



Précis Paper

Powers of attorney

David Pritchard SC and Ben Zipser discuss misrepresentations in the context of powers of attorney.

Discussion Includes

- Powers of attorney may in some circumstances be used by the attorney to guarantee the obligations of a corporation which the principal has no interest in
- Actions taken by an attorney in breach of their fiduciary duty may nevertheless be enforced to provide certainty to innocent third parties in commercial transactions
- Where a fraudulent misrepresentation induces an agreement, the agreement may be set aside if the misrepresentation was merely a factor that induced the agreement. The misrepresentation is not required to be a main factor or to satisfy a 'but for' test
- Settlement agreements may be severed in circumstances where there is no interdependence between the severable parts

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1. In this edition of BenchTV, David Pritchard SC and Ben Zipser discuss the NSW Court of Appeal's (Bathurst CJ, Emmett and Leeming JJA) decision in *Taheri v Vitek* [2014] NSWCA 209. The case considered the use of a Power of Attorney to benefit the attorney himself. The case further considered the circumstances in which consent orders settling a claim are set aside for misrepresentation. Mr Pritchard SC and Mr Zipser acted for the successful respondent-plaintiffs, Peter and Shoshana Vitek, in the Court of Appeal and at first instance.

Material Facts

2. Mrs Taheri signed a Power of Attorney appointing her husband as her attorney. Mr Taheri was the sole director and shareholder of a company known as Estate Homes Pty Ltd. In September 2003, Mr Taheri signed on Mrs Taheri's behalf as guarantor in relation to an agreement by Estate Homes Pty Ltd to purchase land from Mr and Mrs Vitek. The question for the Court was whether the Power of Attorney authorised Mr Taheri to act other than in the interests or benefit of Mrs Taheri.

Resolution of the Power of Attorney Issue

3. Due to the fact that the Power of Attorney explicitly allowed Mr Taheri to confer benefits on himself, the Court decided that it did not matter that Mr Taheri's act did not benefit Mrs Taheri. Therefore, Mrs Taheri was bound to the agreement as guarantor. Central to the Court's reasoning was the need for certainty whenever an attorney enters a contract with third parties, such as Mr and Mrs Vitek. The Court went so far as to say that even where an attorney acts contrary to the actual authority conferred by the Power of Attorney, the person conferring the power may still be bound to the contract entered into with a third party.

Consent Orders for Original Settlement with Wife Set Aside for Misrepresentation

4. The plaintiff vendors settled with the guarantor (the wife) for \$100,000 before the judgment of Barrett J at first instance in the Supreme Court. The decision to settle was made, at least partially, on the basis of an affidavit provided by the wife which suggested she had no actual knowledge of the guarantee when it was signed or shortly thereafter. The wife then reversed her position in a subsequent affidavit whilst her husband's proceedings were still in progress. In the Court of Appeal, the vendors then successfully sought to rescind the consent orders made to settle with the wife on the basis of fraudulent misrepresentation.

5. In resolving this issue, the relevant question for the Court was whether the wife's conduct was sufficiently relied upon by the plaintiff vendors in settling and whether it would be unfair for the Court to rescind the settlement agreement between the Viteks and the wife if the Court did not also rescind the larger agreement involving the vendors, the wife and the wife's attorney (the husband).
6. The court set aside the settlement with the wife because it was "a factor" in the plaintiffs' decision to settle and because there was limited "interdependence" between the varied agreements.

BIOGRAPHY

David Pritchard SC

Barrister, 3 St James' Hall Chambers, Sydney

David Pritchard SC was admitted as a Lawyer in 1985, called to the NSW Bar in 1991 and appointed Senior Counsel in 2007. He is a Member of the Review Panel of the Office of the Legal Services Commissioner and an Instructor and Examiner for the NSW Bar Readers Course. His practice is primarily in banking and finance, bankruptcy and insolvency, commercial disputes, equity and *Corporations Act* proceedings, real and personal property disputes and professional negligence.

Ben Zipser

Barrister, Fifth Floor Selbourne Chambers, Sydney

Ben Zipser was admitted as a Lawyer in 1992 and called to the NSW Bar in 1999. For a number of years he taught Consumer Protection Law at the University of Western Sydney. He is a co-author of Walmsley et al, *Professional Liability in Australia* (Lawbook Co, 3rd ed, 2015) and has published a number of articles in law journals on consumer protection and other topics. His practice includes administrative law, building & construction, commercial litigation, professional liability and trade practices.

BIBLIOGRAPHY

Focus Case

Taheri v Vitek [2014] NSWCA 209

Benchmark Link

http://benchmarkinc.com.au/benchmark/weekly_composite/benchmark_04-07-2014_weekly_civil_law_review.pdf

Judgment Link

<http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=172423>

Cases

Gould v Vaggelas (1985) 157 CLR 215