

AUSTRALIA / JUDGMENT

Singer v No Defendant

[2026] NSWCA 38**COURT**

Court of Appeal

DECIDED

26 March 2026

BEFOREBell CJ at [1]
Adamson JA at [2]
Griffiths AJA at [3]**CASE / FILE NUMBER**

2025/00379310

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Source record**Court of Appeal
Supreme Court
New South Wales****Medium Neutral Citation:** Singer v No Defendant [2026] NSWCA 38**Hearing dates:** On the papers**Date of orders:** 26 March 2026**Decision date:** 26 March 2026**Before:** Bell CJ at [1]
Adamson JA at [2]
Griffiths AJA at [3]

Decision:

(1) Grant leave to file the further amended summons dated 23 March 2026 in the proceedings below and the amended summons seeking leave to appeal dated 23 March 2026.

(2) Grant leave to appeal.

(3) Allow the appeal.

(4) Set aside the orders of the primary judge and in lieu thereof:

(a) Order that the certificate endorsed on the instrument executed by the principal on 18 July 2017 (Instrument) be rectified to include the statement, “I am not an attorney under this power of attorney”.

(b) Declare that the Instrument, having been rectified to include the statement required by s 19(1)(c)(iv) of the Powers of Attorney Act 2003 (NSW), is a valid enduring power of attorney for the purposes of the Act.

(5) Order under s 7 of the Court Suppression and Non-publication Orders Act 2010 (NSW) that the publication or other disclosure of information tending to reveal the identity of the principal is prohibited on the basis that such an order is necessary to prevent prejudice to the proper administration of justice.

(6) There be no order as to costs.

Catchwords:	AGENCY — enduring power of attorney — effectiveness of — whether certificate under s 19(1)(c) of Powers of Attorney Act 2003 (NSW) must be given contemporaneously with execution of enduring power of attorney by principal — whether instrument can be construed or rectified to include omitted statement required by s 19(1)(c)(iv)
Legislation Cited:	Conveyancing Act 1919 (NSW) s 38 Court Suppression and Non-publication Orders Act 2010 (NSW) s 7 Powers of Attorney Act 2003 (NSW) s 19
Cases Cited:	AB v Independent Broad-Based Anti-Corruption Commission (2024) 278 CLR 300; [2024] HCA 10 Bird v DP (2024) 419 ALR 552; [2024] HCA 41 Brown v Tavern Operator Pty Ltd (2018) 98 NSWLR 586; [2018] NSWSC 1290 Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd (1995) 41 NSWLR 329 Re A Power of Attorney [2025] NSWSC 1006 Re An Incapacitated Principal [2025] NSWSC 89 Re Gouder [2005] NSWSC 1116 Re Schoenmakers (No 2) [2013] VSC 658 Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (2019) 99 NSWLR 317; [2019] NSWCA 11 SSABR Pty Ltd v AMA Group Ltd [2024] NSWCA 175 Vakiloroaya v Norri [2026] NSWCA 11 Zhong v Guan (2024) 116 NSWLR 258; [2024] NSWCA 300
Texts Cited:	G E Dal Pont, Powers of Attorney (4th ed, 2025, LexisNexis)
Category:	Principal judgment
Parties:	Simon Singer (Applicant)
Representation:	
Counsel:	D C Price (Applicant) Q Rares (Contradictor)
Solicitors:	David Landa Stewart Lawyers (Applicant)
File Number(s):	2025/00379310
Publication restriction:	Publication of the name and any information or material that may lead to the identification of the principal is prohibited: Court Suppression and Non-publication Orders Act 2010 (NSW), s 7 Decision under appeal
Court or tribunal:	Supreme Court
Jurisdiction:	Equity – Protective List
Citation:	Re A Power of Attorney [2025] NSWSC 1006
Date of Decision:	04 September 2025
Before:	Hammerschlag CJ in Eq

File Number(s):

2025/00310904

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

In 2017, the principal executed an instrument (Instrument) purporting to create an enduring power of attorney and appointing the applicant as attorney. After the principal lost capacity in 2022, the NSW Land Registry Services declined lodgment of the Instrument on the basis that the accompanying certificate did not contain the statement required by s 19(1)(c)(iv) of the Powers of Attorney Act 2003 (NSW) (the Act) that the relevant witness is not an attorney under the power of attorney. Attempts were then made to amend the certificate to include the prescribed statement.

The applicant commenced proceedings in the Supreme Court seeking the advice and direction of the Court as to whether the Instrument created a valid enduring power of attorney. The primary judge held that it did not.

The applicant seeks leave to appeal on the ground that the primary judge erred in finding that the certificate required by s 19(1)(c) of the Act must be given contemporaneously with the execution of the enduring power of attorney by the principal. The applicant also submitted for the first time on appeal that the Instrument should either be construed to include the prescribed statement under s 19(1)(c)(iv) or be rectified in equity to include that statement.

The Court held (Griffiths AJA, Bell CJ and Adamson JA agreeing) granting leave to appeal and allowing the appeal:

(1) The certificate required by s 19(1)(c) of the Act must be given contemporaneously with the execution of an enduring power of attorney by the principal: [25].

(2) Obvious linguistic or conceptual mistakes in wording which are apparent on the face of an instrument can be corrected through construction where the parties' objective intention is clear. However, in the present case where there was a mistaken omission of words that, by virtue of statute, needed to be included in the Instrument to create an enduring power of attorney, it would be inappropriate to read those words into the Instrument: [28].

Zhong v Guan (2024) 116 NSWLR 258; [2024] NSWCA 300, considered.

(3) In the circumstances of the present case, it can be inferred from the available evidence that, at the time the document was executed, there was a common intention by all parties to effectively create an enduring power of attorney which, through a common mistake, was not reflected in the document due to the mistaken omission of the prescribed statement required by s 19(1)(c)(iv) of the Act. The Instrument should be rectified in equity to include that prescribed statement: [41]-[42]

SSABR Pty Ltd v AMA Group Ltd [2024] NSWCA 175; *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd* (2019) 99 NSWLR 317; [2019] NSWCA 11; *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329, considered.

(4) No basis has been shown to suppress the name of the applicant but identification of the principal, who lacks capacity, is prohibited: [44].

(5) In circumstances where the proceedings have been caused by the applicant's personal conduct, there should be no order as to costs: [45]-[46].

JUDGMENT

BELL CJ: I agree with the reasons and orders proposed by Griffiths AJA.

ADAMSON JA: I agree with Griffiths AJA.

GRIFFITHS AJA: By summons dated 28 October 2025, the applicant, Mr Simon Singer, seeks leave to appeal from the decision of Hammerschlag CJ in Eq in *Re A Power of Attorney* [2025] NSWSC 1006 (PJ or primary judgment). The only proposed ground of appeal in the original summons was whether the trial judge erred in finding that the certificate required by s 19(1)(c) of the Powers of Attorney Act 2003 (NSW) (the Act) must be given contemporaneously with the execution of an enduring power of attorney by the principal (in this case, the applicant). As will be developed, the applicant subsequently sought leave to file a further amended summons dated 23 March 2026 in the proceedings below and an amended summons seeking leave to appeal dated 23 March 2026 so as to raise the issue of whether the certificate should be rectified.

Section 19(1) provides:

- (1) An instrument that creates a power of attorney creates an enduring power of attorney for the purposes of this Act if— ...
 - (a) the instrument is expressed to be given with the intention that it will continue to be effective even if the principal lacks capacity through loss of mental capacity after execution of the instrument, and
 - (b) execution of the instrument by the principal is witnessed by a person who is a prescribed witness (not being an attorney under the power), and
 - (c) there is endorsed on, or annexed to, the instrument a certificate by that person stating that—
 - (i) the person explained the effect of the instrument to the principal before it was signed, and
 - (ii) the principal appeared to understand the effect of the power of attorney, and
 - (iii) the person is a prescribed witness, and
 - (iv) the person is not an attorney under the power of attorney, and
 - (v) the person witnessed the signing of the power of attorney by the principal.

In 2017, the principal executed an instrument purporting to create an enduring power of attorney. However, the certificate which was endorsed on that instrument did not contain the statement required by s 19(1)(c)(iv) that the witness was not an attorney under the power of attorney.

The following issues arise:

Can a s 19(1)(c) certificate be effectively given after the relevant instrument purporting to create an enduring power of attorney has been executed by the principal?

If not, should the deficient s 19(1)(c) certificate in this case be construed so as to include the words required by s 19(1)(c)(iv) or be rectified in equity so as to include those mandatory words, as contended for by the applicant in reply in the present proceedings?

The application for leave to appeal was heard both concurrently with the appeal and on the papers.

In the absence of an active respondent, Mr Quintin Rares of counsel agreed to assist the Court by assuming the role of contradictor. Mr David Price of counsel appeared for the applicant.

I consider that leave to appeal should be granted. The issues raised concerning the operation of s 19 of the Act are plainly matters of public importance (see *Vakiloroaya v Norri* [2026] NSWCA 11 at [24] per Payne and McHugh JJA).

For the reasons that follow, I propose that the appeal be allowed but on a basis that was not argued below.

Background summarised

On 18 July 2017, the principal executed an instrument purporting to appoint the applicant as her attorney (Instrument).

It was common ground that the Instrument was intended to create an enduring power of attorney. It satisfied all the requirements imposed by s 19(1) of the Act, save for s 19(1)(c)(iv) (because it did not contain the required statement).

By September 2022, the principal had lost her mental capacity to manage her own affairs due to dementia of the Alzheimer and Vascular types.

In around October 2022, the New South Wales Land Registry Services declined lodgment of the Instrument and issued a requisition seeking a verified alteration of the certificate endorsed on the Instrument to rectify the omitted s 19(1)(c)(iv) statement.

On 18 October 2022, a person employed by the applicant, acting with the authority of the relevant witness, inserted into the certificate by a handwritten change the words, “I am not an attorney under this power of attorney”.

The matter was heard by the primary judge on 1 September 2025. Later that day, the witness resigned the certificate endorsed on the Instrument but with the statement required by s 19(1)(c)(iv) included.

The reasons for judgment are short. The dispositive part is as follows:

20. By s 19(1) an instrument creates an enduring power of attorney if it complies with each of the requirements in that section. The plain meaning of the words if it complies with is that an enduring power of attorney for the purposes of the Act is created only if it complies, and

not otherwise. Part 4 of the Act is a legislative scheme for the creation and operation of enduring powers of attorney. Whereas the Act (Division 3 of Part 5) contains provisions that enable the Court to confirm the operation of a power of attorney despite the mental incapacity of a principal at the time the power is given, there is no power to excuse non-compliance with s 19(1) and give general operation as an enduring power of attorney to an instrument which does not comply.

21. The words of the section make it clear, in terms that compliance is required when the witness witnesses execution of the instrument:
 - (1) the chapeau to s 19(1) is in the present tense;
 - (2) the chapeau to each of s 19(1)(a), (b) and (c) is in the present tense;
 - (3) the certificate must state that the witness explained the effect of the instrument before it was signed and the principal appeared to understand its effect;
 - (4) self-evidently the person must be a prescribed witness at the time of the witnessing and certify that he or she is not an attorney under the power of attorney;
 - (5) the last requirement of s 19(c) is (iv) requires the witness to certify that he or she has witnessed the signing of the power of attorney by the principal. Logically and rationally the earlier requirements in 19(c) must be satisfied before or at the time the certificate is given.
22. There is no room for subsequent compliance. If there was, the enduring power of attorney could be created at a later and indeterminate point of time, which is inimical to the underlying policy of s 19 that specific requirements must be met at a specific time so that there is certainty whether an instrument which has potentially great significance has created an enduring power of attorney. A contrary conclusion would leave open the unpalatable possibility, as would be the case here, that an enduring power of attorney is created at a time when the principal has lost mental capacity to give it.
23. Even if such a certificate could effectively be given ex post facto by a prescribed witness (which I do not think it can) the amended certificate was not given by the prescribed witness. A certificate cannot be given by someone else on a prescribed witness' behalf. Subsequently, and more recently, the witness has himself brought about an amendment to the certificate in an effort to make it compliant but this too cannot be effective for the reasons referred to above.

The primary judge reasoned that each of the requirements in s 19(1) of the Act must be satisfied to create an enduring power of attorney. With respect, his Honour was correct to do so. Section 19 provides that an instrument creates an enduring power of attorney "if" particular requirements are satisfied. This conditional language, coupled with the apparent function of the s 19(1) requirements as procedural safeguards against the fraudulent or inappropriate creation of powers of attorney, manifest a legislative intention that, for an enduring power of attorney to be created, there must be compliance with the requirements.

Timing of s 19(1)(c) certificate

The applicant contends that the required s 19(1)(c) certificate need not be “given immediately after (or contemporaneously with) the execution of the power of attorney” and that there is no temporal constraint as to when the certificate must be executed by. He contends that a “fresh” compliant certificate can be given or an existing non-compliant certificate amended after the execution of the relevant instrument by the principal. Thus, the Instrument created an enduring power of attorney when the witness’s agent corrected the certificate on 18 October 2022 to include the s 19(1)(c)(iv) statement or, alternatively, when the witness himself personally signed the amended certificate on 1 September 2025.

In contrast, the contradictor’s position is that the reasons of the primary judge disclose no error. He submits that the Act contemplates the following steps being taken sequentially to create an enduring power of attorney:

The prescribed witness explains the effect of the instrument to the principal and checks the principal’s understanding of the instrument (s 19(1)(c)(i)-(ii)).

The principal signs the instrument.

The witness signs the certificate (which may be a separate document annexed to the instrument or may be endorsed on the instrument itself) (s 19(1)(c)).

The power being created, the attorney can accept or reject its conferral of authority. Once accepted by signature, the enduring power of attorney commences operation (s 20(3)).

The contradictor submits that Parliament “would have intended the usual proposition to hold, that is a witness signs as witness near contemporaneously to when the principal signs”.

Reference was made to the judgment of Ward CJ in Eq in *Brown v Tavern Operator Pty Ltd* (2018) 98 NSWLR 586; [2018] NSWSC 1290 at [459]-[496]. Her Honour held there, that for a document to be attested in compliance with the requirements for the execution of a deed in s 38(1) of the Conveyancing Act 1919 (NSW), the witness present at the time of execution of the document must sign it at that time as witness for the purpose of attesting the execution.

Section 38 provides:

- (1) Every deed, whether or not affecting property, shall be signed as well as sealed, and shall be attested by at least one witness not being a party to the deed; but no particular form of words shall be requisite for the attestation.
- (1A) For the purposes of subsection (1), but without prejudice to any other method of signing, a deed is sufficiently signed by a person if—
 - (a) by the direction and in the presence of that person the deed is signed in the name of that person by another person,

- (b) the signature is attested by a person who is not a party or signatory (except by way of attestation) to the deed, and
- (c) the person attesting the signature certifies in his or her attestation that he or she is a prescribed witness and that the signature was affixed by the direction and in the presence of the person whose signature it purports to be ...

The question whether a s 19(1)(c) certificate can effectively be given some time after the relevant instrument purporting to create an enduring power of attorney was executed by the principal is ultimately one of statutory construction. As the High Court recently stated in *AB v Independent Broad-Based Anti-Corruption Commission* (2024) 278 CLR 300; [2024] HCA 10 at [21], this inquiry:

must “begin with a consideration of the text itself”, that is, the text of the statute as a whole. That said, ascertaining the meaning of the text requires a consideration of its context, which includes the general purpose and policy of a provision and, in particular, the mischief it is seeking to remedy.

The text of s 19 of the Act is silent as to when a compliant certificate must come into existence for an enduring power of attorney to be created. That being said, the apparent purpose and policy of the certification requirements is to set out a prescribed checklist of procedural steps that must be complied with by the witness in order to protect the integrity of the powers of attorney regime (which is capable of authorising a person to make significant decisions on behalf of another) and to ensure certainty as to when an enduring power of attorney is effectively created. That purpose and policy would be undermined if it were open for a witness to provide the requisite certificate well after the relevant instrument had been signed by the principal (as the applicant seeks to argue), particularly in light of:

the likely difficulties that the witness may experience after the passage of time in recalling whether they had explained to the principal “the effect of the instrument” prior to its execution and whether “the principal appeared to understand the effect of the power of attorney” (s 19(1)(c) (i)-(ii)); and

the uncertainty as to the status of an instrument which has not satisfied the certification requirement to date but might do so at some unknown point in time in the future.

For these reasons, the primary judge was correct to find that the certificate required by s 19(1)(c) of the Act must be given contemporaneously with the execution of an enduring power of attorney by the principal.

Inserting the words required by s 19(1)(c)(iv) by construction or rectification?

There are, however, two additional arguments advanced by the applicant for the first time in his submissions in response in this Court. He contends that the deficient s 19(1)(c) certificate should be construed to include the words required by s 19(1)(c)(iv) or, alternatively, be rectified to include those words such that the Instrument is effective in creating an enduring power of attorney. The contradictor tacitly acknowledges that such arguments may be available, but notes

that they “were not the subject of the decision below and do not appear to have been raised below”.

While it is normally the case that, on an appeal, a party is held to the way the case was conducted at trial, there are exceptions. As Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ recently observed in *Bird v DP* (2024) 419 ALR 552; [2024] HCA 41 at [39] (citations omitted) (emphasis added):

As a general rule, all substantial issues between parties should be settled at trial and new issues should not be raised on appeal. That rule, however, is not absolute. A party will generally be refused permission to rely on a point not taken below, among other grounds, where a party seeks to raise a case which did not arise on the pleadings; where if the issue had been raised at the trial, it might have been the subject of evidence; or where the issue requires a fresh consideration of facts that are neither admitted nor beyond controversy. A party may be permitted to rely upon a point not taken below, however, if the other party concedes that its case would not have been presented differently if the point had been taken below.

Addressing the construction argument first, obvious linguistic or conceptual mistakes in wording which are apparent on the face of an instrument can be corrected through construction where the parties’ objective intention is clear: see eg *Zhong v Guan* (2024) 116 NSWLR 258; [2024] NSWCA 300 at [23]-[38] (Kirk JA, Payne JA and Price AJA agreeing). However, the situation here is different. It involves the mistaken omission of words which, by virtue of statute, needed to be included in the relevant instrument to create an enduring power of attorney. It would be inappropriate for the Court to read into the Instrument the words of the omitted s 19(1)(c)(iv) statement to find that the formal requirements for the creation of an enduring power of attorney have been met.

Rectification in equity is the available and appropriate course in the particular circumstances of this case.

Re An Incapacitated Principal [2025] NSWSC 89 is a recent example where, in the exercise of the Court’s protective and equitable jurisdiction, an enduring power of attorney was rectified (after the principal had become mentally incapacitated) to include a statement required by the Act which, by reason of a clerical error, had been omitted: see at [18]-[19], [39].

Lindsay J reasoned that the use of the heading, “Enduring Power of Attorney” in the instrument, the fact that the instrument was endorsed with a certificate required by the Act, and the fact that the attorneys had accepted their appointment in conformity with the Act gave rise to an inference that the principal intended the instrument to operate as an enduring power of attorney: at [23]. These indicators led his Honour to be satisfied that (at [34]):

the true intention of the defendant at the time she executed the subject instrument was that it operate as an enduring power of attorney, and that when her nominated attorneys formally accepted appointment to the office of attorney by their execution of the instrument they too intended that it operate as an enduring power of attorney.

The instrument was “rectified by inserting the words ‘I give this power of attorney with the intention that it will continue to be effective if I lack the capacity through loss of mental capacity after its execution’”: at [39].

Re Gouder [2005] NSWSC 1116 is another example where the Court rectified a power of attorney. In that case, Mr and Mrs Ballardine (who were husband and wife) had powers of attorney, both in favour of Mr Gouder, prepared for them to execute. However, Mr Ballardine mistakenly signed Mrs Ballardine’s power of attorney instead of his own and vice versa: at [2].

Gzell J made an order rectifying the instrument signed by Mr Ballardine to replace Mrs Ballardine’s name with his name. His Honour held that:

6 An order for rectification will be made if the instrument, by error, does not record the agreement of the parties. In *MacKenzie v Coulson* (1869) LR 8 Eq 368 at 375, Sir William James VC said:

“Courts of Equity do no[t] rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts.”

7 It used to be said that in order to obtain rectification, a party had to prove a valid and enforceable antecedent agreement. In *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies*, 4th ed, Butterworths Lexis Nexis, Australia, 2002 at 26-030, the learned authors analyse the authorities and state that it is no longer tenable to suggest that the plaintiff in a rectification case must prove an antecedent contract. The underlying principle is simply to see that the document executed by the parties accords with their true intentions. Here the power of attorney was executed as a deed poll but if an antecedent contract is unnecessary, there is no reason, in my view, that the underlying principle should not be invoked. The instrument executed by Mr Ballardine did not, by error, record his true intentions for it stated that it was made by Mrs Ballardine. I see no reason why this court should not rectify the instrument to replace the name of Simone Ballardine with the name Jacques Ballardine.

Equity has jurisdiction to correct a “discrepancy between [a] written instrument and a separately proven contrary common intention, which was intended to have been incorporated into the instrument”: *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd* (2019) 99 NSWLR 317; [2019] NSWCA 11 at [15] (Leeming JA, Payne and White JJA agreeing). Although “most frequently applied to address mistakes in contracts, the jurisdiction can encompass some instruments with a unilateral flavour, including deeds, trusts, and for present purposes, powers of attorney”: G E Dal Pont, *Powers of Attorney* (4th ed, 2025, LexisNexis) at [5.58].

The general principles are well established and were summarised by Stern JA (Ward P and Price AJA agreeing) in *SSABR Pty Ltd v AMA Group Ltd* [2024] NSWCA 175 at [138]-[143]. For rectification in equity to be granted for common mistake, the following requirements must be established.

At the time the written instrument was executed, the parties shared a common intention. Clear and convincing proof of this common intention is required.

The written instrument was to conform to that common intention.

But it did not do so because of a common mistake.

As McLelland AJA explained in *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329 at 345:

In general, the remedy of rectification of an instrument is available where it is established by clear and convincing proof that at the time of execution of the instrument the relevant party or parties as the case may be had an actual intention (if more than one party, a common intention) as to the effect which the instrument would have which was inconsistent with the effect which the instrument as executed did have in some clearly identified way. In this context 'effect' means the legal and factual operation of the instrument according to its true construction, but does not include legal or factual consequences of the operation of the instrument of a more remote, or collateral, kind (for example, its liability to stamp duty).

It is common ground between the applicant and the contradictor that the omission of the s 19(1)(c)(iv) statement was an obvious mistake and that the principal, prospective attorney and witness all intended the Instrument to have the effect of creating an enduring power of attorney. The ineffectiveness of the Instrument in creating an enduring power of attorney is far from being an unintended legal consequence of a remote or collateral kind as referred to in *Carlenka*, where rectification would not be granted.

I do not see any need to remit the matter to the primary judge. The evidence before this Court clearly establishes a common intention between the principal, prospective attorney and witness to create an enduring power of attorney through the execution of the Instrument, as well as a common mistake in the form of a failure to include the prescribed statement under s 19(1)(c)(iv) of the Act. The prospective attorney and the applicant, who is the principal's solicitor, deposed that:

on 20 June 2017, the principal instructed him to prepare an enduring power of attorney which nominated him as her sole attorney;

either he or another lawyer within his firm drafted the Instrument using a precedent from his firm's computer system;

shortly after receiving the draft Instrument on 28 June 2017, the principal instructed the applicant that she wished to proceed with signing the documents;

on 18 July 2017, the nominated witness and the principal met at the applicant's office for the purpose of executing the enduring power of attorney among other estate planning documents; and

prior to the New South Wales Land Registry Services issuing a requisition seeking rectification of the Instrument, the applicant was unaware with any non-compliance by the Instrument with the requirements of the Act.

The nominated witness's evidence was that he met with the principal on 18 July 2017 at the applicant's office to explain the enduring power of attorney to the principal and to give a certificate as an independent witness. He stated that because those documents had been prepared before he arrived, he assumed that the certificate complied with the requirements of the Act. He also noted that although he did not have any material recollection of the discussion with the principal that day, it was his usual practice as an independent witness to explain that he was independent from the solicitor who prepared the enduring power of attorney as well as from the prospective attorney, and that he was not being appointed as attorney under the instrument.

In my view, it can comfortably be inferred that there was "at the time the document was executed, a common intention" by all parties to effectively create an enduring power of attorney "which, through a common mistake, was not reflected in the document" due to the mistaken omission of the prescribed statement: *Seymour Whyte* at [12] (*Leeming JA, Payne and White JJA agreeing*).

On this basis, and in the particular circumstances of this case, the Instrument should be rectified in equity to include the prescribed statement required by s 19(1)(c)(iv) of the Act. For completeness, it should also be noted that, following directions made by the Court on 19 March 2026, the applicant sought leave to file a further amended summons in the proceeding below as well as an amended summons seeking leave to appeal to raise the issues of construction and rectification. I propose that leave be granted to file both those documents.

It is also appropriate to make a declaration that the Instrument as rectified is a valid enduring power of attorney. No issue was raised concerning potential prejudice to any bona fide third party occasioned by this relief, nor was any issue raised about the standing of the applicant to seek the relief.

The applicant was also directed by the orders dated 19 March 2026 to file an affidavit and brief submissions in support of the application to suppress the name of the applicant and the principal. While I am satisfied that it is in the interests of the administration of justice to anonymise the principal's name, in circumstances where that person no longer has capacity and the proceedings below were brought in the Protective List, I see no basis for suppressing the name of the applicant.

The applicant sought an order for his costs to be paid on the indemnity basis from the principal's estate, claiming that there was an analogy with a trustee's indemnity where a trustee seeks judicial advice. I consider that the analogy is overstated. The applicant overlooks cases in which a trustee has been deprived of his or her entitlement to indemnity where the trustee's conduct has caused the litigation: see eg *Re Schoenmakers (No 2)* [2013] VSC 658. The Court ordered there that the trustee was to pay the costs of the successful defendant personally and was to bear its own costs.

In the present proceeding, where there is no defendant, I consider it appropriate that the applicant bear his own costs. This litigation has been brought solely because of the applicant's personal failure to ensure that the certificate complied with s 19(1)(c)(iv) of the Act.

Conclusion

I propose the following orders:

Grant leave to file the further amended summons dated 23 March 2026 in the proceedings below and the amended summons seeking leave to appeal dated 23 March 2026.

Grant leave to appeal.

Allow the appeal.

Set aside the orders of the primary judge and in lieu thereof:

Order that the certificate endorsed on the instrument executed by the principal on 18 July 2017 (Instrument) be rectified to include the statement, "I am not an attorney under this power of attorney".

Declare that the Instrument, having been rectified to include the statement required by s 19(1)(c)(iv) of the Powers of Attorney Act 2003 (NSW), is a valid enduring power of attorney for the purposes of the Act.

Order under s 7 of the Court Suppression and Non-publication Orders Act 2010 (NSW) that the publication or other disclosure of information tending to reveal the identity of the principal is prohibited on the basis that such an order is necessary to prevent prejudice to the proper administration of justice.

There be no order as to costs.

Although I propose that the appeal be allowed, it is to be emphasised that this is because of a point which was not argued below.

The importance of practitioners being vigilant in ensuring that the formal requirements of the Act be met cannot be overemphasised. Rectification is appropriate in the particular circumstances of this case. This remedy will often not be available to redress a failure to adhere to the strict requirements of the Act.

Finally, the Court expresses its gratitude to Mr Rares for appearing as contradictor.

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Decision last updated:

26 March 2026

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CASE PAGE <https://chat.esheria.ai/case-law/australia/singer-v-no-defendant-2026>

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