Mediation Lessons from the Cases – Part 3

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Court cases are an important source of guidance for mediators, disputants and their lawyers. They remind us that the law casts a long shadow even when a mediation appears to have resolved successfully.

They can rescue us – helping us **identify** and **avoid** previously unforeseen difficulties.

Here's an example

Mr. and Mrs. Studer moved from Switzerland to Australia and in 1984 Mr. Studer purchased some 20 hectares of land for $A82,000. The contract of sale noted that the land was subject to 3 unregistered leases. Mr. Studer negotiated the departure of 2 of the lessees. The remaining tenant, whose rent was $A1 per year, had an option to renew her lease and an option to purchase her portion of the land. She had built a house there. She had also lodged a caveat (a warning, registered on the certificate of title, to intending purchasers, such as Mr. Studer, of her priority interest in the property).

In order to allow Mr. Studer to become the registered owner of the whole of the land, the tenant removed her caveat at his request, claiming this was on the express basis that it would be reinstated afterwards, thus protecting her interest in the land. However, once registered as the owner, Mr. Studer took steps to evict the tenant, claiming she was occupying an illegal house on an illegal subdivision.

The tenant sued to set aside the registration, alternatively compensation, claiming she had been induced to remove the caveat by fraudulent representations.

The mediation

In May 1991 the dispute went to mediation before a retired judge. Mr. Studer was represented by a barrister and a solicitor.

A shuttle mediation followed opening statements.

The retired judge circulated, making suggestions and trying to resolve the matter. After 8 to 10 hours, Mr. Studer agreed to pay the tenant $A100,000 by instalments, secured by a mortgage. In due course he was unable to pay the instalments and had to sell the property.

The proceedings against the lawyers

In 1992 Mr. Studer sued both his lawyers.

He settled the claim against his barrister. He claimed his solicitor had put undue pressure on him to settle, alternatively failed to make a proper assessment of the parties' respective cases, as a result of which the solicitor advised him to make a settlement that he should never have made.

At trial the solicitor said he had advised Mr. Studer that, win or lose, he would end up $A100,000 or more out of pocket and that the retired judge had said it was quite plain that the case was not going to settle unless Mr. Studer made an offer of at least $A100,000. Mr. Studer said part of the pressure put on him was that he was told that the mediator was not available after 4 o'clock.

It was argued for Mr. Studer that:

- he fought like a tiger all day until all the life went out of him and he capitulated under pressure; and
- he did not have his wife with him at the mediation and that it was she who had made a lot of the running in the case. Mr. Studer gave evidence that: "My wife knew more but she didn't want to come along".

In October 1998 the trial judge dismissed Mr. Studer's claim, finding that his will had not been overborne; that the solicitor had not unduly pressured him; and that the solicitor's advice to settle was based upon a proper assessment of his case.

Mr. Studer appealed

In November 2000, the appeal was dismissed.

The Court of Appeal held that the solicitor acted with proper care and skill in preparing for and conducting the mediation and that his firm advice to settle on the available terms was sound. The solicitor had not overlooked anything, had appreciated the serious difficulties in his client's case and acted professionally and properly in the best interests of his client in bringing pressure to bear upon him to settle on the best available terms.

So what might be some lessons?

For lawyers: it is permissible to put pressure on clients to settle, so long as the pressure is appropriate in all the circumstances, having regard to an accurate assessment of the strengths and weaknesses of the client's case.

[Not an easy test to be confident of satisfying!]

For disputants: even if you have unqualified authority to settle, do not hesitate to bring along as a "support" person someone whose approval of any eventual resolution would make it easier for you to make the decision and to live with it.

For mediators:

- although private sessions can frequently help mediators see room for movement where everyone else is stuck, spending most of the time shuttling can inhibit opportunities for the disputants themselves to restore relationships and find creative solutions. Excessive shuttling often occurs where the mediator is a traditional litigation lawyer, some of whom have had no mediation training and accreditation and who see the dispute solely in terms of the merits and likely costs of the court case. One wonders whether there was any discussion in the mediation between the parties themselves;
- ensuring beforehand that all the **"right"** people will be there. Although Mrs. Studer was not on the title as owner and thus was not needed as a signatory to the settlement agreement, she clearly had a very significant interest in the outcome. One can only imagine the conversation when Mr. Studer got home and reported that he had been induced to settle for more than what it had cost to buy the entire block of land. Had Mrs. Studer been present at the mediation and had she heard the advice given by the lawyers and had opportunities to question them, the subsequent proceedings against them might never have happened; and
- rather than announce during the mediation that you won't be available after 4 o'clock, set aside (at least) the entire day, start as early as possible and be prepared to continue into the night if that is what the parties want.