Leading a horse to water

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Most of us have encountered clients who want to make decisions that are not in their best interests. This presents a dilemma: a solicitor may not usurp the client's right to make a decision, but may be under an obligation to try to guide the client into the best one available.

Solicitors may find guidance in the case of *Studer v Boettcher*.[1] Though more than 10 years old, it remains the most recent case on this topic in NSW.

The facts

Mr Studer was the defendant to litigation where the plaintiff, Ms Koenig, asserted an equitable interest in Mr Studer's real property and alleged fraud. Mr Studer retained a solicitor.

By the time proceedings went to mediation in 1991 it was apparent that:

• the documentary evidence supported Ms Koenig's version of events;

• if Ms Koenig's claim ever went to trial, Mr Studer may be found to have acted fraudulently; and Ms Koenig was legally aided.

•Even if Mr Studer succeeded in the litigation, he would not recover his costs.

At the end of the mediation, Mr Studer agreed to pay Ms Koenig $100,000. It seems that the solicitor exercised some persuasion on Mr Studer before the settlement was reached, in part because the solicitor estimated that it would cost Mr Studer at least as much to defend the case.

Mr Studer later deeply regretted the settlement and commenced proceedings against the solicitor, asserting undue and improper pressure to settle. He argued that:

• the mediation lasted for many hours and placed him under great stress;

• the solicitor had not carried out a proper assessment of Mr Studer's prospects and had recommended a disadvantageous settlement;

• and by the time Mr Studer "capitulated" to the settlement, he was behaving like a "zombie" and had lost the ability to make rational decisions.

Outcome

Trial judge Young J found:

• although the mediation was long and placed Mr Studer under a certain amount of stress, that did not mean that he did not make a free decision;

• the solicitor's pessimistic advice to Mr Studer during the mediation was justified, based on the commercial considerations alone; and

• the settlement was not brought about by any undue pressure. If the solicitor had used any "pressure", he did so appropriately and did not overbear Mr Studer's free will.

His Honour commented that, although the law does not require them to be "paternalistic", "it still is the rule that it is proper and appropriate for solicitors to put pressure on clients to do what is, in the lawyer's view, in the client's own interest."[2]

Appeal

Mr Studer appealed unsuccessfully to the NSW Court of Appeal. The court was satisfied that the solicitor acted with due care and skill and that the advice he provided to Mr Studer was sound. Even if the solicitor had brought "considerable pressure"[3] to bear, he did so in Mr Studer's best interests.

Fitzgerald JA agreed with Handley JA's decision, but helpfully set out some general principles. His Honour proposed that: "good advice does not have to be 'the right' advice: it need only be advice that a person with the special skills of a solicitor could reasonably have given;

• good advice should not just be about the law: advice about settlement can and should usually also encompass commercial considerations; and

• the final decision is the client's: although it is in the public interest for disputes to be compromised whenever possible, a solicitor must not coerce a client into settlement.

His Honour also said it was perfectly appropriate for a solicitor to give a client their opinion about which of the available options was most advantageous.

Other cases

Solicitors with an interest in this topic may also like to read the Victorian decision of *Cassar v Pendergast,*[4] which involved similar allegations to *Studer*. The court found that the solicitor had not placed any pressure on the client, but the case is useful to show how detailed contemporaneous file notes can assist a solicitor to prove that a client made a free decision; and *Emmett v Emmett* (No. 2),[5] in which Watts J of the Family Court had no difficulty accepting that a solicitor might sometimes need to pressure a client. His Honour dismissed an application to set aside a property settlement on the grounds of duress, commenting: "The pressure that was placed upon her by her lawyers did not go beyond legitimate encouragement towards a course of action that … [they] … firmly believed was in her best interests."

ENDNOTES

1. First instance: BC9807363, unreported, Young J, 21 October 1998. On appeal to the Court of Appeal: [2000] NSWCA 263 per Handley, Sheller and Fitzgerald JJA. Mr Studer sought, but was refused, special leave to appeal to the High Court of Australia.
2. {2000} NSWCA 263 at [73].
3. Ibid at [53]
4. [2010] VSC 559
5. [2010] FAMCA57

Practical Lessons

If you find yourself dealing with a client who is reluctant to accept your advice, take steps to protect yourself by:

• being sensitive to any factors personal to the client that might make it difficult for them to accept particular advice;

• outlining all of the options reasonably available to the client and explaining the costs, risks and benefits of each;

• keeping a detailed file note of verbal advice and instructions, confirming them in writing and arming yourself with a witness for difficult encounters; and being forceful and direct, within reason, with clients who provide you with imprudent instructions. Don't be afraid to ask: "Do you know what I would do?"