

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

■ BY GREG COUSTON AND TONY REYNOLDS



Greg Couston is a partner at K&L 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 the *Powers of Attorney Act 2003* (and its regulations), and the predecessor form under the *Conveyancing Act*, confer upon an attorney a power which is stated in wide and general terms:

‘My attorney may exercise the authority ... to do anything on my behalf that I may lawfully authorise an attorney to do’.

The Power of Attorney may contain some express conditions or limitations. An important issue for practitioners is that the general law also imposes restraints and limitations on the ambit of Powers of Attorney. This arises in two particular dimensions:

- First, the courts have traditionally construed Powers of Attorney strictly and narrowly (see *Tobin v Broadbent* [1947]

Snapshot

- 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 improvident or risky transactions, gifts and 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.

75 CLR 378 and *Sweeney v Howard* [2007] NSWSC 852 but note the contrary views of Justice Hamerschlag in *Spina v Permanent Custodians* [2008] NSWSC 561).

- Second, an attorney holds his/her power and authority as a fiduciary, and owes fiduciary obligations to a principal in exercising the power.

This second aspect was the subject of detailed consideration by Justice Lindsay in *Reilly v Reilly* [2017] NSWSC 1419 (*‘Reilly’*), which was upheld by the Court of Appeal in December last year in *McFee v Reilly* [2018] NSWCA 322 (*‘McFee’*).

Reilly v Reilly

The Reilly family operated farming properties. The husband granted an enduring 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 Supreme Court found that this was contrary to the wishes previously expressed by the husband.

The plaintiff in the proceedings was the son who, but for the transfer, would have received the property pursuant to the father’s will.

The Power was in the previous *Conveyancing Act* form, with some amendments.

Justice Lindsay made a number of statements of general principle concerning Powers of Attorney:

- ‘[T]he relationship between ... principal and attorney [is] a fiduciary one, a consequence of which [is] that the [attorney] is obliged not to place herself in a position of conflict, nor to obtain a profit or benefit from her fiduciary position, without first obtaining the fully informed consent of the [principal]’ (at [111]).
- ‘The primary object of a power of attorney is to enable the attorney to act in the management of his or her principal’s affairs; an attorney cannot, in the absence of a clear power so to do, make presents to himself or herself or to others of his or her principal’s property’ (at [114]).

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[T]he Court concluded that the wife had committed a ‘fraud on the power’. The transfer ... had been made for the purposes of giving effect to the wife’s own personal views of what was fair ... and not for the purposes of advancing the interests (or for the benefit) of the husband.

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- ‘[I]t is a breach of duty for an agent to exercise his or her authority for the purpose of conferring a benefit on himself or herself or upon some other person to the detriment of his or her principal’ (at [115]).
- A Power is ‘qualified by the fiduciary obligation of loyalty’. This includes ‘an obligation to exercise the power of attorney *bona fide* and not for any improper, foreign purpose (that is, an obligation not to commit a “fraud on the power”)’ (at [125]).

In the *Reilly* case, the Court concluded that the wife had committed a ‘fraud on the power’. The transfer of the property to the daughters was contrary to, or inconsistent with, the husband’s prior wishes. The transfer had been made for the purposes of giving effect to the wife’s own personal views of what was fair as between siblings, and not for the purposes of advancing the interests (or for the benefit) of the husband. The transfer was ‘for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power’ (at [127]).

The Court of Appeal agreed with Justice Lindsay and found that the wife ‘was in her capacity as [the husband’s] attorney seeking to do what *she* thought was in the best interests of the family, rather than what was in [her husband’s] interest. That did not permit her to cause [her husband] to enter into an improvident transaction, giving away his most substantial asset’ (*McFee* at [63]).

The claim against the solicitor

The plaintiff in the *Reilly* litigation also sued the solicitor who had acted on the transfer of the property. The plaintiff succeeded against the solicitor.

The trial judge, and the Court of Appeal, made some general statements as to factors which impact on a lawyer’s position and duty:

- 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 circumstance, 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 ss 11–13 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 attorney, and have the potential to create liability risks for the lawyer. **LSJ**