

## CORPORATE CONTRACTING Scaffold

### Introductory

- (1) State what kind of company you are dealing with (public or proprietary).
- (2) Ask 'who is the client and what do they want to know?'
- (3) Ask 'what kind of contract am I dealing with?'
- (4) Ask 'how was the contract entered into?' (ie. writing or oral).
  - a. Was the contract entered into by the company on its own behalf with or without common seal (**s 127**), or was it entered into purportedly by an agent exercising the company's power to make contracts (**s 126**)?
- (5) State that 'if it is found that a purported agent did not have the capacity to enter into the contract on behalf of the company, or if any factor in ss 127-9 prevents a third party contractor from enforcing such a contract, the company will not be bound by the transaction in question.'

### Section 127 Contracts

- (1) Ask whether the document was executed with or without a company seal.
  - a. **Section 127(1)**: A company may execute a document without a common seal if it is signed by:
    - i. 2 directors; or
    - ii. 1 director and company secretary; or
    - iii. For a proprietary company, by a director who is also company secretary if they are the sole director.
  - b. **Section 127(2)**: A company may execute a document with a common seal if the fixing of the seal to the document is witnessed by:
    - i. 2 directors; or
    - ii. 1 director and company secretary; or
    - iii. For a proprietary company, by a director who is also company secretary if they are the sole director.
- (2) Ask whether the requirements in the above sections are met. If not, consider whether a third party contractor has a right to rely on the **s 129** assumptions.

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- i. **Section 128**: A third party contractor is entitled to make assumptions under s 129 in relation to dealing with a company, and the company is not entitled to assert that such an assumption was incorrect.
  - ii. **Section 129(5)**: Document executed without a seal.
    1. Third party contractor may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with s 127(1).
  - iii. **Section 129(6)**: Document executed with a seal
    1. A person may assume that a document has been duly executed by a company if the common seal appears to have been fixed to the document in accordance with s 127(2) and the fixing of that seal appears to have been witnessed in accordance with s 127(2).
- (3) Note **s 130**, which states that a person is not taken to have information about a company merely because such information is available to the public from ASIC (ie. third party contractors are probably in a better position not to look at the company constitution).
- (4) Consider whether the third party contractor has lost the right to rely on the assumptions.
- a. **Section 128(4)**: A person is not entitled to make an assumption under s 129 if, at the time of the dealing(s), they knew or suspected that the assumption was incorrect.
  - b. Requires actual knowledge or actual suspicion (ie. wilful blindness – **Soyfer v Earlmaze**).
    - i. ‘Suspect’ means just short of having actual proof that the assumption was incorrect; a positive feeling of actual apprehension or mistrust without sufficient evidence (**Old Bacon v Rees**).
    - ii. Actual knowledge or suspicion – therefore, a person does not lose the benefit of the s 129 assumptions merely because their suspicions *should* have been aroused (**Soyfer v Earlmaze**).
  - c. The company bears the onus of proving a loss of right to rely on the assumptions (**Sunburst Properties v Agwater**) – the company must prove that the third-party contractor knew or suspected that those assumptions were incorrect.
- (5) State that there are competing views as to whether both formal and substantive authority need to be proved under ss 129(5)-(6) but that, given the way the presumptions are worded, it is reasonable to assume that both are required (**Brick & Pipe Industries**).