

# 7. Contracts with Outsiders

## Capacity of a company

See s 124, 125

## Authority of organs and agents to bind the company

- Since company is an abstraction, it can only enter into commitments only through natural persons – its organs (directors/general meeting acting within power) or through agents duly appointed.
- s 126 permits persons acting under the express or implied authority of a company to contract in the name of/ on behalf of the company in the same manner as if the contract were made by a natural person.
- s 127 – execution of documents by company itself
- Difficulties: When can outsiders trust transactions purportedly made on behalf of a company?
- The actions of those professing to act on a company's behalf will bind the company:
  - If there was **actual authority**; or
  - If there was **ostensible authority**; or
  - Under application of the **indoor management rule (ss 128, 129)** – the person dealing with the organ or agent is entitled to assume that the organ/agent had authority.
- However, if the company still wants to take advantage of a transaction, it might be able to ratify the purported agent's unauthorised actions and make the transaction binding.
- *Freeman Lockyer v Buckhurst Park Properties: Diplock LJ*: An actual authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Apparent authority: relationship between principal and 3<sup>rd</sup> party.

## Actual authority

- Primary source of authority – may be express or implied

**Freeman Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480**

- *Diplock LJ*: An actual authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties.
- The contractor is a stranger to this agreement.
- It creates contractual rights and liabilities between the principal and the contractor.

**Hely-Hutchison v Brayhead Ltd [1968] 1 QB 549**

- *Facts*: Richards signed letters of indemnity and guarantee for Perdio on behalf of Brayhead Ltd without a board resolution. Perdio went into liquidation and claimed upon the indemnity and guarantee. Brayhead denied liability alleging that Richards had no authority.
- *Lord Denning MR*: Actual authority may be express or implied – both are binding between company and agent & between the company and others.
- It is express when it is given by express words. It is implied when it is inferred from the conduct of the parties and the circumstances of the case.
- *Held*: Richards had actual authority, implied from the conduct of the parties and circumstances of the case. By their conduct, the board acquiesced in his acting as chief executive and committing Brayhead Ltd to contracts without board resolutions.

## Ostensible authority/apparent authority

- Can arise even where principal did not give consent.
- Basis of this is estoppel. The Court favours the outsider.
  - If persons so act as to give a reasonable person the impression that they are appointing an agent with a certain range of authority and the person receiving that impression deals with the agent within that range of authority, the persons creating that impression cannot deny that the agent was authorised to deal.
  - Any person giving the impression is said to be estopped from denying authority.
- Representation must be made by person who has actual authority (can be conferred by constitution or RR e.g. 198A).

**Freeman Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480**

- *Facts*: Kapoor employed plaintiff architects to assist in developing Buckhurst Park Estate without consent of other director (Hoon) or board resolution.
- *Issue*: Whether company was bound by Kapoor's act. The plaintiff contended that Kapoor had either actual or ostensible authority.
- *Diplock LJ*: There was inadequate material to show that Kapoor had actual authority → inquiry into law of ostensible authority.
- Ostensible authority is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter into a contract on behalf of the principal → renders principal liable to perform any obligations imposed by such contract.
- **4 conditions for ostensible authority**:
  - (1) A representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the third party.
  - (2) Such representation was made by person/s who had actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates.
  - (3) The 3<sup>rd</sup> party was induced by such representation to enter into the contract, that is, he relied on it.
  - (4) Under its constitution, the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.
- The facts are sufficient to establish that Kapoor had "apparent authority" to enter into contracts on behalf of the company.

## Corporations Act 2001

### Chapter 2B—Basic features of a company

### Part 2B.1—Company powers and how they are exercised

#### 124 Legal capacity and powers of a company

- (1) A company has the legal capacity and powers of an individual. Also has powers of a body corporate, including power to:
- (a) issue and cancel shares in the company
  - (b) issue debentures
  - (c) grant options over unissued shares in the company
  - (d) distribute any of the company's property among the members
  - (e) grant a security interest in uncalled capital
  - (f) grant a circulating security interest over its property
  - (g) arrange to be registered or recognised as a body corporate
  - (h) do anything that it is authorised to do by any other law

A company limited by guarantee does not have the power to issue shares.

*Note*: For a company's power to issue bonus, partly—paid, preference and redeemable preference shares, see section 254A.

(2) A company's legal capacity to do something is not affected by the fact that it is not in the best interests of the company.

(3) For the avoidance of doubt, this section does not:

- (a) authorise a company to do an act that is prohibited by State/Territory law
- (b) give a company a right that is denied by State/Territory law

#### 125 Constitution may limit powers and set out objects

(1) A company's constitution (if it has one) may contain an express restriction on, or a prohibition of, the company's exercise of any of its powers. The exercise of a power by the company is not invalid merely because it is contrary to an express restriction or prohibition in the company's constitution.

(2) The company's constitution may set out the company's objects. An act of the company is not invalid merely because it is contrary to or beyond any objects in the company's constitution.

#### 126 Agent exercising a company's power to make contracts

(1) A company's power to make, vary, ratify or discharge a contract may be exercised by an individual acting with the company's express or implied authority and on behalf of the company. The power may be exercised without using a common seal.

(2) This section does not affect the operation of a law that requires a particular procedure to be complied with in relation to the contract.

#### 127 Execution of documents (including deeds) by the company itself

(1) A company may execute a document without using a common seal if the document is signed by:

- (a) 2 directors of the company; or
- (b) a director and a company secretary of the company; or
- (c) for a proprietary company that has a sole director who is also the sole company secretary—that director.

*Note*: If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(5) for dealings in relation to the company.

(2) A company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by:

- (a) 2 directors of the company; or
- (b) a director and a company secretary of the company; or
- (c) for a proprietary company that has a sole director who is also the sole company secretary—that director.

*Note*: If a company executes a document in this way, people will be able to rely on the assumptions in subsection 129(6) for dealings in relation to the company.

(3) A company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with subsection (1) or (2).

(4) This section does not limit the ways in which a company may execute a document (including a deed).

<p><b>Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Pty Ltd (1975) 133 CLR 72</b></p>	<ul style="list-style-type: none"> <li>• Facts: Bruce McWilliam snr was chair of directors of ADMA, Bruce McWilliam jnr was managing director, but Peter McWilliam had no designated role. Peter entered into a contract to buy a machine for \$200,000 on behalf of ADMA.</li> <li>• Issue: Whether Peter had authority to enter into contract on behalf of ADMA.</li> <li>• Applied <i>Freeman v Lockyer</i>.</li> <li>• Held: Due to limitations on his power, Bruce McWilliam jnr had no actual authority to give Peter ostensible authority.</li> <li>• A person with no actual, but only ostensible, authority to do an act or to make a representation cannot make a representation which may be relied on as giving a further agent an ostensible authority.</li> <li>• Hence the stress by Diplock LJ on the need that the person/s making the representation must have actual authority.</li> </ul>
<p><u>Indoor management rule</u></p> <ul style="list-style-type: none"> <li>• Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to enquire whether acts of internal management are regular.</li> <li>• Prevents a company from denying that things are in order.</li> <li>• Statutory reforms → C.L rule no longer really use. Statutory assumptions in s 129 cover all of it.</li> <li>• When not entitled to make an assumption: s 128(4).</li> </ul>	
<p><b>Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146</b></p>	<ul style="list-style-type: none"> <li>• Northside mortgaged its land to Barclays as security for a loan made to companies owned by Robert Sturgess (one of Northside's directors). Northside had no interest of any kind in these companies. The document was executed under the company's common seal, signed by Robert and Gerard Sturgess (who purported to be the company secretary). The articles were not complied with and Gerard was not in fact the company secretary.</li> <li>• Issue: Could Barclay rely on the indoor management rule?</li> <li>• Mason CJ: There is no reason why a third party should be entitled to rely on the formal validity of the instrument and to assume that the seal has been regularly affixed if the very nature of the transaction is such to put him upon inquiry.</li> <li>• If the nature of the transaction is such as to excite a reasonable apprehension that the transaction is entered into for purposes apparently unrelated to the company's business, it will put the person dealing with the company upon inquiry.</li> <li>• The fact that the mortgage was given to secure an advance to third party companies without any indication that it was for the purposes of Northside's business or related in any way requires the conclusion that Barclay was put upon inquiry. Barclay could not rely on the indoor management rule.</li> <li>• The result would have been different if Barclays had a legitimate basis for thinking that Northside had an interest in the borrowing companies and were associated with it.</li> </ul>
<p><u>Statutory assumptions</u></p> <ul style="list-style-type: none"> <li>• ss 128, 129 are a restatement of common law principles relating to contracts or dealings on behalf of companies.</li> <li>• Assumptions overlap with but do not displace the operation of general law doctrines of actual &amp; ostensible authority and the indoor management rule.</li> <li>• Common law doctrine of ostensible authority restated in s 129(2)(b), (3)(b).</li> </ul>	
<p><b>Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd (1991) 6 ACSR 464</b></p>	<ul style="list-style-type: none"> <li>• A deal was executed under the seal of Brick and Pipe guaranteeing repayment of moneys advanced to a related company by Occidental.</li> <li>• Brick and Pipe brought proceedings seeking declarations that the guarantee was not binding. The fixing of the seal was done by 2 directors, Goldberg &amp; Furst, (not a director &amp; a secretary according to the Constitution).</li> <li>• Occidental was aware that Furst was not shown as secretary on company's notice to ASIC, but was assured that he had been validly appointed by Durlacher.</li> <li>• The primary judge held that, notwithstanding that the agreement had not been validly executed, Occidental could rely on s 129(6) to assume that the agreement had been validly executed.</li> <li>• Held: The criteria provided by s 129(6) does not include any requirement that a signatory must fit his or her description on the document → trial judge was correct in his decision.</li> </ul>

## Corporations Act 2001

### Part 2B.2—Assumptions people dealing with companies are entitled to make

#### 128 Entitlement to make assumptions

- (1) A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
- (2) A person is entitled to make the assumptions in section 129 in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from a company. The company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
- (3) The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.
- (4) A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.

#### 129 Assumptions that can be made under section 128

##### Constitution and replaceable rules complied with

- (1) A person may assume that the company's constitution (if any), and any provisions of this Act that apply to the company as replaceable rules, have been complied with.

##### Director or company secretary

- (2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:
  - (a) has been duly appointed; and
  - (b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.

##### Officer or agent

- (3) A person may assume that anyone who is held out by the company to be an officer or agent of the company:
  - (a) has been duly appointed; and
  - (b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.

##### Proper performance of duties

- (4) A person may assume that the officers and agents of the company properly perform their duties to the company.

##### Document duly executed without seal

- (5) A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection 127(1). For the purposes of making the assumption, a person may also assume that anyone who signs the document and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices.

##### Document duly executed with seal

- (6) A person may assume that a document has been duly executed by the company if:
  - (a) the company's common seal appears to have been fixed to the document in accordance with subsection 127(2); and
  - (b) the fixing of the common seal appears to have been witnessed in accordance with that subsection.

For the purposes of making the assumption, a person may also assume that anyone who witnesses the fixing of the common seal and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices.

##### Officer or agent with authority to warrant that document is genuine or true copy

- (7) A person may assume that an officer or agent of the company who has authority to issue a document or a certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy.
- (8) Without limiting the generality of this section, the assumptions that may be made under this section apply for the purposes of this section.

#### 130 Information available to the public from ASIC does not constitute constructive notice

A person is not taken to have information about a company merely because the information is available to the public from ASIC.