

Lender beware: Does the power of attorney authorise ancillary transactions?

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IMPORTANT GUIDANCE ON THE extent to which lenders can rely on a power of attorney was given by the the NSW Court of Appeal on 5 March 2009 in *Siahos v J P Morgan Trust Australia Limited* [2009] NSWCA 20.

The decision considered a mortgage executed by a son pursuant to a power of attorney over his parent's house. It highlights that, when relying on a power of attorney, lenders cannot solely consider whether or not a mortgage is authorised, as it was in this case, but must also consider the extent to which the power of attorney authorises ancillary transactions, including disbursement directions.

The parents in *Siahos* were elderly pensioners, and English was not their first language. The mortgage was executed by their son while they were in Greece on an extended holiday. Immediately prior to the loan, the son was transferred onto the title as tenant-in-common owner in equal shares with his parents. The loan named all three as borrowers. The usual *Contracts Review Act* and unconscionability defences were raised and either not pursued or failed at first instance.

The issues before the Court of Appeal pertained solely to the extent to which the lender could rely on the power of attorney. The standard power-of-attorney form appointed the son "to do on my behalf anything I may lawfully authorise an attorney to do". Where the

standard form states that "this power of attorney is subject to the following conditions and limitations", the word "nil" appeared.

Part of the loan was used to pay out an existing mortgage. The balance of the funds was used to enable the son to complete the purchase of a property in his own name. The lender was aware that part of the funds were to be used solely for the son's benefit.

Disbursement of funds

The appeal did not challenge the giving of the mortgage by the power of attorney. The sole issue was whether the lender could rely on the power of attorney in relation to the disbursement authority so far as it directed the payment of that portion of the funds which was used solely for the son's benefit. If the court found that the direction to pay for the son's benefit lacked authority, then that portion of the funds would be paid out without the authority of the mortgagors and therefore would not fall within the definition of "secured money" in the mortgage.

Macfarlan JA, giving the court's unanimous decision, noted that s.12(1) of the *Powers of Attorney Act, 2003* states that "a prescribed power of attorney does not authorise an attorney to execute an assurance or other document ... as a result of which a benefit would be conferred on the attorney unless the instrument creating the power expressly authorises the conferral of the benefit".

Based on this, and ignoring as unnecessary the question of whether the same conclusion would be reached by construing the powers of attorney without the aid of s.12(1), his Honour determined that the son was not authorised to do any act that conferred a benefit on himself.

The court then considered the issue of ostensible authority

raised by the lender's counsel in oral argument. His Honour disposed of this argument by quoting with approval the decision of Windeyer J in *Sweeney v Howard* [2007] NSWSC 852 at [56]: "It is to be remembered that a third party who reasonably relies on the wording of the power of attorney or the representations of the principal is still protected by the doctrine of ostensible authority. However, a third party who enters into a transaction which is apparently in the interest of the agent exclusively, without reference to the principal or the authorising document to ascertain the transaction's legitimacy, cannot appeal to the law of agency for protection."

This case recalls the decision of Bell J in *Perpetual Limited v Costa* [2007] NSWSC 1093. In that case, too, the mortgage was found to be authorised by the mortgagors but the disbursement directions were not. The lender failed because it relied on disbursement directions given by the broker without the mortgagors' authority. □

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