Self-represented litigants: The limits to the judge's assistance

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Introduction

1. The right of a litigant to appear in person before a court is a fundamental right[1] but a litigant who chooses to exercise that right, especially in a superior court, can often face significant difficulties when preparing and presenting his or her case by reason of a lack of legal skills and a lack of knowledge and understanding of the substantive law and court rules and procedures.

2. In an attempt to overcome these difficulties, a duty is imposed on a trial judge in civil proceedings to provide some advice and assistance to a self-represented litigant so as to ensure that the proceedings are conducted fairly. While the advice and assistance given will depend on factors such as the personal characteristics of the litigant and the nature of the case, it is not without limits. A trial judge will not generally provide legal advice and the assistance provided will be limited to that which is necessary to diminish the disadvantage which the self-represented litigant would ordinarily suffer when faced by a represented opponent. This is because judges must be, and be seen to be, neutral and cannot confer an advantage on a self-represented litigant which he or she would not have if he or she was legally represented.

3. The duty of a trial judge to advise and assist is not an easy one to perform and a trial judge is sometimes subject to claims, not always justified, that appropriate assistance was not given to a self-represented litigant to present his or her case.

4. The limits to the assistance which a trial judge can provide to a self-represented litigant, as well as the problems often encountered by the courts when a case is being conducted – even if only in part - by a self-represented litigant, are illustrated in *Cicek v The Estate of the Late Mark Solomon*,[2] where the New South Wales Court of Appeal held that a trial judge does not have a duty to run the case for a self-represented litigant.

Background

5. The Appellants were a husband and wife who brought proceedings in the Supreme Court of New South Wales against the estate of their former solicitor ("**Solicitor**") and against a bank ("**Bank**") (collectively "**Respondents**").

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[1] See *Cachia v Haines* [1994] HCA 14; (1994) 179 CLR 403 at 415 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.
[2] [2014] NSWCA 278.

6. The proceedings arose out of a series of property transactions and loans entered into by the Appellants pursuant to an arrangement made between them and a third party ("**Third Party**") to develop some land. The Third Party was alleged to have been a friend who had acted as a mortgage broker in facilitating the various loans for the development, and with whom they had purchased the land to be developed.

7. The Appellants alleged in their Statement of Claim:

    - as against the Solicitor's estate, that the Solicitor had been retained by them in relation to the property and loan transactions and had been negligent and had breached fiduciary duties owed to them, the main complaints apparently being that the Solicitor had failed to advise:
        - as to steps that might be taken to eliminate the risk that the Third Party would not use certain loan funds received by him at the Solicitor's direction for the purpose of the development; and
        - that the Bank's 'all moneys' mortgage would secure existing loans which the Third Party allegedly had with the Bank; and

    - as against the Bank, that the Bank had engaged in unconscionable conduct when granting a loan facility and taking a mortgage as security for that facility because, in particular, it had failed to inform the Appellants that the mortgage would secure existing loans which the Third Party allegedly had with the Bank.[3]

8. Prior to and during most of the proceedings, the Appellants were represented on various occasions by a series of firms of solicitors, and sometimes by counsel, but by the time of the hearing they were no longer legally represented.

Procedural history of the matter

9. The procedural history of the matter was a history of delays and failures by the Appellants to comply with orders of the Court.

10. The proceedings commenced in October 2011, but by late February 2013, despite orders having been made for the service by the Appellants of their affidavits in chief on more than one occasion, only two witness statements of each of the Appellants had been served. In April 2013, the Registrar prohibited the Appellants from serving any further evidence in chief without the leave of the Court.

11. There were also problems with the Appellants' compliance with orders for discovery of documents.[4]

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[3] The Third Party was deceased and his estate had also been sued but this claim was abandoned at some stage.

[4] Discovery was important in the case because both the Solicitor and the Third Party were deceased.

12. In May 2013, the proceedings were listed for hearing for a period of four days, commencing on 8 October 2013.

13. On 10 September 2013, McCallum J heard an application made by the Solicitor's estate for summary dismissal of the proceedings because of the Appellants' failure to give proper discovery.[5] The Appellants were legally represented at that time by a new firm of solicitors – apparently, their fourth firm of solicitors - and by counsel.

14. McCallum J dismissed the application and made orders for the further conduct of the proceedings. Although her Honour noted that some of the Appellants' defaults appeared to have arisen from the conduct of one of their former solicitors and that the Respondents ought not necessarily suffer the burden of poor representation of the Appellants, her Honour considered that the degree of injustice that would have been suffered by the Appellants were their claim to be dismissed at that stage outweighed the injustice to the Respondents. Her Honour indicated that she had also had regard to the fact that the Appellants had retained new solicitors and briefed counsel and said that the steps undertaken by the new legal representatives to bring the proceedings back in order played a substantial role in persuading her not to accede to the application.

15. Shortly after McCallum J heard the application, the new firm of solicitors ceased to act for the Appellants. The proceedings were then re-listed before her Honour who made orders that the proceedings were to be automatically dismissed if the Appellants failed to comply with her earlier orders for the further conduct of the proceedings. Those earlier orders apparently included orders for the provision of a final verified list of documents and the need for leave to be obtained in order to rely on any further evidence. At this time, it seems that the Appellants were being represented by yet another firm of solicitors.[6]

16. In late September 2013, about a week before the hearing and almost 6 months after the Registrar had made his order in April 2013 that no further evidence was to be served without leave of the Court, the Appellants served four affidavits on the Respondents ("**September affidavits**").

17. After the proceedings were allocated to Bellew J for hearing on 8 October 2013, the Solicitor's estate had the matter listed before his Honour on the basis that the Appellants had failed to comply with the orders made by McCallum J as to discovery, thus enlivening McCallum J's self-executing order. Bellew J heard the matter on 4 October 2013.[7]

18. Senior counsel appeared for the Appellants. After Bellew J declined to dismiss the proceedings, senior counsel for the Appellants sought leave to file a notice of ceasing to act, on the basis that the Appellants had failed to make provision for the payment of their solicitors' legal costs. Bellew J granted the leave. A further application was then

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[5] See *Cicek v The Estate of the Late Mark Solomon* [2013] NSWSC 1348.
[6] Above, n 2, at [45]-[47].
[7] See *Cicek v The Estate of the Late Mark Solomon (No 1)* [2013] NSWSC 1490.

made by the Solicitor's estate to dismiss the proceedings on the basis of the inadequacy of the Appellants' discovery, and the withdrawal of their legal representatives. The husband appeared for himself at that stage and confirmed his and his wife's intention to appear at the hearing. His Honour declined to dismiss the proceedings.

Hearing before the trial judge

19. The hearing then commenced before Bellew J on 8 October 2013 at which time the Appellants, who were unrepresented, applied for leave to rely on the September affidavits.

20. His Honour first dealt with objections made to the witness statements for which leave was not necessary. After ruling on objections to the husband's witness statement, his Honour admitted the witness statement in its edited form into evidence. Although there were only minor objections to the wife's witness statement, the wife informed his Honour that she did not wish to rely on her witness statement and her statement was not admitted into evidence.

21. His Honour then dealt with the application by the Appellants for leave to rely on the September affidavits. The application was opposed by the Respondents. His Honour refused leave, essentially because of the prejudice, costs and delay that this would cause. After each of the Appellants indicated that there was no further material that they wished to rely on, the Appellants' case closed, with the only evidence contained in the husband's witness statement.[8]

22. Each of the Respondents then made an application pursuant to r 29.10 of the *Uniform Civil Procedure Rules 2005* (NSW) for judgment in their favour on the basis that, on the evidence before the Court, a judgment for the Appellants could not be supported.

23. Bellew J held that, even when the evidence was taken at its highest, it fell substantially short of supporting any cause of action pleaded in the Statement of Claim. His Honour noted that, even apart from the fundamental question of evidence of the retainers that had been claimed to exist with the Solicitor and their precise terms, there was no evidence that the Solicitor had breached his duty towards either of the Appellants and, even if there had been, there was no evidence that the Appellants had suffered any loss as a consequence of such a breach. As for the claim against the Bank, his Honour said that the evidence at its highest did not establish any unconscionable conduct and that there was no evidence of loss. Accordingly, his Honour entered judgment for the Respondents.[9]

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[8] See *Cicek v The Estate of the Late Mark Solomon (No 2)* [2013] NSWSC 1479.
[9] See *Cicek v The Estate of the late Mark Solomon (No 3)* [2013] NSWSC 1492.

Court of Appeal

Appellants' challenge

24. The Appellants appealed to the Court of Appeal. The Court of Appeal (Meagher, Barrett and Ward JJA) dismissed the appeal. The leading judgment was given by Ward JA, with whose reasons Meagher and Barrett JJA agreed.

25. The Appellants challenged the correctness of the decision to enter judgment against them on the ground that Bellew J's interlocutory decision refusing to grant leave for the Appellants to rely on the September Affidavits was wrong. It was said to be wrong because it did not facilitate the just resolution of the real issues in the proceedings.

26. The September affidavits had contained assertions that the Appellants' signatures had been forged on certain documents relating to an increase in the loan facility granted by the Bank, something not pleaded in the Statement of Claim as part of any cause of action against either of the Respondents. It was submitted by the Appellants[10] that Bellew J should have appreciated that the Appellants had a different claim against one or more of the Respondents than that which had been pleaded and that his Honour should have adjourned the proceedings so that they could have obtained legal advice as to that different claim and put on further evidence. It was also submitted that his Honour should have referred the Appellants to the NSW Bar Association's legal assistance referral scheme or alternatively to the Registrar of the Court for an attempt to find a pro bono legal representative for them.[11]

27. In addition, it was submitted that Bellew J had not made reference to ss 57 or 58 of the *Civil Procedure Act 2005* (NSW)[12] and had failed to place appropriate emphasis on the overriding purpose mandated by s 56 of that Act that the resolution of the real issues in the proceedings be not simply "quick" and "cheap" but also "just" because of the likelihood that the "real" issues, those being the alleged forged signatures, would not be determined.[13]

Trial judge's duty

28. Ward JA referred to *Uszok v Henley Properties (NSW) Pty Ltd*[14] where Beazley JA had reviewed a number of cases which had considered the question of what was required of a trial judge in dealing with a claim by a self-represented litigant[15] and said

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[10] The Appellants were legally represented on the appeal.
[11] Above, n 2, at [77], [80].
[12] Section 57 CPA provides that, for the purpose of furthering the overriding purpose referred to in s 56(1), court proceedings are to be managed having regard to, *inter alia*, the just determination of the proceedings. Section 58 CPA imposes an obligation on the Court to follow the dictates of justice in deciding whether to make any order for the management of proceedings.
[13] Above, n 2, at [82]-[85].
[14] [2007] NSWCA 31 at [147]-[154].
[15] Above, n 2, at [126]-[129]. See *MacPherson v The Queen* [1981] HCA 46; (1981) 147 CLR 512; *Neil v Nott* [1994] HCA 23; (1994) 68 ALJR 509; *Minogue v Human Rights & Equal Opportunity Commission* [1999] FCA 85; (1999) 84 FCR 438; *Nipperess v Military Rehabilitation and Compensation Commission* [2006] FCA 943; *King v The Queen* [2003] HCA 42; (2003) 215 CLR 150.

that Bellew J's duty to the Appellants was as explained by Samuels JA in *Rajski v Scitec Corporation Pty Ltd.*[16] In *Rajski*, Samuels JA, with whom Mahoney JA agreed, had said as follows:

> "*In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent. … At all events, the absence of legal representation on one side ought not to induce a court to deprive the other side of one jot of its lawful entitlement. … An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a litigant in person as enjoying a privileged status, would be quite unfair to the represented opponent.*"[17]

29. Ward JA clearly considered that Bellew J had provided appropriate advice and assistance to the Appellants. In this regard, she noted that his Honour:

- had been conscious that the Appellants might have had language difficulties and had made enquiries of the husband before proceeding in the absence of an interpreter;

- had been conscious of the fact that the Appellants were not legally represented and had endeavoured throughout the proceedings to ensure that they had understood procedurally what was happening;

- as regards the witness statements, had first ascertained that when they had been filed, the Appellants had been legally represented and then had explained the basis of the objections made to the husband's witness statement and sought the views of the Appellants on these and had not taken an overly technical view when ruling on the objections;

- had asked the wife whether she wanted him to take into account her witness statement to which only minor objections had been made but the wife had answered in the negative;

- had explained the objections that had been made to the application for leave to rely on the September affidavits and had asked what the Appellants wished to say as to why the material was provided at such a late time; and

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[16] Court of Appeal, 16 June 1986, unreported.
[17] Ward JA set out a more abbreviated form of this statement of the law in her judgment.

- had explained the nature of the r 29.10 application, given the Appellants the opportunity to consider the Respondents' submissions and had invited the Appellants to say what they wished about their case.[18]

30. Ward JA said that none of the authorities dealing with the trial judge's duty to provide advice and assistance suggested that Bellew J had a duty to advise the Appellants as to the inadequacies in their evidence having regard to the case that they had pleaded or to adjourn the proceedings so that they could re-plead their case in order for it to accord with the newly raised forgery complaints. Her Honour then said:

> "*A duty to provide information in order to attempt to overcome the procedural disadvantages faced by a self-represented litigant is not a duty to run the case for him or her.*"[19]

31. Furthermore, her Honour said that it was apparent that the husband had previously received legal advice as far back as April 2008 which had indicated that there would be difficulties with proving a claim for fraudulent misappropriation of funds/ forgery and that, presumably, a forensic decision had been made not to plead the very case that it was now being said Bellew J should have adjourned the hearing to permit be pleaded. This, her Honour observed, illustrated the difficulty inherent in the Appellants' submission that the trial judge had a duty in effect to give advice as to how the Appellants should plead their claim and to adjourn the final hearing of the matter to permit them to do so.[20]

32. Her Honour also said that Bellew J had had regard to the need to determine the application for leave to rely on the September affidavits by reference, inter alia, to the interests of justice and that it was not necessary for him to refer expressly to s 57 or 58 of the *Civil Procedure Act*.[21]

33. In addition, her Honour said that there was no miscarriage of justice suffered by reason of the fact that leave was not granted for the September affidavits to be relied upon because they did not remedy the defects of proof in relation to the Appellants' pleaded case. It was not, for example, alleged that the Solicitor or the Bank had, or ought to have had any knowledge that the signatures on the relevant documents were forged (assuming that the signatures were indeed forged).[22]

34. Accordingly, her Honour concluded that there was no error on Bellew J's part that warranted appellate intervention and that the appeal should be dismissed.

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[18] Above, n 2, at [116]-[125]. See also [52]–[64].
[19] Above, n 2, at [130].
[20] Above, n 2, at [135]-[137].
[21] Above, n 2, at [133].
[22] Above, n 2, at [131]–[133].

Final note

35. The Productivity Commission considers that ultimately the civil justice system will need to better accommodate self-represented litigants and has made draft recommendations designed to achieve this including a recommendation for the development of clear guidelines for judges on how to assist self-represented litigants, while remaining impartial.[23] Any such guidelines, however, are not likely to require a trial judge to provide assistance amounting to running the case for the self-represented litigant.[24]

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[23] See Productivity Commission 2014, *Access to Justice Arrangements*, Draft Report, Canberra, released 8 April 2014 (accessible at http://www.pc.gov.au/projects/inquiry/access-justice/draft). The final report was submitted to the Government on 5 September 2014 but has yet to be released by the Government.

[24] The Family Court of Australia already has established guidelines on the judge's duty in that court. See *Re F: Litigants in Person Guidelines* [2001] FamCA 348; (2001) 161 FLR 189.