Business & Commercial Lasting Powers of Attorney

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A business Lasting Power of Attorney (BLPA) allows the donor to appoint an attorney to make decisions concerning their business interests either when they are unavailable or lack mental capacity. A BLPA should be distinguished from a Property and Financial Affairs Lasting Powers of Attorney created to manage an individual's personal finances. Research conducted by this author has found that EPA's and LPA's are usable to make business decisions.

'Powers of Attorney' (POA) are already widely used by businesses to manage a range of commercial situations. BLPAs should be seen as an extension of managing business interests, as part of the business crisis management practice and reducing business risk. As businesses already use POAs, practitioners should ensure they distinguish these from BLPAs. Where the distinction is lost this may lead to misunderstanding and potential negligence as appropriate advice may not have been understood. Ideally, solicitors should advise business clients on making two separate LPAs - a personal LPA(s) (Financial and also Health & Welfare, if desired) and one to manage their business interests. Senior Judge Lush has commented there are, "Cases where the donor should have made two LPAs: one for their business affairs and the other for their personal finances", (Lush [2013] Eld LJ 144)This Practice Note explains when a BLPA will be required, what problems it may avoid, who may act as a business attorney and how to create a BLPA.

A business may be at risk if it does not have in place a BLPA as part of its crisis management strategy. It may also affect insurance costs and future claims.

Why make a separate business LPA?

If an individual loses capacity and has not executed a valid enduring or lasting power of attorney, an application to the Court of Protection (COP) seeking the appointment of a deputy may be required. Applications to the COP take around six to seven months on average. During this time, there would be no one who could lawfully make financial decisions on that person's behalf and banks accounts may be frozen until the deputy is appointed. This occasionally happens with personal finances and it is more likely to occur with business matters.

This situation may be problematic for someone with business interests who is unavailable or lacks mental capacity. Without a BLPA it may not be possible to pay staff and suppliers, complete unfinished transactions, or enter into new contracts. This is likely significantly to impede the day-to-day running of the business and, in some cases, may threaten its very existence.

Even where bank accounts are jointly held in the names of business partners or directors, the bank may choose to freeze the account if a partner or director loses capacity to deal with their financial affairs. Following such an event the business becomes exposed to failure or winding up.

Having a BLPA in place, the business owner may ensure someone they trust and who understands their particular business will be able to continue the day-to-day running of the business. Attorneys are able to deal with property owned or leased by the business, organise insurance, access bank statements and accounts, invest assets, deal with the businesses tax affairs, pay staff and suppliers and sign contracts.

In many instances, it will not be appropriate for the same person to make both personal financial decisions and business decisions on behalf of the donor. Commercial legislation and practices, Financial Regulatory bodies, conflicts of interest, the partnership agreement or articles of association may prevent such an appointment. Where this is the case, it is important to advise the client to consider making a separate BLPA.

Solicitors should alert their business clients of the need to create a separate BLPA. Where this advice is not provided, the solicitor may find themselves liable in negligence if the donor loses capacity and their business suffers loss as a result of not having a place a BLPA.

An attorney who takes on the management of a donor's business interests without the requisite competency, understanding or skills, may find themselves subject to a claim against them due to their unsuitability to act as an attorney.

Who is eligible to make a business LPA?

<u>Sole traders</u>

Sole traders frequently run specialist or technical businesses. The business does not have its own legal personality or separation from the business owner. A sole trader who does not make provisions for when they are unwell, away on holiday, off on longer term sick leave or lack mental capacity, exposes their business to an unnecessary risk.

Partners

There are effectively two types of partnership governed by either the Partnership Act 1890 or the Limited Partnerships Act 1907. Partners should consult their partnership agreement as this may contain provisions relating to the incapacity of partners. Such provisions removing partners who lack mental capacity may be in breach of the Equality Act 2010. In order to manage a potential situation with a partner who lacks mental capacity and to reduce the risk of discrimination, the partners should each consider putting in place a BLPA.

LLPs

LLPs are governed by the Limited Liability Partnerships Act 2000. This means that some or all of the partners or members limit their liabilities. In practice this means one member may not be responsible or liable for another member's misconduct or negligence. LLPs are subject to many of the provisions under the Companies Act 2006. LLPs frequently adopt as their partnership agreement the Companies Act Model Articles. Solicitors should review the LLP's articles, as with partnership agreements, to remove any offending or potentially discriminatory clauses where a claim for discrimination may arise. As with partnerships, LLP members may wish to appoint either themselves or independent third parties as their attorneys.

Company directors

The law relating to the removal of a director who lacks mental capacity changed in April 2013. From this date, Sch 1 para 18(e), Sch 2 para 18(e) and Sch 3 para 22(e) (Companies (Model Articles) Regulations 2008 SI 2008/3229) were removed by the Mental Health (Discrimination) Act 2013, section 3. Prior to this date, if a director lacked mental capacity you could seek a court order to remove them but now this is not possible. The Mental Health (Discrimination) Act 2013 was introduced as a private members bill aiming to remove the stigma of mental health and to support MPs, jurors and directors to remain in their roles.

An attempt to remove a director lacking mental capacity using the provisions under SI 2008/3229, Sch 1, para 18(d) (and similar provisions under Schedules 2 and 3) may also fail if the grounds for or process of removal are found to be discriminatory. Sch 1, para 18(d) refers to the scenario whereby a registered medical practitioner provides a written opinion to the company stating that that an individual has become physically or mentally incapable of acting as a director.

Shareholders may consider removing a director lacking mental capacity by calling a shareholders' meeting to remove them. Using this procedure, the director needs to be served special notice and given the opportunity to defend themselves. If they lacked mental capacity they would not be in a position to receive notice or to suitably defend themselves. In such circumstances, shareholders may be best advised to make an application to the Court of Protection for representation to be made on their behalf.

Companies with articles which include provisions requiring a director to relinquish their directorship without regard for the provisions of the equality legislation may find themselves subject to discrimination claims.

To protect the company's interests and avoid discrimination claims and regularity investigations, a BLPA should ideally be created by all directors.

Companies sometimes claim that individual directors are unable to authorise a proxy or to delegate their individual authority. The New South Wales, Australia case of Mancini v Mancini ((1999) NSWSC 799 is occasionally cited which says:

> 'The office of a director is not a property right capable of being exercised by an attorney or other substitute or delegate of the person holding the office.'

This case should be viewed with caution as it is not representative of current Australian, English and Welsh, Scottish, Canadian, US legislation or case law. See for example; Deutsche Bank AG v Sebastian Holdings Inc. (Rev 1) [2013] EWHC 3463 (Comm) (08 November 2013); Re Fenox (UK) Ltd; J&W Sanderson Ltd v Fenox (UK) Ltd and others [2014] EWHC 4322 (Ch); Re Brand & Harding Ltd [2014] EWHC 247 (Ch).

UK solicitors will be aware it is quite possible for a director using the provisions described in the accompanying explanatory note and memorandum of SI 2008/3229 to use CA 2006, s 20 to amend their articles to include delegation authority by an individual director.

A difficulty did arise following the change in 2007 from companies using Table A to using Model Articles. Regulation 65 of the Table A provisions (Companies (Tables A to F) Regulations 1985, as amended by SI 2007/2541 and SI 2007/2826, provides as follows:

> ‘Any director (other than an alternate director) may appoint any other director, or any other person approved by resolution of the directors and willing to act, to be an alternate director and may remove from office an alternate director so appointed by him’

When the Companies (Model Articles) Regulations 2008 (SI 2008/3229) were introduced to replace the Table A articles, the above individual director delegation provision was omitted and companies were instead given the option to include individual director delegation if they wish. The explanatory memorandum to the regulations says (emphasis added):

> 2.1 Every company formed under the Companies Acts must have articles of association which are rules, chosen by the company’s members, which govern the company’s internal affairs. … Such companies do not have to adopt the model articles, but they will automatically be the articles for such companies which are formed under the 2006 Act on or after 1st October 2009, **unless the company chooses to adopt its own tailor-made articles in place of all or part of the model articles.**
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> 7.5 Model articles for private companies limited by shares have been designed with the needs of small, owner-managed companies in mind. They therefore are kept as simple and straightforward as possible, and do not cover aspects of the 2006 Act where these are not relevant to the majority of small companies. **The Government has assumed, for example, that private companies using these model articles will not wish to have alternate directors and will have fairly simple capital structures and issue no partly paid shares.** This set of model articles also assumes that a small company will take advantage of the fact that under the 2006 Act it is no longer required to have a company secretary.

Unless the donor is a sole director, he may not appoint an individual to be a ‘director’ in his place without approval from the board of directors. Applying the rules of agency however a principal (donor) may appoint a proxy (attorney) to make decisions on their behalf[1]. Which is different from appointing someone to become who you are. This is the underlying principle when using an LPA within a business context. It does not mean the person becomes a ‘director’, they remain the agent. The Mental Capacity Act 2005 (MCA) Code of Practice at 7.58 says, “An attorney appointed under an LPA is acting as the chosen agent of the donor and therefore, under the law of agency, the attorney has certain duties towards the donor.”. These duties in a limited way are performed by

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[1] See Armitage Holdings Inc v Delahunty; Delahunty v Armitage Holdings Inc and others [2007] EWHC 1556 (Ch) and Christopher Josife (By his authorised representative Maria Joseph) v Summertrot Holdings Limited [2014] WL 1219374.

the attorney standing in the donor's shoes, but they do not become that person[2]. The case of Re Buckley (COP 22 January 2013) at paragraphs 20 to 23 takes this idea a stage further. Standing in the donors shoes the attorney should consider; a) how the donor would have made that decision (s4(6) MCA), b) apply the MCA principles to that decision and c) act in the donor's best interests (s1(5) MCA) when decision making.

Creating a Business LPA

Mental Capacity of the Donor

Section 1(2) of the MCA provides that everyone has mental capacity until disproved. As such, a solicitor when assessing a donor's mental capacity is exploring whether there are reasons why the donor cannot make an LPA.

Under MCA, s 2, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

For the purposes of MCA, s 2, a person is unable to make a decision for himself if he is unable:

- to understand the information relevant to the decision
- to retain that information
- to use or weigh that information as part of the process of making the decision,
- and
- to communicate this decision (whether by talking, using sign language or any other means)

If the donor is deemed to be able to do all of the above, they should have sufficient mental capacity to give instructions.

For further guidance on capacity to make and revoke an LPA, see the Practice Note: [Capacity to make and revoke an LPA]

Intention

As well as having sufficient mental capacity, the donor also needs to demonstrate the intention to create this particular BLPA. To assess intention involves evaluating what is on the mind of the

[2] See Mooney v Keys and others [2012] NICh 23 at 17 and Ash & Anor v McKennitt & Ors [2006] EWCA Civ 1714 at 17.

donor at the time of a) giving instructions, and b) executing the LPA, and ensuring that the donor understands:

- the purpose of making this BLPA at this time
- the consequences flowing from this BLPA, and
- the consequences of their choice of attorney(s)

The choice to make an LPA or BLPA stems from the donor's own understanding and decision making, together with information received from their legal advisers to inform that decision. It is their free choice and should be unencumbered by pressure or undue influence.

Choice of attorney

It is important that the attorney(s) under a business LPA is familiar with the business concerned and is someone whom the donor trusts with his business affairs. Where the donor wishes to appoint more than one attorney, they will need to decide how the attorney(s) are to act - i.e. jointly, jointly and severally or jointly for some decisions and jointly and severally for others.

When advising the donor on these decisions, solicitors should consider the nature of the business and the decision making procedures of the particular business. This will vary depending on whether the business is a sole trader business, a partnership, an LLP or a company.

It is also essential that advisers ensure the attorney(s) understand their role as this may otherwise lead to claims against the attorney(s) and negligence actions against the adviser.

Form of a business LPA

A business LPA should be made using the prescribed form for a financial LPA and should comply with the provisions of the MCA, Sch 1, Part 1 [link to the LexisNexis version of the financial LPA form].

The same execution requirements and rules as to who can and cannot act as an attorney, certificate provider, person to be notified and witness that apply to regular financial LPAs also apply to business LPAs. For guidance on these matters, see the Practice Notes: [link to PNs: Form and creation of an LPA, LPAs—people to notify and certificate providers and the LPA flowchart].

It is important to note that, where the donor wishes to make LPAs covering their personal and business affairs, separate LPAs should be made dealing with the two sets of assets. Attempts by donors to appoint, within the same LPA form, different attorneys to make decisions regarding their personal and business affairs have been rejected by the Office of the Public Guardian.

Where two LPAs are being made, each should contain instructions in Section 7 limiting the scope of the LPA accordingly. For example, the LPA dealing with the donor's personal affairs should contain wording along the lines of the following:

'My attorneys shall have general authority to act in relation to all my property and financial affairs except my business known as [ ], in respect of which I have executed a separate lasting power of attorney'

The LPA dealing with the donor's business affairs should contain wording along the following lines:

'*My attorneys shall have general authority to act in relation to my business known as [ ]. I have made a separate LPA dealing with my personal finances'*

[Business LPA drafting tips

Caution should be exercised in making reference within in an LPA form to another document or LPA. In *Re Hollins* (2009) (unreported), the court directed drafters to be careful about making reference to other documents in the Restrictions and Conditions section of an EPA's Part B. If an LPA drafter includes references to a third party document including other LPAs, *Re Hollins* demonstrates there is a risk the OPG will seek the Court of Protection's direction to sever the clause.

The clause may also fail if the document it refers to is revoked. In this case the original LPA would now contain an ineffective clause which may confuse or create problems for the attorneys when using the LPA.]

Dealing with disputes as to where an attorney's authority ends

If having made both a personal financial LPA and a BLPA appointing either the same attorneys or different attorneys, a dispute arises as to where an attorney's authority ends, reference should be made to MCA, s 4 and paragraph 7.8 of the MCA Code of Practice. These relate to the responsibility of attorneys to act appropriately and in the donor's best interests.

MCA s 4 refers to attorneys making decisions in the best interests of the donor. The attorney who is disputing the extent of their authority may not be recognising the donor's views and wishes regarding this particular LPA. The donor by creating a separate BLPA is showing their views and wishes are that a particular set of individuals acting in a particular fashion regarding a particular enterprise. As such they have created a separate business LPA exercising their views and wishes. The attorney who does not recognise the donor's views and wishes regarding making and using a BLPA, may no longer be following the views and wishes of the donor. It could be said this attorney may have stepped outside of acting in the donor's best interests and may no longer following MCA, s 4(6)(a), which says:

> He [the attorney] must consider, so far as is reasonably ascertainable:
>
> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

There are also implications that attorney may no longer be following MCA, s 42 and having regard for the MCA Code of Practice. Paragraph 7.8 of the Code of Practice says:

> "A donor should think carefully before choosing someone to be their attorney. An attorney should be someone who is trustworthy, competent and reliable. They should have the skills and ability to carry out the necessary tasks."

This indicates that in the donor's mind they picked someone who they believed was suitable to carry out tasks on their behalf, either personal and financial or as a business attorney. The attorney who does not recognise the donor's wishes concerning their choice of an attorney may now also be failing to have regard to paragraph 7.8 MCA Code of Practice.

The donor by creating a BLPA is demonstrating their expressed wishes and intentions of appointing different attorneys to manage different aspects of their life using their different skills and abilities. If an attorney no longer acts in the best interests of the donor, is acting outside of MCA, s 4 and contrary to the MCA Code of Practice, consideration should be given to removing that attorney.

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