

# CORPORATE LAW EXAM NOTES:

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- Incorporation of new written terms
- Incorporation of implied terms
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# COMPANY CONTRACTING

**STATE:** A company has the legal capacity and powers of an individual Corp Act [S124\(1\)](#). It is necessary to determine whether a contract has been authorised by a company and properly executed by the company.

## DIRECT CONTRACTING [S127](#)

A company may execute a document without using a common seal if the document is signed by:

- 2 Directors of the co or;
- 1 Director and a co secretary or;
- Sole director (if applicable).

## OR INDIRECT CONTRACTING (AGENCY):

**STATE:** A company can also be bound by a contract that is entered to by an agent on behalf of the company without a common seal under [S126\(1\)](#). Requires one of the below forms of authority:

### ACTUAL AUTHORITY

**Express:** An agent who has been directly authorised to enter the contract.

**Implied:** Through communicated acquiescence after the event - *Brick and Pipe Industries v Occidental Life* (board had previously acquiesced in G acting as if he was MD, and G then represented that F was company secretary to witness common seal on a guarantee)  
Customary implied if appointed in position *Hely-Hutchinson v Brayhad*  
Must be communicated, not silent acquiescence - Diplock LJ in *Freeman & Lockyer*

### APPARENT AUTHORITY 4 STEP TEST *Freeman & Lockyer v Buckhurst Park* Diplock LJ

- 1 Has company made a **representation** to outsider that agent has authority to **enter contract of the type sought to be enforced**?
- 2 Was the holding out made by person with **actual authority** to manage company's affairs either generally or specifically in the particular contract at issue?
- 3 Was contractor induced by the representation to enter contract, i.e., did contractor rely on the representation?
- 4 Did the company have capacity to enter the contract or delegate authority to the agent? No longer relevant see [S124](#) Corporations.

*E.g. Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising*

A purchase order signed by an employee who purported to act on authority of the appointed managing director

But the MD's authority had been limited by the board so he had no authority to make the purchase

A MD has 'usual' authority to make purchase orders, but actual authority is required in order to make the representation

The company was not liable for the purchase

## RELATIONSHIPS WITH EXTERNAL PARTIES & 'ASSUMPTIONS'

**STATE:** A person is entitled to make the assumptions in [S128\(1\)](#) & [S129](#) 'in relation to dealings with a company.' The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.

Including single transactions *Advance Bank Pty Ltd v Fleetwood Star Pty Ltd*

Assumptions can be relied upon even if an agent is fraudulent or forges a document re the dealings [S128\(3\)](#)

Assumptions can also be used cumulatively [S129\(8\)](#)

### SECTION 129 - ASSUMPTIONS

#### Constitution and replaceable rules complied with

- (1) Assume that the company's constitution (if any), and any provisions of this Act that apply to the company as replaceable rules, have been complied with.

#### Director or company secretary

- (2) Anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:
  - a. has been duly appointed; and
  - b. has authority to exercise the powers.

#### Officer or agent

- (3) A person may assume that anyone who is **held out** by the company to be an officer or agent of the company
  - a. has been duly appointed; and
  - b. has authority to exercise the powers and perform the duties.

#### Proper performance of duties

- (4) A person may assume that the officers and agents of the company properly perform their duties to the company.

#### Document duly executed without seal

- (5) Assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection [S127\(1\)](#). May also assume that anyone who signs the document and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices.

#### Document duly executed with seal

- (6) A person may assume that a document has been duly executed by the company if:

- a. the company's common seal appears to have been fixed to the document in accordance with subsection 127(2); and
- b. the fixing of the common seal appears to have been witnessed in accordance with that subsection.

**Officer or agent with authority to warrant that document is genuine or true copy**

- (7) A person may assume that an officer or agent of the company who has authority to issue a document or a certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy.

**ASSUMPTIONS FORFEITED:** Benefit of an assumption will be lost if at the time of the dealings the outsider knew or suspected that the assumption was incorrect **S128(4)**. Actual knowledge or actual suspicion must be shown; knowledge or suspicion will not be imputed - suspicion is 'More than a mere idle wondering' but a positive feeling of apprehension, *Queensland Bacon v Rees* (1966) 115 CLR 266

**PRE-INCORPORATION CONTRACTS:** Companies comes into being upon registration **S131(1)** but if they entered a contract pre-registration, then the contract is still valid where:

- It has been ratified within the time agreed in the contract (if any) OR within a reasonable time after the contract
- The board of director ratifies the contract

If the company does not ratify the contract or does not perform it, the individual who entered it can be made liable and has no right of indemnity against the company. Court has discretion to order that person or the company to be liable where company does not ratify or enter a substitute contract.

## COMPANY CONTRACTING STEPS

### 1. Identify the parties *Company v Individual*

Is the company registered? Likely, but if not see **S131(1)** pre-incorporation contracts.

If so then:

2. **STATE:** As an incorporated body, [*Company A*] has the legal capacity and power to enter into a contract **Corp Act S124(1)**. [*Company A*] can enter into a contract directly or indirectly (agency) see **S127 & S126(1)**.

### 2A. DIRECT CONTRACTING?

Necessary to determine whether *Individual* is a director (including shadow/de facto) if so, see if **S127** has been met (unlikely).

### 3. AGENT OF THE COMPANY?

**STATE:** If [NAME] is an agent, then they can enter into a contract on behalf of [*Company A*] without a common seal **S126(1)**.

### 3A. ACTUAL AUTHORITY

**Express?** Unlikely.

**Implied?** Argue one on the facts:

- Communication acquiescence by the board *Brick and Pipe Industries v Occidental Life*
- Customary i.e. person was if appointed in position *Hely-Hutchinson v Brayhad*

If no actual authority, then go to:

### 3B. IS THERE APPARENT AUTHORITY - *Freeman & Lockyer v Buckhurst Park*

- i. Has there been a **Representation** by the agent?
- ii. Has the representation been **HELD OUT** by someone with **ACTUAL AUTHORITY**?
- iii. Was the contractor **INDUCED** by the representation that was held out?  
See *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising* for analogous facts.

### 4. ASSUMPTIONS?

**STATE:** [*Company B*] is entitled to make assumptions in **S128(1) & S129** 'in relation to dealings with another company,' including single transactions *Advance Bank Pty Ltd v Fleetwood Star Pty Ltd*.

Consider whether any of the **S129** assumptions are relevant or whether the reliance on them has been forfeited by a suspicion that the assumption was incorrect **S128(4)**.

### 5. CONCLUSION/REMEDIES

Given that [*Individual*] had a lack of actual or apparent authority to enter into the contract on behalf of [*Company A*], it is unlikely that they are bound by the contract with [*Company B*]. [*Company B*] may issue proceedings against the [*Individual*] in respect to a breach of the potential contract.