

Law Society of New South Wales
Elder Law and Succession Committee
“Listen to the Judges” Series
11 September 2012

Justice R I Barrett

This evening’s session is billed as one about *Szozda v Szozda*¹, a case I decided in the Equity Division in 2010.

On the basis that a judgment should stand or fall in its own right and that the judge’s explanation of is of no great use to anyone, I do not propose to say much about *Szozda v Szozda* itself. Rather, I have taken this as an opportunity to offer some more broadly based comments on the general matter of mental capacity with special reference to the creation of powers of attorney, particularly general and enduring powers of attorney.

Solicitors play a central role in these matters. More often than not, the power of attorney is prepared by a solicitor and the statutory statement about the donor’s understanding is made by a solicitor. Both solicitors play a central role in the effectuation of the donor’s wish to confer far-reaching and comprehensive authority on another person. And the solicitors incur responsibilities accordingly.

As a young solicitor – probably of five or six years standing – I received a telephone call one day from a lady who said that she was the sister of an acquaintance of mine and that she wished to see me about making a will. She in due course came to my office and, after a preliminary chat mainly about her brother, we discussed what her assets were and what she wanted to do with them. She explained that she had inherited substantial property from her grandparents which was tied up in the hands of a trustee company. She then told me the dispositions she wished to make. I

¹ [2010] NSWSC 804

cannot remember what they were except that they were normal and unexceptionable in nature.

After I had taken instructions, the client went on her way with an arrangement that she would come back at some future time to sign the will.

She duly arrived back at the office on the appointed day and I took her through the will. We discussed what I had drafted and she was happy with it. I then assembled the necessary witnesses and the will was duly signed and attested. After a decent interval, I sent her a bill.

Some time after that, I received a telephone call from the client's mother. She had found the bill at home and felt that she had to tell me that her daughter was, as she put it, "a very sick young lady" who had absented herself from a psychiatric hospital at the times she came to see me in my office. The mother also told me that her daughter had a delusional illness and that among the delusions was one about having inherited substantial property from her grandparents.

I have often thought back on that experience, trying to work out whether I had failed in some way. The lady came to me as the sister of an acquaintance. She was in fact the sister of an acquaintance. The things she told me were rational, or so they appeared to me. I tried to remember what she looked like. All that came to mind was that she was somewhat flamboyantly dressed and wore heavy makeup, with very red lipstick. Should these factors have put me on my guard? Surely not.

I have convinced myself over the years that there was nothing that I could or should have done that would have put me on notice that this young woman did not have testamentary capacity – which, from what the mother told me, she probably did not.

An experience such as that stands in contrast to the frequently encountered case of the elderly client, often brought in by a son or daughter. That was the situation in *Szozda v Szozda* and in many other cases as well, of course.

The questions about the role of solicitors in contexts of potential lack of capacity arise in a range of cases. I had, in the Equity Division, a case² where an adult daughter took the elderly mother to a solicitor and arranged for the family home to be transferred to mother and daughter as joint tenants, apparently with a well-intentioned purpose of the daughter to ensure that other family members intent on moving the mother to a nursing home should not be able to do so. I had another case³ where a nephew orchestrated the transfer of his aged aunt's house to the nephew and his sons apparently so that it would be kept out of the hands of the nephew's sister who, along with him, might be expected to be a beneficiary under the aunt's will. In both these cases, as in *Szozda v Szozda*, the role played by solicitors came very much to the fore in the court's consideration of the factual circumstances.

It is, of course, trite law that questions of capacity fall to be determined according to the particular context. The High Court tells us that in *Gibbons v Wright*⁴. So, for example, someone well able to decide whether they want a cup of tea or a cup of coffee may be quite incapable of doing much more than that, from the legal standpoint.

You may have noticed the recent decision of Justice Ball in *Hawkes v Wilkie*⁵. The question there was whether an old lady had capacity to create a trust by which she gave \$300,000 to a friend for division equally among six persons of whom that friend was one. After the lady's death, the question of her capacity to make the gifts and to create the trust was litigated. The case was not a will case. No one was propounding any will and the rule in *Banks v Goodfellow*⁶ about the onus and the shifting of it did not apply. Rather, as Justice Ball held, the starting point was the so-called "presumption of sanity" and the proposition that the old lady should be regarded as having had the necessary capacity unless the contrary was established on the balance of probabilities.

² *Winefield v Clarke* [2008] NSWSC 882

³ *Irvine v Irvine* [2008] NSWSC 592

⁴ (1954) 91 CLR 423

⁵ [2012] NSWSC 1039

⁶ [1870] LR 5 QB 549

That was the approach that I took in *Szozda v Szozda* in relation to the creation of a power of attorney. The question is whether the person was of sufficiently sound mind at the particular time to undertake the particular transaction.

In the case before Justice Ball, the decision was a relatively straightforward one – in effect, whether to give \$50,000 each to six particular persons who played a part in the donor's life. The evidence concentrated, naturally enough, on the period immediately surrounding the making of the gift. Several matters were put forward in support of the proposition that the donor did not understand the effect of the instruction she gave to appropriate the moneys and give them to the named persons.

There had been relatively recent statements that she wanted other persons to have the proceeds of the sale of her house, something that was inconsistent with what she eventually did. Also, a relative who lived overseas gave evidence that it had become difficult to speak to the donor by telephone and that the donor sometimes addressed her not by her own name but by her sister's name or some other name. She said that when she telephoned, there was often no response or if the telephone was picked up it was dropped. Evidence was given of one conversation where the relative called the old lady, introduced herself and made some affectionate remarks to which the response was, "Who's that, what do you want?"

Another relative from overseas gave evidence of having visited the lady in her nursing home during a visit to Australia and of making a video to take back with her. The maker of the video spoke in a conversational way during the filming but the lady, for the most part, was unresponsive. There was also reference to notes kept by the nursing staff and by the lady's general practitioner referring to a rapid decline in the later part of 2011.

Justice Ball decided that this evidence did not establish on the balance of probabilities that the donor lacked the capacity to understand the effect of what she said when she gave the instruction for the appropriation and payment of the \$300,000. Paragraphs 24 and 25 of his Honour's judgment contain a succinct assessment of the evidence. The first matter he noted was that the making of the gift was a rational act, having regard to several expressions of intention by the donor

to benefit the persons concerned. As to the evidence about the telephone being not answered or dropped, his Honour noted that the old lady was in bed and could not reach the telephone unless it was on the bed in front of her; also her hearing was not good so that she may not have understood who was calling at any particular time when she did answer the phone. As to the unresponsiveness during the making of the video, his Honour pointed to the possibility of her being upset that her relative was about to return to her home overseas or that she may have been uncomfortable being filmed. The evidence from the nursing staff and the doctor was consistent with the lady having had good days and bad days.

On the whole of the evidence, the judge held that the presumption of sanity had not been displaced.

The decision in *Szozda v Szozda* concerning the power of attorney was, of course, to the opposite effect. One big difference is that the case before Justice Ball concerned a single isolated transaction – the making of the gifts to the five persons – whereas *Szozda v Szozda* involved the creation of a general and enduring power of attorney by which the appointee was put into the position to do anything and everything that the appointor could lawfully do. The question was therefore not whether \$50,000 should be given to each of six persons as a one-off matter, but whether, first, full and unlimited power to act should be delegated and, second, whether the particular delegate was an appropriate person to be appointed.

I took the view in *Szozda v Szozda* that, on the scale of complexity of decision-making, the creation of a general and enduring power of attorney stood at a very high point – a much higher point than a decision whether to give \$50,000 to each of six trusted friends and relatives and a point somewhat higher than a decision about who should be the objects of testamentary bounty and what should be given to them. The decision with respect to a general and enduring power of attorney is one that strikes at every conceivable aspect of the donor's property and affairs. Only if the donor has some reasonably informed appreciation of what the property and affairs amount to and what the appointee will be able to do can the decision be said to be a properly informed decision.

In this respect, I relied on an observation of Justice Young in *Ranclaud v Cabban*⁷:

“Such a power permits the donee to exercise any function which the donor may lawfully authorise an attorney to do. When considering whether a person is capable of giving that sort of power one would have to be sure not only that she understood that she was authorising someone to look after her affairs but also what sort of things the attorney could do without further reference to her.”

I also quoted from the judgment of Justice Hoffmann (later, of course, Lord Hoffmann) in *Re K*⁸:

“Finally, I should say something about what is meant by understanding the nature and effect of the power. What degree of understanding is involved? Plainly one cannot expect that the donor should have been able to pass an examination on the provisions of the Act. At the other extreme, I do not think that it would be sufficient if he realised only that it gave Cousin William power to look after his property. [Counsel as *amicus curiae*] helpfully summarised the matters which the donor should have understood in order that he can be said to have understood the nature and effect of the power. First, (if such be the terms of the power), that the attorney will be able to assume complete authority over the donor’s affairs. Secondly, (if such be the terms of the power), that the attorney will in general be able to do anything with the donor’s property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if the donor should be or become mentally incapable the power will be irrevocable without confirmation by the court.”

Courts always assess these matters after the event and with the benefit of evidence about contemporary events including, very often, medical evidence. They are therefore generally in the position to sit back in an armchair, as it were, and to survey the whole of the scene with the full benefit of hindsight.

Solicitors do not have that luxury. I am thinking particularly of solicitors in the position of those who featured in the *Szozda* case, that is, the solicitor who takes instructions for the preparation of a general and enduring power of attorney and the solicitor who gives the certificate under s 19 of the *Powers of Attorney Act 2003* – sometimes, of course, the one solicitor will perform both functions, not being excluded by virtue of being one of the attorneys. I want to say something particularly on the task of the solicitor giving the certificate under s 19.

⁷ [1988] NSW ConvR 55-385

⁸ [1988] Ch 310

The requirement is stated in quite general terms. The prescribed witness – whether a solicitor or someone within one of the other designated legally trained categories – must certify that he or she “explained the effect of the instrument to the principal before it was signed” and that “the principal appeared to understand the effect of the power of attorney”.

At one level, I suppose, the solicitor could read the whole of the power of attorney aloud and then say, “Do you understand that?”; and if the appointor said, “Yes”, then the job might be regarded as done. But that would be a very dangerous approach. The solicitor must form a view as to whether the principal “appeared to understand the effect of the power of attorney”. It is true that it is only appearance that must be dealt with but the clear responsibility is to undertake sufficient explanation and sufficient probing to come to an informed view about the state of the principal’s understanding.

Approaches will no doubt differ according to whether the person concerned is a regular client or someone who has been referred for the isolated purpose of the s 19 certificate. The solicitor in the first situation will obviously have a greater insight into the appointor and his or her strengths and weaknesses than a solicitor in the second situation. Approaches will also differ as between someone who is 25 and someone who is 95.

Solicitors in this State are fortunate to have significant guidance available to them concerning assessment of mental capacity. There is the Law Society’s 2009 publication “When a Client’s Capacity is in Doubt: A Practical Guide for Solicitors”⁹. There is also the “Capacity Toolkit” issued by the Attorney-General’s Department in 2009 and available on the Diversity Services section of the Lawlink website¹⁰. And

⁹ Available at
<<http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/023880.pdf>>

¹⁰ Available at
<http://www.diversityservices.lawlink.nsw.gov.au/agdbasev7wr/divserv/documents/pdf/capacity_toolkit_0609.pdf>

in the Law Society Journals of September 2003¹¹ and June 2008¹² there are informative articles giving particular guidance.

In preparing for this evening, I had a look at a couple of similar documents from elsewhere, one from Queensland and the other from the United States.

The Queensland document was published by the Office of the Adult Guardian in June 2005 and is entitled “Capacity Guidelines for Witnesses of Enduring Powers of Attorney”¹³. It contains some very good practical suggestions. These are broken into two groups, one associated with initial contact and the other with what is termed the interview process.

The first suggestion or recommendation at the initial contact stage is one that is, I think, of overwhelming importance. So many of the cases we see involve failure to observe this simple rule: see the person alone. Do not countenance the situation where the adult child or other relative or the carer remains in the room as well. I suppose there might be very rare exceptions related to mobility or disability but, if it is necessary to have someone else in the room, they should be parked very much in the background.

The Queensland document makes the obvious but important point that by seeing the person alone, you have an opportunity to develop rapport and to establish the context within which the person has decided to give the power of attorney. The answer, “Because my son/daughter wants me to” will much more readily be given if the son or daughter is not present. The Queensland document goes on as follows:

“During this initial contact, it is reasonable to discuss background, family, health problems or related issues ... and the principal’s broad financial circumstances including assets, source of income, payment of household and other accounts.”

¹¹ Law Society of New South Wales Client Capacity Issues Sub-Committee, “Client Capacity Guidelines: Civil and Family Law Matters”, (2003) 41(8) *Law Society Journal* 50.

¹² Jenna MacNab, “Assessing Decision-making Capacity: A Practical Guide for Lawyers”, (2008) 46(5) *Law Society Journal* 63.

¹³ Available at

<http://www.justice.qld.gov.au/___data/assets/pdf_file/0009/7569/capacityguidelines.pdf>

At this initial contact stage, the solicitor may observe some warning signs. I found particularly useful in this regard the content of the American document I have mentioned. It is entitled “Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers” and was published in 2005 by the American Bar Association and the American Psychological Association¹⁴. It refers to six possible signs of cognitive incapacity that can fairly readily be picked up in the early stages of an interview.

The first of these is short-term memory loss. Indicators, needless to say, are repeating the same thing or asking the same question several times; and also there may be difficulty describing events of the last few days or weeks, even, “How did you get here today?” There is also a warning in this section that the ability to engage in apparently normal small talk can be used to hide cognitive difficulties.

The second matter referred to is communication problems and ways in which they might be masked. If you ask the person for their phone number and they say, “I hardly ever call my own number, my son would remember it because he uses it”, that is a warning sign. So too is the inability to capture a particular word – “I’ve got the papers here in my what’s-its-name”.

Thirdly, there are comprehension problems – something that can be probed, to a certain extent, by asking questions that call for more than a yes or no answer.

Fourth, there is lack of mental flexibility, suggested by lack of capacity to understand or even acknowledge alternatives or different viewpoints.

Fifth, there can be calculation problems. The example given is that of somebody with a university degree who makes an error in adding dollar amounts together.

And sixth, there is disorientation, an example being inability to appreciate what day it is or how to leave the office that has been visited many times before.

¹⁴ Available at <www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>

A warning that runs through the literature, however, is that lawyers should be very wary of converting themselves into amateur psychologists and should not, for example, try to administer the MMSE (or Mini-mental State Examination) and other tests widely used by medicos and other health professionals trained in their use.

Returning to the Queensland document and looking at its treatment of what it calls the interview process, we find what is, to my mind, a particularly important point which is an amplification of one of those to which I have already referred.

The task of becoming satisfied, in terms of s 19, that “the principal appeared to understand the effect of the power of attorney” cannot sensibly or properly be approached by a statement of the kind to which Justice Hoffman referred in *Re K* – “Now you understand, don’t you, that this will give Cousin William power to look after your property?” Nor can it be sufficient, as I have said, simply to read out the content of the document and then say, “That is what you want, isn’t it?”; or to say, “You understand what an enduring power of attorney is, don’t you?”.

The recommendation in the Queensland document is that questions be open-ended, not closed like those I have just given. This was a point that came home to me with particular force from the psychiatric evidence in *Szozda v Szozda*.

I have no doubt that, as a solicitor, there were myriad occasions on which I sat down with a client, gave a layman’s paraphrase of the document and then asked for confirmation that that was what the client wanted. It did not necessarily occur to me then as it does now that a question framed in that way invites, at one level, merely polite agreement or co-operation and that most people are keen to be polite and agreeable.

The Queensland document suggests – to my mind very constructively – that questions such as the following should be put:

- What is an enduring power of attorney?
- Why do you want an enduring power of attorney?
- What sort of decisions would your attorney be making for you?

- Can you limit the attorney's power if you want to?
- Are you able to give specific instructions to your attorney about decisions to be made?
- What is the extent of the assets over which the attorney will have control?
- Can you have more than one attorney?
- Why have you selected this person to be your attorney?
- If you have more than one attorney who will make decisions concerning you or your finances?
- When will the attorney's power for financial matters begin?
- When will the attorney's power for personal matters begin?
- How long does the attorney's power last?
- Can you change or revoke the enduring power of attorney?
- Is there anything else that will end the attorney's power?
- What would you do if you didn't agree with the attorney's decision?

It should not be suggested that all of these questions be asked on every occasion. That would border on what Justice Hoffmann, in *Re K*, referred to as passing an examination on the provisions of the Act. The point is that an attempt should be made to get from the person's own mouth some statements indicating their appreciation of the significance of what they are about to do.

The importance of open-ended questions rather than closed questions played a significant part in the recent decision of Justice White in *Dellios v Dellios*¹⁵. That was a will case, not a power of attorney case, but it serves to illustrate the point.

The solicitor went to the elderly lady's home at the request of a relative. The lady did not speak English or, at least, spoke only very little. The interview conducted by the solicitor took place in the presence of a number of family members and other persons. The solicitor had apparently asked them to leave, but they declined to do so. There was, in any event, the problem of translation. Let me just read some sections from the evidence the solicitor gave, noting that the lady wishing to make a will was Paula and that everybody else mentioned was a relative or friend present:

¹⁵ [2012] NSWSC 868

"I said to Victor 'Does Paula know we are here today about a will for her what to do with her property when she has died?'

Victor then had a conversation with Paula in Macedonian.

Victor then replied 'Yes she knows that'.

I said to Victor 'Can you ask her what property she owns'.

Victor then had a further conversation with Paula in Macedonian.

Victor replied 'She only owns a half share in this house and a little money in a bank account'.

Athena said 'As well as all you can see here in the house – no value at all'.

I said to Victor 'Ask Paula who owns the other half share'.

Victor then had a conversation with Paula in Macedonian.

Athena said 'Chris Dellios there has been a big court case'."

And later:

"I said to Victor 'I will summarise a will which Athena asked me to bring. Can you please translate to Paula when I speak?'

Victor replied 'Yes'.

I then said to Victor 'Please tell Paula that a will is the document which sets out what you want to do with your property when you are dead'.

Victor had a conversation in Macedonian with Paula Dellios.

Victor then said 'Yes she understands'."

And so it went, with the solicitor relaying through the third person the particulars of the will and the third person indicating that Paula understood.

Justice White's conclusion was as follows:

"These discussions do not provide a basis for me to be satisfied that Paula then understood the nature of the act of making a will and its effect, nor that she understood the extent of the property of which she

was disposing, nor that she was able to comprehend and appreciate the claims on her estate to which she ought to give effect.”

Justice White gave two reasons for this. First, he did not know - and the solicitor did not know - whether the questions were accurately translated to Paula and whether her responses were accurately conveyed to the solicitor. The intermediaries did not give evidence. Justice White continued:

“If the accuracy of the translation were accepted, the discussion does not provide an adequate basis for drawing a conclusion in favour of Paula having testamentary capacity. The only non-leading question that was apparently asked of Paula to which she gave a response indicative of capacity was when she was asked what property she owned and Victor replied after a conversation with her that she owned a half-share in the house and a little money in a bank account.

There was no non-leading question to elicit her understanding about what a will was. Rather the statement was framed by [the solicitor] that a will was what would be done with her property when she had died.”

The lesson here is applicable across the board.

In conclusion, I should emphasise the importance of a solicitor’s note taking and recording. In *Szozda v Szozda*, one of the solicitors was a prolific maker of contemporaneous notes, while the other was not. I am not criticising the solicitor who did not take detailed notes. We all have our own ways of doing things. The point is that, if and when the matter of capacity comes to be tested, notes made on the spot or soon afterwards are much more useful than unassisted recollections and resort to what the solicitor says was his or her general practice at the particular time.

Solicitors are cast by s 19 of the *Powers of Attorney Act* in an important social role. They are, as it were, gatekeepers whose task it is to deflect from the statutory process persons who do not appear to understand what they are doing. The fact that that task is given to solicitors and certain other legally trained persons emphasises the expectation that they will approach the matter responsibly and diligently and by reference to the well-established legal criteria concerning capacity and the assessment of capacity.
