

Determination



Case number

██████████

Applicant

████████████████████

Financial services provider

Rabobank Australia Limited

Determination



Case number: [REDACTED]

13 April 2018

1 Overview

1.1 Dispute

The dispute is about whether the applicant's daughter, acting as the applicant's Attorney, is entitled under a General Power of Attorney, to obtain information about accounts held by the FSP by the applicant and his son as borrowers (Partnership).

The FSP says that it accepts the validity of the General Power of Attorney and is willing to provide any information it holds relating solely to the applicant. However, the FSP has declined to provide documents related to the accounts held by the Partnership because it says it owes a duty of confidentiality to the applicant's son.

1.2 Issues and key findings

What information is the Attorney entitled to obtain?

She is entitled to obtain all information that the applicant would be entitled to obtain.

Will the disclosure of this information breach the FSP's duty of confidentiality?

The disclosure of this information does not breach any duty of confidentiality that the FSP has to the applicant's son because he consented to the disclosure in the loan contract.

1.3 Determination

This determination is in favour of the applicant. If the Attorney accepts the determination, the FSP needs to provide to the Attorney all of the documents it holds about the applicant personally and about the Partnership, other than information that is solely related to his son.

2 Reasons for determination

2.1 What information is the Attorney entitled to obtain?

The FSP accepts the validity of the General Power of Attorney

The FSP has advised that it accepts the validity of the General Power of Attorney made on 1 February 2011 by the applicant in which he appoints his two daughters as joint Attorneys.

As previously advised, the General Power of Attorney deals with property and financial matters and enables the Attorney to sign legally binding documents on the principal's behalf or use the principal's money and assets. It also allows the Attorney to sign most documents or do most things that the principal can do legally.

The General Power of Attorney derives its legal authority from Section 9 of the Power of Attorney Act 2013 (NSW). I have extracted this in section 3.1 of the determination, below. Effectively, this section means that the powers conferred allow the Attorney to stand in the shoes of the applicant.

The parties disagree about what powers the General Power of Attorney confers

The Attorney says that in order to manage her father's affairs she requires:

- records and information about the Partnership's financial position (assets and liabilities) and her father's entitlements
- bank account statements
- loan account statements
- any applications for finance made by her father or the Partnership,
- the supporting documents provided for the applications.

The FSP says that it can only provide documents to the Attorney that solely relate to the applicant. It says that the General Power of Attorney does not authorise the Attorney to obtain information related to a third party. It acknowledges that information related to the partnership would be able to be provided directly to the applicant if he had capacity to request it, but submits that partners cannot delegate that entitlement.

The Attorney has the right to all of the information the applicant is entitled to

The FSP is not correct when it talks about the applicant "delegating" his entitlement to obtain information about the partnership.

The General Power of Attorney is not a delegation of authority, it is the appointment of an authority who will act in the place of the applicant.

The FSP has a contractual obligation to act in accordance with the customer's mandate. If a customer has set up a power of attorney, then this authority is considered to be in line with the customer's mandate. It is important to recognise and respond to requests from this authority as if they were made from the customer themselves.

This means that any information that the applicant would be entitled to obtain directly from the FSP, the Attorney can obtain.

In most banking disputes, this will extend to the Attorney being able to transact as if they were the customer, including the power to open and close accounts, perform and stop financial transactions or payments, or make changes to the customer's banking products and services.

In this dispute, the account in question is a Trade Facility which has a line of credit. It is secured by various properties and personal guarantees given by the applicant and his son. The borrowers are identified as:

- the applicant
- the applicant's son
- the Partnership.

I would consider that the applicant as a borrower and account holder of the Trade Facility would be entitled to ask the FSP for all of the documents it holds about him personally and about the Partnership, other than information that is solely about his son.

I am satisfied that this would include all of the documents requested by the Attorney, with the exception of:

- any supporting documents provided by the applicant's son that are personal him
- any information that relates solely to the son's personal banking

2.2 Will the disclosure of this information breach the FSP's duty of confidentiality?

I acknowledge the FSP's concern that by disclosing the information requested by the Attorney, it will breach the duty of confidentiality it owes the applicant's son.

The duty of confidentiality that the FSP owes its customers is a legal one arising out of contract, however that duty is not absolute but qualified.

Common law and the Privacy Act 1988 (Cth), extracted below in section 3.2, have made it clear that an FSP can disclose information that would otherwise be confidential:

1. Where disclosure is under compulsion of law
2. Where there is a duty to the public to disclose
3. Where the interests of the bank require disclosure
4. Where the disclosure is made by express or implied consent by the customer.

The relevant exception here is express or implied consent. When the applicant and his son signed the Trade Facility contract they agreed to the Terms and Conditions and Privacy Statement which form part of the total agreement between the FSP and the borrowers.

The Terms and Conditions state that the borrowers agree that:

- 3.1 If the Account is owned by two or more people...we may deliver to any of you any documents, deeds or items we hold

The Privacy Statements further specifies that:

we may disclose your personal information to...other owners, borrowers and guarantors and their respective directors, trustees and beneficiaries (if any) related to any account you have with us, including an application for an account

I am satisfied that by agreeing to the contract, the applicant's son consented to the disclosure of this information to the applicant by the FSP. This is not a consent that he can unilaterally withdraw now in order to prevent the Attorney accessing information that the applicant would be entitled do if he had capacity.

If the applicant's son has concerns about the operation of the General Power of Attorney, he needs to raise his concerns with the Guardianship Tribunal. Neither the FSP nor FOS are authorised to make decisions about who is the correct person to handle the applicant's affairs.

The FSP's role is to:

- act in accordance the applicant's mandate by following the requests for information from his Attorney as if they were made by him
- provide to the Attorney all of the documents it holds about him personally and about the Partnership, other than information that is solely about his son.

If the Attorney accepts this determination, the FSP should comply with her requests in accordance with the direction provided herein.

3 Supporting information

3.1 The Power of Attorney Act 2013 (NSW)

9 Powers conferred by prescribed power of attorney

(1) Subject to this Act, a prescribed power of attorney confers on the attorney the authority to do on behalf of the principal anything that the principal may lawfully authorise an attorney to do.

(2) A prescribed power of attorney has effect subject to compliance with any conditions or limitations specified in the instrument creating the power.

3.2 The common law exceptions to confidentiality

The existence of a duty of confidentiality and of exceptions to that duty were placed beyond all doubt by the decision of the English Court of Appeal in *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461, universally known as Tournier's case. The leading judgment, in which the classic list of exceptions is to be found, is that of Bankes LJ and his judgment remains the unchallenged authority on the subject.

3.3 The Privacy Act Schedule 1 Section 6.1

6.1 If an APP entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose (the secondary purpose) unless:

- a. the individual has consented to the use or disclosure of the information



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