Lawyers' Risks in Acting for Corporate Clients without Authority

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The recent decision in *Rushbrooke UK Ltd v 4 Designs Concept Ltd* [2022] EWHC 1687 (Ch) has highlighted the dangers for lawyers in acting for corporate clients on the instructions of a director without authority of the company. Most of the authority in this area has focused on commencement of litigation but the principles apply too to transactional matters.

His Honour Judge Paul Matthews made a wasted costs order against solicitors Neath Raisbeck Golding Law. They had purported to act for a corporate client on the instructions of one of two directors in bringing an application to restrain a winding-up petition. The judge struck out that claim in an earlier judgment on 13 May 2022 on the ground that the single director had no authority to make the application or instruct lawyers to do so on behalf of the company.

This issue emerges most commonly in claims for breach of warranty of authority. Generally, lawyers warrant that they act on behalf of those whom they purport to act for. It is a relatively unforgiving jurisdiction with strict liability and relatively few areas of defence. Ratification provides a lifeline in some instances and inability of a claimant to demonstrate reliance in others. Despite this, claims can be hard fought, expensive and complicated. Wasted costs orders are a potentially less complicated route for a counter-party left aggrieved at a claim being brought without authority.

In addition to liability concerns, the issue of authority in agency situations has consistently merited express provision in the Codes of Conduct for Solicitors. In the current Codes the SRA provide (at 3.1 and 4.1) "*You only act for clients on instructions from the client, or from someone properly authorised to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your client's wishes, you do not act unless you have satisfied yourself that they do. However, and in circumstances where you have legal authority to act notwithstanding that it is not possible to obtain or ascertain the instructions of your client, then you are subject to the overriding obligation to protect your client's best interests*.". This clearly extends beyond strict authority issues in the corporate setting and highlights a number of issues arise in practice.

In *Rushbrooke* the company was a two person shareholder/director entity with no managing director. The directors were in dispute with each other. The judge reviewed the constitutional documents of the company and held that, in the absence of any delegated authority by the board, authority to issue proceedings could only come from the board of directors.

Rushbrooke was by no means the first occasion on which this issue had to be considered. In *Mitchell & Hobbs (UK) Ltd v Mill* [1996] 2 BCLC 102 Anthony Machin QC, sitting as a deputy judge of the High Court, had to deal

with a similar situation. He held that a single director of a company (with more than one director) did not have authority to commence proceedings under regulation 70 of Table A in the company's articles. He also held that regulation 72 did not assist in relation to the managing director's powers because no powers had in fact been delegated to him.

Later in *Smith v Butler* [2012] EWCA Civ 314 the Court of Appeal held that *Mitchell* was correctly decided but suggested that it may be unusual for a managing director not to have some delegated authority – "*The managing director has certain powers by implication from his office. Even in a small company those powers will often include power to commence proceedings unless the board has expressly or by implication decided that such proceedings should not be taken or would be likely not to ratify the commencement of proceedings*.".

This is an unforgiving area of practice which permits for opportunist points to be taken as well as claims with justice on their side. The mistakes are typically made at the very outset of the retainer in failing to consider carefully the authority of the agent of the corporate entity giving instructions on behalf of the client. Nothing in a firm's terms of engagement will rescue the situation and sometimes potentially difficult questions will have to be raised with the agent of the at the outset.

There are problems too outside the area of litigation as the breadth of the Code (above) suggests. In *Newcastle International Airport Ltd*[1] solicitors acted for the claimant company in drafting executive service contracts between the company and two executive directors. The claimant unsuccessfully alleged that the director did not have authority to instruct the solicitors to draft the contracts in the specific terms that they did and should in any event have provided a summary of the contracts to the remuneration committee of the claimant. The Court of Appeal found it surprising that the solicitors should have taken instructions on behalf of the company from the executives themselves but was not prepared to say that they should not have done so. However, there had been a duty to take reasonable steps to ensure that the remuneration committee properly understood the effect of the drafts created on the executive's instructions. On the facts, the court held that such advice would not have made any difference because the head of the relevant committee would not have read any such advice.

The existence of such actual and potential conflicts can play a part in the existence or otherwise of authority (see for example *Fusion Interactive Communication Solutions Ltd v Venture Investment Placement Ltd* [2005] EWHC 736 (Ch)). That was not the case in *Newcastle* where the concern was more the duty of care to the client rather than the scope of the authority.

This continues to be a difficult area which generates costly and complex disputes.

[1] [2013] EWCA 1514