

# CORPORATE CONTRACTING

>> Traditionally a highly-examined area

>> Rely on the cases only to the extent that they explicate the statute

HEART OF THE QUESTION = IS THE CO. CONTRACTUALLY BOUND OR NOT?

**OPENER:** “[Co.] can enter into Ks as it has the same legal capacity and powers as an individual (s 124(1))”

**1. IS THE CONTRACT VALIDLY ENTERED?** *Likely not going to be bc would be end of problem*

**Directly** = where an organ contracts in name of co., its act is the act of the co.

**Indirectly** = when co. contracts through an agent, this an act for (but not of) the co.

## Directly

“[Co.] will want to argue that the purported K is invalid bc \_\_ didn’t have authority/some deficiency in process”

### Authorisation; AND

- The K must be authorised – i.e. the co. has authorised/permitted the transaction through a board resolution

### Proper execution of the document

- [Co.] may directly enter a K by executing it in accordance with s 127(1). This is satisfied if doc signed by
  - o Two directors of the co.; or
  - o A director and secretary of the co.; or
  - o For pty co. that has a sole a director who is the sole secretary – that director
- S 127(2) relates to doc executed using **common seal** (change signed to witnessed)
- Co. may execute doc as deed if expressed to be executed as such and in accordance with (1) or (2) (s 127(3))
- This section doesn’t limit the ways in which a co. may execute a doc (inc a deed) (s 127(4))

## Indirectly

“\_\_ has entered into the K on behalf of the co. (s 126(1)), [co.] will argue that the purported K is invalid bc \_\_ didn’t have authority/some deficiency in process. [TP] will argue \_\_ had [express/implied actual or apparent or K was ratified]”

- Co.’s power to **make**, vary, ratify or discharge a K may be exercised by an individual acting with the co.’s express or implied authority and on behalf of the co. (s 126(1)) >> Look for words ‘for and on behalf of’
- **Policy issues:** certainty in commercial dealings and protecting innocents (both co. and TP are innocent here)
  - o If protect TP the innocent SHs are stuck with a K entered into by unauthorised agent
  - o If protect co. the TP will not be able to get their K enforced
- If co. is found liable may want to sue agent (their duties as an agent/employee will be relevant here). TP may also want to sue agent if K found invalid for representing that had authority

### Actual Authority (express or implied)

- Arises where principal (co.) **agrees or consents to the agent acting for and on its behalf**. Often, the board will be the principal
- Has the agent gone **beyond the scope** or the terms of the agreement?
- Implied agreements can be overridden by express agreements
- The **board has the power to grant actual authority** to persons to act for the co. (s 198A(RR); *Hely*) → If no board exists, director (s 198E)

### Express Actual

- Requires evidence, can be provided in many forms i.e. CC, agent’s employment K and board decisions
- Directors may confer on MD and directors can delegate – worded better in SN, not sure if need

## Implied Actual

### Appointed to a position

“The agent will have implied actual authority that customarily attached to a person in that position (*Panorama*)”

- **Managing director (MD)**
  - o Has customary authority to transact on behalf of co. in relation to the day-to-day management of the co. (*Freeman*), such as borrowing money and giving security
- **Individual (non-executive) director**
  - o No customary authority implied merely from being a director (*Sparrow*) (except to execute docs set out in s 127) unless co. is a single D/SH Pty co. (s 198E)
  - o Powers of directors reside in the collective (s 198A(RR)) unless director has received a delegation
  - o Non-executive director is an officer but not an employee, not involved in day-to-day management but a part of the board
- Non-executive chair: no customary authority to transact on behalf of the co. (*Hely*)
- **Company secretary:** customary authority to enter into Ks that are related to the administration of the co. only (*Panorama; Northside Developments*)
- HR manager: has authority to advertise for and discipline staff

### Acquiescence – course of dealings

- Agent will have implied authority to perform certain acts if the board has previously acquiesced to the agent performing those acts by communication (*Hely*)
  - o In *Hely* there had been a pattern of conduct that board knew of and was agreeable to

## Apparent (Ostensible) Authority

“[TP] can argue that [co.] represented that [agent] was acting as their agent, when no actual authority is given and should be **estopped from reneging** on that representation (*Freeman; Crabtree*)”

- **TEST:** per *Freeman*, the agent will have apparent authority to contract on behalf of co. if:
  - o A representation (by words or conduct) was made that the agent had authority to bind the co.; and
    - E.g., where co. equips agent with certain title, status and facilities or permits a person to act in a certain manner without taking proper safeguards (*Pacific Carriers*)
  - o It was made by a person/body with actual authority to bind the co.; and
    - Only a person with actual authority can make representation, **not a person with apparent authority** (*Crabtree*)
  - o The agent acts within the scope of this representation; and
    - E.g. secretary would hire cars (*Panorama*), MD would hire architects (*Freeman*)
  - o A TP relied on the representation when entering into the K
    - No actual or constructive knowledge that the representation was false. Should have known?
    - Only estopped from denying the representation when the TP is misled

## Ratification

- Where agent has no actual authority but principal subsequently approves agents conduct
- Ratification must occur within a **reasonable time**
- The **whole K** must be ratified (can't 'cherry pick')

## 2. WHAT DEFECTS WILL [CO.] WANT TO RAISE?

>> Might be more than one, need to treat separately

- This is on the facts, look at the assumptions to give inspo but don't use same wording

## 3. IS [TP] ENTITLED TO ASSUME THE K WAS VALID?

- Statutory assumptions operate independently of and in addition to the CL (*Brick & Pipe*)
- TP entitled to make assumptions related to
  - o Dealings with the co. (s 128(1)); and
  - o Dealings with **another** person who has, or purports to have directly/indirectly **acquired title** to prop from a co. (s 128)

“[TP] may be entitled to rely on the statutory assumptions in s 129 if they can show they had dealings with [co.] (s 128)”

### Dealings

- Very wide scope which embraces far more than a legally binding K or deal (*McIntyre*)
- Need to show that dealt with someone who had a nexus with the co. (*Story*)
- Includes purported dealings with a person who didn't have authority (*Gleeson J in Story*)
  - o Beyond just actual authority and inc situations where docs are fraudulent
- Can simply be communications between co. and TP (*Frenmast*)
- A **single transaction is sufficient** (*Story; Brick & Pipe*) don't need prior relationship
- Also **extends to negotiations** or other steps (*Story*) so long as they're with someone who has **actual/ostensible authority to negotiate** on behalf of the co. (*Frenmast*)

### Which assumptions?

>> link them to defects and apply facts

>> only list relevant assumptions

“[TP] will seek to rely on the following assumptions, they operate independently (*Brick & Pipe*) and cumulatively (*Oris*)”

#### S 129(1) Assume **the CC or RR have been complied with**

- Is a TP entitled to assume that an agent has been delegated power to act for the co. simply bc the CC provides such a power of delegation?
  - o At CL, agent would need to have apparent authority or TP would've have to have read the CC and the co. to have held out the agent's authority (*Northside*)
- Doesn't require TP to have knowledge of the CC or RR (*Oris*)
- See *Oris*

S 129(2) **Directors and secretaries** shown in co. returns have been **duly appointed and have authority** to, exercise powers and perform the duties that someone in position normally does

- *Northside*: director normally has authority to
  - o Act as part of the collective board
  - o Execute docs (s 127) by signing a doc with/out co.'s seal
  - o However, need to look at factors of the case to determine if there is actual or implied authority to enter into other Ks *Junker v Hepburn*
- *Panorama*: usual authority of co.'s secretary
  - o can't ordinarily enter into very large K, e.g. \$50k
  - o regularly makes representations on behalf of co. and enters into K's on its behalf, connected to admin functions but clearly doesn't extend as far as role of dirs.

S 129(3) A person who is **held out** by co. as officer or agent is **duly appointed** and can do what someone in that position normally does

- Holding out is same as in CL (see *Crabtree; Freeman*). 'Normally does' (see *Panorama*)
- Silence while representation is being made is still holding out (*Brick & Pipe*)

S 129(4) Officers and agents **properly performed their duties** to the co.

- TP can assume compliance with all duties (*Pico*)

S 129(5) **Doc has been duly executed** by co. if appears to have been signed in accordance with s 127(1)

S 129(6) **Doc has been duly executed** if co.'s common seal appears to have been fixed to doc in accordance with s 127(2) and witnessed in accordance with s 127(2)

- Don't have to check whether the witness/signatory is who they say they are (*Soyfer*)
- Doesn't matter if signatures are illegible, as long as the appearance is such that for the assumption to be made (*Soyfer*)

S 129(7) Authority to issue a doc includes **authority to warrant** that its genuine and it's a true copy

## Any Bars to Reliance?

"Co. will argue that [TP] can't rely on assumption in s 129[list relevant one] bc they 'knew' or 'suspected' defects (s 128(4)). This is a subjective test (*Oris; Sunburst*)"

- The existence of fraud or forgery doesn't bar reliance on the presumptions (s 128(3); *Frenmast; Story*)
- **Knew**: had actual knowledge or wilful blindness
- **Suspected**: positive feeling of apprehension/mistrust amounting to a slight opinion but w/o sufficient evidence (not as wide as exception to IMR) (*Old Bacon*)
  - o More than mere idle wondering, more than passing suspicion. Suspect *was* incorrect not that it *might* be (*Rees*)
  - o Compelling inference, about 3-4 or on Baden scale
- 'Should', 'would' or 'ought to know' aren't sufficient – all objective
- A person isn't taken to have info about a co. merely bc the info is available to the public from ASIC (s 130)
- Policy issue: criticised for protecting TP in not making inquiries, in better situation if don't show that they know

## 4. IF CAN'T USE S 129, DOES IMR APPLY?

### Indoor Management Rule (CL)

"[TP] may argue they are protected by the common law IMR, this has a much stricter notice test than the statute"

- Operates when a person purporting to act on behalf of the co. is acting within the scope of their actual or ostensible authority but some procedural irregularity has occurred (*Turquand*)
- Under the IMR, TP is **entitled to assume that all internal procedural requirements have been fulfilled** (*Turquand*)
- **Doesn't apply if**
  - o A RP would have been put on inquiry of the irregularity or there was fraud (*Northside*)
    - Not focusing on fraud
    - Inquiry: TP had reason to believe that the process wasn't followed
    - E.g. funds paid into dirs. personal account

- The person had **actual knowledge** of an irregularity
- Employees of the co. **can't rely on** IMR

## **5. CONCLUDE:**

“[TP] can/can't rely on [assumption/IMR], therefore the K is valid and [co.] will/won't be bound”