

# SUPREME COURT OF QUEENSLAND

CITATION: *Steindl Nominees P/L v Laghaifar* [2003] QCA 49

PARTIES: **STEINDL NOMINEES PTY LTD** ACN 063 915 935  
(plaintiff/respondent)  
v  
**SOHAIL LAGHAIFAR**  
(defendant/applicant)

FILE NO/S: Appeal No 9565 of 2002  
SC No 7276 of 1999

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 18 February 2003

DELIVERED AT: Brisbane

HEARING DATE: 18 February 2003

JUDGES: Davies and Williams JJA and Philippides J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made

ORDER: **1. Application for extension of time refused**  
**2. Applicant to pay respondent's costs of this application on an indemnity basis**  
**3. Application for costs on indemnity basis against Mr Wrenn adjourned on the basis that the parties be invited to make further submissions on this question in writing to this Court:**  
**(a) within seven days for Mr Francis; and**  
**(b) within 14 days for Mr Wrenn.**

CATCHWORDS: APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - TIME FOR APPEAL - EXTENSION OF TIME - WHEN REFUSED - where judgment by default obtained - where application to dismiss default judgment dismissed - where applicant sought leave to appeal against dismissal - where great time delays in both applications - whether applicant was under a legal disability within Rule 96 of the *Uniform Civil Procedure Rules* 1999 (Qld)

PROCEDURE - COSTS - DEPARTING FROM THE GENERAL RULE - ORDER FOR COSTS ON INDEMNITY BASIS - where application unmeritorious, prolonged litigation and included false allegations of fraud against solicitor - whether indemnity costs should be ordered

on an indemnity basis against applicant and applicant's counsel

*Uniform Civil Procedure Rules 1999 (Qld), r 96*

COUNSEL: A C Wrenn for the applicant  
C L Francis for the respondent

SOLICITORS: No appearance on behalf of the applicant  
Steindl Bell (Benowa) for the respondent

DAVIES JA: This is an application filed on 14 October 2002 to extend the time within which to appeal against an order made on 9 January 2002 dismissing an application by the applicant to set aside a judgment by default which had been obtained against him on 22 September 1999. It was therefore more than two years after the judgment was obtained that the application to set it aside was made, and this application is made more than nine months after the order sought to be appealed from was made.

The judgment by default was for moneys lent on three separate occasions pursuant to a deed of loan made for the payment out of another loan and the construction of a shopping centre.

There does not ever seem to have been any dispute as to the making of the loan or the advance of the money nor does it seem to have been disputed that the money was not repaid.

Moreover, on receipt of the respondent's claim and statement of claim the applicant sought counsel's advice and counsel advised in writing, in effect, that he had no defence to the claim but may have a claim against third parties. It seems plain from the written outline by Mr Wrenn and from Mr Wrenn's submissions orally to this Court today that it is that claim which the applicant seeks to litigate. What he seeks, in

effect, to do is to prevent the respondent from enforcing its judgment until the applicant's claims against the third parties have been litigated.

The applicant's argument, as advanced by Mr Wrenn to this Court is based, it seems, entirely on rule 96 of the Uniform Civil Procedure Rules which is in the following terms:

"If a defendant who is a person under a legal incapacity does not file a notice of intention to defend within the time limited, the plaintiff may not continue the proceeding unless a person is made litigation guardian of the defendant."

The question therefore is whether there is any evidence before this Court that the present applicant, the defendant, was under a legal disability on or before 22 September 1999 when judgment was obtained against him.

In support of the argument that he was under a legal incapacity Mr Wrenn referred us to a report of a Dr Rhagana dated 12 July 1994 which in summary said in effect that the applicant had then a depressive condition and that he was under a psychological incapacity. That report was not in any of the six volumes of material which the applicant sought to put before this Court and had to be read out to us by Mr Wrenn.

In any event, it seems to me that it is not evidence which would prove a legal incapacity on or about the time I am speaking of. In the first place, all it shows, and this is

most important, is that the applicant had a psychological incapacity. That simply means a psychological disability which, it is probably fair to say, a significant proportion of the general population has if they were examined and certainly it is a very common thing to find, after accidents of various kinds, that people have psychological disabilities and particularly disability of this kind; a depressive illness following on a physical injury but that does not prove or even suggest that he was legally incapable within the meaning of rule 96 of the Uniform Civil Procedure Rules.

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Mr Wrenn also relies on a letter from his solicitors at about the relevant time, 16 September 1999, to the solicitors for the present respondent suggesting or saying that Mr Laghaifar had been requested to provide the solicitor with a psychological assessment to determine if he has sufficient capacity to give instructions and he went on to say that he was unable to have his client respond to the claim.

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That is not surprising when one considers the advice which the client had already received from counsel currently instructed by Mr McIlwraith to the effect that there was no satisfactory response which could be made to the claim because there was no defence. That letter, in my opinion, is of no relevance to the question whether on the date in question the applicant had a legal incapacity within the meaning of the relevant rule.

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The other document relied on is a report from a Dr Peter Morse, a psychiatrist after the event, on 18th November 1999

which is in the material which is briefed to us and it is a very long report and it says a number of things and in substance it says that the applicant is suffering from a complex and difficult to analyse chronic pain syndrome and again I interpose that that is something which is common in consequence of injuries.

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But, more importantly, the report does not say that even at that date or imply even at that date which is after the event that the applicant had a legal incapacity within the meaning of the relevant rule but I emphasise, in any event, that it is at some time after the relevant date and not, in my opinion, relevant to determine whether at that date he had a legal incapacity.

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I have already mentioned that counsel had advised that there was no defence on the merits and notwithstanding some cross-examination from the Bench to Mr Wrenn I still find it difficult to see what the applicants possible argument could be on the merits. The loans were made, the money was not repaid, that much is unarguable. There seems to be some reference in passing and it doesn't seem to be any more than that in the course of Mr Wrenn's written outline to some limited capacity to understand commercial transactions on the part of the applicant, limited understanding of English and so on, which implies and I put it no higher than that, the possibility of an unconscionability plea. But Mr Wrenn has not attempted to put that forward in his oral argument today. The truth of the matter, it seems to me, is that the applicant

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is clutching at straws. Nothing approaching an arguable defence has been established or even outlined nor has the evidence come anywhere near establishing that the applicant was under a legal incapacity at the time he was called on to defend this matter.

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In my opinion, therefore the application should be refused.

WILLIAMS JA: The phrase "person under legal incapacity" in rule 96 is defined in the Schedule 4 dictionary to the Uniform Civil Procedure Rules by reference to definitions in Schedule 2 of the Supreme Court Act of 1991. When one goes to that latter Schedule one finds that relevantly a person under a legal incapacity is a person "who is not capable of making the decisions required of a litigant for conducting proceedings".

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In my view, for the reasons given by Justice Davies, the material here does not satisfy that test. I agree for the reasons given by Justice Davies that the application should be refused.

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PHILIPPIDES J: I also agree.

DAVIES JA: That is the order of the Court.

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DAVIES JA: Mr Francis, for the respondent, has sought costs against both the applicant and against his counsel, Mr Wrenn,

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in each case on an indemnity basis. He has quite rightly said  
that the application was unmeritorious, that it has unduly  
prolonged litigation in the face of and in disregard of known  
facts, that it did, at some stage, in any event, include false  
allegations of fraud against his solicitors. He also mentions  
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although this is not so relevant to indemnity costs, that  
previous costs have not been paid.

It seems to me for those reasons or, at least, some of those  
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reasons the application not just for costs but for indemnity  
costs against the applicant should succeed and I would order  
that the applicant pay the respondent's costs of this  
application on an indemnity basis. As to the application  
against Mr Wrenn I suggested to Mr Wrenn that he might like to  
get some legal advice and representation in the matter and he  
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said he would.

In those circumstances, it seems to me that we should adjourn  
the application for costs on an indemnity basis against Mr  
Wrenn having heard Mr Francis' submissions and I would not  
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like to, in those circumstances, prevent Mr Francis from  
making further submissions.

I think those submissions, on both sides, should be in writing  
and I would therefore propose that Mr Francis put any  
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submission that he wants to make on this question in writing  
to this Court within seven days and that Mr Wrenn, or if he  
obtains legal assistance his legal representative, puts  
submissions in writing to this Court on that question within

14 days of today and this Court will give judgment without hearing further oral argument. Do you agree with that?

WILLIAMS JA: I agree.

PHILIPPIDES J: I also agree.

DAVIES JA: Right. Those are the orders of the Court.

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