

CORPORATE LAW 2022 – SEM 2

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Company Contracting - Was the contract validly entered into?

- State:** Under s 124, a company has all the powers of a natural person, including the capacity to enter into contracts. However, the contract will be validly entered into for it to be binding.
- State:** A company can enter into a contract directly or through an agent.

Direct entry into contract

- State:** Direct entry into contracts is governed by s 127 of the CA.
- Consider:** Was contract entered by common seal or two directors and a company secretary?
 - Per s 127(1) □ a company can execute a document directly without using a common seal if the document is signed by two directors or by a director and a company secretary.
 - Per s 127(2) □ if it has been witnessed by 2 directors or by one director and the company secretary
 - Northside Developments Pty Ltd v Registrar-General** (1990) 170 CLR 146 □ ‘the affixing of the seal to an instrument makes the instrument that of the company itself [...] it may be said that a contract executed under the common seal evidences the assent of the corporation itself and such a contract is to be distinguished from one made by a director or officer on behalf of the company, being a contract made by an agent on behalf of the company as principal’ (Mason J)
- Conclude:** Was contract validly entered into directly by the company?

Entered into by an agent

- State:** Per s 126, a company can enter into a contract via an agent.
- State:** The agent must have actual or apparent authority to so.
- Consider:** Did the agent have actual authority?
 - Consider:** Express actual authority - Company constitution or delegation of power by board of directors.
 - Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549** □ “[actual authority] is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques.
- Consider:** Implied actual authority?

- **Hely-Hutchinson v Brayhead Ltd** □ It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him [sic] to do all such things as fall within the usual scope of that office.” (Lord Denning)
- MD can also authorize agents to enter into contracts
- The role of company secretary has implied authority to enter into contracts related to administration of the company
 - **Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd** □ court held that a secretary can sign contract to order cars i.e. wide authority
 - **Club Flotilla (Pacific Palms) Ltd v Isherwood** □ did not include substantive matters such as conducting litigations
- Role of single director does not have authority to bind the company
 - **Northside Developments Pty Ltd v Registrar General** □ “the position of director does not carry with it an ostensible authority to act on behalf of the company. Directors can act only collectively as a board and the function of an individual director is to participate in decisions of the board” (Dawson J)
 - **Junker v Hepburn [2010] NSWSC 88 [43]** □ “an implied grant of actual authority can result from acquiescence in the course of behaviour by persons who have actual authority to delegate. For example, if directors as a board stand by whilst a single director enters into transactions outside his or her authority, the board’s acquiescence in that course of dealing can constitute the grant, by implication, of actual authority to enter into those transactions.”
- **Conclude:** Is actual or implied actual authority made out?

On the basis of Apparent Authority

- **Consider:** An agent may also enter into a contract on the basis of apparent authority.
- **State:** Apparent authority arises where a company allows a person to hold themselves out as an agent, it will then be estopped from asserting otherwise.
- **State:** The relevant test was expounded in *Freeman v Lockyer*.
- **Consider:** Limb 1: First, did the company make a representation to outsider that agent has authority to enter into contract of the type sought to be enforced?
 - *Pacific Carriers Ltd v BNP Paribas* □ “the assurance with which outsiders deal with a company is more often than not based, not upon inquiry, or positive statement, but upon an assumption that company officers would have the authority that people in their respective positions would ordinarily be expected to have.
 - *Flexirent Capital Pty Ltd v EBS Consulting Pty Ltd* □ “a holding out may be of general character, arising for example out of an office or position in which the principal places the agent, or it may be specific to a particular transaction”
- **Consider:** Limb 2: Was the representation made by someone with actual authority to manage company’s affairs either generally or specifically in the particular contract at issue.
 - *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising* (1975) 133 CLR 72 □ ‘the holding out must be conducted by the principal, not the agent. A third party cannot rely upon the agent’s own representation as to authority’
- **Consider:** Limb 3: Was contractor induced by the representation to enter the contract (reliance)?
 - *Northside Developments Pty Ltd v Registrar-General* □ if third party has some reason to doubt authority, they are taken to be ‘put on inquiry’ and must ask questions to determine if authority actually exists. Failure to do so will deny the right of estoppel.
- **State:** Operation of s 124 abolishes need to prove company’s capacity.
- **State:** Under s 128(1), a person engaged in dealings with a company can rely on the assumptions set out in s 129.

- **Consider:** Do any of the assumptions apply?
 - S 129(1) □ person can assume constitution and RR's have been complied with
 - S 129(2) □ third party may assume that a person who appears on the information provided to ASIC to be a director or secretary of the company has been duly appointed and is authorised to perform the duties customarily applied to that role
 - S 129(3) □ 'a person is entitled to assume that someone who is held out by the company to be an officer or agent has been duly appointed and has the authority to exercise the powers and perform the duties customarily performed by such an officer or agent of a similar company
 - Overlaps with apparent authority
 - S 129(4) □ any person who has dealings with a company can assume that its officers and agents properly perform the duties they owe to the company
 - S 129(5) and 129(6) □ allows a third party to assume that a document that appears to have been signed in accordance with ss 127(1) or (2) has been duly executed.
 - S 129(7) □ allows a person who has dealings with a company to assume that any officer or agent who has authority to issue a document or certified copy of a document on the company's behalf also has authority to warrant that the document is genuine or a true copy.

- **Consider:** Can any of the assumptions be rebutted?
 - Section 128(4) □ benefit of an assumption will be lost at the time of the dealings the outsider knew or suspected that the assumption was incorrect
 - **Eden Energy Ltd v Drivetrain USA Inc** □ a person is not required to make any inquiry in order to rely on the assumptions provided by s 129: 'a person does not lose the benefit of the assumptions in s 129 merely because, in the circumstances, their suspicions *ought* to have been aroused' therefore actual knowledge is required
- **Conclude:** Was the contract validly entered into?

Variation of Class Rights

- State:** In order to enforce a valid variation of class rights, the company must follow the procedure set out in s 246B. Two scenarios are contemplated.
- If constitution exists: State:** Per s 246B(1), any variation of class rights must be performed in accordance with the procedure set out in the company's constitution.
- If no constitution: State:** Per s 246B(2), a company must obtain special resolution of the members in GM and either a special resolution passed at the meeting of the affected class, OR written consent of at least 75% of the votes of the class.
- State:** Under s 246B(3), the company must give written notice to members in 7 days of variation AND company must lodge notice with ASIC within 14 days if dividing shares into classes if not previously divided or converting shares into another class (s 246F(1), (2)).

Do different classes of shares exist?

- State:** Per s 245B(1), a company can issue different classes of shares. In *Crumpton v Morrine Hall Pty Ltd*, it was observed that if shares can meaningfully be differentiated from one another by reference to the rights they offer, then they are different classes of shares.
- Consider:** Do different classes of shares exist?

Do class rights exist?

- State:** Per s 246B, class rights are “rights attached to shares in a class of shares.”
- State:** In *Cumbrian Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper and Printing Co Ltd*, the court considered 3 categories of class rights.
 - (1) Rights or benefits specifically annexed to particular shares
 - These are class rights
 - (2) Rights or benefits conferred on an individual otherwise than in the capacity of shareholder
 - These are not class rights
 - (3) Rights conferred on a shareholder in its capacity as shareholder but which are not annexed to any particular shares
 - These are class rights according to *Cumbrian Newspapers*
 - However, there is an element of doubt whether they are ‘rights attached to shares in a class for the purpose of s 246B
- Consider:** Is there a class right?

Has the class right been varied?

- State:** What constitutes a variation of a class right is contemplated in s 246C.
- Consider:** Are any of these actions being made?
 - (1) A class of shares is divided into further classes, and after the division the rights attached are not the same
 - (2) Rights attached to some of the shares in the class are varied
 - (3) A company with 1 class of shares issues new shares with different rights, and those rights are not provided in the company's constitution or notice lodged with ASIC.
 - (4) Issues new preference shares that rank equally with existing preference shares, and the issue not authorized by the terms of the existing preference shares or the constitution
- State:** In *White v Bristol Aeroplane Co Ltd*, the court emphasised that the variation must change the legal rights of the member. Dilution of a voting right or an economic alteration will not amount to a variation of the right.
 - White v Bristol Aeroplane Co Ltd* □ Ordinary and preference shareholders had one vote per share. Co proposed to issue bonus to ordinary shareholder only. Effect was to dilute the voting power of preference shareholders
 - Held:** Not variation of their voting rights - still have 1 vote per share. Doesn't change the legal right of vote per share.
- Conclude:** Have class rights been varied? If yes, members may be able to seek oppression remedy.

Who is a Director?

- State:** In order to determine the duties applicable to an individual, it must be shown whether they can appropriately be classified as a director of the company. Under s 9, a director can be validly appointed, a de facto director, or a shadow director.

Validly Appointed

- State:** Under s 9, a person formally appointed to the position of director will be considered a validly appointed director.
 - Consider:** Includes executive, non-executive, nominee and alternate directors.
- Conclude:** Is the director validly appointed?

De facto Director

- State:** Section 9 contemplates a de facto director as someone who while not validly appointed nonetheless acts in the position of a director.
- State:** In *Deputy Commissioner of Taxation v Austin*, it was held that a de facto director needs to be exercising high-level management functions. This will be informed by the size of the company and how the person is perceived by outsiders.
- Consider:** Could the person be characterised as a de facto director?
 - Mistmorn Pty Ltd (in liq) v Yasseen* □ a person working under the

title of ‘consultant’ but undertaking responsibilities typical of a director was held to be a de facto director

- Grimaldi v Chameleon Mining NL (No 2)** □ although s 201B requires directors to be individuals, a consultant company cannot be ‘used as a screen’

to avoid being a de facto director. Directors of the consultant company may be de facto directors if the facts point toward that conclusion.

- Conclude:** Can the person be characterised as a de facto director?

Shadow Director

- State:** A shadow director is contemplated in s 9(b)(2) as someone whose wishes in accordance with which the directors of the company are accustomed to act.
- State:** In **Bluecorp Pty Ltd (in liq) v ANZ Executors and Trustees** it was held that the directors must perform positive acts, and that there be a causative link between the outside person’s will and the action of the directors.
- Consider:** Is the person likely to be a shadow director?
 - Re Akron Roads Pty Ltd (in liq) (No 3)** □ ‘an adviser does not become a shadow director merely because the directors follow his or her advice, particularly when the adviser has been retained to give advice’
 - Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd** □ a company can be found to be a shadow director. As Apple was a major creditor of all 6 Buzzle retailers, they felt that they had no choice but to agree with the requirements that were put in place. Further, the court found that there must be a ‘causal connection between the putative shadow director giving the instruction or expressing the wish and the directors acting on it’
 - Ultraframe (UK) Ltd v Fielding** □ English court suggested that ‘habitual compliance over a period of time’ is required (White J)
- Conclude:** Is the person likely to be a shadow director?

Officer

- State:** An officer is defined in s 9 as someone acting in a director-like capacity, including:
 - (a) a director or secretary of the corporation; or
 - (b) a person:
 - (i) who makes, or participates in making decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation’s financial standing; or