

Corporate Law 2004 Exam

Question 4

High Distinction 85%

The mortgage was not granted by Nimble. Ben had no actual authority to enter into the mortgage. The mortgage was signed no behalf of Nimble, by Ben alone.

Prima facie, there is no enforceable mortgage against Nimble. s127 CA says that (unless a sole shareholder Co) there must be two signatures to bind the Co, here Ben has only signed. However, s198(c),(d) allow the delegates of the Board (ie agents) may bind the Co, even if s127 is not complied with. Thus, it is possible that the mortgage is enforceable against Nimble.

However, Ben had no actual authority unless one could argue that this was implied by his role as managing director (LK Bruthers). However, this seems not to be in the commercial interest of Nimble, and is a large sum of money, so it is unlikely that Ben could argue that it was apart of his managing director role. s126 allows such actions to bind the Co.

Thus, Ben had no actual or implied authority from Nimble. However, ostensible authority may still be enough to bind Nimble. Only if the agent has been held out by the Co, as having authority, by someone with actual authority will this be ostensible authority to by the Co (Crabtree Vickers). There is no ostensible authority as there has been no representation by anyone with actual authority.

To help ascertain ostensible authority there are a set of assumptions which a person dealing with the Co can rely on: s129.

- may assume Constitution complied with
- replaceable rules apply to Nimble

The assumption that one may assume the person held out to have powers to contract on behalf of the Co is duly appointed, etc, only applies when there has been a representation by a person with actual authority. There has not been in this case.

Furthermore, the presumptions do not apply in the 'factual matrix' resulted in suspicion or knowledge that the person lacked authority. There is no longer a duty to 'positively inspect' the facts (Northside Developments; BNZ v Fiberie). So one can probable not argue that Eastpak should have done more (at law rather than good practice). However, there has been no actual, implied or ostensible authority and Nimble is not bound by the mortgage.