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1. Topic 1-4 Company and institutions

A company is a **separate legal** entity distinct from its shareholders and directors. The company can be a secured debtor of its shareholders. *Salomon v Salomon & Co* [1897] AC 22

The main shareholder and governing director of the Co was a separate person to the Co and could negotiate a contract between the Co and himself. *Lee v Lee's Air Farming Ltd* [1961] AC 12. Shareholders have no legal or equitable interest in the property of the Co. *Macaura v Northern Assurance Co Ltd* [1925] AC 619

Company Obligations

- Set out its name followed by its ACN on its common seal and all its public documents and negotiable instruments ss 123 and 153
- Have a registered office in Australia s 142
- New companies may have a constitution or replaceable rules or a combination of both s 134
- Section 168 requires a company to set up and maintain the following registers - register of members
 - register of option holders
 - register of debentures
- All companies must keep minute books s51
- Give ASIC notice within 14 days – the personal details of a director or secretary appointed after registration
- A company must keep written financial records that properly record and explain its financial position and performance. These records must enable true and fair financial statements to be prepared and audited s 286 (1)
- Public companies and large proprietary Companies are required to prepare financial reports s 292 They are also required to have financial reports audited s 301. Copies of the financial report and directors' and auditors reports must be sent to members s 314 and ASIC s 319.

Types of Companies

- A **small proprietary** Co must **keep accounts** but does **not require an audit** except if requested by 5 % of shareholders or ASIC. A Co is a small proprietary Co if it satisfies two of the following 3
 - its revenue is less than \$10 mill
 - its assets are less than \$ 5 mill
 - it has less than 50 employees
- Public company means a company other than a Proprietary Co s 9
- Public company must have 3 directors at least 2 must reside in Australia
- Proprietary company:
 - must have no more than 50 non employee shareholders s 113
 - must not engage in any activity, such as issuing shares or debentures, that would require disclosure to investors under Ch 6 D s 113 (3) except for the issue of shares to existing shareholders & employees
 - must have at least one shareholder and one director
 - may have a provision in their Constitution giving directors a discretion to refuse to register a transfer of shares
- The initial directors and secretary are those persons named in the application for registration. Subsequent appointments may be made in

accordance with the replaceable rules or constitution. Where the other directors appoint a director, the appointment must be confirmed by the General Meeting. S 210 H

The Replaceable Rules and Constitutions

- The replaceable rules apply to cos formed after July 1998 and those formed before this date that repeal their constitutions. A Co may be formed with a Constitution that replaces or modifies some or all of the Replaceable Rules s. 135
- Most Replaceable rules apply to all Cos . But some only apply to proprietary or Public Cos. Some of the rules are mandatory for public Cos.
- A Co has the legal capacity and powers of an individual s 124.
- The doctrine of “ultra vires” has been abolished s 125. If a Co has an Objects Clause – an action by the Co is not invalid merely because it is contrary to or beyond any of its objects.
- The Constitution or Replaceable Rules apply as if they were a contract between the
 - Co and the member
 - The Co and each director and Co Secretary
 - The members
- Hickman v Kent or Romney Marsh Sheep Breeders Assoc {1915} 1 Ch 881 and s 140.

Restrictions on the Alteration of Constitution

- A special resolution is required to modify or repeal a provision of a constitution s 136(2)
- A “special resolution” is a resolution passed by at least 75% of the votes cast by members entitled to vote on the resolution. - This means that the s 140 contracts can be altered. This can apply to Officers appointed in the Constitution Shuttleworth v Cox Bros [1927] 2 KB 9
- Class Rights - Section 246B – 246G are designed to restrict Majority shareholders from varying or cancelling class rights. As a general rule, class rights can be varied or cancelled only with the approval of a special resolution of both the Co and the holders of the affected class s 246B.
- Oppression – s 232 allows members to apply to the court for a remedy if the majority votes in favour of a resolution altering the constitution or replaceable rules that is contrary to the interests of the members as a whole, oppressive, unfairly prejudicial or unfairly discriminatory to members
- Common Law – According to the High Court in Gambotto v WCP Ltd (1995) 13 ACLC 342 an alteration that involves an expropriation (taking) of shares must be fair as well as for a proper purpose. The process must be fair and the price must be fair. (note the new compulsory acquisition powers given by the CA allows a shareholder with 90% to compulsorily acquire the remaining 10%)

Company's Relations with Outsiders

The Directing Mind and Will of a Company

- The intention of the company can be derived from the intention of its officers and agents. Whether their intention is the company's intention depends upon the nature of the matter under consideration, the relative position of the officer or agent and the surrounding circumstances – H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1957] 1 QB 159
- Normally the board of Directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not... But the Board of Directors may delegate some part of their functions Tesco supermarkets Ltd v Nattrass [1972] AC 153

Final exam preparation:

MY SAMPLE CASE STUDY ANSWERS

APPARENT AUTHORITY QUESTION

The main legal issue arising from this question is whether Client Contact Pty Ltd (CC) can enforce the sale agreement against Financial Investment Consultants Ltd (FIC), specifically whether Abe has apparent authority to sign the agreement on behalf of FIC or whether CC can rely on the statutory assumptions (s129) to enforce the contract against FIC.

Under common law, apparent authority exists when a company represents or gives the impression to an outsider that an agent has authority to sign contracts for the company, and the outsider *relies* on this by entering into the contract with the agent. Firstly, the representation that a person is its agent with authority to sign contracts can also be express or implied, but it is usually implied by one of two types of conduct: when the company allows the agent to have a particular position in the company, like manager, then the company gives the impression that the agent has the customary authority of a person in such a position; or when the company's conduct allows the agent to carry out particular tasks on the company's behalf that are beyond the scope of the agent's normal authority. Additionally, the representation made by a person or persons who had "actual" authority to manage the company's business either generally or in respect of those matters to which the contract relates extracted from the case **Freeman and Lockyer v Buckhurts Park Properties** and it induces the outsider to enter into the contract.

In this case, Phillip, the FIC's managing director, who had "actual" authority to manage the company's business and matters relates to the contract and the full board of director of FIC did not approve the sale agreement with CC that Abe signed as well as they did not allows to sign the contract on behalf of the company but the representation may be implied because Abe is non executive director of FIC so he has the customary authority of a non executive director in the same company. However, non executive director is not a managing director which is in charge of managing the company's daily business, it is only an individual director. According to the case *Northside Developments Pty Ltd v Registrar- General, Dawson J* stated that an individual director does not have customary authority to make contracts on the company's behalf so as an individual director Abe does not have customary to make contracts on FIC's behalf. Moreover, Michelle should have known that as a non executive director, Abe can not enter into a contract when he handed Michelle his business card because he has no authority to do so as an individual director. Hence, the Michelle can not be induced to enter into the sale agreement with Abe.

In conclusion, based on the above analysis, Abe is an individual director who was not represented as FIC agent by Phillip the managing director or the full board of directors so he did not have apparent authority to enter into the sale agreement with CC. Hence, the sale agreement can not be enforced against FIC.

Under statutory law, a person is entitled to make certain assumptions of regularity in relation to dealings with a company, these assumptions are set out in s129 of the Corporation Act. s129 (2) of the Corporation Act stated that persons named as director or secretary in lodged documents have been duly appointed and have authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company. However, the right to make assumptions is lost where a person knew or suspected that the assumptions were incorrect in accordance with s128(4) of the Corporation Act.

Applying to the fact of the case, CC can assume that Abe is a director of FIC so he has been duly appointed and has customary authority of a director in the same company. However, when he handed his business card to Michelle showing that he is a non executive director, she knew that Abe is just an individual director, not a managing director and she also could suspect that a non executive directors do not have customary authority to make the contracts on behalf of the company because non executive directors do not involve in daily