The ties that bind: execution & statutory assumptions under the Corporations Act

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1. The Numbers Trend
Court judgments referring to ss127 or 129 (Austlii)
Cases considering s129 (CaseBase)
Outline

1. The numbers trend
2. Sections 127, 128 and 129
3. Issue 1: Purported dealings under section 128(1)
4. Issue 2: Can statutory assumptions help create proprietary rights?
5. Issue 3: Do sections 129(5) and (6) cover substantive authority?
6. Conclusion
2. Sections 127, 128 & 129
Purpose of sections 127-129

- Balancing exercise
- Protect outsiders in dealing with corporations
- Clarify and supplement common law rules
Section 127 – Execution by company

• A document may be signed by the company with or without a seal by the following people signing:
  - two directors of the company;
  - a director and a company secretary; or
  - in the case of pty company, by a sole director who is also the sole secretary.
Section 128 - Gateway

• Entitles a person to make the assumptions set out in s 129 in relation to:
  ▪ **dealings** with a company; or
  ▪ dealings with another person who has or purports to have directly or indirectly acquired title to property from a company.

• Disentitles access to assumptions if at the time of the dealing the person **knew or suspected** the assumption was incorrect.
Section 129 – Statutory Assumptions

1. **129(1)** - the company's corporate **constitution** is complied with

2. **129(3)** - a person **held out** by the company to be an officer or agent has been **duly appointed and has the customary authority** of someone in that position in a similar company

3. **129(4)** - the officers and agents of the company **properly perform their duties**

4. **129(5) and (6)** - a document which **appears** to have been executed in accordance with section 127(1) or (2) has been duly executed by the company.
3. Purported dealings under section 128(1)
“A person is entitled to make the assumptions in section 129 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.”
Purported dealings under s128(1)

Development of the Law

• Includes purported dealings?
  - **Yes**: *Story v Advance Bank Australia Ltd* (Gleeson CJ)
• What are ‘purported dealings’?
  - Authority **to negotiate or take other steps**: *Soyfer v Earlmaze Pty Ltd*
• How do you establish that authority?
  - CL actual or ostensible authority or under **statutory assumptions**: *ANZ v Frenmast*
• Recent applications of *Soyfer*
Purported dealings under s128(1)

*Story v Advance Bank Australia Ltd (Gleeson CJ)*

- “[dealings must] *embrace*, subject to the qualifications contained in the legislation, *purported dealings*”

- “[if] the statutory provisions only extended to cases where the person representing the company had actual authority then they would be largely unnecessary ”
Purported dealings under s128(1)

Development of the Law

• Includes purported dealings?
  ▪ Yes: *Story v Advance Bank Australia Ltd* (Gleeson CJ)

• What are ‘purported dealings’?
  ▪ Authority *to negotiate or take other steps*: *Soyfer v Earlmaze Pty Ltd*

• How do you establish that authority?
  ▪ CL actual or ostensible authority or under *statutory assumptions*: *ANZ v Frenmast*

• Recent applications of *Soyfer*
Purported dealings under s128(1)
Soyfer v Earlmaze Pty Ltd (Hodgson CJ in Eq)

“[It] is not necessary that the person representing the company have authority from the company to commit the company to the relevant transactions or execute the relevant documents; but in my opinion, it is necessary that the person have authority to undertake some negotiation or other steps, so that the dealings, in relation to which the document is executed, are properly considered to be dealings with the company.”
Purported dealings under s128(1)

Development of the Law

- Includes purported dealings?
  - Yes: *Story v Advance Bank Australia Ltd* (Gleeson CJ)
- What are ‘purported dealings’?
  - Authority to negotiate or take other steps: *Soyfer v Earlmaze Pty Ltd*
- How do you establish that authority?
  - CL actual or ostensible authority or under **statutory assumptions**: *ANZ v Frenmast*
- Recent applications of *Soyfer*
‘Purported dealings under s128(1)

Commentary

• Summary of current state of law

• Soyfer in context
Purported dealings under s128(1)

Practical Implications

• Good news for outsiders:
  ▪ Where there are negotiations and communications with the company, relative degree of comfort
• So-so news:
  ▪ Not always the case
  ▪ No foolproof way to protect against complete impostors
• Named officeholder signing
4. Can statutory assumptions help create proprietary rights?
“A person is entitled to make the assumptions in section 129 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.”
Statutory assumptions and proprietary rights

*Esperance Cattle Co Pty Ltd v Granite Hill Pty Ltd*

On appeal: *Caratti v Mammoth Investments Pty Ltd*

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Diagram:

- 'Navarac' → 'Lease 1' → 'Mammoth' → 'Sublease' → 'Granite Hill'
- 'Esperance Cattle' → 'Lease 2' → 'Mammoth'

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Statutory assumptions and proprietary rights

Commentary

• Statutory language arguments

• Practical difficulties
Statutory assumptions and proprietary rights

Practical Implications

• Serious challenge to ambit of statutory assumptions rejected

• When dealing with proprietary rights, property related checks still need to be made
5. Do sections 129(5) and (6) cover substantive authority?
Sections 129(5) and (6) and substantive authority

Formal Authority
- Authorised method of execution

Substantive Authority
- Authorised entry into the transaction
Sections 129(5) and (6) and substantive authority

Development of the Law

• Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd
• Soyfer v Earlmaze Pty Ltd
• Caratti v Mammoth
• Great Investments v Warner
Purported dealings under s128(1)
Soyfer v Earlmaze Pty Ltd (Hodgson CJ in Eq)

“if it can be assumed (and cannot be denied by the company) that a company has duly executed a document, I do not think there is any separate question as to whether this was duly authorised.”
Sections 129(5) and (6) and substantive authority

Development of the Law

- Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd
- Soyfer v Earlmaze Pty Ltd
- Caratti v Mammoth
- Great Investments v Warner
Sections 129(5) and (6) and substantive authority

Practical Implications

- Good news: entrenchment of broader substantive authority view
- Be careful where you might be on notice
6. Conclusion
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