

Dealing with unrepresented litigants

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The adversarial system works best when all parties are legally represented and the parties are able to make informed judgments about how to progress a matter. When one party is unrepresented, tensions and competing obligations inevitably arise.

A number of cases have stated that the Court has a duty to advise and assist the unrepresented litigant, at least to the extent required 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 the untutored ...’ (*Rajski v Scitec Corporation Pty Ltd*, Court of Appeal, 16 June 1986, unreported (at [14]) per Samuels JA).

In such situations, legal practitioners acting for a client in a dispute with an unrepresented party must similarly balance their obligations to act in the best interests of their own client with their duty to the Court to achieve the correct result.

Considerations by the courts

In *Kimber v The Owners Strata Plan No. 48216* [2017] FCAFC 226 (*Kimber*) the Full Federal Court recognised a positive duty on legal practitioners to assist the Court not only to understand the claims made by the unrepresented parties, but also to bring deficiencies in their own case to the Court’s attention in circumstances where the unrepresented party has not done so. Logan, Kerr and Farrell JJ allowed an appeal of a summary dismissal application in respect of an application for review of a decision not to set aside a bankruptcy notice. The application had been brought by a represented party against an unrepresented party.

The Full Court found the primary judge had failed to identify that the unrepresented party had a ground to resist the summary dismissal application, on the basis that it had reasonable prospects of claiming the bankruptcy notice was invalid pursuant to s 41(5) of the *Bankruptcy Act*. Furthermore, both parties had also failed to draw the relevant ground to the primary judge’s attention. The Court held (at [73]): ‘In our view, the proper observance of the represented party’s duty to the Court encompasses telling the Court what may be the weaknesses of their summary judgment

Snapshot

- Legal practitioners have a positive duty to assist the Court. The Full Federal Court and the NSW Court of Appeal have defined the scope of this duty to include assisting the Court to understand an unrepresented litigant’s claims.
- When considering adverse steps against an unrepresented party, legal practitioners should be aware that it may also be necessary to draw the Court’s attention to the weaknesses in their own client’s case.

or summary dismissal application as well as making the case for it. To use an old expression, it must be a “clean kill”. Otherwise, justice demands that the issues raised by the litigant in person’s application be tried.’

The Court also raised the prospect of ordering costs against a solicitor who failed to comply with this duty under the relevant Federal Court overarching purpose provisions (at [70]).

The *Kimber* decision referred to and endorsed the approach taken by the NSW Court of Appeal in *Serobian v Commonwealth Bank of Australia* [2010] NSWCA 181 (*Serobian*) in which the represented respondents to an appeal failed to address

any of the matters raised in the unrepresented appellants’ written submissions (at [41]). By not assisting the Court by responding directly to the appellants’ submissions, the respondent had wasted the Court’s time and failed to facilitate the ‘just, quick and cheap resolution of the real issues in the proceedings’ as required by *Civil Procedure Act 2005*, s 56(3). However, where an unrepresented litigant files onerously lengthy and obviously irrelevant submissions it may not be necessary or appropriate for represented parties to respond in detail to each and every allegation. In *Serobian*, the Court required the represented party to respond to the unrepresented parties’ submissions which warranted the Court’s full and fair consideration.

What this means for legal practitioners

Practical considerations arise for legal practitioners advising their clients in relation to whether or not to take adverse steps against an unrepresented party, such as seeking to strike out a poorly pleaded claim. When doing so, a solicitor must be conscious of their obligation not only to identify the problems in the unrepresented parties’ case, but also to inform the Court of the deficiencies in their own client’s case. Depending on the circumstances, it may be more practical and preferable to consider other options such as seeking that the hearing be expedited.

Both the Law Society of NSW and NSW Bar Association have published helpful guidelines for practitioners. See: NSW Bar Association – *Guidelines for barristers on dealing with self-represented litigants*, and The Law Society of NSW – *Guidelines for solicitors dealing with self-represented parties*. **LSJ**