

WHY DO WE NEED YOUR POWER OF ATTORNEY? - (Rita Keevil, Consultant)

The purpose of a Power of Attorney is to provide certainty that your attorney acts with your authority in the matter and manner authorised. It is also to prevent a person whose name is used in Court process as a plaintiff or defendant from afterwards repudiating the process and saying he had given no authority. Of course, it is also to prevent the bringing or defending of an action in the name of a person who has never authorised it.

Essentially a Power of Attorney is a warrant empowering the attorney to institute or defend proceedings in Court on behalf of his client.

The Power of Attorney also provides comfort that indeed the party who brings you to Court has sanctioned the proceedings so that in the event costs are granted in your favour, you will be able to recover those costs without the risk of the other party denying liability on the ground of not having instituted (or defended) the proceedings.

There are instances in which the Courts have the discretion to condone the absence of a Power of Attorney or defects in it. The Courts may allow an opportunity to provide a complete and or proper Power of Attorney. This discretion is exercised in the interests of justice.

A Power of Attorney may be retroactive in effect and thus would authorise any steps that may have been taken up to the date of its filing, and similarly, so can a Board Resolution be retroactive in effect.

The period of time in which an attorney may correct the position and show a proper mandate depends upon the circumstances.

A plethora of judgments show that our Courts do not allow technicalities of form or practice to overwhelm substance; they will however, consider what prejudice the other party may suffer in such a situation.

There are also a number of judgments which state that the ratification of an attorney's authority is allowable even after an objection has been made to a lack of authority.

Your best bet is, of course, to ensure that your attorney does have a proper Power of Attorney and a proper Resolution - if this is appropriate.

P.S. I promised to come back to you on the recent ART law case heard at the Court of Appeal. Unfortunately, this was a bit of a damp squid in terms of the issues surrounding this hot topic. The Court focused on matters of jurisdiction which prevented it from dealing with the issue of the genetic material. So, for the time being our law in the ART sphere is embryonic at best!