not confer on the court jurisdiction absent a statutory basis for it.

### *What Errors May Amount to a Nullity?*

Clearly, if the defendant disputes the jurisdictions of the court from which originating process has been filed, an unconditional appearance ought not to be filed, but a conditional appearance should. Questions of the court's jurisdiction may arise in the following examples:

- Where the defendant is served outside the jurisdiction;
- Where a foreign defendant is served while inside the jurisdiction;
- Where a resident is served in respect of a cause of action with foreign elements.

It must be remembered that even though the plaintiff may have a right under the rules to effect service on a defendant outside the jurisdiction, it does not necessarily mean that the court will exercise the jurisdiction created by that service. The court from where the originating process was filed may be clearly inappropriate to hear and determine the dispute.

### **A Conditional Appearance:**

By filing a conditional appearance, the defendant, without submitting to the court's jurisdiction, or waiving their entitlement to raise a procedural objection with respect to an irregularity in the plaintiff's proceeding, reserves the right to challenge the jurisdiction of the court, the validity of the originating process, or the validity of the service of process.

An irregular proceeding may only be invalidated by the court setting it aside. The procedural advantage for the defendant over an application under r 8/09 is pending the plaintiff may enter a default judgment.

If after having filed a conditional appearance, the defendant is able to establish the court's lack of jurisdiction, or any irregularity in the service, the court can stay the proceedings or set them aside. However, the defendant will be bound by the court's decision if the court determines that it has jurisdiction.

### **8.08 Conditional appearance**

- (1) A defendant may file a conditional appearance.
- (2) A notice of conditional appearance shall be in Form 8B.
- (3) A conditional appearance shall have effect for all purposes as an unconditional appearance, unless, on application by the defendant, the Court otherwise orders.
- (4) Application under paragraph (3) shall be made by summons within 14 days after the day the conditional appearance is filed.

#### Other Rules of Court Relevant to Conditional Appearances:

- i. A defendant can apply to have the originating process or its service set aside before the filing of an appearance (whether conditional or unconditional); r 8.09;
- ii. If there is a non-compliance with the Rules, a defendant can apply to have the originating process set aside: r 2.03;
- iii. The court has complete discretion as to whether to allow an unconditional appearance to be amended to a conditional appearance. For the discretion to arise, the unconditional appearance must have been filed by accident or mistake such as where there has been failure of communication between solicitor or client or misunderstanding between them. The discretion will not arise if the unconditional appearance is entered 'deliberately' and on proper advice or consideration that such appearance be filed. In other words, there was an intention to file an unconditional appearance.

However, the discretion will rarely be exercised if the application to amend is not made promptly or if there is any prejudice suffered to the plaintiff, which cannot be overcome.

### **8.09 Setting aside writ or originating motion**

Notwithstanding Rule 8.08, the Court, on application made by the defendant before filing an appearance, whether conditional or not, may exercise its jurisdiction to –

- (a) set aside a writ or originating motion or its service;
- (b) make an order under Rule 46.08; or
- (c) stay a proceeding.

### **2.03 Application to set aside for irregularity**

The Court shall not set aside any proceeding or any step taken in any proceeding or any document, judgement or order in any proceeding on the ground of a failure to which Rule 2.01 applies on the application of any party unless the application is made within a reasonable time and before the applicant has taken any fresh step after becoming aware of the irregularity.

### **25.01 Withdrawal of appearance**

A party who has filed an appearance in a proceeding may withdraw the appearance at any time with leave of the Court.

#### **Summary:**

1. If there is an issue with respect to service of the writ or the jurisdiction of the court to hear or determine a case, a **conditional appearance** ought to be filed. If an unconditional appearance is filed, those irregularities are **waived** – that is, those issues cannot be raised at the trial of the action.
2. Failure to file an appearance (in one form or the other) will allow the plaintiff to get a default judgment. That is, the plaintiff gets a judgment in their favour without the matter receiving any judicial consideration by a judge.