SUPREME COURT OF QUEENSLAND

CITATION:	*Steindl Nominees P/L v Laghaifar* [2003] QCA 157
PARTIES:	**STEINDL NOMINEES PTY LTD** ACN 063 915 935 (plaintiff/respondent) v **SOHAIL LAGHAIFAR** (defendant/applicant)
FILE NO:	Appeal No 9565 of 2002 SC No 7276 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time - Further Order
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Judgment delivered 18 February 2003 Further Order delivered 17 April 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
FURTHER ORDER:	**1. Dismiss the application for costs against Andrew Wrenn** **2. Order that the sum of $5,000 paid into court by Sohail Laghaifar pursuant to the order of Mackenzie J made on 17 January 2003 be paid out of court to Steindl Bell, Solicitors for Steindl Nominees Pty Ltd**
CATCHWORDS:	PROCEDURE - COSTS - DEPARTING FROM THE GENERAL RULE - ORDER FOR COSTS ON INDEMNITY BASIS - where applicant applied for an extension of time within which to appeal - where respondent sought order for costs on an indemnity basis from counsel - whether counsel unreasonably pursued the application in circumstances in which his conduct in doing so, justified a costs order - whether allegations of falsehood in submissions were allegations of dishonesty recklessly made and sufficient to justify a costs order *Queensland Barristers' Rules* r 18, r 19 *Giannarelli v Wraith* (1988) 165 CLR 543, applied *Levick v Deputy Commissioner of Taxation* [2000] FCA 674, applied

Medcalf v Mardell [2003] 1 AC 120, considered
Ridehalgh v Horsefield [1994] Ch 205, distinguished
White Industries (Qld) Pty Ltd v Flower and Hart (a firm) (1998) 156 ALR 169, applied

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

SOLICITORS: The applicant appeared on his own behalf
Steindl Bell (Benowa) for the respondent
Carter Newell Solicitors for A C Wrenn

[1] **DAVIES JA:** This is an application by Steindl Nominees Pty Ltd ("Steindl") for an order that Mr Wrenn ("Wrenn"), a barrister, pay the costs of Steindl, on an indemnity basis, of an application to this Court for an extension of time within which to appeal to it. That application, in turn, had been made by Sohail Laghaifar ("Laghaifar") against whom, on 9 January 2002 an order had been made dismissing an application to set aside a judgment by default which had been obtained against Laghaifar by Steindl on 22 September 1999. Laghaifar's application to this Court was an application for an extension of time within which to appeal against the order of 9 January 2002. He was represented on that application by Wrenn. The application was dismissed on 18 February 2003 with costs on an indemnity basis.

[2] In that application Steindl had also sought an order for costs against Wrenn personally, also on an indemnity basis. Upon the hearing in this Court on 18 February that application was adjourned to enable Wrenn to be independently legally represented and this Court made orders that any further evidence or submissions with respect to this question be furnished to it in writing indicating that it would give judgment without hearing further oral argument.

[3] Since that date each of Steindl and Wrenn has filed affidavits and extensive written submissions. Unfortunately these have done little to clarify the extent of Wrenn's involvement in the application to this Court by Laghaifar. Before turning to that and to the arguments of the parties on the central question, however, it is necessary to say something about the original judgment and the bases on which the application to this Court by Laghaifar was made.

[4] As appears from the reasons for judgment of this Court on 18 February 2003 the judgment by default obtained by Steindl against Laghaifar on 22 September 1999 was for monies due pursuant to a deed of loan. It was not disputed that the deed was made, that the relevant advances were made under the deed or that the amount due by way of capital and interest in respect of those advances was not repaid. Nor does there appear to have been any dispute, in the end, as to what that amount was. It is not entirely clear on what basis Laghaifar sought to set aside this judgment in his application which was dismissed on 9 January 2002. However, as best can be judged from his affidavit, apparently sworn in connection with that application on 17 December 2001, there were two such bases.

[5] The first of them, to which a large part of the affidavit is devoted, appears to have been a claim of unconscionable conduct by Steindl at the time the loan transaction was entered into. However, even if all the facts deposed to in that affidavit which

could relate to such question were accepted, it did not raise an arguable defence to the claim. This basis was abandoned in oral argument on 18 February 2003.

[6] The other basis on which the application appears to have been made was much the same as that which was ultimately the sole basis of the application to this Court for an extension of time within which to appeal. It was that, at the time when Laghaifar should have filed his notice of intention to defend, he was under a legal incapacity.[1] However the evidence exhibited to the affidavit fell well short of that. It consisted of a letter from a social worker dated 26 November 2001 and a letter from his general practitioner dated 13 December 2001. What each of them said was that Laghaifar had recovered from earlier trauma and had been fully rehabilitated. Neither of them said or implied that at any prior time he would have been under a legal incapacity. It appears that at an earlier time he had some psychological sequelae of a physical injury which he had suffered but there is not even a suggestion in that material that he was ever under a legal incapacity.

[7] It is therefore unsurprising that the application to set aside the judgment by default, which was made more than two years after the judgment had been obtained, was dismissed. Presumably the explanation for the delay was said to have been Laghaifar's incapacity although that is not entirely clear. Wrenn was apparently not involved at that stage of the proceedings.

[8] It is unclear when Wrenn first became involved in the application to this Court. On the hearing in this Court on 18 February 2003 Wrenn said:

> "I certainly had something to do with drafting the notice of appeal".

However in his affidavit sworn on 11 March 2003 he said:

> "I did not prepare the Notice of Appeal and the Application for Extension of Time to Appeal filed herein, nor to my recollection were these documents settled by me."

He does not explain what he had to do with the notice of appeal if it was not drawing it or settling it.

[9] Wrenn was certainly involved in the preparation of Laghaifar's outline of submissions and his amended outline of submissions. These allege facts which are not supported by evidence or findings, include what is arguably an allegation of dishonesty by Steindl which had no evidentiary basis, are discursive and unduly lengthy and in a number of other respects fail to comply with the Practice Direction. However they appear to raise the same arguments as those raised on the application of 9 January 2002. There is an allegation of unjust enrichment apparently relying upon unconscionability in the circumstances in which the loan was made; and there is an allegation that at the time at which Laghaifar should have filed his notice of intention to defend he was a person under a legal incapacity. In the end, as already mentioned, the first of these was abandoned in oral argument in this Court on 18 February 2003.

[10] Six volumes of documents amounting to many hundreds of pages were filed in the application to this Court by Laghaifar. Presumably, to the extent that they were relevant to anything, they were relevant only to the allegation which was abandoned. Only one document among them, a report of Dr Peter Morse of 18 November 1999, was sought to be relied on in support of the argument which

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[1] Within the meaning of r 96 of the *Uniform Civil Procedure Rules*, sch. 1 thereof and sch. 2 of the *Supreme Court of Queensland Act* 1991.

was pursued orally. It is impossible to say that Wrenn was responsible for the filing of this large volume of material.

[11] Wrenn is clearly responsible for both the outline of submissions filed 10 February 2003 and the amended outline filed 14 February 2003 both of which contained lengthy factual and argumentative assertions, many of them difficult to follow, but apparently related to the argument abandoned only at the commencement of the oral hearing on 18 February 2003. These resulted in expenditure of wasted time and effort by those acting for Steindl.

[12] Wrenn's oral argument relied only on two medical reports. One was by Dr John Regano, a consultant psychiatrist, dated 12 July 1994, presumably after the accident which he suffered, which was by way of electrocution. Dr Regano said:

> "In answer to your specific questions the medical repercussions of his electrocution would appear to include muscular, dental and neuronal injury which had been elaborated in other medical reports. Psychologically, he initially demonstrated features consistent with a depressed mood which showed some response to anti-depressant medication but he would seem dependant and focussed on his injuries with much of his life revolving around his suffering. Whilst not specifically a clinical syndrome other than a chronic pain syndrome, he does have psychological incapacity as a result of the injury."

[13] As the Court indicated in giving judgment against Laghaifar this report did not go any way to proving that Laghaifar was legally incapacitated on and shortly prior to 22 September 1999. And I would add that that ought to have been clear to Wrenn.

[14] The second report relied on is one from Dr Peter Morse a consultant psychiatrist dated 18 November 1999. Dr Morse in that report did not say when he saw Laghaifar but it was, presumably, shortly before 18 November. Plainly it was after 13 October because he refers to a type-written statement of that date.

[15] Dr Morse thought that, when he saw Laghaifar, he was suffering from a complex and difficult to analyse chronic pain syndrome. He said that it was difficult to state what emotional psychiatric factors were involved in the pain state but added that he was depressed, agitated and tense. He did not come to any firm conclusion regarding the psychiatric diagnosis in respect of Laghaifar's pain. He also said that Laghaifar had quite definite subjective and objective cognitive impairment most likely due to his quite markedly disturbed emotional state and the extreme stresses he had experienced. He explained this by saying:

> "Anyone suffering from on-going chronic depression, anxiety and concerns about his financial, marital condition and concerns about the welfare of his daughter would experience problems with concentration and memory."

[16] In dismissing Laghaifar's application this Court said that this evidence was not sufficient to establish that Laghaifar was under a legal incapacity at the relevant time, that is, not capable of making decisions required of a litigant for conducting proceedings. Nevertheless I am not prepared to say that, in the light of that report, that question was completely unarguable.

[17] However that was to miss the point. At the time when Laghaifar should have filed his notice of intention to defend, it is plain that there was no arguable defence to Steindl's claim and Laghaifar's then counsel had so advised. Before this Court Wrenn could not suggest any arguable basis for defending Steindl's claim.

[18] This was the substantial weakness of any application to set aside the judgment by default and of the application to this Court. Wrenn appeared not to grasp this point because his submission was, in effect, that, if Laghaifar's incapacity could be shown at the time when he should have filed his notice of intention to defend, the judgment by default should be set aside.

[19] Steindl in this application made a number of criticisms of Wrenn's outlines of argument filed in Laghaifar's application to this Court, some of which are plainly justified as I have already indicated. Moreover the unconscionability argument and its abandonment required Steindl to perform work which, as it turned out, was unnecessary. However it is unclear that, when Wrenn prepared the outlines, he ought to have known that it was unarguable.

[20] The following conclusions may be reached from undisputed evidence and from what I have said so far.

1. The application for an extension of time had no real prospect of success because, whatever the position may have been about Laghaifar's legal capacity at the time when he ought to have filed his notice of intention to defend, he never had any defence on the merits to the claim by Steindl and this was apparently pointed out by counsel who was engaged in the matter at the time.
2. The fundamental importance of this to the application to this Court does not appear to have been grasped by Wrenn, even after the unconscionability point was abandoned, who seemed to think that, if he could demonstrate that there was an arguable basis for a contention that Laghaifar did not have legal capacity at the time at which he ought to have filed his notice of intention to defend, an extension of time within which to appeal would be granted. That was plainly a mistake, at least in retrospect.
3. The costs which have been incurred by Steindl were undoubtedly increased by the inclusion in Wrenn's outlines of argument of the unconscionability contention which, in the end, was not advanced. However it is unclear when it must have been obvious to Wrenn that the unconscionability claim was unarguable.
4. The point which Wrenn mistakenly thought would be sufficient to result in an extension of time being granted was not, in my view unarguable; that is whether Laghaifar lacked legal capacity at the time when he ought to have filed his notice of intention to defend.
5. Both the original and the amended outline allege, without any evidentiary support, a false claim on the part of Steindl.

[21] From these conclusions there appear to be two arguable bases upon which costs may be ordered to be paid by Wrenn. The first is that he unreasonably pursued the application in circumstances in which his conduct in doing so justified a costs order against him. And the second is that the allegations of falsehood were allegations of dishonesty recklessly made and that this was sufficient to justify an order for costs against him.

[22] As to the first of these, in *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)*[2] Goldberg J after analysing the relevant authorities on the question at that time said:[3]

> "This analysis of the cases makes it clear that the jurisdiction to order costs against an unsuccessful party's solicitors is enlivened when they have unreasonably initiated or continued an action when it had no or substantially no prospects of success but such unreasonableness must relate to reasons unconnected with success in the litigation or to an otherwise ulterior purpose or to a serious dereliction of duty or serious misconduct in promoting the cause of and the proper administration of justice. Further, the cases establish the proposition that it is a relevant serious dereliction of duty or misconduct not to give reasonable or proper attention to the relevant law and facts in circumstances where if such attention had been given it would have been apparent that there were no worthwhile prospects of success."

[23] That statement of principle was referred to by both parties in their outlines of argument on this application. It was also accepted as correct by the Full Court of the Federal Court in *Levick v Deputy Commissioner of Taxation*.[4] With one important qualification I would also accept it and the reasoning of Goldberg J generally in *White Industries* and of the Full Court of the Federal Court in *Levick*. That qualification relates to their acceptance of propositions stated by the Court of Appeal in *Ridehalgh v Horsefield*.[5] In that case the Court of Appeal said that:

> "clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved."

The court then went on:

> "It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court …
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> It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."

[24] To the extent that those statements state or imply that it is not improper for a legal representative to present a case which he or she knows to be bound to fail, I would reject them. I would prefer to say that it is one thing to present a case which is barely arguable (but arguable nevertheless) but most likely to fail; it is quite another to present a case which is plainly unarguable and ought to be so to the lawyer who presents it. In my opinion, with respect, it is improper for counsel to

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2 (1998) 156 ALR 169.

3 At 239.

4 (2000) 102 FCR 155.

5 [1994] Ch 205 at 233 - 234.

present, even on instructions, a case which he or she regards as bound to fail because, if he or she so regards it, he or she must also regard it as unarguable.

[25] Rule 18 of the Queensland Barristers' Rules states that a barrister "must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's … desires where practicable". Some examples of how that duty may override counsel's duty to his or her client are contained in r 19. Together they reflect what was traditionally described as counsel's duty to the court which may more accurately be described as counsel's duty to the administration of justice according to law.

[26] In *Giannarelli v Wraith*[6] Mason CJ said:

> "a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting … what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of [an] independent judgment in the conduct and management of the case."[7]

[27] If it is counsel's duty to exercise his or her own independent judgment upon which points will be argued it must also be his or her duty, in the exercise of that judgment, to decide whether there is any point which can be argued. Greater care must be taken, in judging the conduct of a lawyer for a party in litigation, where the arguability of that party's case depends on a question of fact than where it depends on a question of law, for it is not for counsel or solicitor to sit in judgment on the reliability of his or her client's witnesses. Nevertheless the question, in my opinion, is the same whether it depends on fact or law. If the case is plainly unarguable it is improper to argue it.

[28] Both bases for the application to this Court on behalf of Laghaifar turned out to be unarguable. The questions are whether it ought to have been plain to Wrenn that the unconscionability point was unarguable well before he abandoned it on 18 February; and whether it ought to have been plain to him on 18 February that the necessary basis for the application was unarguable.

[29] It is unclear what evidence Wrenn had before him when he prepared his outlines of argument and what further evidence he received by 18 February. The lack of clarity in these matters is Wrenn's fault. He should have deposed to these relevant matters in this application and he failed to do so. However his failure in this respect has not been the subject of complaint by Steindl. Moreover, further affidavits have been filed since the previous order of this Court was made and no request has been made that Wrenn be cross-examined in respect of these matters.

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6 (1988) 165 CLR 543 at 556.

7 See also D Ipp, *Lawyer's Duties to the Court* (1998) 114 LQR 63 at 99.

[30] In those circumstances I would be reluctant to conclude that Wrenn's failure to depose to these matters was either deliberate or reckless. It may well be that evidence was presented to him in such a piecemeal way as to make it extremely difficult, if not impossible for him now to say what evidence was presented to him when. This aspect of the present matter, and a number of others, point to the dangers of a young and inexperienced counsel such as Wrenn taking instructions directly from a lay client in a matter of some factual complexity. In view of the fact that there would no doubt have been a number of solicitors prepared to become involved in this matter on a pro bono basis it was, to say the least, unwise of Wrenn to accept direct instructions.

[31] On the other hand I would not be prepared to conclude, in the absence of any evidence on this question, that Wrenn ought to have seen, before 18 February, that the unconscionability point was plainly unarguable. It is, of course, unfortunate for Steindl that it was obliged to prepare to meet this argument but it has a costs order against Laghaifar and I do not think that these circumstances justify that these costs thrown away be borne by Wrenn.

[32] As to the legal incapacity point, Wrenn wrongly thought that, if it could be shown that, at the time Laghaifar was obliged to file his notice of intention to defend, he was under a legal incapacity, the judgment against him ought now to be set aside. However, as I have said, that is wrong because at no time did Laghaifar have an arguable defence and Wrenn rightly conceded that. The question for us now is not whether, with hindsight, it is clear enough that Laghaifar's legal incapacity at a specific date, even if it could be established, would not entitle him to set aside a judgment to which he had no defence. It is whether, in the circumstances in which Wrenn was placed, it ought to have been plain to him, before 18 February that Laghaifar had no defence.

[33] Those circumstances no doubt include that he apparently ascertained, only on or shortly before 18 February, that what appears to have been his main argument, unconscionability, was unarguable; and that he was taking instructions directly from a lay client in a factually complex matter of some years standing. In the end, although I think that this question is a finely balanced one, I would not be prepared to conclude that it ought to have been plain to Wrenn, before 18 February, that there was no arguable basis for the application for an extension of time.

[34] The second basis upon which it was argued that costs of this application should be ordered against Wrenn was his baseless allegation in his outlines of falsity of part of Steindl's claim. In his original outline he said that the learned primary judge was not "made aware that the judgment debt included a false claim, whereby the monies already received from the sale of the Applicant's house was not credited to reduce the judgment debt." He went on a little later:

> "It is now apparent that the judgment is significantly flawed … in that the Affidavit of Robert Bruce Boston dated 21 September 1999, describes an amount of $160,000 which was received by the Respondent as the proceeds from the sale of the Appellant's house under the mortgage held by the Respondent over the finance advanced to the Appellant. The amount of $160,000 was not subtracted from the amount of alleged indebtedness detailed in the actual judgment prepared by the Respondent and signed by Deputy Registrar P J Irvine."

[35] The second of these assertions, but not the first, was deleted from the amended outline. It is contended on Steindl's behalf that these assertions were assertions of fraud on the part of Steindl or its solicitor.[8] It was accepted in oral argument by Wrenn that the assertions were not correct.

[36] I do not think that either assertion was plainly one of fraud. A claim may be false because it is fraudulent or because it is mistaken. Dishonesty was not specifically alleged. Though they could possibly have been construed as assertions of fraud I do not think that they were clearly so and I would not be prepared to infer that they were intended as such.

[37] That is not to excuse Wrenn's conduct in this application. His outlines were discursive and unduly lengthy, they contained baseless assertions of fact and in a number of important respects they failed to comply with this Court's Practice Direction. Whatever consequences, if any, his conduct of this matter have for him, I do not think that they justify an order for costs against him. I would therefore refuse the application for such an order.

[38] Steindl have sought two further orders. One is an order that the costs order which we have made include costs ordered by Mackenzie J on 17 January 2003 to be Steindl's costs in the appeal. I would not make such an order because those costs are plainly included in the order already made.

[39] The other order sought by Steindl is an order that the amount paid into court by Laghaifar of $5,000 for security for the cost of this application be paid out to the solicitors for Steindl. As the cost of this application will plainly exceed that sum I would make that order.

Orders

1. Dismiss the application for costs against Andrew Wrenn.
2. Order that the sum of $5,000 paid into court by Sohail Laghaifar pursuant to the order of Mackenzie J made on 17 January 2003 be paid out of court to Steindl Bell, Solicitors for Steindl Nominees Pty Ltd.

[40] **WILLIAMS JA:** I agree with all that has been said by Davies JA in his reasons and with the orders he proposes. I only wish to add some brief observations on a recent House of Lords decision dealing with the circumstances in which a costs order may be made in favour of a party against the barrister on the other side: *Medcalf v Mardell* [2003] 1 AC 120.

[41] The judgments make clear (particularly Lord Hobhouse of Woodbrough at 143) that the conduct giving rise to the claim must "relate clearly to a fault in relation to the advocate's duty to the court not in relation to the opposing party, to whom he owes no duty". Lord Hobhouse went on to say at 143-144:

> "So it is not enough that the court considers that the advocate has been arguing a hopeless case. The litigant is entitled to be heard; to penalise the advocate for presenting his client's case to the court would be contrary to the constitutional principles to which I have

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[8] Counsel must not allege fraud unless satisfied, on reasonable grounds, that there is admissible evidence to prove it: Barristers' Rules, r 36; *Minister Administering the Crown Lands (Consolidation) Act and Western Lands Act v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201. A breach of this rule may enliven the jurisdiction to order costs against the barrister: *White Industries* at 242.

> referred. The position is different if the court concludes that there has been improper time-wasting by the advocate or the advocate has knowingly lent himself to an abuse of process."

[42] It is further made clear in the judgments that the claim against the barrister should be clearly proved; the court is not entitled to speculate what may be behind the conduct in question and the barrister is entitled to the benefit of any doubt accruing on counsel's side.

[43] A consideration of the reasoning in *Medcalf v Mardell* confirms my view that the conclusion reached by Davies JA is the correct one.

[44] **PHILIPPIDES J:** I agree with the reasons of Davies JA and the further reasons of Williams JA and with the orders proposed.