

TOPIC 5: Corporate Contracting (Agency)

Structure of Problems regarding “whether company bound by contract/whether 3rd parties can enforce them”

1. Introduction:

- a. **If advising company** → X should be advised that they may be bound by the following contracts (list 1,2,3). These contracts will only be enforceable if it is found that either they were entered into directly by the company or where they were entered into via an agent that had the requisite authority to enter the contract on the companies behalf.
- b. **If advising 3rd party** → X should be advised that they may be able to enforce the following contracts (list)

2. Company Y’s capacity to contract

- a. Under [s124\(1\)](#) company Y has the legal capacity and power to enter into contracts in the same way that a ‘natural person’ could.
- b. A company’s capacity to do something is not affected by the fact its not in their interests to do that thing – alleviating the burden on third parties and getting rid of the ultra vires doctrine ([s 124\(2\)](#))

3. Has Company X contracted directly or through an Agent? ([Kinsela](#) – two ways)

- a. Test: A contract will only be made directly if it is entered into by one of the companies organs: ([s 198A](#))
 - i. The members in general meeting
 - ii. The board of directors

If it was a contract made directly with the company:

- a. How was the document executed?
 - a. The document appears on the face to be executed in accordance with [s127\(1\)](#) although it was not sealed it was signed by ___ and ___ who are _____.
 - b. The document appears on the face to be executed in accordance with [s127\(2\)](#) as the document was sealed and witnessed by ___ and ___ who are _____.
 - c. OR: Can be another method under the constitution OR [s 9](#) a de facto can sign
- b. Assumptions about peoples authority/status (as directors/secretaries):
 - a. Under [s128\(1\)](#) X is entitled to make the assumptions in [s 129](#) when dealing with the company. → Dealings construed broadly ([Story v Advance Bank](#))
 - i. X is entitled to assume under [s 129\(5\)](#) that the contract has been duly executed as [s127\(1\)](#) has been complied with.
 - ii. X is entitled to assume under [s 129\(6\)](#) that the contract has been duly executed as [s127\(2\)](#) has been complied with.
 - iii. **S129(2):** [only applies where people have done ASIC search] [Director or Secretary]: 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
 1. (a) has been duly appointed and
 2. (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
- c. **Assumptions about substantive authority** (e.g.: was a resolution passed before 2 directors signed?)
 - a. **S129(1):** The outsider can assume that the company acts within its constitution and powers have been properly and duly performed and is not bound to inquire whether acts of internal management have been regular.

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- d. **Effect of Fraud:** under **S128(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 dealing.
- e. Do any Exceptions bar the outsider from relying on the statutory assumptions?
 - a. **S128(4):** Person is not entitled to make this assumption if they **knew or suspected** that there was a forgery/a defect in authority [assumption was incorrect].
 - i. Definition of suspect - cases below.
 - ii. No longer objective test as was the previous common law position (**Northside**)
 - iii. Consider different levels of 'suspicion' for banks v sole traders/friends.
 - iv. For and against

If it was a contract made through an Agent:

- a. **Section 126** recognises that companies can make contracts through agents and it's a matter of determining whether that individual has proper authority to act contract on the company's behalf.
- b. Did X have express authority?
 - a. The board acts under **s 198A** to manage the business (including making contracts). Where the board delegates this power to an agent, the law infers the company is in a contractual relationship with the third party.
- c. Did X have implied authority?
 - a. The extent of this authority, though actual, is not expressly agreed upon as between the agent and the principal. The authority is implied from the conduct of the parties and the circumstances.
 - b. In **Hely Hutchinson** the court found that for there to be implied authority there must be:
 - i. Consent of the individual board members; and
 - ii. Communication by words or conduct of their consents to each other and to the agent
 - c. In **Brick and Pipe** → need consent from CEO if small proprietary company and acquiescence
 - d. [customary authority]: Frequently arises when an agent is placed in a particular position by principal
 - i. indiv director
 - ii. managing director
 - iii. chair
 - iv. secretary
 - e. If Director or secretary → **s129(2)**: if listed on public doc (ASIC website) as D or Sec
 - i. → can assume they have the authority customary exercised
- d. Did X have apparent authority?
 - a. X should be advised that they may be successful in arguing that Y had ostensible authority. There are 3 main conditions (4th – capacity -no longer applies) laid out in **Freeman & Lockyer v Buckhurst Properties** by **Diplock J** and subsequently accepted in **Crabtree-Vickers** which must be satisfied before a contract can be enforced against a company where the purported agent did not have actual authority:
 - i. Representation or holding out that the agent had authority to enter into the contract on behalf of the company;
 - 1. Written, verbal or conduct → **Freeman & Lockyer** (allowed K to act in a way so held out as MD – look for course of dealing)
 - 2. In **Paribas**: court held that bank made a representation about the authority of Ms Dhiri to issue indemnities, through equipping her

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with a certain title (manager of the Documentary Credit Department), status and facilities, and also by failing to establish proper safeguards to protect itself – and outsiders with whom it dealt- from unauthorised conduct.

- ii. Representation made by the company (someone with actual authority); and
 1. The board under [s 198A](#) and managing director under [s 198C](#) can make representations to a third party re authority
 2. In [Crabtree-Vickers](#) the court found the MD had limited authority and therefore did not have actual authority to make a representation to a third party. Note the conclusion in this case may have been different had [s 129\(3\)](#) been in force.
- iii. The third party was induced by the representation and relied
 1. If the third party knows or ought to know of the facts that suggest the lack of authority, the company is not bound – ie. if the agent is put on enquiry. ([Northside Developments](#))

e. Assumptions

- a. Since Company Y has held out to ___ that Y is an MD/officer X is entitled to assume under [s129\(3\)](#) that Y has the power to perform duties customarily exercised by that position. [[use where someone has been appointed to the position](#)]
 - i. Question becomes whether the power to _____ is one of the powers customarily exercised by a [MD/officer].
 1. Managing Director (can have power delegated under [s 198C](#) and appointed under [s 201J](#))
 - a. Deals with everyday matters and is generally in charge of the business of the company ([Entwells](#))
 - b. No authority to enter into transactions which are not in the everyday running of the business ([Re Tummons](#))
 - c. Authority to borrow money to deal with cash-flow problems (everyday running) but not to borrow for capital purposes ([Green v Meltzer](#))
 - d. Have authority to authorise agents to make contracts of the kind a managing director can make ([Crabtree-Vickers](#))
 2. Individual Directors
 - a. No usual authority to bind the company ([Northside Developments](#))
 - b. Unless actual authority, cannot bind company individually
 3. Company Secretary
 - a. Keeps records to ensure the company performs statutory functions ([s 188](#))
 - b. Previously had limited authority but now has usual authority to do with the admin side of business ([Panorama Developments](#))
 4. Other Agents
 - a. Authority of executives below board level will depend on their particular position – [AWA v Daniels](#) (per Rogers J – regarding money market managers and foreign exchange dealers)
 5. Look to prior dealings
 - ii. If no → **Although X has been held out as an [officer] the authority to make a contract of this nature does not fall within their customary duties. Therefore, the outsider will not be able to rely on the assumption unless they can show that the 'holding out' extended their authority beyond customary authority.

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- b. Since Company Y has held out to ___ to Y was is an _____, X is entitled to assume under **s129(1)** that the companies constitution/RR have been complied with
- i. Eg: do not have to inquire whether the Managing Director has been properly appointed.
 - ii. Must be holding out by someone in a position of authority of the company
→ **Brick v Pipe Industries**
 1. A dominant manager with acquiescence of the board had actual authority to bind the board

f. Limitations

Under the CL, if the company wanted to stop the outsider from enforcing the contract they would only have to show that the outsider "knew or was put on inquiry" that the agent did not have authority to enter the transactions. This was an objective test and inquired into what a reasonable person in their position would have done. Applying that test it could be argue that _____, _____ should have put Y on inquiry.

However under the Corporations Act, the company has the tougher burden of proving that the outsider subjectively knew or suspected that the assumption was not correct.

- a. Under **s128(4)** X is not entitled to rely on **s129(3)** if he/she knows or suspects that there is a default in Y's authority.
 - i. Why might X know of suspect?
 - ii. What is the threshold?
 1. The wording of the Corporations Act has changed to imposed a subjective rather than objective test meaning the courts will no longer inquire into what a reasonable person would have done.
 2. **Oris** – more than mere wondering... [see case law below]
 3. Whilst arguably X would have been "put on enquiry" by the _____, it is unlikely that they actually suspected a defect in authority.
- g. If the court found that the contract was not governed by the legislation [prior to 2001] then the rule in **Turquands** case would apply. This rule is embodied in **s129(1)** so the assumptions would be similar. The difference would arise in the exceptions to the assumptions as under the general law, Y would not be entitled to rely on the Indoor Management Rule where she had knowledge or was put on inquiry as to the defect in authority.
 - a. (**Morris v Kansan**) → is there something objectively suspicious that would make a reasonable person ask questions? – **Northside**.
 - b. **Turquands Case** → allowing third parties to assume internal procedures have been complied with provided there is something to indicate the thing had been done (document record or representation – **Northside**). Mere constitution or statutory power to appoint agents is not enough – **Houghton**.

If not a bank and just an individual, they may be more likely to rely on assumptions

Advise to Company as to whether they can get out of contract:

- Unfortunately, due to the difficulty in proving that an outsider 'subjectively suspected' that an assumption was incorrect, s128(4) has made it much harder for companies to deny contractual obligations as compared to the position at common law (Turquands case). X should be advised that they will likely be found to the contract despite the unauthorised acts of [agent] in executing the contract.

Advice to 3rd party as to whether they can enforce the contract:

- Fortunately because 'suspected' has been interpreted narrowly (Sunburst Properties v Agwater) it is likely that the outsider will be given the benefit of the assumptions and will be entitled to enforce the contract.

Effect of the contract being outside the object clause of the constitution?

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- a. [S125](#): Y's constitution may limit power or objects but acts outside those limitations are not invalid as against third parties, therefore X will still be able to enforce the contract even though [ys agent] acted outside the object clauses of the constitution.
- b. The members of company Y will have internal remedies available.

Ratification

- a. Company can subsequently ratify that conduct of someone who presumed to act as its agent. Ratification cures X's absence of excess of authority as agent. Ratification must occur within a reasonable time ([s 131](#)). Can occur through:
 - a. Board resolution – ordinary resolution at GM
 - b. Individual authority – [s 126](#)
 - c. Liquidator – *Alexander Ward v Samyang Navigation Co Ltd*

Case Notes:

- *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* (1964) 2 QB 480
 - The facts are similar to BP and the court decided on the basis of ostensible authority. Directors Kapoor and Poon were shareholders of company concerned with property development and held issued shares and also were on the board. The quorum was held and Poon was overseas and Kapoor acted as managing director though not appointed. He engaged architects to do work and the company argued the contract could not be enforced because acted outside authority.
 - Kapoor held out as managing director by company and therefore, held liable to the contract.
 - LJ Diplock 3 principles: representation, needs to be made with authority (normally board) and then reliance by the outsider.
- *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72
 - Court applied Freeman and discussed at page 148 text
 - There were 4 directors and Bruce McMillan Snr and William Jnr and wives on the board who took no part on affairs and another son Peter who was employed but not director. Committee the 3 boys even though Peter not board member and Jnr acted as managing director but not formally appointed.
 - Peter negotiated contract with CT and Jnr indicated Peter had authority to sign order form and it was held the company wasn't bound because authority given to Peter was given by someone who lacked authority themselves because decisions made jointly by people.
- *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35
 - Involved a contract of indemnity and the action concerned the actions of Mr D who was a bank officer (credit department) signed 2 letters of indemnity addressed to cargo ship and under letters bank agreed to indemnity the charter in respect of any loss or damage in delivering cargo without documentation. When charter delivered without documentation they claimed indemnity and bank claimed not liable because Mrs. D lacked authority to bind.
 - The distinction between holding out being someone with actual authority and what occurred was too simplistic and said oversimplification and holding out might be from without taking proper safeguards and banks made misrep about Miss D and gave her title so status and facilities in the bank and failed to establish safeguards to protect from outsiders and unauthorised conduct of bank officers.
 - Equipping her with title gave her representation she had facilities in the company.
 - The representation or conduct – structure presents to outsiders structure with authority and not based on enquiry that assumption that people in this position at other banks would ordinarily have this type of authority. Need to prove express actual authority or implied actual authority. Or acquiescence with de facto CEO.
- But note: *Paribas* case, where HC took a very broad view of 2nd requirement:
- Before *Paribas*: consequence of this requirement that representation/holding out be made by someone with actual authority is that purported 'agent' – who lacks actual authority – cannot make a legally recognised representation as to his/her own authority.
- In *Paribas*: court held that bank made a representation about the authority of Ms Dhiri to issue indemnities, through equipping her with a certain title (manager of the Documentary Credit Department), status and facilities, and also by failing to establish