Powers of attorney: recent case law

By Catherine Cheek

Ede v Ede [2006] QSC 378 (13 December 2006)

This case addressed the obligations of an attorney to avoid conflict transactions. Section 73 of the *Powers of Attorney Act* 1998 (Qld) states that an attorney may enter into a conflict transaction only if the principal authorises that transaction or transactions like it, or authorises conflict transactions generally. Section 73 defines conflict transactions as:

'a transaction in which there may be conflict, or which results in conflict, between –

a) the duty of an attorney towards the principal; and

b) either –

i) the interests of the attorney, or a relation, business associate or close friend of the attorney; or

ii) another duty of the attorney.'

The court may excuse attorneys from liability for breaches of their obligations under the Act, if they act 'honestly and reasonably and ought fairly be excused for the breach' (s105(1), *Powers of Attorney Act* 1998).

In this case, the defendant was the plaintiff's son and the attorney under a valid enduring power of attorney (EPOA). The plaintiff developed dementia, lost capacity and ultimately moved into a nursing home. The plaintiff owned a house in Bardon and a holiday home at Beachmere.

A few months after the plaintiff moved into the nursing home, an officer of the Office of the Adult Guardian criticised the defendant for not managing the plaintiff's assets properly. The defendant consequently decided to sell the holiday house. The property was valued due to Department of Veterans' Affairs requirements at $85,000 and, shortly after, by a different valuer at $75,000 if about $10,000 was spent on it.

The defendant's daughter expressed a desire to purchase the property.

The instrument that created the EPOA said the following in relation to conflict transactions:

'You must not enter into transactions that could or do bring your interests (or those of your relation, business associate or close friend) into conflict with those of the principal. For example, you must not buy the principal's car unless you pay at least its market value.'[1]

The example in s73(2) of *the Powers of Attorney Act* 1998, however, is significantly different, because it does not countenance unauthorised conflict transactions, even where market value is paid:

'A conflict transaction happens if an attorney for a financial matter buys the principal's car.'

Because he was concerned about breaching his duty as an attorney, the defendant sought clarification of the meaning of 'market value' in the EPOA instrument from the Office of the Adult Guardian, which advised that he needed a certified valuation. He also consulted a financial planner and obtained legal advice. The legal advice was that the transaction would not breach his obligations if the sale was at a fair market price on a current valuation. The defendant had the property re-valued by the same valuer who performed the second valuation. The valuation was the same. The defendant queried this but was told that the valuation was accurate. The defendant also did his own investigations as to property values in the area and was satisfied with the result. The defendant's daughter then purchased the property for $70,000 – that is, the value less half the estimated cost of making the property marketable, saving the cost of an agent's commission.

At trial, the defendant admitted that he had acted in breach of his authority under the EPOA by entering into a conflict transaction because it had not been authorised by the plaintiff, although he was not aware that he was in breach at the time.

Muir J found that the plaintiff had suffered a loss and that the market value was $110,000, although the agent's commission should be deducted. The plaintiff led evidence of a valuation of $140,000.

Muir J found that the defendant had acted honestly and reasonably but was nevertheless liable for the loss. His Honour held that, where an attorney (or his or her relation) benefits from a conflict transaction, the court will not readily excuse liability for the breach under s105. >>

Janson v Janson [2007] NSWSC 1344 (23 November 2007)

This case was about undue influence in the context of a power of attorney.

Eric Janson, the plaintiff, was an elderly man who was profoundly deaf and nearly blind. Nearly 60 years earlier, he underwent shock treatment for a 'mental condition'. At the time the matter went to hearing, he also suffered from age-related cognitive impairment, mild dementia, memory impairment and confusion regarding recent events.

HISTORY OF RELEVANT EVENTS

1959 The plaintiff's mother transferred ownership of the family home to her three sons: Eric (the plaintiff), Adrian (the second defendant) and Robert (the third defendant). Eric lived in the house with his mother until her death in 1972.

1961 Alleged agreement by the second defendant that the plaintiff could live in the house for the rest of his life on condition that he paid all outgoings and looked after the property (the second defendant subsequently disputed the existence of this agreement). On the plaintiff's death, the property was to be left equally to the other brothers.

1981 Richard Janson (the first defendant), Robert's son and the plaintiff's nephew, became the plaintiff's carer.

1988 Plaintiff made a will leaving entire estate to first defendant.

1999 First defendant lodged a caveat indicating that the plaintiff had life tenancy.

2003 September, plaintiff moves out of the property into an aged-care facility.

2003 October, plaintiff made general power of attorney appointing first defendant as attorney. Enduring clause struck out.

2004 February, first defendant alleged that plaintiff told him that he intended to sign over his share in the property to first defendant.

2004 March, plaintiff and first defendant executed transfer of plaintiff's interest in the property to the first defendant.

2004 The daughter of the second defendant (Helen) alleged that she had been unable to locate the plaintiff for 12 months and that she believed that the first defendant had not given her letters to the plaintiff. Helen visited plaintiff on 19 September.

2004 29 September, plaintiff wrote a note saying that he intended to leave his interest in the property to the second defendant and Helen.

2004 November, plaintiff made a will leaving everything to the second defendant and Helen, a power of attorney naming Helen as the attorney and a revocation of the earlier power of attorney.

2005 September, Helen commenced proceedings as the plaintiff's tutor.

The evidence was that the first defendant looked after the plaintiff's physical and financial needs. The first defendant obtained legal advice for himself before the transfer of the property to him was signed. The plaintiff did not receive any legal advice; nor did the first defendant discuss the need for independent advice with him.

The plaintiff claimed that he had not realised that he was transferring his interest in the property to the first defendant and that the transfer had been obtained fraudulently.

THE DECISION

The court considered the following issues:

'(a) whether a presumption of undue influence by [the first defendant] arises in [the plaintiff's] favour either because of the nature of their agent-principal relationship under the general power of attorney from [the plaintiff] to [the first defendant]; or alternatively, because of the position of influence by [the first defendant] over [the plaintiff] or the dependence or trust on [the plaintiff's] part; and

(b) if so, whether [the first defendant] has failed to rebut the presumption.'[2]

At [71] – [93], Biscoe AJ reviewed numerous decisions, including *Johnson v Buttress* [1936] HCA 41 (presumed undue influence where 'one party occupies or assumes toward another a position naturally involving an ascendancy or influence over that other, or a dependency or trust on his part' per Dixon J at 134); *Brusewitz v Brown* [1923] NZLR 1106; *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; *Sprong v Sprong* [1914] HCA 52 and *Trevenar v Ussfeller* [2005] NSWSC 582.

His Honour was called on to decide which, if any, class of relationship giving rise to the presumption of undue influence existed in the circumstances of this case. The classes are:

(i) specific relationships of influence recognised by law – for example, solicitor and client; and

(ii) relationships of 'dominion and dependence'.[3]

His Honour determined that, on the facts of the case, '[the plaintiff] had a dependence or trust on [the first defendant] or that [the first defendant] was in a position of influence over [the plaintiff]'.[4] The case thus fell within the second category of relationships of 'dominion and dependence'. The facts that his Honour took into account in coming to

this conclusion were:
- the plaintiff was almost 90, without family and living in an aged-care facility;
- he was without any other property or income other than his interest in the property and his pension;
- he was profoundly deaf, almost blind and frail;
- he had a mild cognitive impairment, mild dementia and memory impairment;
- he was unable to communicate easily about his financial, legal and property affairs;
- he had a history of mental illness;
- the first defendant was his trusted carer and agent;
- the first defendant held the plaintiff's general power of attorney; and
- the first defendant was the plaintiff's sole beneficiary from 1988 onwards.[5]

The first defendant failed to rebut the presumption primarily because the plaintiff had parted with such a large proportion of his estate and he did not have 'independent, competent and sufficient advice'.[6]

His Honour found the existence of undue influence and ordered that the transfer to the first defendant be set aside.

Whitney v National Australia Bank Ltd [2007] QSC 397 (21 December 2007)

Mrs Murphy made an enduring power of attorney (EPOA) on 17 March 2003. Her attorneys accepted the appointment on 16 October 2007. Between making the EPOA and the acceptance by her attorneys of the appointment, Mrs Murphy lost capacity. The National Australia Bank consequently refused to accept the validity of the EPOA.

Lyons J held that an EPOA – in the approved form – is made when it is signed by the principal (or eligible signer on behalf of the principal) and signed and dated by an eligible witness (s44, *Powers of Attorney Act* 1998 (Qld)). The principal must have capacity *at the time of making* the EPOA.

Because making an EPOA is a unilateral decision, it is effective from the date it is made, regardless of whether the attorneys have accepted the appointment. However, the attorneys are not able to exercise their power until after they have signed the document accepting the position.

The EPOA was therefore valid. ■

Notes: **1** Contained in 'Important Notes to the Attorney' in the Queensland EPOA form. **2** At [97]. **3** See Dal Pont, G & Cockburn, T, *Equity and Trusts in Principle*, Lawbook Co (2005), p92. **4** At [99]. **5** At [100]. **6** At [105].

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