



Who can act for a company in a dispute about the identity of its directors?

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When does this problem arise?

Some common scenarios:

- Potentially invalid EGM (e.g. lack of proper notice, insufficient quorum, votes not properly counted, votes cast by shareholders where validity of share issue is in dispute etc.)
- Expiration of appointment under the company's articles of association (e.g. retirement by rotation, including disputes about which directors have been automatically retired)
- Automatic removal by a trigger event under the Articles (e.g. on conviction of a criminal offence or some other factual circumstance the existence of which may be doubtful)
- Appointment or removal of directors by the board in circumstances where there is an alleged improper exercise of a power or failure to give sufficient notice to all members of the board.
- Improper exercise of shareholder power (see ***Re HR Harmer* [1959] 1 WLR 62, 82**)



Out of court solutions

- The Logan Roy method (blackmail son into abandoning lawsuit): not recommended
- Call an EGM and confirm the position with a vote
- Form a valid sub-committee of the board (treating the doubtful director, provisionally, as a director) to deal with all matters concerning the status of the disputed director and/or the company's business generally
- Exercise of powers to appoint and remove directors under the Articles



Resolution in court

Step 1: Identify who can bring the claim

- The Company itself?

Art 3 of the Model Articles for private companies limited by shares: *“Subject to the articles, the directors are responsible for the management of the company’s business, for which purpose they may exercise all the powers of the company.”*

Art 7(1) of the Model Articles for private companies limited by shares: *“The general rule about decision-making by directors is that any decision of the directors must be either a majority decision at a meeting or [by unanimous decision without a meeting].”*

- A shareholder?
- Director/disputed director? (see ***Pulbrook v Richmond Consolidated Mining (1878) 9 Ch D 610***)



Resolution in court

Step 1: Identify who can bring the claim

What if I get it wrong?

- Proceedings may be struck out for lack of authority
- Company may have claim to recover its funds in so far as improperly expended on proceedings without authority
- Adverse costs orders....



Resolution in court

Step 2: Identify the appropriate form of relief

- Declaration as to status of disputed director
- Permanent injunctive relief to prevent defendant from purporting to act as a director
- Order for an EGM to take place under s.306 of the Companies Act 2006: see ***Re El Sombrero*** [1958] Ch 900



Interim relief

- Injunction: ***Theseus Exploration v Mining and Associated Industries Limited* [1973] QdR 81**
- Can the court make an effective order permitting one or more purported directors to act without the others in the meantime?
 - Consent/undertaking: ***Pulbrook v Richmond Consolidated Mining Co (1878) 90 Ch D 610.***
 - No power to take the management of the company out of the hands of the directors: see ***MacDougall v Gardiner (1874-5) LR 10 Ch App 606, 609.***
 - Although, see ***Choudhary v Bhattar [2009] 2 BCLC 108 at [27].***
 - Section 996 CA 2006 – but section 994 threshold required: ***Re A Company (No.004175 of 1986) [1987] 1 WLR 585.***
 - Appointment of receiver: s.37(1) of the Senior Courts Act 1981.



Costs issues

- Company funds should not be used to pay for legal costs unless an action on behalf of the company is properly authorised
- Where proceedings are commenced in the name of the company without proper authority, the solicitors purporting to act for the company may be ordered personally to pay the defendant's costs
 - But the law in this area is now riddled with technicality: see generally “***An unwarranted approach – costs orders against solicitors acting without authority***” (2022) 41 CJQ 7
 - The traditional approach was that if it transpired that solicitors had wrongly purported to act in the name of the company in a dispute of this nature they would be liable for the defendant's costs: see ***Newbiggin-by-the-sea Gas Company v Armstrong*** (1879) 13 Ch D 310.
 - Modern first instance authorities (analysing the position by reference to warranty of authority principles) suggest that the solicitors will not be liable for the defendant's costs unless the defendant actually relies on the solicitor's purported authority, which will not generally be the case where the underlying dispute concerns the identity of the directors: see for example ***Zoya v Ahmed*** [2016] 4 WLR 174.



Costs issues

- Whatever the position of the solicitors purporting to act for the company, the person purporting to give instructions on behalf of the company is likely to be amenable to a third-party costs order.

