Powers of Attorney – an ‘enduring’ source of liability for solicitors

\[\text{Greg Couston is a partner at HLS; Gates and Tony Reynolds is a claims solicitor at Lawcover}\]

Powers of Attorney continue to generate difficulties for the community generally, and for lawyers in particular. The Australian Law Reform Commission (in its discussion paper on elder abuse) said that Powers of Attorney were being used by some as a licence to steal.

A number of LSJ articles have provided useful guidance for lawyers on matters which require consideration at the time a Power of Attorney is created and signed (e.g. a lawyer’s duties to the principal, ambit of the proposed power, capacity, undue influence etc). There are also particular issues which require a lawyer’s careful attention at the time when transactions are entered through, or with the assistance of, a Power of Attorney.

Of course, many transactions undertaken pursuant to a Power of Attorney are relatively straightforward. However, particular issues and difficulties arise with ‘hazardous’ or improvident transactions; and with transactions involving a gift, a transfer of property without full consideration, or a transaction under which the attorney receives a benefit or in which the attorney has an interest.

Ambit of power

Practitioners will be aware that the form prescribed pursuant to a Power of Attorney is relatively straightforward. However, particular issues and difficulties arise with ‘hazardous’ or improvident transactions; and with transactions involving a gift, a transfer of property without full consideration, or a transaction under which the attorney receives a benefit or in which the attorney has an interest.

Powers of Attorney are constrained by limitations expressed in the Power itself. There are, however, additional restrictions imposed by the general law upon the ambit of a Power of Attorney.

These restrictions are particularly relevant in the context of both transactions in which the attorney has an interest.

Ordinarily, in effecting a transaction under the authority of a Power of Attorney, a solicitor will owe a duty of care (at least) to the principal who granted the Power.

Power of Attorney to his wife. The husband then lost capacity through Alzheimer’s. Prior to the husband’s death, the wife transferred one of the farming properties to the daughters for nominal consideration.

The starting point is to identify the lawyer’s client, or the person to whom a lawyer may owe a duty of care; as well as the nature and scope of the lawyer’s retainer.

Ordinarily, the lawyer will owe (at least) a duty of care to the principal. This arises because, in the usual circumstances, the lawyer will undertake a transaction dealing with the principal’s property and/or rights; and in doing so, will take instructions from the attorney (McFee at [110]).

A solicitor should appreciate the fundamental necessity of recognising that the interests of the [principal] could not simply be equated with the interests of the [attorney] (Reilly at [403]; see also McFee at [159]).

Where there was inconsistency between the interests of the principal and the attorney, the solicitor is ‘under a duty to warn … the [attorney] of risks associated with the [proposed] course’ (Reilly at [405]).

‘If, duly warned, [the attorney] persisted in instructions to take that course [in conflict with the interests of the principal] they were under a duty to decline to act for the attorney’ (Reilly at [405]; see also McFee at [176]).

Conclusions

The Reilly case dealt with a Power of Attorney in the previous Conveyancing Act form, which had been amended by the parties. Practitioners will be aware that the standard form of Power of Attorney under the Powers of Attorney Act 2003 contains provisions which authorise the attorney to make reasonable gifts, and/or to confer benefits on the attorney or a third person, to meet their reasonable living and medical expenses. These powers are defined and substantially qualified by s 1–13 and Schedule 3 of the Act.

It is essential for lawyers to recognise that, in most cases, the lawyer will owe a duty of care to at least, the principal of the Power of Attorney; and is required to critically examine the instructions of the Attorney.

An additional aspect of the Reilly case involved the technical question of whether the solicitor owed a duty of care to the son. The Court concluded that, where the solicitor was retained for estate planning purposes in the context of an incapable person, the solicitor did owe a duty of care to the son (being a beneficiary under the will of the incapable person).

The Reilly litigation is a timely reminder to practitioners to be watchful for transactions and circumstances in which an attorney’s instructions concerning a proposed transaction generate fiduciary problems for the lawyer, and have the potential to create liability risks for the lawyer.