SUPREME COURT OF QUEENSLAND

CITATION:	*Chidgey v Utz Wellner t/as Wellners Lawyers* [2010] QCA 215
PARTIES:	**DAVID CHIDGEY** (appellant/applicant) **v** **UTZ WELLNER** (respondent/respondent) **WELLNERS LAWYERS** (respondent/respondent)
FILE NO/S:	Appeal No 1483 of 2010 DC No 1691 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	13 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	13 August 2010
JUDGES:	Muir and White JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal be granted;** **2. The appeal be allowed;** **3. The order of the District Court made on 19 November 2009 be set aside and that in lieu thereof it is ordered that the orders made in this proceeding in the Magistrates Court on 21 January 2008 and 29 May 2009 be set aside;** **4. The respondent pay the applicant the amount of any filing fees paid by the applicant in respect of any documents filed by him in this proceeding on 12 February 2010.**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – DISTRICT COURTS – CIVIL JURISDICTION – APPEAL AND NEW TRIAL – APPEAL TO SUPREME COURT – FROM WHAT DECISIONS AND ON WHAT GROUNDS – District Court judge struck out applicant's defence and directed any amended defence be filed by a specified date – applicant did not file a defence – Magistrates Court gave

default judgment against the applicant – Magistrates Court dismissed applicant's application to have the default judgment set aside – District Court judge dismissed applicant's appeal from the second order of the Magistrates Court – whether default judgment was irregularly entered – whether applicant denied natural justice

District Court of Queensland Act 1967 (Qld), s 118(3)
Uniform Civil Procedure Rules 1999 (Qld), r 137, r 139, r 280, r 281, r 292

Adler v District Court of NSW (1990) 19 NSWLR 317, (1990) 48 A Crim R 420, cited
Johns v Johns [1988] 1 Qd R 138, cited
Kioa v West (1985) 159 CLR 550, [1985] HCA 81, cited
Ringwell Pty Ltd & Ors v Kumali Holdings Pty Ltd [2004] QCA 48, cited
Rodgers v Smith [2006] QCA 353, cited
Salemi v MacKellar [No. 1] (1976) 137 CLR 388, [1976] HCA 45, cited
Zinace Pty Ltd v Tomlin & Ors [2003] QCA 102, cited

COUNSEL: The applicant appeared on his own behalf
B Curran for the respondent

SOLICITORS: The applicant appeared on his own behalf
Wellners Lawyers for the respondent

MUIR JA: The applicant seeks leave to appeal to this Court pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) against an order of a Judge of the District Court made on 19 November 2009 dismissing the applicant's appeal from a Magistrate's order refusing the applicant's application to set aside a default judgment.

The respondent solicitor acted for the applicant in matrimonial proceedings in the Federal Magistrates Court. He commenced proceedings against the applicant in the Magistrates Court claiming $13,892.55 on account of legal fees earned and outlays incurred in the Federal Magistrates Court proceeding. On 28 July 2006, the respondent obtained judgment in the Magistrates Court for the sum claimed. The applicant appealed to the District Court. The respondent filed an application for an order that the appeal be struck out. That application was determined by Judge McGill on 30 November 2006. His Honour ordered that a party to the appeal be struck out as a respondent and otherwise dismissed the application.

The applicant's appeal was also heard by Judge McGill who, on 21 December 2007, allowed the appeal, set aside the 28 July 2006 judgment, ordered that the applicant's defence and counterclaim be struck out and directed that any amended defence and counterclaim be filed by 18 January 2008. No such defence and counterclaim was filed.

On 21 January 2008, a default judgment was given in the Magistrates Court at Wynnum against the applicant in favour of the respondent in the sum of $19,646.86, together with costs. The applicant applied in the Magistrates Court to have that order set aside. The application was dismissed on 29 May 2009 for reasons which were not placed before this Court.

The applicant appealed to the District Court against the 29 May 2009 order. That appeal was dismissed by a Judge of the District Court on 19 November 2009.

On 12 February 2010, this Court ordered that a purported notice of appeal filed by the applicant on 17 December 2009 be struck out with costs to be assessed and that a purported application for leave to appeal filed on 6 January 2010 by the applicant also be struck out with costs to be assessed. The applicant was granted an extension of time within which to apply for leave to appeal and within which to file an application for leave to appeal. He filed an application for extension of time within which to obtain leave to appeal on 12 February 2010. Having regard to the earlier orders of this Court, it is appropriate to treat the document as an application for leave to appeal.

The rather obscurely and cryptically worded grounds advanced in the application for leave to appeal at first blush do not seem compelling. However, there is a ground which alleges denial of natural justice and it appears to me that it has substance.

The default judgment was entered under Division 2 of Chapter 9 of the *Uniform Civil Procedure Rules* ("UCPR"). Under rule 281, Division 2 applies where a defendant in a

proceeding started by a claim has not filed a notice of intention to defend and the time allowed under rule 137 to file the notice has ended. Rule 137 requires a notice of intention to defend to be filed within 28 days after the day on which the claim is served. In this case, a notice of intention to defend was filed and, presumably, it had the applicant's defence attached to it as required by rule 139. Although these documents were not placed before the Court, the respondent does not allege or rely on any irregularity in relation to the notice of intention to defend, except to the extent that I will shortly mention.

The order of Judge McGill of 21 December 2007 striking out the defence and counterclaim did not produce the result that a notice of intention to defend had not been filed within 28 days after service of the claim. Consequently, there was no scope for the operation of Division 2 of Chapter 9.

The consequence of the applicant's failure to file a defence made in January 2008 was not to breach Judge McGill's order. It did not require any defence or counterclaim to be filed but limited the time within which such a pleading could be filed. Accordingly, there was no scope for judgment under rule 280 either. In any event, an application for such a judgment would have necessitated an application to the Court on notice to the applicant. The respondent could have applied for summary judgment under rule 292 but, again, that would have necessitated an application to the Court.

Mr Curran of counsel who appeared for the respondent argued that the effect of the striking out of the defence was that there was then a non-complying entry of appearance and the argument continued that, as I apprehended it, rule 281(1) applied.

The argument, however, it seems to me, overlooks both the scheme of the provisions relating to notices of intention to defend and the wording of rule 281(1).

The former contemplate that a notice of intention to defend be filed once and once only. It is a document separate to the defence. Under rule 139, the notice of intention to defend must have the defendant's defence attached to it.

An order that a defence be struck out without anything further says nothing about the notice of intention to defend. Indeed, it may be that a notice of intention to defend, at least in normal circumstances, could not be ordered to be struck out. It is, however, unnecessary to develop that point any further.

The other difficulty with Mr Curran's argument is the plain language of rule 281(1). Under it, Division 2 applies if, relevantly, a defendant has not filed a notice of intention to defend and the time allowed under rule 137 to file the notice has ended.

That provision plainly refers to something which has happened or may happen once only under rules 134 etc. In this case, a notice of intention to defend was filed within the time allowed by rule 137. Once that has happened, anything that takes place in the future cannot undo what has been done regularly under the rules.

Consequently, the judgment was irregularly entered. In the circumstances, any application for judgment was required to be made to the Magistrates Court on notice to the applicant. The applicant was denied natural justice, as he alleges. The applicant has shown both error and injustice and the appeal raises a question of general application in relation to the operation of Division 2 of Chapter 9 of the UCPR.

For the above reasons, I would order that:

(a) Leave to appeal be granted;

(b) The appeal be allowed;

(c) The order of the District Court made on 19 November 2009 be set aside and that in lieu thereof it be ordered that the orders made in this proceeding in the Magistrates Court on 21 January 2008 and 29 May 2009 be set aside;

(d) The respondent pay the applicant the amount of any filing fees paid by the applicant in respect of any documents filed by him in this proceeding on 12 February 2010.

WHITE JA: I agree.

APPLEGARTH J: I agree with the reasons and with the orders proposed. The respondent relies upon rule 139 and submits the notice of intention to defend was non-compliant because it did not have the defendant's defence attached to it. But it did. The defence was struck out.

I do not accept that the notice of intention to defend was non-compliant. But if it could be said that it became non-compliant because it ceased somehow to have the defence attached to it, then the consequence would not be to render the notice of intention to defend a nullity.

Under rule 371, a failure to comply with the rules is an irregularity and does not render a document such as the notice of intention to defend a nullity. If there had been non-compliance with rule 139, then it was open to the respondent to make an application of the kind envisaged by rule 372 for an order that might have sought, amongst other things, an order for the defence to be filed, or to attach a new defence to the notice or even for judgment. An application of that kind would have had to set out the details of the failure to comply with the rules and such an application would have been on notice to the applicant.

I agree with the orders proposed.

MUIR JA: Mr Curran sought an order for costs on the basis that the error which this Court has found was not drawn to the attention either of the Magistrate or the learned

District Court Judge and, in consequence, he submits, the respondent has been put to unnecessary expense through the procession of applications in this proceeding.

The difficulty with the argument is that it was the respondent who procured the irregularly entered judgment, a judgment which should never have been entered in breach of the rules.

It was also a difficulty to which the respondent, had it considered the various applications appropriately, should have adverted to and raised.

Accordingly, I would not be disposed to alter the order already made.

WHITE JA: I agree.

APPLEGARTH J: I agree.