

24/7 technology driving lawyers' duty to act

By LUCY WILLIAMS and GREG COUSTON

Though the decision is specific to the facts of the case, the Supreme Court has found that a solicitor breached his duty to his client when he failed to respond to calls for urgent attention made over a weekend.

Anecdotal, lawyers often complain that changing technology has placed greater pressures and burdens on them – particularly in the context of the increasing pressure to respond quickly to electronic communications.

But how quick is “quick enough”? Is there a real prospect that a lawyer who received an SMS text message at 9.00pm on a Friday evening, and a voicemail message at lunchtime on the Saturday could be regarded as negligent because they failed to respond before Monday morning?

Well, that was exactly the

finding of the NSW Supreme Court at the end of last year in *Maestrale v Aspite* [2012] NSWSC 1420.

Will dispute

Of course, there was more to the case than its bare outline suggests. The litigation was a will dispute and reasonably complex. Proceedings were commenced almost six years, and the case heard 10 years, after the events occurred. There was a large amount of conflicting evidence and some interesting, and difficult, issues of law.

However, the critical factual

matters, as determined by the court, were relatively straightforward. At the relevant time, the testator was based in hospital. On 8 July he left on a day pass to attend a function and meet with a solicitor, as arranged by his son, at a local cafe for the purposes of providing instructions for a new will. It was common ground that the new will proposed was to substantially benefit the son.

The judge accepted that, at the time of the meeting, it was obvious that the testator was ill but not so gravely ill that his death was imminent. The lawyer was told that the testator was receiving treatment in hospital for cancer and had “a few months to live”.¹

The court and the experts called by both parties agreed that, based on this information, the fact that the solicitor did not take immediate steps to have his client make an informal will – or to act immediately to have a formal will drawn up – was not unreasonable.

At 9.00pm on the evening of Friday 12 July the solicitor received an SMS from the son. There was a dispute about its content, but the court accepted that it related to the son's concerns about his father's deteriorating health, the preparation of his father's will and a request from the son that the solicitor ring him urgently.

At about noon on Saturday 13 July, the son left a further message on the solicitor's voicemail. Again, there was a dispute about the content of the message, but the court accepted that it was a repeated request by the son for the solicitor to call him urgently due to his father's deteriorating health.

Although the solicitor disputed the content of the two messages, he did accept that he had received an SMS from the son on 12 July and a voicemail on 13 July. The solicitor did not respond to either message on the Friday, Saturday or Sunday.

On Monday 15 July, the solicitor prepared a new will



Lucy Williams is a litigation special counsel at K & L Gates. Greg Couston is a litigation partner at K & L Gates and a member of LawCover's panel.

and at 11.40am attended the hospital with the son. Unfortunately, the son's father had died at 11.20am that morning.

The court concluded that “(the son) has proved that (the solicitor) breached his overriding duty to his client when he failed to respond to (the son's) calls for urgent attention on 12 and 13 July to what he must have known or suspected related to his client's health and the unexecuted will”.²

“The breach of duty did not reside in an unduly dilatory approach to preparation of the will by allowing the passage of seven days before the will was prepared but in (the solicitor's) failure to respond to (the son's) urgent calls for advice and attention in the interim.”³

Conclusion

Obviously, the issue of dilatory conduct is fact-specific and highly dependent on contextual factors. It would be fair to say that all of the surrounding circumstances of this particular case determined its outcome.

Nevertheless, it is a useful reminder for the profession to note that technology – in particular, mobile voicemail and text messages – make lawyers accessible, almost on a 24/7 basis. This adds a particular dimension to the duty to act with reasonable diligence and speed, and is a matter of which we should all be conscious. □

ENDNOTES

1. *Maestrale v Aspite* [2012] NSWSC 1420 at [20].
2. *Ibid* at [94].
3. *Ibid* at [107]. □

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