

# BINDING THE CORPORATION: CAPACITY, AUTHORITY AND BREACH OF DUTY

## 1. Capacity of the Corporation

Three key questions:

1. Capacity of company: did the company have capacity to enter into the transaction or is its act ultra vires? -> ultra vires abolished through ss124-125
2. Authority of Agent issue: Did the Agent purporting to act on the company's behalf have authority to bind the company?
3. Directors Duties: Was the agent, in exercising the powers, acting bona fide for the benefit of the company as a whole?

S125: Company constitution may express restrictions, limit powers and set out objects. Exercise by company is not invalid merely because contrary to company's constitution.

## 2. Authority of organs and agents

### Contracting by Corporate organs and agents

CA ss 126-7

- S126 (Directly as a company): Execution of contracts by company directly on its own behalf:
  - (1) Without common seal: signed by 2D/ 1D & S/ in single director or shareholder prop company, that director
  - (2) With common seal: under seal + witnessed by same group of people above
- S127 (Indirectly through an agent): Execution of contracts by company through agents
  - Company's power to make contract may be exercised by an individual acting with company's express or implied authority on behalf of company.

Authority at common law -> **VOIDABLE** if agent acted outside their authority

### A. Actual Authority (verbal or written)

i. *Express actual authority* (whether the principle, the corporation, has expressly consented to the agent acting on its behalf)

- S198A (RR): From provision in the CA or the Company's **constitution**
- S198C (RR): By the board of **directors delegating** its power or board **resolution** (eg. MD's service agreement sets out power and limits of authority delegated by the board)

ii. *Implied actual authority* (whether authority is inferred from the conduct of the parties and the circumstances of the case)

**Usual implied authority:** An individual will have actual implied authority usual to their certain position office. That is, they have the authority implied from nature of office (*Hely-Hutchinson*). Eg. MD, CEO

**Customary authority:** Ask, would a similar person in a similar company in a similar situation have the power to enter into the contract? -> if yes, implied actual authority to position

- **CEO or MD:** Being appointed to this position involves a grant of implied actual authority to "do all such things as fall within the usual scope of that office": *Hely-Hutchinson*
  - Whereas in *Crabtree*, MDs power were limited and so she was not taken to have actual authority to enter into contracts.
  - **Managing director (replaceable rule)**—see section 135(1) The directors of a company may confer on a managing director any of the powers that the directors can exercise.
- **Other Executive Officers:** Some implied actual authority reflecting the scope of authority that is usually delegated to someone doing their type of job in their type of company
- **A director acting alone or Chairperson of the Board:** Individual directors do not usually have the power to bind the company: *Hely-Hutchinson*; *Brick and Pipe*
- **Company Secretary:** Implied authority to execute contracts relating to administrative matters: *Panorama Developments*
- **Chairman:** Note in *Hely-Hutchinson*, role of Chairman was found to not carry authority -> but since *ASIC v Rich*, importance and authority of chairman has been more recognised

**Acquiescence by the actual authority holder:** Where actual authority holder, based on its conduct, has given person authority such as through acquiescence (*Hely-Hutchinson*). A pattern of behavior. Must be communicated acquiescence that emanates from the board as a whole (*Freeman*).

- This implied actual authority flows from the conduct (or lack of conduct) of the BOD when it acquiesced in the **agent's earlier actions** (only valid for transactions that have occurred so far): *Brick & Pipe Industries*; *Hely-Hutchinson*
- For the future, the agent has implied authority to bind the company in **similar transactions**

## B. Ostensible authority

Vesting authority through an application of the principle of estoppel

- **Elements** (*Freeman and Lockyer*):
  - a. A **'holding out'**: A representation was made that the agent had authority to enter into that type of contract;
    - May be by words or conduct
    - a) Principal may permit the agent to occupy a particular position – i.e. they are holding out that the agent has the **customary authority** of a person in such a position (e.g. MD/CEO)
    - b) Principal's **conduct** permits the agent to carry out **tasks** on Principal's behalf **beyond** the scope of the agent's customary authority. E.g. a single director may be permitted by the company to contract on its behalf in a number of previous transactions – i.e. defacto MD
    - c) Agent holds **no formal position** in the company, but Principal's conduct leads 3rd party to **believe** Agent has authority (E.g. *Pacific Carriers v BNP*)
  - b. The representor **had actual authority to act** on behalf of the company either generally or in the specific matter (MUST SHOW PRINCIPAL HAS ACTUAL AUTHORITY – go through office and acquiescence);
    - Generally eg. BOD, MD. In relation to matters which contract relates to
    - *Crabtree*: Someone with actual (not ostensible) authority must make the representation which confers ostensible authority. A purported "agent", who lacks actual authority, cannot make a legally recognized representation as to his or her own authority -> MD's power limited by Constitution
      - Whole board did not agree, which was required by Constitution + was not even a director
    - *BNP Paribas*: The Court stated that a holding out "might result from permitting a person to act in a certain manner without taking proper safeguards against misrepresentation"
    - The bank had made a rep about the authority of D, through equipping her with a **certain title, status and facilities, and also by failing to establish proper safeguards** to protect itself – and outsiders with whom it dealt – from unauthorized conduct (ie. Let them do anything)
  - c. There was **reliance on this representation**; and 3rd party must rely on the representation (*Northside Developments*)
    - if 3rd party **knows** that agent has no actual authority = no estoppel
    - if 3rd party **ought to know of the lack** of authority = no estoppel
    - if 3rd party is put on **inquiry** and is required to make further inquiries to determine whether actual authority exists – **failure** to do so will prevent the 3rd party from enforcing the contract:
  - d. The company is not deprived by constitution of the ability to delegate authority to agent

### Statutory assumptions as to authority

*ACT Pty Ltd* per Gummow J; statutory provisions do not displace common law but instead act to repair deficiencies in it. **A contractor should look to the assumptions available at statute first, and if the assumptions are inapplicable, turn to the common law doctrines.**

### *Indoor Management Rule - Common law*

- **Rule**: Persons dealing with a company in good faith may assume that acts within its constitution and powers (e.g. affixing with corporate seal) have been duly performed, and they are not bound to inquire whether acts of internal management have been regular (*Turquand*).
- *Crabtree v Vickers*: 3rd parties, under the courtesy of constructive notice doctrine, were **assumed** to have **knowledge** of all of the contents of the **company's internal structure (constitution)**
- Following the enactment of the statutory reforms, the doctrine is of little importance, but still relevant because the CL regime may still apply in circumstances where a contract **falls outside the statutory regime**. Statutory assumptions need general law to interpret them. CL provides a standard against which they were drafted to begin with.

### *Statutory Regime*

- **Assumptions**: s 129 – Statutory assumptions regime (authority under Corporations Act) to see if person dealing with the corporate organ or agent is entitled to assume under s 128-9 that the organ or agent had authority to bind the company
- Section 128(1): A person is entitled to make assumptions in s 129 in relation to **DEALINGS** with a company.
  - "Dealings" with the company includes "purported dealings", not just dealings that are actually authorized: *Story v Advanced Bank*
  - these assumptions can be relied upon cumulatively: *Sunburst Properties*
  - note, single dealing is insufficient, must be a course of dealings
- s130 – person not taken to have information about a company merely because information is available to the public through ASIC

(1) Can assume the corporate constitution has been complied with. This is essentially the statutory equivalent of **indoor management rule**. [Similar to “that is in order which appears to be in order”

- eg. 3<sup>rd</sup> party can assume quorum in board resolution was met, meeting validly called

(2) Can assume that persons listed as directors or company secretaries on ASIC have been

(a) duly appointed [Builds on s 205B] and

(b) have usual authority. [*Hely* – reflects **usual authority/customary authority**]

- I.e. Similar position in a similar company

(3) Can assume that people **held out** by the company as an officer or agent has been

(a) duly appointed and

(b) has authority to exercise the powers and perform the duties customarily exercised. [Reminds us of **ostensible authority** (*Freeman*)].

- A ‘de-facto MD’ has implied actual authority to make a holding out (*Brick & Pipe*)

(4) Can assume officers and agents **properly perform** their **duties** to the company (i.e. that they are not acting in breach of their duties)

- Third parties can presume that whatever was being entered into was the proper performance of the functions of that director

(5) Can assume document **duly executed** if it appears to have been executed in accordance with s 127(1) (i.e. signature of 2 directors or 1 director and company secretary)

- **Both formal and substantive authority** are required. Execution is insufficient, underlying substantive authority (actual or ostensible authority) still needs to be proved (i.e. those who signed have the authority).
- I.e. When seeking to rely on the assumption and document has not been executed by 2 Ds or 1D +1S, one can be cured by formal authority under s129(5) or (6). However, need an assumption to cure any defects in agency/authority under s129(2) or (3).

(6) Can assume a corporate **seal** has been **properly affixed** and **witnessed** under s 127(2).

- If it merely appears document has been executed properly or seal affixed properly, that is enough. (Courts have adopted this interpretation: *Brick and Pipe*)
- The assumption relates to formal authority only. Must still establish substantive authority under either s129(2), s129(3) or CL
- Majority view: formal authority + substantive authority; so safer to do both
  - **Substantive authority** – the existence and scope of the officers’ authority to enter into the contract
  - **Formal authority** – the officers’ authority to signify, in the proper form, the company’s assent

## Exceptions/when benefit forfeited

### Common Law

- *Northside Developments*: If the party was put on notice because of the unusual nature of the transaction then failure to make further inquiries may deprive 3<sup>rd</sup> party the protection of the indoor management rule.
  - Put on inquiry to take further steps due to red flags:
    - transaction outside Co’s usual business
    - not for the benefit of Co
  - Can also consider red flag examples in *Bank of NZ* case below

### Statutory exception

Section 128(4): A person is not entitled to make an assumption in s 129 if at the time of the dealings they **knew or suspected** that the assumption was **incorrect**.

- **Burden of persuasion that a person knew or suspected is on the company seeing to avoid application of the statutory assumption** (*Sunburst Properties*). I.e. Burden of proof on Co to prove 3<sup>rd</sup> party knew or suspected
- You have to show **subjective (actual) knowledge or suspicion** of something that would make someone suspect the truth: *Sunburst Properties*
  - Under case law, ‘knew or suspected’ found to be **‘actual’** ones (i.e. no constructive knowledge under the Act – i.e. one does not lose his right to rely on these assumptions because he should have known) - ‘Know’ = actual knowledge, ‘suspect’ = actual suspicion (*Brick & Pipe*)

- *Soyfer v Earlmaze*:
  - A person does **not lose** the **benefit** of the assumptions in s129, merely because the person's suspicions, in the circumstances, should have been **aroused**
  - The notion of 'actual suspicion' includes '**willful blindness**'
- *Queensland Bacon P/L v Rees*:
  - Suspect = 'a **positive** feeling of actual apprehension or mistrust'
  - Suspect is **not** just a mere idle wondering whether something exists or not but is an apprehension/mistrust just short of sufficient evidence to prove it
- Now: I.e. being put on **inquiry** (*Northside*) is insufficient under the statutory regime
- Can consider: *Bank of NZ* (case that supports predecessor of s128(4) – for "ought to know")
  - Ought to know required the court to **assess** what the person in the particular situation acting **reasonably** would have known
  - Put on inquiry involves the court in asking: Were there features of the particular situation which required the person in question to make further inquiries?
  - **Alarm bells** - Kirby: Are there factor present, which would have rung alarm bells, such as to put a person on notice or "ought to know" amiss?
    - No commercial advantage to Fiberi
    - No search made to check proper officers of company
    - No check re whether Denis MD with extra powers
    - Land of a residential nature