



POWERS
of
ATTORNEY

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‘A Power of Attorney in the hands of an unscrupulous person is one of the most lethal legal documents known to the civilised and uncivilised world; a power of attorney is capable of dissipating all the assets of the donor at the stroke of a pen. Financial misfortune always happens to the other person – until it happens to you. Caution and care are the watchwords.’

Anonymous

Introduction

Powers of attorney are among the most frequent legal documents a notary encounters in his or her professional practice. The notary is frequently requested to authenticate a power of attorney or draft a power and is often called upon (and relied on by foreign authorities) to certify that the instrument creating the power of attorney is adequate in form and content to bind the principal and is executed in accordance with the laws of Ireland. A writer in a celebrated law review noted in 1950 that ‘next to the bill of exchange and the bill of lading, the power of attorney is one of the most frequently used instruments in international intercourse’.¹ Six decades and more on, the notary and the power of attorney are inextricably linked ‘in international intercourse’.

What is a Power of Attorney?

A power of attorney has been defined in section 2 of the Powers of Attorney Act 1996 (Ireland) as meaning

‘an instrument signed by or by direction of a person (the donor) or a provision contained in such an instrument, giving the donee the power to act on behalf of the donor in accordance with the terms of the agreement’.

‘Attorney’ is an ancient English word derived from the word ‘*atourner*’ – ‘to substitute’, and an attorney is the person substituted for another - one that is in the place of another.

¹ P.J Eder, ‘Powers of Attorney in International Practice’, 98 U.Pa.L.Rev., 840 (1950).

A power of attorney is the evidence of the will of the person who gave it so that the person who receives it shall do the act or acts which the grantor can do by himself or herself.

The person who gives the power of attorney is called the 'principal' or 'donor' or 'grantor'; the person to whom the power of attorney is given is called the 'attorney' or 'donee' of the power. A power of attorney may be in the form of a stand-alone document or may be incorporated in another deed.

It has been held in case law that the donee of a power of attorney embodies the 'will' or 'volition' of the donor – the person who gave the power of attorney – within the confines of the powers set out in the empowering instrument (the power of attorney).

In so many transactions that the present writer has seen, persons have given an absolute power of attorney to a foreign national (sometimes an estate agent, sometimes a lawyer unknown to the donor or donors) – frequently in a county outside the European Union – to open a bank account in the name of the donor, to borrow money, to mortgage property, to withdraw money from bank accounts, to delegate any of the powers set out in the Power of Attorney to anyone in the 'office' and to do all other matters that are deemed necessary by the donee. This is, of course, a recipe for financial disaster. And financial disasters have happened. Further, the potential for further financial disasters, with so many powers of attorney unrevoked is still considerable.

Textbook writers note that the agent (the donee) (as the law of powers of attorney is an extension of the law of agency) is 'deemed to have a unity of volition' with the principal (the donor) within the legal capabilities of the donor.² These words, once again, emphasise how careful the donor must be in granting the donee the power to act on his or her behalf. The donor is granting his 'will', his 'volition' to another; this is an awesome power.

Types of Powers of Attorney.

There are three classes of powers of attorney: (i) the general power of attorney that is cast in wide terms empowering the donee to do almost everything the donor can do himself or herself either in respect of the complete business of the donor or a complete segment of the business of the donor; (ii) the special, specific or limited power of attorney with a specific or limited powers set out

² See, for example, V St Clair Mackenzie, *The Law of Powers of Attorney and Proxies*, London, (1913) p 4.

in the instrument creating the power of attorney, and (iii) an enduring power of attorney.

In the Powers of Attorney Act 2006, a power of attorney is considered an ‘enduring power’ if the instrument creating the power contains a statement by the donor to the effect that the donor intends the power to be effective during any subsequent mental incapacity of the donor and complies with certain other provisions set out in the 2006 Act.³ An enduring power is not considered in this short paper.

A full General Power of Attorney

The Third Schedule to the Powers of Attorney Act 1996 sets out the most simple yet effective form of a general power of attorney. This general and ‘absolute’ power of attorney reads as follows:

‘This GENERAL POWER OF ATTORNEY is made this of
by AB of .
I appoint CD of
[or CD of and EF of
jointly (or jointly and severally)]
to be my attorney(s) in accordance with section 16 of the Powers of
Attorney Act 1996.

IN WITNESS etc’

Section 16 (1) of the Powers of Attorney Act 1996 provides:

‘16(1) A general power of attorney in the form set out in the Third Schedule, or in a form to the like effect expressed to be made under this Act, shall operate to confer on the donee or donees of the power acting in accordance with its terms authority to do on behalf of the donor anything which the donor can lawfully do by attorney.’

A donor can lawfully do most matters by attorney – the so-called ‘volition’ of minds. So, In effect, the general power of attorney expressed here is an

³ Section 5 of the Powers of Attorney Act 2006.

absolute power of attorney – the power to do anything that the donor can lawfully do by attorney.

Where the Donor is Physically incapable of Signing the Power

Where a power of attorney is signed by direction of the donor, which means, in effect, that the donor is physically incapable of signing the power of attorney – but with full mental capacity - the power of attorney must be signed in the presence of the donor and of another person who shall ‘attest the document as witness’. [Section 15 (1) of the Act of 1996]

Execution of a Power of Attorney by a Company

Several issues arise in relation to the execution of a power of attorney by a company. Reference is also made below to issues that arise in relation to the certificate of the notary which is requested by many lawyers on the mainland of Europe and in other civil law countries. Such a certificate is frequently set out in the body of the power of attorney granted by a body corporate. An example suffices to illustrate several issues.

The following wording in a power of attorney to be granted by a body corporate was in two languages, one language facing the other with the ‘foreign’ language to take precedence over the text in English:

‘In Dublin, Ireland, on [....] day of [.....] before me [Name of Notary Public] duly appointed and empowered by the laws of Ireland to attest documents and public instruments which take effect in foreign countries:

APPEARS

[AB] of legal age, [marital status] of [.....], nationality [.....] with address at [.....] and with passport of his nationality number [....] currently in force:

ACTING

On behalf of and representing the company [CD Limited a company duly incorporated and existing in accordance with the laws of Ireland] with a corporate address at [.....]

I, the Notary Public, deem [AB] to have legal capacity and authority to grant the power of attorney herein.

Therefore [AB] with the aforementioned authority

GRANTS

A power of attorney as broad as may be required by the law in favour of [Names]

To [details of the powers specified.....]

Signed by [AB] this [....] day of [....]

Signature of [AB]

NOTARIAL ATTESTATION

I [EF] Notary Public of Ireland do hereby CERTIFY:

1. That the company [CD Limited] is in existence and was duly incorporated in accordance with the laws of Ireland with its corporate address at [.....] with Tax Identification number [.....];
2. That [AB] has, according to the laws of Ireland and the constitution of the company, the authority and capacity to act on behalf of [CD Limited];
3. That [CD Limited] has, according to the laws of Ireland, authority and capacity to grant this Power of Attorney and to bind [CD Limited] in this act;
4. That the signature of [AB] is true and authentic and has been signed in my presence;
5. That this Power of Attorney by [CD Limited] has been granted and executed according to the laws of Ireland.

In WITNESS thereof, I, [EF], Notary Public of Ireland, make this certificate on [....] day of [.....]

Signature and Seal of [EF] Notary Public of Ireland.

The notary will have to be certain of each fact as set out above, before he or she can provide the 'attestation' or notarial certificate. Then, there is the issue of

whether AB (who is not specified to be a director of the company and, in fact in most cases, no status is specified at all) may lawfully execute the power of attorney on behalf of the company without the power being under the common seal of the company. Remember, the notary above is certifying that the power of attorney by the company was granted and executed in accordance with Irish law.

In the past, there has been a difference of opinion expressed as to whether a power of attorney by a company must be under the common seal of the company. For example, section 41 of the Companies Bill 2012 as passed by the Dáil (2014) specified as follows:

‘Powers of attorney

41. (1) Notwithstanding anything in its constitution, a company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds or do any other matter on its behalf in any place whether inside or outside the State.

(2) A deed signed by such attorney on behalf of the company and under his or her seal shall bind the company and have the same effect as if it were under its common seal.’

The obvious inference was that a power of attorney granted by a company must, in effect, be under the common seal of the company and that the donee of the power would bind the company similarly under his or her seal.

The above provision was expressed to re-state the existing law but did not reflect the true position in the opinion of many practising lawyers/notaries.

Happily, in the Seanad on 30 September 2014, the sponsoring Minister of State on the Companies Bill 2012 (Report and Final Stages) clarified the matter by successfully amending the provision above by deleting the words in section 41 (1) ‘,by writing under its common seal,’ and the words in section 41(2) ‘and under his or her seal.’ on the basis:

‘The purpose of these two amendments is to bring this section [41 of the Companies Bill under the heading of ‘Powers of Attorney’] in line with

the Powers of Attorney Act 1996 and the Land and Conveyancing Law Reform Act 2009.

The use of a seal is no longer necessary to empower a person to execute deeds or other matters on behalf of a company.’ [*Seanad Debates*, 30 September 2014. [*Seanad Debates*, Report and Final States Companies Bill 2012, 30 September 2014]

Accordingly, section 41 of the Companies Act 2014 (dealing with powers of attorney), now reads as follows:

41. (1) Notwithstanding anything in its constitution, a company may empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds or do any other matter on its behalf in any place whether inside or outside the State.

(2) A deed signed by such attorney on behalf of the company shall bind the company and have the same effect as if it were under its common seal.’

This clarifies this matter finally: a power of attorney by a company does not need to be under seal.

Parts 1 to 14 of the Companies Act 2014 (including section 41 as above) apply to a private company limited by shares – sometimes designated as a ‘CLS’ – the constitution of which no longer contains an ‘objects clause’. The name of the company will end with ‘limited’ or ‘teoranta’ (‘ltd’ or ‘teo’).

Section 41 (powers of attorney) and some other general provisions will also apply to the other categories of companies - the ‘Designated Activity Company’ (DAC) – the private company limited by shares or limited by guarantee having a share capital, the primary feature of which is the continued existence of an objects clause in its constitution. This type of company name will end with the words ‘d.a.c.’ or ‘dac’. Similarly section 41 above will apply to a ‘Public Limited Company (‘plc’), a private unlimited company, public unlimited company and a public unlimited company that has no share capital.

In the context of a company limited by shares (CLS) – the most common form of company, section 38 of the Companies Act 2014 will also be of fundamental significance for notaries in the context of corporate capacity and authority. In effect, section 38 provides in relation to a CLS that it will have the same full

capacity as a natural person and, therefore the doctrine of *ultra vires* will no longer apply to such a company.

Section 38 of the Companies 2014 Act provides as follows:

‘Capacity of private company limited by shares

38. (1) Subject to subsection (2), notwithstanding anything contained in its constitution, a company shall have, whether acting inside or outside the State –

(a) full and unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction; and

(b) for the purposes of paragraph (a), full rights, powers and privileges.

(2) Nothing in subsection (1) shall relieve a company from any duty or obligation under any enactment or the general law.’

Section 38 above only applies to a private company limited by shares.

Section 39 of the Companies Act 2014 introduces the ‘registered person’. This occurs where the board of directors of a company authorises any person as being a person entitled to bind the company, the company may notify the Registrar of Companies in the prescribed form of the authorisation. In the section as passed by the Dáil, the notification to the Registrar of Companies was mandatory. The provision, as amended in the Seanad is now permissive only. Concern had been raised that making notification mandatory would create unnecessary additional administrative burdens on both companies and the Companies Registration Office.

The Governing Law

Usually the governing law of the power is specified in the power. If not, and a power of attorney is to be exercised wholly or partly in another country, the power is generally read according to the law where the acts pursuant to the powers are to be done (*lex loci solutionis*).

Liability of Principal/Donor

The principal/donor is liable for the acts of the donee done within the expressed or implied scope of the donee's/agent's authority.

There is old case law to the effect that the principal 'is liable to third persons ... for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances or misfeasances and omissions of duty of his agent *in the course of his employment*, although the principal did not authorise or justify, or participate in, or indeed know of such misconduct.....' *McGowan v Dyer* (L.R. [1873] 8 Q B. 143.

Duties of the Donee/Agent/Attorney

The person who is given a power of attorney or a corporation designated as a donee, agent or attorney must act in good faith.

No profit is to be made by the donee/agent without the consent of the donor/principal.

There should be no conflicts of interest. Any possibility of a potential conflict of interest should be notified to the donor/principal.

There is an obligation on the donee/agent to keep proper accounts.

Determination/Revocation of a Power of Attorney

Unless specified to be irrevocable, a power of attorney may be revoked by the donor. While there is case law to the effect that a revocation may be oral, it is of course preferable for a revocation to be in writing or by deed.

A power of attorney may be ended - described in the lawyer's language as by 'efflux of time' - either specified or implied in the creating instrument - the power of attorney.

In general, revocation does not become operative until it is known. Any notice of revocation should be sent to all parties with whom the donee/agent has been dealing with - for without proper notice to all parties, the donor/ principal may still be liable for the acts of the donee:

‘Where an agent is clothed with authority and afterwards that authority is revoked, unless the revocation has been made known to those who have dealt with him, they would be entitled to say:’The principal [donor] is precluded from denying that the authority continued to exist, which he has led us to believe, as reasonable people, did formerly exist.’” Erle CJ in *Staveley v Uzielli* ([1860] 2 F & F 30)

Section 18 of the Powers of Attorney Act 1996 provides certain protection to the donee of a power of attorney in the context of a revocation. Section 18 (1) of the 1996 Act provides that a donee of a power of attorney who acts in pursuance of a power when it has been revoked shall not, by reason of the revocation, incur any liability (either to the donor or any other person) if at that time the donee did not know that the power had been revoked.

S. 18 (2) of the 1996 Act provides that where a power of attorney has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them shall, in favour of that person, be as valid as if the power of attorney had then been in force.

Section 18 (3) of the 1996 Act provides:

‘Where the power is expressed in the instrument creating it to be irrevocable and to be given by way of security then, unless, the person dealing with it knows that it was not in fact given by way of security, that person shall be entitled to assume that the power is incapable of revocation except by the donor acting with the consent of the donee and shall accordingly be treated for the purposes of subsection (2) as having knowledge of the revocation only if that person knows that it has been revoked in that manner.’

Particular rules apply where the power of attorney is expressed to be irrevocable and to be given by way of security. Section 20 of the Powers of Attorney Act provides that where the power of attorney is expressed to be irrevocable and is given to secure a proprietary interest of the donee of the power, or the performance of an obligation to the donee, then for as long as the donee has that interest the power shall not be revoked (i) by the donor without the consent of the donee, or (ii) by the death, incapacity, or bankruptcy of the donor, or if the donor is a body corporate, by its winding-up or dissolution.⁴

⁴ See generally, Brian Gallagher, Solicitor, Annotation to the Powers of Attorney Act 1996 (Round Hall Sweet & Maxwell) (1998) pp.25-28.

Subject as above in the case of a power given as security, at common law (in general), an ordinary power of attorney (not given for security) was revoked by the death of the donor, the incapacity of the donor/principal, the bankruptcy of the donor/principal, and the death or incapacity of the donee/agent.

Suggested Safeguards on the part of the Donor of the Power

Retention of a full copy of the Power as Notarised and Apostilled

A full copy of the power of attorney duly executed, notarised and apostilled (where applicable) should be retained by the donor and reviewed regularly.

Return of the original Power of Attorney

The donor should always request the return of the original power of attorney as soon as the specific transaction in question has been completed or if the power has been revoked.

As stated above, liability of the donor to third parties may continue when the third parties have no notice of the revocation. There is case law to the effect that where a power of attorney was left in the hands of a donee and he afterwards exhibited it to a third party who dealt with him as agent (donee) on the faith of the power of attorney, without notice of the revocation, the act of the agent was deemed to be within the scope of the authority and was held to bind the donor (principal). [See *Salte v Field* 5 T.R 215 and *Drew v Nunn* 4 Q.B.D 667 (1878-79)]

Copy of all documents signed by the Donee in the Name of the Donor

Some persons advise the donor of a power of attorney to inform and obtain the agreement of the donee (in a separate or side document) so as to ensure that the donee sends the donor a copy of any document signed by the donee in connection with the power of attorney and to send it by post to the donor within 48 hours of the signing of the document.

Donor should Diary Forward Review Dates

The donor should diary the date 'forward' when he or she should review the power of attorney to check if the power has been spent or the task completed so as to remind the donee to ensure the return of the power of attorney and to ensure the donor writes to any third parties, as below.

Donor should consider writing to Third Parties

When the donor revokes the power of attorney or indeed, where the power has been spent, a standard letter may be issued by the donor to all agencies, offices, banks etc which were the subject of the power to the effect that the power of attorney has been revoked with effect from a specified date.

Always have the donor sign the [Faculty] Acknowledgment.

The donor should acknowledge the limit of the notary's advice in the standard form.

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