

**COURT OF APPEAL**

**MULLINS P  
BOND JA  
APPLEGARTH J**

**Appeal No 3513 of 2022  
Appeal No 4341 of 2022  
SC No 8958 of 2019**

**CAROLYN MARY THOMSON**

**Applicant**

**v**

**AUSTRALIA AND NEW ZEALAND  
BANKING GROUP  
ACN 005 357 522**

**Respondent**

**BRISBANE**

**TUESDAY, 15 NOVEMBER 2022**

**JUDGMENT**

[1] **MULLINS P:** Mrs Thomson has two substantive appeals pending in this Court – appeal number 3513 of 2022 and appeal number 4341 of 2022. The respondent to each appeal is the Australia and New Zealand Banking Group Limited. Ms Thomson is self-represented. She has brought an interlocutory application for the Court to appoint a contradictor with the cost of the contradictor to be borne by the Court.

[2] The application is brought in reliance on r 766 and r 767 of the *Uniform Civil Procedure Rules 1999* (Qld). For the purpose of confining the issues, the Bank has

made its submission on the assumption that this Court has the power, in an appropriate case, to appoint a contradictor to participate in an appeal. The role of a court-appointed contradictor was explained by John Dixon J in *Bolitho v Banksia Securities Ltd (Receivers and Managers Appointed) (In Liq) (No 6)* (2019) 63 VR 291 at [78]-[123]. A contradictor will be appointed by the Court to assist the Court to dispute the relief that is sought by an applicant where there is no other party participating in the proceeding who will perform that role. As observed in *Bolitho* at [96], “a contradictor’s role is to maintain the adversarial nature of the court’s processes.”

- [3] In order to determine whether the Court should appoint a contradictor to this appeal, the starting point is to describe the substantive appeals. The first appeal is against the judgment of the primary judge, Williams J in *Australia and New Zealand Banking Group Limited v Thomson* [2022] QSC 18, whereby the primary judge refused to recuse herself for actual or apprehended bias and the statutory demand dated 1 August 2019 served on the Bank by Mrs Thomson was set aside. The appeal grounds are wide-ranging and include complaints about the process that resulted in the primary judge’s refusal to recuse herself, the primary judge’s decision-making process and the failure to make sufficient allowance for Mrs Thomson as a self-represented litigant. The second appeal was given after a further hearing of the matter on 18 March 2022 in which the primary judge made orders to the extent necessary pursuant to r 371(2) and r 389(2) of the *UCPR*, ordered Mrs Thomson to pay the Bank’s costs in respect of the application to set aside the statutory demand and made other orders in relation to costs. The grounds of appeal in respect of the second appeal are also wide-ranging and apart from errors alleged on the part of the primary judge in dealing with the application pursuant to r 389(2) included complaints about the process, the failure of the primary judge to determine issues raised by Mrs Thomson and also that not sufficient allowance was made for Mrs Thomson as a self-represented litigant.

- [4] The two appeals are being heard together in this Court. The listing of the appeals has been postponed, pending the determination of this interlocutory application.
- [5] Mrs Thomson is the appellant in both appeals. That means she is the party that has the carriage of establishing the errors and deficiencies in process which she alleges should result in her success in the appeals. The Bank as the other party to those appeals is opposing them and therefore has the role of putting the arguments to the Court that it relies on to prevent the judgments being overturned. The Bank is the natural contradictor as the respondent to Mrs Thomson's appeals.
- [6] It is apparent from the material filed on behalf of Mrs Thomson that she is concerned that as a self-represented litigant that she does not demand the same attention from the Court as a party who is represented by lawyers. There is no doubt that it is difficult for a self-represented litigant in appearing for herself to be across all aspects of the law and procedure and relevant factual matters in prosecuting an appeal. The problem for Mrs Thomson is that the adversarial system of justice is based on giving the parties the responsibility of agitating their disputes before the Court, whether they are represented by lawyers or not. The decision of *Papoutsakis v Prime Capital Securities Pty Ltd* [2022] FCA 1041 on which Ms Thomson relies is not authority to the contrary.
- [7] The appointment of a contradictor in *Bolitho* is explicable, having regard to the nature of the proceeding which was the settlement of a class action where there was no party disputing the claims of the litigation funder for commission and legal costs to be paid from the settlement fund.
- [8] Mrs Thomson would like a contradictor appointed in these appeals to investigate her concern that the Bank's inhouse counsel in the first affidavit sworn on 21 August 2019 in the primary proceeding may have committed perjury. That is not a matter on which the Court requires assistance in order to deal with the issues raised on the

appeal to the extent that Mrs Thomson's allegations about the particular affidavit may be raised on the hearing of the appeal.

[9] Mrs Thomson is very critical of the conduct of the Bank not only in relation to her own matters but in relation to other matters and asserts that the Bank is not an appropriate contradictor. The Bank is the respondent to the appeals and therefore is the appropriate contradictor.

[10] Unlike *Bolitho*, where there was a settlement fund which no doubt could be the source of paying for the contradictor appointed by the Court, there is no fund available in the context of these appeals from which a contradictor could be paid. The Court of Appeal does not otherwise have access to any funds from which it could direct the payment of a contradictor's costs for these appeals.

[11] A contradictor is not necessary to assist the Court in deciding these appeals. The Court will rely on the submissions of both Mrs Thomson and the Bank. The application to appoint a contradictor with the costs of the contradictor to be borne by the Court should be dismissed.

[12] **BOND JA:** I agree with the order proposed by the President and with the reasons which her Honour has expressed. I wish to add only the following brief remarks explaining that agreement.

[13] The appellant seeks to appeal from orders made in the trial division setting aside a statutory demand which the appellant had served on the respondent. The respondent opposes the appeal and seeks to maintain its success below.

[14] The Court has before it today an interlocutory application made by the appellant in the appeal.

[15] By the application the appellant seeks, purportedly pursuant to r 766, an order that the Court appoint a "contradictor" to assist the Court in the hearing of this

application and the appeal. She also seeks an order that the Supreme Court bear the cost of the contradictor so appointed.

[16] The respondent opposes the order.

[17] The application is misconceived. The respondent is the natural contradictor, both for the appeal and this application.

[18] The appellant is self-represented. She suggests that there is some principle of law that a self-represented litigant cannot be a proper contradictor because their lack of legal experience prevents them from being able to assist the Court with factual context and background like would be the case if they were legally represented, and, it seemed, the Court should appoint a “contradictor” whenever faced with such a litigant.

[19] It is undoubtedly true that a self-represented litigant suffers many disadvantages compared to litigants who are represented by legal practitioners. But that fact does not support the existence of a legal principle such as that suggested by the appellant.

[20] The principal case on which the appellant relies is *Papoutsakis v Prime Capital Securities Pty Ltd* [2022] FCA 1041. But that case concerned an application that the trustee of the applicant’s bankrupt estate be restrained from appearing in an appeal from an order refusing to annul the applicant’s bankruptcy. The creditor on whose petition the sequestration order had been made had not appeared as a respondent to the application to annul the bankruptcy. The trustee had been given leave to appear by the primary judge, there being no other contradictor. In the course of rejecting the application, Halley J observed “I note that Mr Papoutsakis is self-represented, there is no proper contradictor and that Mr Papoutsakis is, by reason of his lack of experience, not in a position to provide the assistance to the Court as to the factual context and background that might be expected of a party who was able to obtain legal representation.” His Honour was making relevant observations of fact. He was not stating a principle of law. In any event, the critical

consideration was that, unlike the present case, there would be no contradictor to the applicant's appeal unless the trustee was permitted to appear.

- [21] The appellant also places reliance on class action cases in which the Court has exercised a power to appoint a contradictor – at the parties' cost – to assist the Court in its consideration of whether or not to approve a proposed settlement. Such cases bear no relation to the present case.
- [22] The applicant also relies on observations made by Porter KC DCJ in *National Australian Bank Limited v Garner* [2022] QDC 221 that “[m]atters of admissibility and submission are the responsibility of admitted practitioners.” His Honour's remarks were made in the course of rejecting a poorly presented application for substituted service which had been made by a well-resourced applicant. His Honour's remarks were evidently intended to convey his suggestion that the preparation and presentation of the application should have been made by admitted practitioners rather than by the paralegal employee who had been apparently given that task. His Honour was obviously not saying that matters of admissibility and submission could not be advanced by self-represented litigants.
- [23] The appellant also suggests that the fact that the registry has assisted her in the preparation of the appeal books for her appeal somehow also supports the existence of the principle for which she contends. It does not.
- [24] In my view, the present application does not provide the occasion to explore any more deeply the jurisdiction of this Court to make orders appointing a contradictor. There is no arguable basis for the orders which have been sought by the appellant.
- [25] As developed orally, the appellant's argument was that the problems faced by self-represented litigants should be responded to by the Court recognising and exercising a jurisdiction to appoint an independent legal advisor to assist self-represented litigants, and at the Court's cost. As she accepted, there was no authority which supported the existence of such a jurisdiction. Nor, it might be observed, is there

evidence of the existence of any fund out of which the Court might pay for such costs. In truth, the appellant's submissions are either a cry for greater civil legal aid (which is a matter for the executive or legislative arms of government), or a suggestion that the Court should itself undergo some form of inquisitorial process when responding to some factual submissions advanced by self-represented litigants (which type of process is not recognised by our system of justice). Such submissions do not provide a basis for the orders which she presently seeks.

[26] It remains to note that in the material before this Court on the present application the appellant has seen fit to advance the speculation that knowingly false allegations were advanced in an affidavit relied on by the respondent before the primary judge. The appellant has suggested that the deponent may have perjured herself. The sole basis for this speculation appears to be the appellant's suggestion that a statement that "the [present respondent] has continued, without success, to seek to negotiate a compromise with the [present appellant] through dealings between its Customer Advocate and the [present appellant]" was inaccurate because there were also communications between the present appellant and the present respondent which did not involve the Customer Advocate. Of course, as the respondent submits, the fact that the appellant exchanged emails with other staff of the respondent does not falsify the statement which the appellant now impugns, much less demonstrate the deponent knowingly gave false evidence. Because the suggestion is in any event irrelevant to the present application, it is unnecessary to express a final view on the merits of the appellant's suggestion. If, as she has told this Court she will, the appellant pursues the suggestion in her appeal, it can be dealt with by the Appeal Court.

[27] The application must be dismissed.

[28] **APPLEGARTH J:** I agree with the reasons given by the President and with the reasons given by Justice Bond. I agree that the application be dismissed.

[29] **MULLINS P:** The orders of the Court are:

1. Application to appoint a contradictor is dismissed.
2. The applicant must pay the respondent's costs of the application for the appointment of a contradictor to be assessed on the indemnity basis.

...

[30] **MULLINS P:** After the Court delivered the reasons for dismissing the application, submissions were heard on the question of costs. Mrs Thomson asked that costs be reserved to be determined when the substantive appeals are determined. Mr Goodwin of counsel, on behalf of the Bank, asked for costs on the indemnity basis on the basis that the application for the appointment of a contradictor was always doomed to fail.

[31] As will have been apparent for the reasons given for dismissing the application, the members of the Court shared the view expressed that the application was doomed to fail, even though Mrs Thomson found some comfort in the various statements made by members of the Court about the position of a self-represented litigant. Those statements that were made can be found elsewhere in the literature and Mrs Thomson did not need to bring her application for the appointment of a contradictor in order to hear the various statements made by the members of the Court about the disadvantages suffered by a self-represented litigant.

[32] Costs should follow the event in the normal case. And in this particular case, where the application could never succeed, it is appropriate to order that they be assessed on the indemnity basis. At first instance, the primary Judge had deferred the costs assessment until after any appeal was determined. Mrs Thomson sought a similar order from this Court. In view of the reasons for ordering indemnity costs, it is also not appropriate to exercise the discretion to defer the assessment of those costs.



[33] **BOND JA:** I agree with the reasons given by the President for the costs order that the President proposes and I agree with the making of that order.

[34] **APPLEGARTH J:** I also agree with the order and for the reasons given by the President.