CASE notes

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Liability of solicitors in the conduct of litigation and mediation

Studer v Boettcher [2000] NSWCA 263

In the recent decision of *Studer v Boettcher*,[1] the New South Wales Court of Appeal has dismissed, with costs against the appellant, an appeal against a decision that a solicitor was not negligent in the preparation of his client's case or in the conduct of a mediation. The court considered that the solicitor had appreciated the weaknesses in his client's case and had acted properly in putting pressure on his client to compromise his claim on the best available terms. Some interesting observations were made by the Court in relation to the conduct of litigation, and the function of legal advisers and mediators.

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The facts

The appellant had compromised litigation on the advice of the respondent, his former solicitor. He subsequently sued the respondent, claiming common law damages for professional negligence. He alleged that he had been unduly pressured into accepting a compromise and/or that the respondent had been negligent in his preparation for, and at the mediation, because he had failed to make a proper assessment of the respective cases and caused the appellant to compromise on improvident terms.[2]

The decision of the trial judge

The trial Judge dismissed the action, finding that the client's will had not been overborne, that the solicitor had not unduly pressured his client, and that the solicitor's advice to compromise was based upon a proper assessment of his client's case. From this judgment the client appealed to the New South Wales Court of Appeal.

The decision of the Court of Appeal

The appellant's case against the respondent required him to establish firstly that the respondent had given bad or incorrect advice, and secondly that he had been negligent in doing so.[3]

The Court of Appeal held that the trial Judge had correctly found that in the circumstances, in particular considering the serious difficulties properly recognised in the appellant's case, that the respondent had acted professionally with proper care and skill in preparing for and conducting the mediation and that his firm advice to compromise on the available terms was sound and in the best interests of the appellant.[4] It was not established that the respondent had overlooked any relevant fact, document or legal argument in his client's favour.

The test of negligence

Advice to compromise litigation will not be considered negligent mere-

ly because a court may subsequently consider that a more favourable outcome might have been obtained at a later stage in the proceedings or at judgment.[5]

Practitioners "should not be unduly inhibited in making a decision to compromise a case by the apprehension that some Judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the Bench, may tell him *(or her)* he *(or she)* should have done otherwise.[6] "A variety of factors may influence a lawyer's advice to compromise:

> *A lawyer's advice to a client to make or reject an available compromise is commonly not concerned only with the client's rights, obligations and hopes. Usually, other matters must also be considered. For example, it is often impossible to predict the outcome of litigation with a high degree of confidence. Disagreements on the law occur even in the High Court. An apparently strong case can be lost if evidence is not accepted, and it is often difficult to forecast how a witness will act in the witness-box. Many steps in the curial process involve value judgments, discretionary decisions and other subjective determinations which are inherently unpredictable. Even well-organized, efficient courts cannot routinely produce quick decisions, and appeals further delay finality. Factors personal to a client and any inequality between the client and other parties to the dispute are also potentially material. Litigation is highly stressful for most people and notoriously expensive. An obligation on a litigant to pay the costs of another party in addition to his or her own costs can be financially ruinous. Further, time spent by parties and witnesses in connection with litigation cannot be devoted to other, productive activities. Consideration of a range of competing factors such as these can reasonably lead rational people to different conclusions concerning the best course to follow. Advice to compromise based on a variety of considerations is not negligent if a person exercising and professing to have a legal practitioner's special skills could reasonably have given that advice.*[7]

The function of a legal adviser in the conduct of litigation

It is in the public interest for disputes to be compromised whenever practical.[8] However, a lawyer is not entitled to coerce a client into a compromise even if it is objectively in the client's best interests, at least when the client alone must bear the consequences of the decision.[9] It is for the client, not the lawyer, to decide whether to compromise or continue with the litigation.[10] As succinctly put by Fitzgerald JA:

> *Broadly, and not exhaustively, a legal practitioner should assist a client to make an informed and free choice between compromise and litigation, and, for that purpose, to assess what is in his or her own best interests. The respective advantages and disadvantages of the courses which are open should be explained. The lawyer is entitled, and if requested by the client obliged, to give his or her opinion and to explain the basis of that opinion in terms which the client can understand. The lawyer is also entitled to seek to persuade, but not to coerce, the client to accept and act on that opinion in the client's interests. The advice given and any attempted persuasion undertaken by the lawyer must be devoid of self-interest. Further, when the client alone must bear the consequences, he or she is entitled to make the final decision.*[11]

The role of the mediator

Although in the case before the court the manner in which the mediator had performed his function was not challenged, Sheller JA commented that:

> *In regard to the role of the mediator, current practice suggests different views about whether the mediators should do no more than facilitate negotiation and the extent to which any greater intervention is acceptable. There would, I think, be no doubt that it is generally agreed not to be part of the mediator's function to attempt to impose a compromise upon a party.*[12]

Comment

This decision and its reasoning will no doubt be welcomed by practitioners. It acknowledges the various pressures and uncertainties of litigation and the difficulties this creates for lawyers and clients alike. The judgment of Fitzgerald JA in particular contains sensible guidance to practitioners involved in litigation as to their responsibilities, particularly in the context of advising clients whether to accept a proposed compromise. PL

Footnotes:

1. [2000] NSWCA 263, unreported, New South Wales Court of Appeal, no 40907/98, Handley, Sheller, and Fitzgerald JJA, 24 November 2000
2. See the summary of the facts in the decision of Fitzgerald JA at para 61.
3. See Handley JA at para 54.
4. Handley JA at para 53-56; Sheller JA at para 57; Fitzgerald JA at para 77-79
5. Fitzgerald JA at para 62 citing *Karpenko v Parvian, Courey, Cohen and Houston* (1981) 117 DLR (3d) 383, 397; *Chancellor etc of Oxford University v John Steadman Design Group* (1991) 7 Cons. LJ 102, 107; *Finmore v Slater & Gordon* (1994) 11 WAR 250.
6. *Karpenko v Parvian, Courey, Cohen and Houston* (1981) 117 DLR (3d) 383 at 397 per Anderson J
7. Fitzgerald JA at 63 citing *Rogers v Whittaker* (1992) 175 CLR 479, 483 by way of analogy.
8. Fitzgerald JA at para 74 citing *Unity Insurance Broker Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, 651; *Tresize v National Australia Bank* (1994) 122 ALR 185, 189; *Studer v Konig* (unreported, McLelland CJ in Eq., 4 June 1993).
9. Fitzgerald JA at para 74 citing *Harvey v Phillips* (1956) 95 CLR 235, 242; *Tresize v National Australia Bank* (1994) 122 ALR 185, 199; see also Sheller JA at para 58.
10. Fitzgerald JA at para 74
11. Fitzgerald JA at para 75
12. Sheller JA at para 59