

CONTRACTING WITH A COMPANY

- A co is **directly** bound to the contract with an outsider, if the agent, who entered into the contract on its behalf, is actually the directing mind and will of the co ie its as if the co itself enters into the contract
- A co is **indirectly** bound to the contract with an outsider, if the contract, the agent entered into on its behalf, is within the **scope** of the agent's **actual** authority, whether expressed or implied - the co itself did not enter into the contract

So, is the co directly bound to the contract?

Directing Mind of Company & Organic Theory: acts of agents are treated as acts of the company itself

Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd:

- A co is an artificial person, which comes into existence on registration, **ss 119 & 124**. It does not have a mind or body parts of its own, so a co's active and directing must be sought in a person, who may be called an agent, but is really the directing mind and will of the corporation and control what it does: ss 198A, 250N(1) & 250N(2A).

HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd:

- Where it may be said that the officers or agents represent the directing mind and will of the co, to determine whether the intention of the officers and agents really is the intention of the co itself, consider:
 - the **nature of the subject matter** of the contract under consideration,
 - the relative **position** of the officer or agent, and
 - the other relevant facts and circumstances of the case.

Tesco Supermarkets Ltd v Nattrass

- Where the store manager did not have managerial powers and have the necessary responsibility or control of the co's operations to be identified as the controlling mind and will of the co
- BOD, the MD and perhaps other superior officers do so they may be regarded as the directing mind and will of the co – they entrusted with a significant degree of freedom from supervision of higher authority
- The BOD may delegate some part of their functions of management. In this case, they have put such a delegate in their places so that, within the scope of the delegation, he can act as the co.

Brick & Pipe Industries Ltd

- Where a dominant director had **implied** authority **to act as the company**, ie represent the **mind and will** of the co, and had the authority of a **MD**, as the other dirs acquiesced to this and did not involve themselves in transactions entered into by the dominant dir

Executive Director v Non-Executive Director:

AWA Ltd v Daniels:

- Exec dirs are full-time employees to whom the board has delegated significant management and administrative functions

- Non-exec dirs are not directly involved in the day-to-day management of the co's business. They are not bound to give continuous attention to the affairs of the corporation. They have part-time, intermittent role in the co that is usually performed at periodic board meetings

The CA and Corporate Contracts

Under s 126(1) an individual acting on behalf of the company, with the company's actual **express** or **implied** authority, may exercise a co's power to enter into contracts.

Apparent authority applies under s 126(1) as when agent with apparent authority creates a contract between the principal and outsider, the contract is created by an agent with actual authority

Actual Authority to Act for Company – Expressed or Implied

Expressed Actual Authority

- occurs when the principal has expressly given authority to the agent to enter into particular contracts on the principal's behalf. E.g. **contract of employment, Constitution, CA.**

Implied Actual Authority

- a director, company secretary and managing directors have implied authority to do all things that fall within the scope of those offices, unless such authority has been restricted.

Factors to consider to determine if agent has Implied Actual Authority

- What their position is? Is what they have done is within the customary powers and authority of a person in the same **position ie does it fall within the scope of officers in same position**
- Is what they have done *usual* to the course of what they were employed to do, ie is what they have done necessarily or normally incidental, to an activity expressly authorised ie ordinary course of business
- Is the BOD aware of what they're doing/have done - knowledge and acquiescence makes it seem like they have authority so co cannot say that the contract is not binding. **Hely-Hutchinson and Brick & Pipe**
- Is the BOD doing anything to stop them OR standing by/letting them do what they're doing/not involve themselves
- If what they have done is something they have done before ie previous dealings

AWA Ltd v Daniels:

- **By employing** him as a money market dealer and foreign exchange manager, the manager had
 - **express** authority to carry out and manage all aspects of foreign currency management, AND

- **implied** authority to do what was **usual** in the course of a money market dealer and foreign exchange manager's business eg entering into contracts to borrow foreign currency from banks is an activity necessary for, or incidental to, the conduct of foreign exchange operation

Cases that tell you the MD/dir had implied actual authority bc of dirs acquiescence:

Hely-Hutchinson v Brayhead Ltd

- MD had **implied** actual authority, to sign letters of indemnity and guarantee that are binding on the company, bc the board knew of and acquiesced in that.

Apparent/ostensible authority

A agent who does **not** have **actual** authority, may **have apparent** authority to enter contracts on behalf of a principal if:

- The co (1) represents/holds out to the **outsider**, that they are appointing an agent/dir (2) with a certain range of authority (3) to enter into contracts on their behalf; and
- The outsider relies (4) on that representation, that the agent has the requisite authority, and deals with the agent within that range of authority

The principal creating the impression cannot assert that the agent lacked authority, even where he did not consent

If have apparent authority, then can do all such things as fall within the usual scope of that office

Common law requirements for the existence of apparent authority:

(1) **Who can make a holding out for a co? - s 129(3)**

- A holding out by the co can only be made by a person who has actual authority to manage the business of the co either generally or in respect of those matters to which the contract relates, such as the board, or a duly appointed MD, who can be said to represent the directing mind and will of the co. ***Freeman and Lockyer***

Cases where apparent authority is NOT created bc the dir who made the representation did not have actual authority:

- ***National Australian Bank Ltd v Sparrow Green Pty Ltd:***
 - Where the one director did not have the apparent authority to bind the company as the constitution required more than one to execute a contract and a person cannot confer authority on themselves by their own words or conduct ie representation of authority had to be made by someone with actual authority

- The other director had stepped down from management and the only remaining director of the company, executed a finance agreement and a debenture as the sole director and company secretary, even though the company's constitution required two signatures.
- ***Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd*** – a dir who has apparent authority is not capable of making representations for the co