

Lessons in **communication**



Clear and documented communication can prevent costly mistakes and claims

The failure of solicitors to properly communicate with clients to ensure they share the same understanding is a common underlying cause of claims. Obtaining instructions, and providing advice “on the run”, is another very risky practice.

Recently, a solicitor acted for a client in relation to a commercial dispute involving several properties, leases and guarantees. The dispute was resolved by way of mediation with all parties seemingly pleased with the outcome. However, on advice from the solicitor, the client did not attend the mediation in order to avoid possible confrontation between the underlying parties. The Deed of Release was signed by the solicitor on behalf of the client.

Subsequently it became apparent that the terms of the settlement did not accord with the client’s understanding of the areas of the dispute which had been resolved.

The client made a claim upon the solicitor alleging that he had intended the settlement to encompass a wider range of issues which were indirectly related to the principal dispute. His

alleged loss was due to him remaining exposed to certain liabilities which he thought had been extinguished by the settlement.

The basis of the claim was that the solicitor had breached his duty in failing to obtain proper instructions leading up to the mediation and in failing to properly explain the effect of the proposed settlement during the mediation. The client was then in the unsatisfactory position of being in dispute with both his solicitor and the other party to the underlying commercial matter.

Communication clarity

In this instance, it was apparent that there had been a lack of clear communication between the solicitor and the client in relation to the mediated settlement. While both the solicitor and the client may have contributed to this from a potential breach of duty perspective, there is a very high onus on a solicitor, as the professional adviser, to obtain detailed, clear and concise instructions of the client’s intentions and to either implement them, or explain if that cannot be done.

The position of the solicitor was not assisted by his lack of properly recorded file notes or correspondence to the client confirming instructions. Additionally, in the context of a mediation in which all parties were

pressing to settle, much of the discussion or contact between the solicitor and the client was at the last minute.

In such circumstances, it was considered that the solicitor faced a potential liability exposure due to his inability to clearly substantiate his instructions from the client. The claim against the solicitor was ultimately resolved, but only after a protracted dispute and further mediation involving all parties.

To avoid ambiguity, or costly misunderstandings, communication with clients must be clear and well documented at all times.

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