Episode 49

Settlement regret: Why solicitors still get burned

Intro

This is Risk on Air by Lawcover. Today's episode: Settlement Regret. Welcome to Risk on Air. I'm Julian Morrow and today we're joined by Melissa Fenton, a principal at Gilchrist Connell, to talk about settlement regret. Melissa's got close to 30 years' experience in giving advice about multi-party litigation and dispute resolution.

Julian: Melissa, welcome to Risk on Air.

Melissa: Thank you, Julian, great to be here.

Julian: It's great to have you. Now settlement is something that's usually a very desirable way of avoiding the perils of litigation and hopefully means that it's game over, but it's not always the case for solicitors. Why are solicitors vulnerable, Melissa, to claims about the settlement or, I suppose, the non-settlement of litigation?

Melissa: Yeah, it's a really great point and it's vexed as litigators. When clients and solicitors build their relationships, it's usually because something stressful is happening in the client's life. There might be a financial challenge or a dispute, or there may be a marital breakdown or a death in the family or a personal injury even. So, the clients are seeing solicitors in an anxious, fraught state. On top of that, many people aren't aware of the cost and delay, I guess, of litigation, so the processes are not known to them. So there's a real disconnect between what solicitors do and what their clients' expectations might be

Julian: And they often have this very naive idea that they might get justice and total vindication.

Melissa: That's it. It is the pursuit of justice and then there's the reality. So that does make solicitors really vulnerable then to trying to encourage clients to settle, because then you have some certainty… but then post-settlement often a bit of regret about actually settling maybe for terms that they weren't entirely happy with. So solicitors are really vulnerable in relation to that. There's also in litigation lots of peaks and troughs, so there are points in the journey of litigation which are fraught with stress for clients - so mediations or going to court, they're all really intense events.

Julian: And also, the tempo of whether it's a mediation or that sort of seconds to midnight, clock ticking as you lead up to a hearing date often means that there's a bit of a rush that comes on when settlement happens. That's good in terms of the potential to actually conclude a deal, but I suppose it comes with risk as well.

Melissa: It comes with a lot of risk, but there's things that solicitors can do to protect themselves in that situation. But you're right, the risks of deadlines approaching and there's nothing more risky than actually being in a hearing in court. Different witnesses will give evidence. Your prospects might look better or worse one particular day depending on what one witness says or doesn't say. It's very high anxiety.

Julian: So, what tips would you have for solicitors who are particularly keen to avoid these vulnerabilities and the possibility of a claim against you because of this rush of settlement?

Melissa: There are so many things we can do to protect ourselves - one is, I mean and this is an overarching mission I think that all solicitors should have, manage your client's expectations. So try to explain in advance what is likely to happen. So, for example, if you're going to a mediation, the decision will have to be made on that day, so you want to arm your client with all the information they need in advance so that they are equipped to make that decision. Give them a range of settlement - people who know mediation language will talk about the Zone of Possible Agreement, the ZOPA - so talk about those things beforehand what might be realistic, what's unrealistic. Get your client to think about it in advance, so it's not new information. The second thing that you can do that's also really encouraged and Lawcover is constantly reminding us about this risk message - document and record your advice, so keep giving advice, make sure it's in writing. Often, if you're having a conversation with your client, or even on the telephone, follow up with an email. Then you've got the advantage of having the date and timestamp, so there's no question about when or what you said, and it also gives the client the opportunity, if they thought you said something else or they didn't understand, to come back with a question or query.

Julian: Yeah, so two levels there. There's the sort of the contemporaneous file note, having a record yourself in the file but then also actually sending a follow-up communication that sets it out in black and white and, I suppose, also being aware of the different ways that clients communicate. Some people are very good in the written word and others probably you really need to sit them down and have an eye-to-eye conversation.

Melissa: Yes, yes, and, like I said, you might do both and you might give your... I've been in situations where we've been in a mediation, we've made offers, we haven't quite got there at the end of the day and the solicitor on the other side will say to me could we have overnight? My client needs to think about this, we probably want to put a written advice to the client, so will you leave the offer open? I mean, and that's a really sensible thing to do.

Julian: Yeah, absolutely. And I suppose when you're dealing with settlement offers there's kind of two levels of risk, aren't there? There's the will you win or lose the overall outcome, but what are the costs implications of not accepting a settlement offer - and that itself is something that your average client, if they're not an experienced litigant and you hope for their sake that they're not, that can be a whole other thing to get your head around.

Melissa: That is a really significant part. In fact, cost is a huge issue even for the initial settlement, because there'll be the solicitor's costs that will form part of the decision-making on the day. But then you're right if an offer is made but somebody doesn't accept it or makes a counter-offer, there might be consequences that flow from that. There's lots of decisions on this issue, but there's a decision recently in *Odlum v Friend*.

Julian: Yeah, that was a case of the New South Wales Court of Appeal in July 2024. What was going on in *Odlum v Friend*?

Melissa: Well, it was a property adjustment proceedings between an estranged husband and wife.

Julian: So there you go, high emotions straight away.

Melissa: Yes, exactly, and what was before the court was the solicitor's file and it was pretty evident looking at the communications between the solicitor and the client that she operated at a heightened level of anxiety and that it was quite difficult to get instructions from her. She messaged that it was very difficult for her to understand so I think in that scenario, as solicitors, we have to be attuned to the way we communicate with clients. People have different communication needs, and some clients might need you to be a bit slower in how you communicate or a bit more repetitive, or maybe try to explain things in a few different ways so that they understand.

Julian: And I think in that case the communications from the solicitor were fairly frank in terms of the recommendations and the potential costs implications. But even that didn't seem to have the desired effect.

Melissa: No, and you know that's a really good point you make. When I read this decision too, there were excerpts from the solicitor's correspondence and it was absolutely frank. I think one of the quotes was your instructions are not good enough, and I thought that's fairly clear. But what the solicitor had done was communicated to her a costs offer that had been made by her ex-husband. She had rejected the offer. The solicitors had encouraged her to make a counteroffer and explained the reason for that was to protect against an adverse costs order down the track. She rejected the advice, didn't make a counteroffer. Luckily, her husband then made another offer on costs, but for a lower amount so, it had actually a good effect. But again, she didn't want to accept that offer on costs and they had to then go to the Judge, and he made a determination about the costs, which ultimately gave a much more generous award to the husband. That was what caused her to be dissatisfied, and she then sued her solicitor and her barrister saying that they hadn't advised her properly.

Julian: And it went to the full Court of Appeal.

Melissa: Yes

Julian: And I think Ms Odlum was self-represented at that level. One of the things that's really striking from that judgment was the different perceptions about what had been lost in the case, because it seemed pretty clear that Ms Odlum was really focused on the fact that she'd lost - proverbially lost the house - and that was the scale of losses that she had in mind. But then when it came to assessing the costs and the losses from that, it was a very different scale, it was much smaller. It was just the difference between the two offers.

Melissa: Yes, but I think that highlights beautifully the attachment and the emotion that clients come to litigation, which is completely separate to the law and the way we operate in terms of what's reasonable for a property settlement in a breakdown of a marriage. But she, by arguing that the costs weren't explained to her, she wanted to somehow seek also then the lost opportunity of buying her husband out of the property, which was actually never realistically, from my reading of the judgment anyway, a possibility.

Julian: So it seems like the lawyers in that case - well, ultimately they were successful, twice successful. In terms of the tips that you were giving us before the solicitor and the barrister in that case, how did they fare in terms of the records that they kept, or where were the sort of the pinch points in the case that maybe left open some possible holes that they didn't think were there?

Melissa: Yes, and that's what's so good about judgments, actually, for the brave people who actually proceed to trial we do get a little bit of insight into what is a good way to protect ourselves. What the solicitor did here, which was no doubt the reason why he was able to successfully defend the claim, he had really detailed written advices, so it seemed from the judgment that he had a pattern of having a telephone conversation with his client. He then followed that up with a letter of advice or an email, and he actually then asked her to sign advices as well as an acknowledgement that she understood the advice.

Julian: You got the impression that perhaps the solicitor saw that there was a problem brewing here.

Melissa: You know that's, I absolutely think he would have been alive to that. And again, that's a good solicitor - you've got to read your client and we can generally feel when there's something that makes us a bit nervous about an unhappy client or a complaining client - they sort of ring the alarm bells.

Julian: Yeah, if you have to send the letter that says you refuse to follow our advice, but still want to instruct us.

Melissa: Yes, and then I think she asked for an opinion from another barrister.

Julian: Yes.

Melissa: So, yes, when you're armed with that, it makes it fraught with difficulty. The one thing that did create a trap for him which I'm sure he will probably, with hindsight, never do again - when there was argument about the second costs offer and what advice he may or may not have given, his testimony was different to hers. He said he gave advice on that second offer before they went into the costs hearing. She says it was after, and she pointed to the language that he'd used in the file note to say it was past tense. And of course he then didn't give me that advice prior to the costs hearing. A simple time on the file note would have alleviated any of that argument - so another top tip is if you are taking a file note, date and time it.

But yes but, luckily for him, the primary judge, Justice Kavanagh, decided that he had to look at how he presented himself in the witness box versus how Ms Odlum presented, and he, on balance, preferred the evidence of the solicitor.

Julian: So, not only making contemporaneous records, but making them in a way that there's evidence that they were contemporaneous.

Melissa: Yes, that's right, and it's really hard when you're in the moment. I know mine get pretty messy.

Julian: Well, they start off quite well at the beginning of the meeting and then, as the meeting goes on which is of course when the settlement gets to the pinch point, it gets a little bit more cursory.

Melissa: Yes, and you just dot, point, dot, point, dot point. But again your point about you know, recognising the client and knowing the clients, where you really need to be very particular about what you're recording.

Julian: What about in terms of exactly what you advise about the settlement? I mean, to some extent, the calculation of what you're likely to recover compared to the costs, that might be an easier thing to formulate at one level. What about the broader question of pros and cons of settlements?

Melissa: That's a really, really good point because in fact there was a really interesting decision, it's a couple of years old now, from Victoria, but the solicitor was criticized by the judge for focusing on all the risks of the case when he was advising the client, rather than the strengths. And I think there is a propensity in solicitors to you know, we are risk averse generally by nature and no one wants to lose. No one wants to lose a case. So we focus on all the risks and maybe do that to the peril of actually saying there's some really good points to your case and focusing on the strengths. So, it is definitely part of our duty when we're advising on settlement to talk about the pros and the cons, the risks and also the strengths, but also if there is a likely range - we talked about that ZOPA before - but the equivalent, you know, looking at the likelihood of you know you succeeding on this argument and then what does that translate into in terms of costs or damages?

Julian: What about the idea of getting a second opinion? I mean, it can be difficult if you're in a time critical situation, but I suppose it's always reassuring when lawyers have that sort of accumulated sense of what the zone is for this. If you sort of show your cards and someone else has a card that's pretty similar, that's reassuring.

Melissa: Yeah, I think so. I mean I think a lot of practitioners will engage counsel and then independently ask them to assess what they think the claim is worth. I think that's really smart. It doesn't mean we as solicitors can abdicate our views, like we might not agree with counsel, but it's, I think, a really good exercise to get that second opinion. And back to the file notes that we were talking about, dating them, if you are maybe in a mediation context or in a trial, if you do have a barrister there, you know you've got another witness to any conversations you might be having. So that's another sort of benefit, if you are having those heightened emotional discussions about whether or not you settle, maybe have the barrister in the room at the same time.

Julian: Yeah, so great to have another person present for witnessing and corroboration purposes, and if it's a barrister as well, that's particularly handy if you're on the verge of going to trial. What about advocates' immunity as we get closer to a trial, when does and doesn't that kick in?

Melissa: That's a great question. In 2016, the High Court delivered its decision in *Attwells v Jackson Lalic*, which really clarified the extent of that immunity, and it really is limited to work done in court or that is intimately connected with work done in court. So, before that decision, it was pretty much the experience in New South Wales that if a barrister and a solicitor were in a settlement, that would be protected to some extent by immunity. But after that High Court decision in Jackson Lalic, it's clear and accepted that the immunity does not extend to advising on settlement. So, no one is protected, and the best way to actually protect yourself is to do the things that we talked about - good file note keeping and managing your client expectations.

Julian: When you reject an offer, are there particular things you need to bear in mind in communicating that rejection?

Melissa: Yes, so the cost consequences, which is really what Ms Odlum was unhappy about when she decided to sue her solicitor in the matter we were talking about. If you reject an offer, there could be cost consequences and the cost consequences generally for most litigators, they know that if that offer is then beaten at trial, you may be faced with an indemnity cost order, which is a significant amount of money.

And you also just lose control of the proceedings. It's much better to be able to negotiate an outcome that you can live with, but yeah, so rejecting an offer can have significant consequences.

Julian: When you talk about beating an offer, is that always considered in fairly narrow financial terms? What if there are other factors, something like an apology, which might have a personal value but it's harder to put a financial value on? How do you go about sort of comparing different elements within a settlement?

Melissa: That's a great point, because it does tend to boil down to financial consequences. I mean, that's the way that you can apply cost orders, but the settlement could be anything. It could be an apology, it could be an agreement to do something else, to sell something or buy something. So, it can be difficult, and I think for the underlying decision in the *Odlum v Friend* case, which was the property proceedings, it was quite difficult to actually calculate what the financial total of the offer was, because there were so many components. And so definitely too in my experience with personal injury as well, you might have many heads of damages that all might have different amounts. So, there can be quite a bit of working out that goes into you know what is a good offer or what should be rejected. I don't think that making an error in that context is going to be fatal for a lawyer, if they have explained the rationale for their advice. We're not supposed to be perfect. So I think if you're at least able to explain why you think an offer is good or should be rejected and the rationale for it, that would probably be acceptable.

Julian: One of the things that we were saying is really striking about some of the correspondence from the solicitor in the Odlum case is how blunt it was. Obviously, it can be very hard to pull all the different strands of a settlement together. How do you think about the question of how much do you push on a client to try and get a settlement?

Melissa: That is a great question too. There was another case I think I mentioned it before in Victoria where a client sued his solicitor saying that he pressured him, he pressured him to settlement, and there was a very long and convoluted history to that matter, but what ultimately happened is, maybe a month before a trial, a new solicitor stepped in and tried to convene a mediation and the client then in hindsight said, no, he wanted me to settle because he wasn't prepared for the trial so he put extra pressure on me. So there is that risk - I think what I tell the people that I work with is you know, your job is to advise and it's the client's job to decide - so we advise, they decide. Pressure is okay, as long as you're, you know, not the one making the ultimate decision. I think Mr Friend did that in that case with, like you said, the correspondence. He said you know, I really think you should take this. There are costs risks. Our barrister thinks you should accept this too. You can't do any more.

Julian: Well, it's been great discussing settlements with you, Melissa. Any final words for solicitors who are still stressing about this area - what's the one thing you'd want them to take home from this?

Melissa: Just manage your client's expectations, communicate and document. They're kind of the key takeaways.

Julian: Melissa Fenton. Thanks so much for being part of Risk on Air.

Melissa: Thanks very much, Julian.

Outro

Thanks for listening to Risk on Air by Lawcover and to stay up to date. Join us for the next episode on current risks in legal practice.

Resources:

Odlum v Friend [2024] NSWCA 159