

[00:00:03.290] - Suzanne Kearney, Of Counsel

In today's episode we're going to discuss corporate authority. Who are authorised to bind companies as a matter of Irish law? I'm Suzanne Kearney, Of Counsel in the Corporate and M&A department in Arthur Cox.

[00:00:14.710] - Tom Courtney, Partner

And I'm Tom Courtney, Partner here at Arthur Cox.

[00:00:17.800] - Suzanne Kearney, Of Counsel

We've discussed in previous episodes that a company is a legal person with separate legal personality distinct from its members. Accordingly, a company has the same capacity as a natural person, including the capacity to own property, enter contracts and borrow money.

[00:00:33.210] - Tom Courtney, Partner

Taking it back to basics, one of the points to look at in relation to any transaction to be entered into by a company is that company's capacity to enter into that transaction. The doctrine of ultra vires no longer applies to the private company limited by shares or the "LTD" as we generally refer to them. Section 38 (1) of the Company's Act 2014 provides that a LTD has full and unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction and for those purposes it has full rights, powers and privileges. It follows necessarily that an Ltd cannot act ultra vires since it has been conferred with full unlimited capacity to undertake any business or activity. Loans, guarantees and even gratuitous dispositions of assets are all therefore intra vires because everything is intra vires and cannot be impugned on the grounds of lack of capacity or ultra vires. However, we must remember that all other companies incorporated under the Act, DAX, PLCs, unlimited companies, CLGs are still required to have an Objects Clause in their Memorandum of Association.

[00:01:46.520] - Suzanne Kearney, Of Counsel

Although it is a legal person, a company requires the assistance of natural persons in order to carry out any transaction. Once the corporate capacity of the company to enter the transaction has been established, the next step is to ensure that any person who is purporting to act on behalf of that company has the authority to bind the company. As we mentioned, although the company is a separate legal person, it does not have the same contractual capabilities as a natural person. A company can only act through its human agents. So how can persons dealing

with a company be satisfied that the person who is acting on behalf of the company has the authority to bind the company?

[00:02:23.020] - Tom Courtney, Partner

The root of corporate authority in general and contractual authority in particular lies with the members of a company. However, it's invariably the case that under the constitution adopted by companies members on its incorporation, the members will divest themselves of almost all authority by delegating the management of the Company and the exercise of all powers not required to be reserved to them, the members, in general meeting to the board of directors. So in practical terms, corporate authority will have been delegated to the directors acting together as a board and not to any individual director. Indeed, it can come as somewhat of a surprise to some to learn that a director per se has zero authority to bind his or her company, and will only have whatever authority is delegated to him or her by resolution of the Board of Directors.

[00:03:17.860] - Suzanne Kearney, Of Counsel

That's right, Tom. The business of the Company is managed by the Board of Directors acting collectively, and the Board generally has authority to exercise any power of the Company and to authorise others to do so. So, while the Board may in turn delegate its authority, for example to individual directors, to committees of the Board or to other persons, where a person enters into a contract or transaction on behalf of the Company, they must only act within their permitted delegated authority. Delegations can be general in nature. For example, a CEO may be vested with a series of authorities which will continue for so long as they're not revoked by the Board of Directors. Or alternatively, delegation of authority may be transaction specific.

[00:03:58.910] - Tom Courtney, Partner

An enforceable contract will come into being when the person who enters into it on behalf of the Company has the actual authority of the Company to enter into such a contract. Such actual authority may be express or implied. An example of express actual authority might be where the Board has approved the entry of a particular transaction and the specific authority of certain persons authorised to sign documents on behalf of the company in connexion with that transaction, as evidenced by a formal recording in board minutes of the meeting but authority can also be implied.

[00:04:35.230] - Suzanne Kearney, Of Counsel

An enforceable contract can also come into being even where the person who enters into it on behalf of the Company does not have actual authority, that is, where they act beyond their permitted delegated authority. This can happen in a number of different circumstances. Firstly, where a person has deemed authority under section 40 of the act. Secondly, where a person has ostensible authority at common law. Or thirdly, where the Company is stopped from denying the contract by reason of the indoor management rule, also known as the Rule in Turquand's case. Taking the first of these examples, deemed authority under section 40. Tom, can you please explain the impact of this provision for our listeners?

[00:05:13.150] - Tom Courtney, Partner

Of course, Suzanne. Section 41 of the act provides that the Board of directors of the Company and any registered person each shall be deemed to have authority to exercise any power of the Company and to authorise others to do so. Section 40 is a very powerful provision and means that anyone who deals with the persons mentioned in 41 can rest assured that whether or not those persons have actual authority to transact, they are deemed to have the authority to exercise any power of the Company and to authorise others to do so. For example, if a Company's constitution reserves certain powers to the members, and if, in breach of that reservation, the board of directors conclude a contract, the person dealing with the Company can rely on the director's deemed authority under section 40 and enforce the contract. Section 40 operates where persons deal with the board of directors or registered persons, and only with the board of directors or registered persons. It's worth noting that in practice, companies have not generally availed of the option to appoint registered persons. There are probably a number of reasons for this, but in my view a board of directors should exercise great caution in appointing registered persons, since it can create a real governance disconnect between the persons entitled to bind the company and the persons who are accountable for the consequences of the company being so bound.

[00:06:39.090] - Suzanne Kearney, Of Counsel

Apparent or ostensible authority prevents the company from denying the authority of the person who purports to act on the company's behalf where the company has represented that person as having such authority. Ostensible authority operates as a form of estoppel where the company is stopped from later denying that person's authority to bind the company. In order for ostensible authority to apply, there must be a representation from someone with actual authority. In other words, the company, usually the board of directors, must hold out that person as having the authority to carry out the transaction in question. It's not sufficient for the person

themselves to represent that they have authority to bind the company. As they say, “you cannot pull yourself up by your own shoestrings.” In practical terms, representing that someone has authority often arises by conduct, for example, where the board holds a particular person out as having the usual authority of a person in a particular position or holding a particular office.

[00:07:34.370] - Tom Courtney, Partner

An example of a Managing Director's ostensible authority is seen in what is the leading case on Ostensible authority *Freeman and Lockyer versus Buckurst Park Properties, Mangal Limited*, a decision of the UK's Court of Appeal. In that case, the company's constitution permitted the appointment of a Managing Director who, if appointed, would have whatever powers the board delegated to the Managing Director. In fact, the board of directors never formally appointed any director to the position of managing director. Despite this, to the knowledge of the board of directors, one of the directors acted as if he had been appointed to the office. And when he concluded a contract with an architect to carry out work for the company, it was held that the company was bound to pay the architect's fees because the director had the ostensible authority of a managing director.

[00:08:28.150] - Suzanne Kearney, Of Counsel

Finally, the indoor management rule, or rule in *Turquand's case*, relieves third parties who deal with a company from any duty to satisfy themselves that any internal requirement necessary to perfect a person's actual authority has been complied with. In practical terms, this means that a third party dealing with a director who's contracting on behalf of a company can assume, unless they've acknowledged the contrary, that that director has the authority to bind the company. The third party is entitled to rely on the company having carried out all of the necessary acts or resolutions without the necessity for inquiring whether the company has complied with its own constitution or other procedural rules.

[00:09:06.520] - Tom Courtney, Partner

The rule in *Turquand's case* has in fact been expressly enshrined in Irish law by virtue of section 40, subsection 11 of the act, which provides that this section is in addition to and not in substitution for the rule in *Royal British Bank versus Turquand*. It's important to note, however, that the rule does not apply in circumstances where the third party is actually aware that the company's internal procedures were not complied with.

[00:09:34.710] - Suzanne Kearney, Of Counsel

So, Tom, having considered the legal position, what are the practical steps that companies can take in order to ensure that the chain of authority is clear?

[00:09:42.190] - Tom Courtney, Partner

Suzanne the first point for any non Ltd is to ensure that the company has capacity in the first place, ensuring that transaction or activity is permitted by its Constitution. While the ultra vires rule has been mitigated for companies which have objects clauses, it does remain a practical concern. Secondly, for all companies documenting those decisions, approvals and any delegation of authority is key to legal formality and good corporate governance. Having a paper trail so that it is clear what has been approved, who has been delegated with authority, and what that delegated authority entails. Generally evidencing, the authority will take the format of board minutes, which are a formal written record of the proceedings and decisions at board meetings, where minutes are signed by the chair of a board meeting or the chair of the next following board meeting. Such minutes are deemed by section 166 (3) of the Act to be evidence of the proceedings of that meeting.

[00:10:40.990] - Suzanne Kearney, Of Counsel

One of the common ways of the board delegating authority, which we come across in practise, is the granting of a power of attorney appointing a specified person or persons to act on behalf of the Company and in its name. The granting of any such power of attorney should always be approved by the board, either at a board meeting or at a written resolution of the directors, where permitted by the Constitution.

[00:11:01.900] - Tom Courtney, Partner

And so, to wrap up with a few parting thoughts, never assume that a particular person has authority. As I said at the beginning of the podcast, a company director does not have any inherent authority and whatever authority he or she has will derive from a resolution of the board of directors. And also remember that a director or the company secretary does not have any inherent authority to use the common seal to seal a document. Under section 43 of the Act, the use of the seal will always require the approval of the Board of directors, which approval will be evidenced by a resolution recorded in minutes.

[00:11:35.920] - Suzanne Kearney, Of Counsel

And while the Rule in Turquand and the doctrine of ostensible authority provide useful defences to claims that a person does not have actual authority, these are best considered shields rather than swords, which will never be needed if you establish at the outset that a person purporting to bind the company has the actual authority to do so. That's all we have time for today. If you have any questions on anything we discussed or if there's a particular issue you would like Tom and I to focus on in a future episode, please let us know. Tom and I will be back with a new episode for focusing a new aspect of company law soon. And in the meantime, thank you for listening.