

# Settlement perils and client regret: what can solicitors do to protect themselves?



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**T**he prospect of a client experiencing settlement regret is never far from the minds of litigation lawyers. This is especially true where the client's decision to settle may be emotionally charged or influenced by financial difficulties.

Ultimately it is the client's decision whether or not to settle an action. But what do lawyers need to be mindful of when advising a client in such circumstances? And what can a lawyer do to protect themselves against a professional negligence claim should their client change their mind?

## **Johnson v Firth [2021] NSWCA 237**

These questions were considered in the recent case of *Johnson v Firth*. The client suffered injuries in a motor vehicle accident. He retained the solicitor to act on his behalf in relation to a compensation claim.

The client was in financial difficulties and repeatedly expressed his desire for an early settlement. Following an unsuccessful settlement conference, he gave instructions to settle his claim for \$500,000 (inclusive). Proceedings were at an early stage and medico-legal opinions had not been obtained.

Prior to the settlement conference, the solicitor provided written advice to the client that 'Ultimately the important thing to remember above everything else is that if you are not happy with what they are offering then you do not have to take it' (at [37]).

When discussing the post-conference offer with the client, the solicitors' diary note recorded he advised that 'if he proceeded further he could get more' (at [44]) and he should take his time to think about it. This advice was confirmed in writing.

Almost two years later the client commenced proceedings against the solicitor for damages for professional negligence, claiming the solicitor settled his claim prematurely and at an undervalue. The claim was dismissed as: (i) the solicitors' conduct did not depart from competent professional practice and

## **Snapshot**

- The prospect of a client experiencing settlement regret is never far from the minds of litigation lawyers.
- The recent case of *Johnson v Firth* [2021] NSWCA 237 considered this topic.
- While it is ultimately the client's decision whether or not to settle an action, lawyers can take steps to protect themselves against a professional negligence claim should the client change their mind.

thus no breach of duty of care was established, and (ii) the client did not establish causation of any loss.

In unanimously dismissing the appeal with costs, the Court considered breach of duty of care and causation. As to breach of duty of care, the Court confirmed the primary court's finding and considered:

- due to the client's dire financial circumstances, he made it abundantly clear he desired a quick settlement;
- the solicitor did his utmost to discourage the client from settling at a serious undervalue, including offering loans to the client on a number of occasions;

- the solicitor's advice that ordinarily they would have liked more time to prepare for the settlement conference including obtaining medico-legal opinions;
- the solicitors' advice that the client did not have to accept any offer and might improve his position by waiting for a medico-legal report, but that it might also be adversely impacted by the discovery of certain information by the insurer;
- the ultimate settlement figure of \$500,000 was far from being so unreasonable as to warrant a warning against acceptance.

The Court concluded there was no breach of duty of care and even if there was, causation was not established because whatever the advice, the client still would have accepted the best offer available in the short term.

## **Practice tips**

- Document settlement discussions with clients in contemporaneous file notes, and confirm advice/ instructions in writing;
- Provide the client with clear advice (in writing) with respect to any settlement offer, including whether or not the client may improve his/her position by waiting;
- Make it clear to the client that the decision to settle or not is ultimately theirs;
- Ensure that advice to the client is understood and obtain the client's informed consent to settle any action. **LSJ**