Self-represented litigants and non-practitioner representatives conducting superior court litigation

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Introduction

1. Proper preparation and presentation of a case before a superior court is not an easy task, even for a very experienced legal practitioner. The facts of the case are often complicated; the law is often complex; there is a need to know and understand the court rules and procedures; and superior legal skills, usually acquired from conducting many cases over time, are often necessary.

2. Not surprisingly then, a self-represented litigant or non-practitioner representative is likely to struggle when conducting such proceedings. As the plurality (Mason CJ, Brennan, Deane, Dawson and McHugh JJ) observed in *Cachia v Hanes*:[1]

> "*It would be mere pretence to regard the work done by most litigants in person in the preparation and conduct of their cases as the equivalent of work done by qualified legal representatives.*"

3. Moreover, the involvement of a self-represented litigant or non-practitioner representative in superior court litigation can cause many problems for both the court and the opposing represented litigant because the litigation is often conducted less efficiently; tends to be prolonged; may result in an increase in the costs of legal representation for the opposing litigant; and can impose a considerable drain upon the court's resources.[2]

4. A recent example of the kinds of problems that can be created by the involvement of a self-represented litigant/ non-practitioner representative in superior court litigation can be seen in the New South Wales Court of Appeal decision in *ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia* ("**ACES case**")[3] where the Court held that much of the cost, delay and complexity of the case, both at trial and on appeal, was attributable to the litigant/ representative's ignorance of the law and his preparedness to make serious allegations without foundation. In a follow-up judgment, the Court said that the litigant/ representative had not adhered to the standards that it expected of those who appeared before it.

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[1] [1994] HCA 14; (1994) 179 CLR 403 at 415.
[2] Above, n 1, at 415.
[3] [2014] NSWCA 402.

The ACES case

Background

5. In 2006, the Commonwealth Bank ("**Bank**") made a loan of $1.5 million to ACES Sogutlu Holdings Pty Ltd ("**ACES**") to enable it to acquire commercial property at Botany. At this time, Mr Ercan Sogutlu was the sole director and shareholder of ACES. Mr Sogutlu was also the sole director and shareholder of another company, Ceyser Pty Ltd ("**Ceyser**") which was the trustee for the Ceyser Hybrid Unit Trust. Ceyser was the registered proprietor of commercial property located in or near Alexandria.

6. The Bank took security for the loan which included:

   - a registered mortgage by ACES as trustee for the Sogutlu Family Trust over the Botany property;

   - a guarantee by Ceyser as trustee for the Ceyser Hybrid Unit Trust supported by a registered mortgage by Ceyser over the Alexandria property; and

   - a guarantee by Mr Sogutlu.

7. In 2011, following default by ACES, the Bank appointed agents to take possession of both properties and to sell them. After the properties were sold and the net proceeds of sale applied to reduce the debt, there remained, on the Bank's calculations, a shortfall.

8. In 2012, the Bank sued ACES and the two guarantors, Ceyser and Mr Sogutlu, for the shortfall. The three defendants filed defences and a cross-claim which were later amended.

9. By the time Further Amended Defences were filed, a Mr Charara was involved. His name and phone number appeared on the front page of the pleadings. He also swore an affidavit verifying the Further Amended Defences as the authorised officer of ACES and Ceyser. In the Further Amended Defences, his capacity was given as "Director".[4]

10. A "2nd (further) Amended (first) Cross-Statement of Claim" came to be filed with leave in the proceedings and this named Mr Charara as the fourth cross-claimant. The cross-claim was signed by Mr Charara and verified by him as follows:

> "I am the 4th cross-claimant and a director of the first and second cross-claimants and I am authorised to commence and carry on this cross-statement of claim".[5]

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[4] Above, n 3, at [131].
[5] Above, n 3, at [132].

Proceedings at first instance

11. The proceedings were heard by Young AJ in the Supreme Court of New South Wales.[6] Mr Charara, described by his Honour as the fourth cross-claimant, appeared with leave on behalf of all the defendants and cross-claimants.[7]

12. Young AJ observed that the defences were "rather difficult to understand"[8] and said that "the fact that the defences were prepared by a non-lawyer has caused considerable problems."[9] His Honour proceeded by setting out the defences/ claims in what he said was roughly the order in which they appeared in the defence and cross-claim. This resulted in a list of some 25 complaints. His Honour then rationalised these complaints into groups so that he could deal with them.

13. The main complaints were that the loan had been made to the wrong entity and that Ceyser had only entered into the guarantee as trustee; the Bank did not have the right to exercise the mortgagee's power of sale; the mortgagee's power of sale had been improperly exercised; and the Bank had failed to properly account for the proceeds of sale.

14. After dealing with the complaints, Young AJ found that the defence and cross-claim "wholly failed" and so entered a verdict for the Bank and dismissed the cross-claim. His Honour ordered that the defendants and cross-claimants pay the costs of the Bank.[10]

Events following the hearing

15. The Bank then had a judgment or orders in its favour. However, a judgment or order of the court may not be enforced until it has been entered in accordance with the uniform rules.[11] Under the uniform rules, unless the court orders otherwise, a judgment or order is taken to be entered when it is recorded in the court's computerised court record system.[12]

16. Orders in the proceedings were recorded in JusticeLink, the court's computerised court record system, but they referred only to ACES, Ceyser and Mr Sogutlu as the defendants and cross-claimants. On application by the Bank, the Registrar ordered that JusticeLink be amended to record Mr Charara as the fourth cross-claimant and, ultimately, a sealed order of the Court to that effect was obtained by the Bank.[13]

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[6] See *Commonwealth Bank of Australia v ACES Sogutlu Holdings Pty Ltd* [2013] NSWSC 1184.
[7] Above, n 6, at [12].
[8] Above, n 6, at [10].
[9] Above, n 6, at [13].
[10] Above, n 6, at [74].
[11] See s 133 of the *Civil Procedure Act 2005* (NSW).
[12] See r 36.11 of the *Uniform Civil Procedure Rules 2005* (NSW) ("**UCPR**").
[13] Above, n 3, at [138]-[140].

17. Mr Charara then brought an application for review of the Registrar's decision, claiming that he was not and had never been the fourth cross-claimant in the proceedings and that the Registrar's order amending JusticeLink should not have been made. The application was heard by Slattery J.[14] Mr Charara appeared for himself.

18. Slattery J, in an ex tempore judgment, said that it was self-evident that Young AJ had assumed that Mr Charara was the fourth cross-claimant in the proceedings and found that Young AJ had had every reason to make that assumption.[15] Slattery J rejected various arguments advanced by Mr Charara for why JusticeLink should be amended to remove him as fourth cross-claimant and dismissed the application. In the course of his judgment, his Honour said that:

> "*Mr Charara seems to have been seeking to present a case before Young J, which had it been successful, may have advantaged him by allowing him to recover damages as a fourth cross-claimant. But now he has been unsuccessful he appears to want to avoid the consequences of that failure. He will not be permitted to do so.*"[16]

Court of Appeal

19. The defendants and Mr Charara appealed from the decision of Young AJ to the Court of Appeal. By the time the appeal was heard, ACES and Ceyser were in liquidation and Mr Charara had ceased to be a director of the companies but claimed to be a creditor of each company and an assignee of each company's rights.[17]

20. The Court of Appeal (Beazley P, Macfarlan and Leeming JJA) dismissed the appeal. The leading judgment was given by Leeming JA, with whom Beazley P and Macfarlan JA agreed.

21. On the appeal, Mr Charara appeared with leave for the appellants. Many of the grounds of appeal raised, in substance, the same kinds of issues that had been raised at first instance. In addition, it was claimed that Young AJ had erred in referring to Mr Charara as the fourth cross-claimant.

22. Leeming JA said that there had been at first instance, and remained on appeal, a large difficulty resolving the allegations made by the defendants/ appellants which was "best confronted squarely at the outset." The reason for this, his Honour made clear, was because the defence and cross-claim at first instance, and the notice of appeal and submissions on appeal, had been prepared by Mr Charara who did not have a practising certificate.[18]

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[14] See *Commonwealth Bank of Australia v A.C.E.S. Sogutlu Holdings Pty Ltd* [2013] NSWSC 1884.
[15] Above, n 14, at [9] and [19].
[16] Above, n 14, at [24].
[17] Above, n 3, at [3], [144] and [156].
[18] Above, n 3, at [12].

23. His Honour noted that Mr Charara laboured under the misconception that a trust was a legal person, distinct from the trustee and had expressed this view at first instance and maintained it although Young AJ had "politely observed" that this was not the case.[19] Moreover, his Honour said that, without any authority to support this view, Mr Charara had maintained this view on appeal and had made serious allegations of fraud based on it, namely, that the Bank had "fraudulently manufactured" a mortgage from Ceyser.[20]

24. His Honour said that there was no basis for the complaint and nothing that was sufficient to sustain an allegation of fraud, once it was appreciated that the Ceyser Hybrid Unit Trust was not a legal person and had no legal capacity distinct from Ceyser.

25. His Honour went on to say that because of the importance of the proceedings for both Mr Sogutlu and Mr Charara, and because the case had been prepared and conducted by a person without a practising certificate, he had reproduced verbatim the grounds of appeal as drafted, and then sought "as best as I can, having put to one side the misconceptions in the arguments, to address their substance insofar as may be seen from the written and oral submissions."[21]

26. After dealing with some threshold issues, his Honour then addressed each of the grounds of appeal and found that none of them had been made out.

27. In the course of addressing one ground of appeal, his Honour said that the submissions had come close to a complaint that Young AJ's mind had been "fully made up", amounting to a claim for actual or apprehended bias. In dismissing this ground, his Honour said that, to the contrary, Young AJ had "addressed, as best he could, the defendants' claims despite the legally erroneous way in which they had been articulated and advanced."[22]

28. In relation to another ground of appeal which involved a complaint that the Bank had exercised its power of sale in breach of its duty under s 420A of the *Corporations Act 2001* (Cth), a provision which had not been pleaded or relied upon by the appellants at the trial, his Honour rejected a submission by the Bank that the appellants should not now be allowed to raise it. One of the reasons his Honour gave for rejecting the Bank's submission was that prior to and during the trial, the defendants had been represented by "a person who did not have a right to practise as a lawyer in Australia, and whose knowledge of the law was, in part, manifestly defective.[23] His Honour then considered the appellants' complaint on its merits and found that there was no contravention of s 420A.

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[19] Above, n 3, at [13]-[14]. His Honour did note, however, that this erroneous view might be widely held: at [15].
[20] Above, n 3, at [19].
[21] Above, n 3, at [20].
[22] Above, n 3, at [37].
[23] Above, n 3, at [45]-[47].

29. Another matter raised by the appellants was that Young AJ had erred in accepting a valuer's report obtained on behalf of the Bank over another valuer's report obtained on behalf of the appellants, in part by reason of what was claimed to have been the relative inexperience of the Bank's valuer. Mr Charara placed reliance upon the curricula vitae of the valuers, material which appeared to have been included in the appeal books but which had not been before Young AJ.[24] In this regard, his Honour said that:

> *"At the very least, it was incumbent upon Mr Charara to point out, to the Bank and to the Court, that pages on which he placed particular reliance on the appeal, in respect of which he contended that the primary judge had erred, had been inserted into the appeal book and were not before the primary judge. It may be added that Mr Charara is no ordinary unrepresented litigant. His letterhead describes him as:*
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> > *'A HIGH PROFILE AND VERY EXPERIENCED LITIGANT IN THE LOCAL COURT, DISTRICT COURT, SUPREME COURT, COURT OF APPEAL, FEDERAL COURT AND THE HIGH COURT OF AUSTRALIA' "*[25]

30. His Honour emphasised the importance to the efficient and fair resolution of appeals that the parties and the Court be able to have confidence that the appeal materials accurately reflect the evidence at trial.[26] Noting that what appeared to have occurred was "potentially extremely serious", his Honour made orders giving Mr Charara 14 days to provide an explanation for how the appeal papers had come to include material not before Young AJ.[27]

31. In relation to yet another ground of appeal which his Honour said, as articulated in the appellants' written submissions, amounted to an allegation that there had been a "fraudulent debit" by the Bank in accounting for GST paid by the buyers of one of the properties, his Honour noted that the serious allegation of fraud had never been pleaded or particularised at trial, had been permitted to be raised – generously to the defendants - at the end of the trial, and had caused the trial to extend into a third day.[28] His Honour dismissed this ground of appeal, saying that there was never any proper foundation for the allegation of fraud and that the allegation should never have been made.[29]

32. His Honour then considered whether Mr Charara had been a party to the proceedings at first instance. Mr Charara's claim, in substance, was that the naming of him in the cross-claim as the fourth cross-claimant was a typographical error made by his

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[24] Above, n 3, at [85]-[86]. Note: The UCPR contains detailed rules governing the preparation and contents of the Appeal Book. The Appeal Book is usually prepared by the appellant.
[25] Above, n 3, at [87].
[26] Above, n 3, at [88].
[27] Above, n 3, at [88] and [159].
[28] Above, n 3, at [109], [110] and [120]. Note: UCPR r 14.14 requires fraud to be pleaded specifically. UCPR r 15.3 requires a pleading to give particulars of any fraud.
[29] Above, n 3, at [117] and [121].

secretary, that all he had done was sign a document which was a draft cross-claim and that no leave had ever been granted to the filing of the draft cross-claim.[30]

33. His Honour, however, said that there was no mere typographical error because Mr Charara had sworn an affidavit verifying the cross-claim; the cross-claim had named him, twice, on its front page, as the fourth cross-claimant; and Mr Charara had caused the document to be filed. Accordingly, his Honour concluded that "the document plainly reflected a conscious forensic choice to expand the parties to the proceedings."[31]

34. His Honour noted that a person who seeks relief from a court, by invoking its jurisdiction in the usual way by filing a statement of claim or cross-claim, becomes a party even though his or her claim may be utterly hopeless, unless removed from the proceeding or the litigation is resolved.[32]

35. Mr Charara had been given leave to file supplementary submissions and had included in these submissions (described by his Honour as almost illegible) allegations that the Bank and its lawyers had deliberately misled the Court about leave having been granted to file the cross-claim.[33] His Honour said that there was no foundation in the evidence for these serious allegations and that there had been "a clear misuse of the privilege attaching to statements made in court".[34]

36. In conclusion, his Honour said that it was evident that:

> "*much of the cost and delay and complexity both at trial and on appeal has been attributable to Mr Charara's ignorance of basal principle and preparedness to make serious allegations, including of fraud, without foundation.*"[35]

37. In these circumstances, his Honour said that the case was a proper case for the usual order as to costs to be made in respect of the costs at first instance and on appeal. Accordingly, his Honour proposed that the appeal be dismissed with costs.[36]

Follow up judgment

38. The Court of Appeal subsequently addressed, on the papers, the issue of fresh evidence having been included in the appeal books.[37]

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[30] Above, n 3, at [145]-[146].
[31] Above, n 3, at [148].
[32] Above, n 3, at [149].
[33] Above, n 3, at [150]-[152].
[34] Above, n 3, at [153]-[154].
[35] Above, n 3, at [157].
[36] Above, n 3, at [158]-[159].
[37] See *ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia (No 2)* [2014] NSWCA 431.

39. The Court noted that, by letter, Mr Charara had complained that the Court's reasons for judgment in the ACES case were defamatory and had undertaken not to sue the State of New South Wales for defamation if, what he described as the 'transit judgment' was withdrawn from publication by a specified date. The Court further noted that the Registrar had advised Mr Charara that communications of that kind were "inappropriate."[38]

40. After considering the evidence put forward by the appellants and the Bank, the Court said that it was undisputed that:

- documents not before Young AJ were inserted by the appellants into the appeal books without any application being made for the tender of fresh evidence, and without the Court's attention being drawn to that fact, although the appellants relied on those documents; and.

- there was nothing in the submissions made by Mr Charara to suggest that there was any appreciation by him of the seriousness of what had occurred, nor was there any expression of contrition.[39]

41. Indeed, Mr Charara's submissions had included a request that the appeal be reheard and that Leemington JA should furnish him, within 14 days, with copies of material that related to any contact between his Honour and the Bank's lawyers. The Court said that the suggestion that it had had inappropriate contact with the Bank's lawyers, aside from its offensiveness, "betrayed a very deep misunderstanding of the nature of the judicial process."[40]

42. In conclusion, the Court found that there had been a serious irregularity in connection with the preparation and conduct of the appeal but that it had been detected, had not affected the outcome of the appeal and had not materially impacted upon any party. The Court then said:

> *"Mr Charara has sworn that he had no intention to mislead the Court or interfere with its process. Even so, had Mr Charara been a barrister or solicitor, it would have been appropriate to refer the matter to the Bar Association or Law Society for investigation whether it amounted to unsatisfactory professional conduct or professional misconduct.*
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> *19 That course is not available here. In all the circumstances, it is not appropriate to refer the matter for further investigation. However, this Court can by its judgment record the expectations which it holds of all of those who appear before it, including those who are not subject to the same ethical and professional obligations as a barrister or solicitor. Further, this is an unusual case, because Mr Charara holds himself out to be a 'very experienced litigant'*

[38] Above, n 37, at [3]-[4].
[39] Above, n 37, at [13]-[14]. Mr Charara's submissions were annexed to the judgment.
[40] Above, n 37, at [16]-[17].

> *and seemingly provides legal services to others … In those circumstances it is appropriate that there be a public record of this Court's conclusion that Mr Charara has not adhered to the standards it expects of those who appear before it."*[41]

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[41] Above, n 37, at [18]-[19].