

# Corporate Contracting

There are two ways that a company may be bound by contract:

1. Execution by the company itself → where company executes the document such that it is recognised in law as having the company's signature on it
2. Execution by an agent for and on behalf of the company

## FLOW DIAGRAM OF CORPORATE CONTRACTING

- ◆ DIRECT ENTRY
  - s 127(1) – **signed** by 2x Directors OR Director + Company Secretary.
  - s 127(2) – common seal fixed and **witnessed** by 2x Directors OR Director + CS.
- ◆ INDIRECT ENTRY
  - Actual authority
    - Express
    - Implied
      - By Position
      - By Acquiescence
  - NOT actual authority:
    - Ostensible (apparent) authority

**Step 1:** Identify the purported contract and its parties/signatories

**Step 2:** How was the contract purportedly entered into?

- Directly:
  - STATE: Company is a SLE with all the functions of a natural person and can enter into contracts (**s 124(1), Saloman**)
  - S 127(1): company may execute document WITHOUT a common seal if the document is **signed by two directors OR director + company secretary.**
  - S 127(2): company with a common seal may execute using the common seal by **fixing it** to the document and the **fixing is witnessed by two directors OR director + company secretary.**
- Indirectly - s 126(1): an individual may have **express or implied authority** to act on behalf of the company.

- **Express Authority**
  - When the company appoints a company executive or other employee as its authorised agent to enter into contracts.
  - Organs include:
    - Board resolution
    - Employment contract
    - Constitution
    - Communication between company and agent
  - Look for: 'X is authorised to act as agent...'
  
- **Implied Authority**
  - Implied from Position
    - **Individual director:** does not have usual authority to bind company to contracts with third parties unless the D has been appointed by the Board as an agent (or authority otherwise flows from the conduct of the board)
    - **Managing Director:** power to exercise all the powers of the Board when Board not in session – implied authority to enter into ordinary transactions
      - **Brick and Pipe:** Goldberg was found to be a defacto MD and therefore had actual authority to represent himself as a director and hold Furst out as a company secretary.
    - **Chair-person:** doesn't have authority to do business on behalf of the company or to exercise powers
    - **Company secretary:** usually a lawyer, fills out forms
    - **Other officers:** look at their title and their role and ask what this person USUALLY does → they would have the authority to do what customarily attaches to their roles
  
  - Implied from Acquiescence
    - If no actual express authority given, but the Board/organ acquiesces to a course of conduct adopted by the agent, they may be held to have implied authority to enter into K (*Hely-Hutchinson*)
    - Implied from conduct of parties and circumstances of case (needs to be a pattern, not a one-off event)
    - NOTE: requires acquiescence by entire board, not just one or two directors
    - **Hely-Hutchinson:** even though Richards was only Chairman, the fact the company allowed him to act as the Chief Executive for many months and enabled him to contract provided him with requisite authority to bind the company. He was writing letters on Brayhead's letters, entering into contracts regularly without prior authority of the Board and then he would report that back to the Board

- Even if the agent doesn't have actual authority, ask: HAS THERE BEEN RATIFICATION by the relevant organ of the company who has actual authority?
- **Not actual authority:** If they don't have any of those do they have ostensible authority?
  - Whether or not an agent has actual authority, if a company makes it appear to the third party that the agent has authority and the third party relies on that representation, the company will be bound – *Freeman v Lockyer*
    - ***Freeman v Lockyer:*** by allowing Mr Kapoor to act as MD, the Board represented to the architects that Mr Kapoor had the usual authority that attaches to the position of MD (entering into Ks)
  - Representation must be made by someone with actual authority to either manage the business generally, or in respect of matters to which the contract relates ('holding out') – *Crabtree Vickers*
    - ***Crabtree Vickers:*** Bruce Junior held Peter out to Crabtree as having authority to finalise K by arming Peter with the order form but Bruce Jnr didn't have actual authority to manage the company's business despite his MD title. Only the committee (Bruce Jnr, Bruce Snr, Peter) had authority to make such representation. Bruce Junior only had apparent management authority and someone with apparent management authority can't hold out another person as having authority.
  - Representation can include someone with actual authority arming an officer with document/power to impart appearance of authenticity.
    - ***Pacific Carriers v BNP Paribas:*** Ms Dhiri had access to company's stamp, letter of indemnity and was in a position where she could write the letter – by putting her in a position where she could execute this document and send it out on behalf of BNP, BNP made the representation that Ms Dhiri had authority.
- Identify **all the problems** with the contract by the end of step 2
  - E.g. Mr Smith entered into this contract but he was never authorised by the board and he's entered into a contract for \$1mil whereas his usual practice is to enter into contracts of \$100,000 - so not implied by position or acquiescence

**Step 3:** if there's a problem and the company hasn't validly entered into the contract, do any of the **statutory assumptions assist?**

**FIRST: Is the 3P entitled to make assumptions as per s 128(1)?**

- Do we have DEALINGS?

- Does the person have some authority to undertake negotiations/speak to the third party as the company, not as the individual
  - **ANZ v Frenmast**: Robert had actual or ostensible authority to deal with the ANZ on behalf of Frenmast as had done so since 2000 to the knowledge of Steve and Vlado – ALSO: if the person the 3P is dealing with is a negotiator that is sufficient to satisfy dealings
- Can include one transaction/a single dealing
- ASSUMPTIONS
  - **S 129(1)**: 3P can assume **constitution** and **RR** have been **complied** with
  - **S 129(2)**: 3P can assume that a person who appears to be a director or secretary (from ASIC records) has been **duly appointed** and **has the authority** to exercise relevant powers and duties
    - **Crabtree Vickers**: outcome may have differed if statute was in place – 3P could assume that Bruce Jr would have powers and duties of managing director, including the power to hold out Peter as having authority to make purchase
  - **S 129(3)**: 3P can assume that anyone **held out by the company** to be an officer/agent has been duly appointed and has the authority.
    - This is codification of apparent/ostensible authority (Freeman v Lockyer)
  - **s 129(4)**: 3P can assume officers/agents properly perform their duties
    - **Pico Holdings**: Just because the MD of the land-owning company may have breached their fiduciary/statutory duties didn't mean the mortgage was invalid – company cannot avoid contractual responsibility by arguing the officer breached their duties.
  - **S 129(5)**: 3P can assume that **document** has been **duly executed** in accordance with s 127(1)
  - **S 129(6)**: 3P can assume that a document has been duly executed in accordance with s 127(2) – (company seal)
- LIMITATIONS
  - S 128(3) – forgery NOT a limitation to making assumption
  - S 128(4) – 3P not entitled to make assumptions if they knew or suspected that the assumption was incorrect

**Step 4:** Does the indoor management rule add anything?

- Provides for assumptions at common law
- TEST: third parties are entitled to assume that matters occurring behind the closed doors of the company are in order (*Turquand's Case*)

- The company is benefitted more by the exceptions to the Indoor Management Rule than the statutory exceptions. The 3P will usually prefer to rely on the statutory exceptions and will likely plead their case under the statutory assumptions.
- IMR covers:
  - Procedural defects in the appointment of company officers
  - Irregularities with board meeting procedures
  - Lack of approvals required under the company's constitution
- HOWEVER – does not cover issues arising whereby an agent of the company has acted without authority – that is part of agency. This rule only covers procedural irregularities.
  - **Turquand's Case:** requirement in consti to obtain SH approval for bank loan of a certain size, not complied with. Held: loan was enforceable because the 3P was entitled to assume the SH resolution was passed as it was an internal matter which 3P could not discover.
- If the company can demonstrate that the third party was put on inquiry about it or some of the facts suggested that the 3P should have made further inquiries, then the 3P loses the benefit of the Indoor Management rule.
- Consider which applies:
  - The IMR will not operate where the company alleges FORGERY in the execution of the document (e.g. fake seal or forged signature (NOTE: cf statutory provisions, IMR is narrower))
  - The IMR will not operate where 3P has ACTUAL KNOWLEDGE of irregularity
  - The IMR will not operate where 3P keeps EYES SHUT in order not to discover an irregularity they think exists
  - The IMR will not operate where the 3P does not MAKE INQUIRIES that would normally be made by 3P in their position OR a reasonable person in their position would have been 'PUT ON INQUIRY' at the time of entry into transaction about a possible irregularity and would have investigated it
    - **Northside Developments:** Barclays should have been put on inquiry by the fact that the funds of loan did not go to the company or for the benefit of the company → should have inquired re: company's approval

**Step 5: CONCLUDE: IS THE CONTRACT BINDING OR NOT?**

- If there are problems that were all fixed by the assumptions, the contract is binding, valid and enforceable
- If there are problems that weren't fixed, then the contract is not valid, binding or enforceable