

Powers of attorney and solicitors' liability:



The case law

The 2007 ruling in the *Reviczky v. Meleknia* case put the spotlight on questions about a solicitor's duty to "go behind" a power of attorney. The case has generated discussion within various practice sectors – and among lawyers within the same practice area – about a lawyer's obligations when dealing with matters involving powers of attorney. Some argue that the ruling suggests a new standard of care requiring lawyers not to take a power of attorney at face value; others maintain what lawyers are doing now is appropriate and sufficient.

A look at case law provides some insight and direction on this question. This Casebook column examines "power of attorney" issues confronting lawyers in two parts:

- 1) preparing and explaining powers of attorney; and
- 2) transactions carried out with a power of attorney.

Preparing and explaining power of attorney

In *Thibeault v. Household Realty Corp.; Walsh, Greenberg and Robinson, third parties*, [1993] O.J. No. 2024 (Ont. Ct. Gen. Div.), Mr. Justice Binks severely criticized a solicitor who obtained the signature of an extremely ill and elderly woman on an unlimited power of attorney. The power of attorney allowed the elderly lady's daughter and son-in-law to place mortgages against her home as security for their indebtedness to Household.

The same solicitor acted for Household Realty, as well as for the daughter and son-in-law. The solicitor and the son-in-law went to the plaintiff's house and obtained her signature on the power of attorney. No effort was made to explain its meaning or the potential consequences of signing it.

The mortgages went into default and the home was sold under power of sale. In resisting Household's action for payment of the proceeds, the plaintiff relied upon the defence of *non est factum*, the failure of Household's lawyer to recommend independent legal advice, and the fact that the transaction was unconscionable. Household's solicitor was third partyed by Household, but settled

with it prior to trial. The plaintiff's action was upheld by Mr. Justice Binks on all three grounds.

The following expert evidence was adduced on the standard of care of a solicitor overseeing the execution of a power of attorney. Mr. Justice Binks accepted it:

"It is my opinion that any lawyer practising in Ontario in obtaining a power of attorney has a responsibility to fully explain the nature of the document to the person executing it. The lawyer must be in a position to be able to testify, if necessary at a later date, that there was no doubt of the fact that the person giving the power was fully aware of all the consequences. This statement is even of more importance when the solicitor has had no previous contact with the person involved, and is in fact acting on behalf of another client.

"In circumstances where the solicitor involved is acting on behalf of a client who will benefit from the execution of the document by being granted security for a debt which might otherwise be uncollectible, the solicitor has an even greater duty to the person granting the power and should insist upon that person obtaining independent legal advice."

The trial judge termed the solicitor's behaviour as "slipshod and appalling". His comments about Household's behaviour were also scathing.

In *Macedone v. CL Collins*, [1996] NSWSC 634, the Court of Appeal for New South Wales was sharply divided about the scope of the advice necessary when advising about the risks of giving a power of attorney to complete a corporate transaction.

A company controlled by Mr. and Mrs. Collins on the one hand, and Mr. and Mrs. Wallis on the other, contracted to buy a property. A lender agreed to provide the financing, provided the Collinses and the Wallises provided personal guarantees and mortgages on their homes. Mrs. Collins intended to be on holidays in the Fijis at the time set for closing. She agreed to give Mr. Wallis a power of attorney to execute the necessary documents on her

behalf. Mr. Willis, the solicitor for the borrower company, prepared the power of attorney. Mr. Wallis executed the guarantee and mortgage on Mrs. Collin's behalf, although, unbeknownst to Mr. Wallis, Mrs. Collins had by then returned to Australia.

Default eventually occurred. The lender called in the guarantees and the mortgages. Mrs. Collins alleged, and the trial judge accepted, that solicitor Willis was negligent in failing to properly explain the power of attorney to her. Willis told her that she risked losing her home on the basis of the documents which Wallis would sign on her behalf. Willis failed to expressly tell her that the power of attorney would be used not only to place a mortgage on her home, but also to sign a guarantee rendering her jointly and severally liable, along with the other investors, for the borrowing company's entire indebtedness. The trial judge also faulted Willis for failing to make the power of attorney time limited to the period in which Mrs. Collins would be absent from Australia.

Two of the three justices sitting on Willis's appeal agreed that his explanations were adequate. It seemed to them that a sensible way of explaining to a legally unsophisticated person the impact of granting the power of attorney was to stress the risk that her home could be lost. Mrs. Collins worked as a cleaner and had no other assets. The temporal duration of the power of attorney was irrelevant to Mrs. Collins. The power of attorney was used for the purpose intended. The third justice on appeal agreed with the trial judge and would have upheld the finding of liability.

Transactions carried out with a power of attorney

A firm of solicitors came to grief in *Al-Sabah v. Ali*, [2000] E.W.J. No. 3721 (Eng.C.A.), allowing in part appeal from Ferris, J., 22nd January 1999 (the Times 27th January 1999).

The plaintiff invested in real estate in London. His property manager, Ali, forged a power of attorney from the plaintiff to a solicitor. Ali then had the solicitor use the forged power of attorney to mortgage the property. The proceeds were evidently misappropriated by Ali. Next, Ali forged the plaintiff's signature on a transfer to himself. Ali then obtained another mortgage to pay out the first. These documents were registered on proof of the power of attorney. Ali eventually defaulted on his mortgage payments, and the "new" mortgagee carried out a power of sale.

The plaintiff successfully sued the solicitors who acted on the mortgages and on the conveyance. They accepted the instructions from a person claiming to represent the supposed client without ascertaining the true position. They did not speak with the plaintiff, or seek his written instructions. The transactions involved the transfer of the supposed client's property to his agent; thus the duty imposed on the solicitor was heavier still.

In *Carr v. Bower Cotton* [2002] EWCA Civ 1788, a British solicitor saved himself from liability by going back to the donor of a power of attorney to confirm the instructions given to him by the donee of the power.

Mr. Carr, an Australian solicitor, represented a syndicate of investors. He entered into an investment agreement with, and signed a limited power of attorney in favour of, Kelci Management Consultants. Under the agreement, \$4 million belonging to Carr and others was transferred into an account held by Bower Cotton, a respected London firm. The agreement and power of attorney authorized Kelci to ask Bower Cotton to transfer funds out of their account for the purpose of making specified investments. Carr believed that fantastic profits were in the offing. The English Court of Appeal observed that both documents were poorly drafted. Neither Carr nor Bower Cotton expressed concern.

Kelci asked Bower Cotton to transfer the money to a separate bank account in Copenhagen, controlled by Kelci. Mr. Simms of Bower Cotton was worried. Bower Cotton would have absolutely no control over the money. Bower Cotton would have no way of ensuring that the money was properly used to purchase investments. Kelci was providing no security to ensure the return of the money. Simms was concerned that the investment agreement and power of attorney did not permit this transfer. Simms contacted Carr, who agreed that the money could be sent from the solicitor's account, to Kelci's account. This was done, and afterwards the money duly disappeared.

Carr sued Bower Cotton. The judge at first instance dismissed the claim; the Court of Appeal affirmed the dismissal. Carr had instructed Bower Cotton that he wanted the funds to be placed under Kelci's control, and that he did not require any safeguard. Bower Cotton were entitled to act as they had. The English Court of Appeal was highly critical of Bower Cotton's involvement in this scheme.

The most recent notorious real estate fraud case is *Reviczky v. Meleknia; Caplan (Intervenor)* 2007 Canlii 56494 (On S.C.).

Justice Macdonald voided the HSBC Bank's mortgage because it did not take steps to scrutinize the power of attorney pursuant to which its chargor took title. Fraudsters forged the power of attorney, and used it to sell the house they did not own to an innocent purchaser. The HSBC funded the purchase.

Caplan, the lawyer representing the fraudulent seller, sent a copy of the forged power of attorney to the lawyer acting for both the purchaser and the Bank. Both lawyers were unaware the document was a fake.

At this point, the second lawyer failed to "inform himself about the terms, conditions or validity of the power of attorney." The power of attorney was ostensibly dated only one month before the

transaction closed. The power of attorney stated on its face that the donor of the power of attorney was over 88 years old, that the power could be revoked at any time, and was valid until the donor's death. The power of attorney was witnessed by only one person, instead of the two mandated by the *Substitute Decisions Act*.

The Court suggested that the Bank's solicitor should have made inquiries as to whether the donor was still alive, had ever revoked the power of attorney, or was mentally competent when the power of attorney was signed. The lack of proper witnessing might also have been questioned. Had the Bank's solicitor made inquiries on these points, it is likely that the fraud would have been prevented.

Since HSBC, through its lawyer, had an opportunity to avoid the fraud and did not do so, the court decided it could not succeed in its claim that the mortgage was valid.

This case raises difficult issues about a solicitor's duty to "go behind" a power of attorney. Where a power of attorney has ostensibly been signed very recently, but the donor is elderly, must a solicitor really make inquiries about the donor's mental capacity at the time of signing, and whether the donor is dead or alive? And what sort of evidence is adequate to satisfy these inquiries? What if the donor is out of the country, or has become mentally incompetent in the meantime? Must the donor be contacted to see if he has revoked the power of attorney?

Shiokawa v. Tohyama; Woods Adair (T.P.), [2005] B.C.J. No. 294 (B.C.C.A.), Dismissing Appeal From [2003] B.C.J. No. 1997; [2004] B.C.J. No. 230 (B.C.S.C.) ended more happily for the solicitors involved.

A firm of solicitors which represented a lender, and a purported borrower in a transaction were not negligent in failing to detect that the powers of attorney presented by the "borrower's" fraudulent agent were forgeries. The borrower was later successful in having the mortgage expunged from title. The lender lost its security and its money.

The standard of care for this transaction was stated to be:

"... a reasonably competent solicitor in dealing with documents executed out of the province, having determined that the form of documentation meets the criteria of due execution will accept those documents for the purpose intended without making further inquiry of the witnessing lawyer unless circumstances relating to the documentation suggests that further inquiry would be warranted."

The facts surrounding the transaction were not sufficiently suspicious to put the solicitors on inquiry. The power of attorney initially presented contained certain errors, e.g., legal descriptions, which were corrected.

The lender made no inquiries of its own concerning the authenticity of the power of attorney. It did not instruct the solicitors to make any inquiries. Solicitors are not expected to authenticate legal documents, unless instructed to do so. There was no reason to believe that if the initial errors were reported to the lender, it would then have made inquiries which would have disclosed the forgery.

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Lessons to be learned

What do these examples show us? A review of the current case law provides some guidance on how lawyers may want to approach clients and files involving powers of attorney. Lawyers should take note that the following are not intended to be a projection of where a court may say the standard of care is or what the lawyer best practices should be.

- Fully explain the nature of the power of attorney to the person executing it. Make sure that the person giving the power is fully aware of all the consequences. This is even more important when you have had no previous contact with the person involved, and are in fact acting on behalf of another client.
- Where you are acting on behalf of a client who will benefit from the execution of the power of attorney, because it will be used to grant security to the client for a debt which might otherwise be uncollectible, insist upon independent legal advice for the person being asked to execute the power.
- Where the power of attorney is given for the purpose of executing documents in an upcoming commercial transaction, consider whether you ought to advise the donor about the consequences of the documents to be executed under the power. This may or may not be practicable, depending on whether you have personal knowledge of the transaction.
- Consider making the power of attorney time limited, and its terms no broader than absolutely necessary.
- Be VERY concerned if the donee of the power of attorney proposes to take the donor's property for himself or herself. Seriously consider confirming the propriety of the transfer with the donor, unless the power of attorney expressly allows for the donee to take the property.
- Scrutinize the power of attorney for irregularities on its face. Was it signed by two witnesses? Are there any suspicious circumstances, i.e., was the document witnessed overseas, yesterday?