

7. CORPORATE CONTRACTING

1. A company can enter into a contract as they have the same legal capacity/powers of an individual: s 124(1).
2. Is the contract **valid**?
 - Direct s 127 – where an organ contracts in the name of the co, its act is the act of the company.
 - Indirect s 126 – when the co contracts through an agent, the act is an act for (but not of) the company → actual (express or implied) or apparent
3. Identify the **defect(s)** the company wants to rely on to argue that the contract is invalid?
4. Per s 128 and s 129, is TP **entitled to assume** the contract is valid ie. can any of the **statutory assumptions** be relied on (they operate independently)?
 - Have there been dealings with the company?
5. If NO dealings with the company, cannot use statutory assumptions → forced to **use indoor management rule** – does IMR apply?
 - This is a much stricter notice test (knowledge or constructive knowledge).

CONTRACTS ENTERED INTO **DIRECTLY**

[Co] will want to argue that the purported contract is invalid because [X did not have the authority/some deficiency in process].

1. Authorisation; AND
 - The contract must be authorised – ie. the co has authorised/permitted the transaction through a board resolution.
2. Proper execution of the document
 - [Company] may directly enter into a contract by executing it through:
 - (1) Use of **company seal** and **signed** by specified officers: s 127(2) [*use of common seal is optional: s 123, 127]
 - (2) **Signed** by specified officers (no company seal): s 127(1)
 - **'specified officers'** – this [is/is not] satisfied because the document [was/was not] signed by:
 - a. 2 directors of the company; or
 - b. A director and secretary of the company; or
 - c. [for 1 person company] Sole director/secretary.

CONTRACTS ENTERED INTO **INDIRECTLY** ie. **AGENCY (s 126 + CL)**

- A company's power to enter into a contract may be exercised by an individual (**AGENT**) acting with the company's express or implied authority and **on behalf of the company**: s 126(1)
- NB: Look for words "for and on behalf of"

If X has entered into the contract on behalf of the company: s 126(1), the company will want to argue that the purported contract is **invalid** because [X did not have authority/deficiency in the process].

- **Did X have authority to contract?** → An agent has authority to bind the company as principal where he or she had:
 - a. Actual authority (expressed or implied)
 - b. Ostensible or apparent authority
 - c. If the agent had no authority, a contract may still be binding if the principal (ie. company) later ratifies it. Ratification must occur within a reasonable time and the contract must be ratified in its entirety.

ACTUAL AUTHORITY (EXPRESS OR IMPLIED)

- **s 126(1)**: A co's power to enter into 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.
- Actual authority arises where the co (often the Board) **agrees or consents** to the agent acting for and on its behalf.
 - Requires an **agreement** between co and agent (the agreement may be express or implied). (*Hely-Hutchinson*)
Implied agreements can be overridden by an express agreement.
 - **Limits to the authority**:
 - If it is an implied agreement, you look at the agreement and the nature of the position to suggest the limits of the authority. The agent must act within the limits.
 - Eg. If you are appointed as a 'purchasing officer' of the company – you can do what a purchasing officer normally does.
- The Board has the **power to grant actual authority** to persons to act for the company: s 198A (RR)
NB: If no Board exists, senior director: s 198E

- **EXPRESS ACTUAL AUTHORITY**
 - Requires evidence, can be provided in many forms, ie. co constitution, agent's employment contract, Board decisions.
 - Directors may confer any powers (including contracting) on the managing **director (MD) or CEO: s 198C (RR)**
 - Directors may also **delegate** any powers to: a committee of Ds, a single D, an employee of the co, or another person: **s 198D(1)**, as long as recorded in minutes (**s 251A**) and the delegate has acted in accordance with directors (**s 198D(2)**).
NB: Unless company constitution provides otherwise.
- **IMPLIED ACTUAL AUTHORITY**
 1. **Appointed to a person**
 - The agent will have implied actual authority that customarily attaches to a person in that position. (*Panorama – secretary hiring cars*)
 - *Determine the capacity in which X has been acting, then determine whether X has implied actual authority.*
 - **Managing director (MD)**
 - A MD has customary authority to transact on behalf of the company in relation to the day-to-day management of the company, (*Freeman*) such as borrowing money and giving security.
 - Does NOT extend to selling co's business or assets.
 - **Individual (non-executive) director**
 - NO customary authority implied merely from being a director (*Sparrow*) (except to execute docs as set out in **s 127**) unless company is a single director/SH proprietary company: **s 198E**.
 - Powers of Ds reside in the collective (**s 198A (RR)**) unless D has received a delegation.
 - **Non-executive chair** (chair = director)
 - NO customary authority to transact on behalf of the company. (*Hely*) (*AWA?*)
 - **Company secretary**
 - A secretary has customary authority to enter into contracts that are related to the administration of the company only. (*Panorama; Northside Developments*)
 - **Human resources manager**
 - Has customary authority to advertise for and discipline staff.
 2. **Acquiescence – ie. course of dealings**
 - An agent will have implied authority to perform certain acts if **the Board has previously acquiesced** to the agent performing those acts by communication. (*Hely-Hutchinson*)
 - In *Hely*, X has engaged in a **pattern of conduct** which allows them to enter into contracts obo the co, that the Board **knew of and was agreeable to** ie. by doing nothing to intervene (**CF. ostensible**).

Hely Hutchinson (implied actual authority)

- Brayhead Pty Ltd – one director (R) encouraged another director of the company to invest in another company. That director was reluctant – he said I will do it only if I can get a guarantee from Brayhead.
- Richards gave guarantee **'on behalf of' Brayhead.**
- HELD: R had **actual (implied) authority** to bind the company.
- Crucial fact is that the **company had NO MD appointed.** Richards was just an individual director. Being a single director carries no authority (it goes to the Board).
- Richards **de facto MD** – Board allowed Richards to run the business and Richards acts like this. The Board allows Richards to do this through its conduct.
- Although R had no actual express/implied authority, he had actual implied authority arising from **past conduct**:
 - R had the **final say in financial decisions**, which B accepted as binding.
 - By their actions, Board acquiesced to R as acting CEO in the guarantee (as it had in previous transactions).
- Try to identify an agency agreement between the agent and the company eg. course of conduct, appointment of a position etc.

APPARENT OR OSTENSIBLE AUTHORITY

- **Arises when conduct leads a [Third Party] to believe that [X] is acting as company's agent, when no actual authority has been given. The company is estopped from denying that the person is their agent** (*Freeman, Crabtree*).
- **TEST = Per Freeman, the agent will have apparent authority to transact on behalf of the company IF:**
 - (1) **A representation by the 'company' (by words or conduct) was made that the agent had authority; AND**
 - Eg. Where company equips agent with certain title, status and facilities or permits a person to act in a certain matter without taking proper safeguards (*Pacific Carriers*)
 - ***The **agent acts within the scope** of this representation: representation that X had the authority to enter into a contract of that kind.

- (2) **Representation was made by a person/body with actual authority to bind the company** (either generally or with respect to the matters to which the contract relates);
 - A person with express or implied **actual** authority can give the representation (*Brick & Pipe – standing in silence*), but **NOT** a person with only apparent/ostensible authority. (*Crabtree*)
- (3) **The third party was induced by and relied on the representation (when entering into the contract) ie. no actual or constructive knowledge that it is false..**

Freeman & Lockyer

- K and H formed company to act as property developer. K and H were both directors and SHs (K had the business expertise, H had the money/financing).
- H argued K had no authority to make the decision – K hired architects in company name.
- No MD but K was the de facto MD – H ‘acquiesced’.
- **HELD:** K had apparent authority so company was bound. Board knew K had acted as if he had the usual authority to engage builders, which FL relied on in signing the k → so K was bound by his actions.
- Court said it fell a bit short of acquiescence/*Hely Hutchison* scenario. Instead, court said H knew what K was doing, he let him do it, this fell short of actual authority.
 - Representation – yes allowed K to appear as an acting MD.
 - Did K act within scope of representation – yes a MD would normally be able to hire architects etc.
 - TP relies – no reason to know he did not have authority.
- Note: **WHO** must make the representation – someone who has actual authority?
 - Both K and H were making it appear that K was the MD – the representation was made by the directors, the board, who has actual authority to make this representation.
 - Together, they had the power to enter into the contract.

Panorama Developments (co secretary – scope of authority)

- Co secretary has been renting all these cars from a car hire company. The co argued it did not know about the co secretary’s actions, did not want to pay.
- Company and car hire company – innocent parties. But if company represented that co secretary had authority, then TP can recover money.
 - Representation – the person is the co secretary, he must have authority to do some things.
 - Scope – as the co secretary, what is his role? Is he allowed to hire cars for the company?
 - Car hire company had no reason to suspect that the co secretary was not authorised.
- **HELD:** Co secretaries are involved with the administration of the company so yes they have the power to hire cars for the members of the company.
- Note fall back on CL if not covered by legislation (enacted after this).

Crabtree Vickers

- 4 directors: B Snr, B Jnr, 2 wives.
- **B Jnr was the MD, BUT he had limited powers of management** ie. he could not do what a MD usually could (this limits his actual authority but note maybe not apparent, TP do not know this).
- Full decision-making power was with the full board or 3 men (B Snr, B Jnr and P, a bankrupt).
- B Jnr told P to **get quotes but NOT to do anything else**; P **puts in order** with a printer company.
- **HELD:** Needed the full board or 3 men to authorise P – no actual authority, no apparent authority either.
 - **NO apparent authority since B Jnr himself had no actual authority to contract** (power required authority of the full board or 3 men, and BW Snr’s approval) → **so could not hold out P as having the same authority.**
 - B Jnr told P to get quotes, seems that B Jnr did not represent that P could enter into the contract either.
- NOTE: B Jnr was MD and **MDs can usually do this** but note here he had **internal limited powers** of management. The situation would be different if B Jnr was a normal MD.
 - If B Jnr had signed instead of P, co would have been bound as he was MD → CV would have assumed that he had power as MD to enter into these types of ks.
- Arguable that the case was unsatisfactory? Print company could not know that P was not a usual MD etc had limited powers.

Pacific Carriers (holding out by appointment to a position)

- Ship carrying peas from Aus to India. Company (N) and shipping co (PC). PC handed the peas to someone they should not have.
- PC ended up with massive liability for damages. PC was relying on the guarantee with the bank – bank said no – bank was just verifying the signature NOT the guarantee.
- Internally, there were two processes – (1) verifying someone’s signature (2) giving guarantee.
- **Contract signed by someone who had the power to verify a signature but NOT to give a guarantee.**