IN THE COURT OF APPEAL OF NEW ZEALAND

CA755/2012
[2014] NZCA 616

	BETWEEN	PASCOE PROPERTIES LIMITED Appellant
	AND	ATTORNEY-GENERAL Respondent

Hearing: 11 September 2014

Court: French, Courtney and Asher JJ

Counsel: K B Johnston for Appellant
M J Andrews and R D L Garden for Respondent

Judgment: 16 December 2014 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is granted.

B The appeal is dismissed.

C Costs are reserved. The respondent is to file submissions on costs by 26 January 2015, and the appellant within five working days of the date of filing by the respondent.

REASONS OF THE COURT

(Given by Asher J)

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Introduction

[1] This appeal concerns whether an agent had authority to bind the Ministry of Economic Development (the Ministry) to a renewal of lease and, if so, whether an agreement to renew the lease was in fact formed and can give rise to a damages claim. In a judgment of 23 October 2012, Simon France J determined that the Ministry was not bound by the actions of the alleged agent, and that there was no contract to renew formed.[1] The landlord, Pascoe Properties Ltd (Pascoe), challenges that decision.

[2] The lease in question, dated 25 August 2003, related to a commercial building in Lower Hutt known as Levin House. The Ministry occupied the fourth and fifth floors of the building and related space. The lease commenced on 1 August 2003 and was for a term of three years, with two rights of renewal each for three years. The rights of renewal were exercisable by the Ministry giving written notice to the landlord at least three months before the end of the expiring term.

[3] Pascoe purchased Levin House on 18 December 2003, after the lease had commenced. Pascoe had two directors: Lewis Thompson and Nanette Thompson. Mr Thompson was the Chief Executive and Pascoe's principal representative for all dealings in relation to Levin House.

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1 *Pascoe Properties Ltd v Attorney-General* [2012] NZHC 2671.

[4] The lease had been executed for the Ministry by Neville Harris, who was the Deputy Secretary of the Business Services Branch of the Ministry. The Ministry had retained Paul Benjamin, a property consultant, to deal with matters relating to Levin House and other buildings it occupied.

[5] There were leaking problems in the building. Mr Benjamin gave evidence of sending notices about leaks on 16 September 2004, 11 May 2005, 2 August 2005, 10 July 2006, 27 July 2006 and 7 September 2006. He deposed that Pascoe rarely undertook maintenance work on Levin House and that at times the leaks became so bad that the Ministry stopped paying rent until they were fixed, as it was entitled to do under the lease.

[6] The lease was due for renewal on 1 August 2006, but oral discussions began in early October 2005. Mr Benjamin then wrote to Pascoe on 17 October 2005. He set out matters of concern that would have to be addressed before the Ministry would consider exercising its right of renewal.

[7] There then followed a written exchange between Mr Thompson and Mr Benjamin. On 20 February 2006 a letter was sent by Mr Benjamin relating to the renewal of the lease and the work to be done before that could happen. Mr Thompson added some handwritten comments about the work and then countersigned the letter on 10 March 2006. Two months later, on 9 May 2006, Mr Benjamin's office wrote to Mr Thompson acknowledging receipt of the countersigned letter and asking for a variation of the lease incorporating the comments to be forwarded to the office for execution. Pascoe pleaded that it was at this point that there was a concluded binding agreement to renew the lease. The Ministry denied this.

The High Court decision

[8] Simon France J recorded that both parties accepted Mr Benjamin did not in fact have authority to conclude a contract on behalf of the Ministry.[2] However, he found that "notwithstanding it is a surprising conclusion", he was satisfied that

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2 At [22].

Mr Thompson believed Mr Benjamin had that authority.[3] Pascoe argued that belief was based on an impression conveyed by the Ministry, and therefore that the Ministry had cloaked Mr Benjamin with apparent authority to conclude the contract, and was accordingly bound by it.

[9] The Judge did not consider that the letter of 9 May 2006 represented a concluded contract.[4] While accepting that it was not uncommon in renewal situations for agreement to be reached by an exchange of correspondence, with formal documentation later, he construed the exchanges as making it plain that there was a need for a formal document to be executed.[5]

[10] He also held that in any event the Ministry did not cloak Mr Benjamin with apparent authority to enter into a renewal of lease on its behalf. While he had held Mr Thompson to be an honest witness, he did not place weight on his evidence that he had been told by Rodney Grindey of the Ministry that he should be dealing with Mr Benjamin, who "had the authority to [act]".[6] The Judge regarded this evidence as hearsay evidence, and considered that Mr Thompson had assumed a meaning rather than focused on the exact spoken words. He noted that the allegation only came to light in the course of Mr Thompson's oral evidence. He concluded, "and not with much difficulty", that the claim of ostensible authority failed.[7]

[11] Simon France J went on to record in relation to damages that he would have rejected the Ministry's submission that Pascoe had failed to show it had mitigated its losses.[8] He held that Pascoe had adduced sufficient evidence on loss. We will return to his reasoning in more detail later in this decision.

[12] The Judge did not refer to s 41 of the State Sector Act 1988, which permits certain defined delegations, although it had been relied on by Ministry witnesses. There was no submission made to us based on s 41, and it was not suggested that the Ministry could rely on it in this dispute. Since it has not been suggested that

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3 At [24].
4 At [31].
5 At [32].
6 At [42].
7 At [45].
8 At [47].

Mr Benjamin had actual authority, or that Mr Thompson was aware of s 41, we do not consider this issue further.

Grounds of appeal

[13] Pascoe has appealed against Simon France J's decision. Four primary issues arise in the appeal:

(a) Should leave be given to Pascoe to adduce further evidence?

(b) Was Simon France J correct in deciding that Mr Benjamin did not have ostensible authority?

(c) Was Simon France J correct in deciding that the letter of 9 May 2006 did not constitute a binding agreement?

(d) If Pascoe establishes liability, is there an entitlement to damages?

The fresh evidence

[14] Following delivery of the High Court judgment, Pascoe's solicitors sought certain information from the Ministry under the Official Information Act 1982. The Ministry responded on 14 February 2013, providing a small bundle of documents. The bundle included two internal Ministry email communications with an attached letter of 2 May 2001. The emails were sent by the Manager of Business Development of the Operations Branch of the Ministry, Mr Grindey. Pascoe seeks to adduce the documents as further evidence under r 45 of the Court of Appeal (Civil) Rules 2005.

[15] Such evidence can be accepted on appeal if the evidence is fresh, credible and cogent.[9] Evidence is not fresh if it could, with reasonable diligence, have been adduced at trial.[10]

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9 *Erceg v Balenia Ltd* [2008] NZCA 535 at [15]; *Aotearoa International Ltd v Paper Reclaim Ltd* [2006] NZSC 59, [2007] 2 NZLR 1 at [6]; and *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192.

10 *Erceg v Balenia Ltd*, above n 9, at [15].

[16] There is no doubt that the internal emails and letter are genuine and the evidence is therefore credible. There is also no doubt that the evidence is fresh, in the sense that the documents should have been discovered by the Ministry but were not, and were only obtained after the hearing under the Official Information Act. Finally, there is no doubt that the evidence is cogent, as it relates to the extent of Mr Benjamin's authority to negotiate property matters. As we will set out later in this judgment, the internal emails show that Mr Benjamin did not have actual authority to bind the Ministry but, consistent with Mr Thompson's evidence, had full authority to "negotiate" and "deal with" all lease matters.

[17] The application for leave to adduce the further evidence is granted.

Ostensible authority

[18] We agree with Simon France J that the heart of the dispute is Mr Benjamin's role.[11] We therefore deal with the issue of ostensible authority first.

The law

[19] Ostensible authority or, as it is sometimes called, apparent authority, was discussed by this Court in *New Zealand Tenancy Bonds Ltd v Mooney.*[12] Richardson J, who gave the judgment of the Court, stated:[13]

> The doctrine of apparent or ostensible authority applies where a person by words or conduct represents or permits it to be represented that another person has authority to act on his behalf: in such a case he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if that other person had the authority that he was represented to have, even though he had no actual authority (*Bowstead on Agency* (15th ed, 1985) p 284). As *Bowstead* goes on to emphasise (p 286) a representation by the agent that he has authority cannot create apparent authority unless the principal can be regarded as having in some way instigated or permitted it, or put the agent in a position where he appears to be authorised to make it. "No representation by the agent as to the extent of this authority can amount to a 'holding out' by the principal" (*Attorney-General for Ceylon v A D Silva* [1953] AC 461, 479; also *Fay v Miller, Wilkins & Co* [1941] Ch 360, 365 and *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 505). It is of the essence of the doctrine that the principal has made a

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11 *Pascoe Properties Ltd v Attorney-General*, above n 1, at [22].
12 *New Zealand Tenancy Bonds Ltd v Mooney* [1986] 1 NZLR 280 (CA).
13 At 283–284.

> representation as to the extent of the agent's authority. An agent cannot by simply asserting that his authority exceeds the limits laid down by the principal and notified to the contracting party create an apparent or ostensible authority wider than that.

[20] Courts customarily refer to the concept of estoppel in discussing ostensible authority. Thus, it was observed by the House of Lords in *Armagas Ltd v Mundogas SA* (*The Ocean Frost*) that:[14]

> Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is estopped from denying that actual authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it.

[21] Ostensible authority is created, therefore, by the actions of the principal, who by words or conduct represents to the other party that a person has the necessary authority to enter into the transaction on the principal's behalf. The authority may be either express or implied, and may arise by the principal permitting the agent to act in some way in the conduct of the principal's business with other persons.[15] The representation of authority can be effected through a course of dealing that is sufficiently frequent and understood.[16] It also may arise where an agent is vested with a particular office and that office is of the kind that could reasonably be expected to carry the authority.[17] The perception of authority by the other party must be reasonable.[18] Specific limitations on the authority of an agent may not be effective if the actions of the principal have created the representation of authority.[19]

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14 *Armagas Ltd v Mundogas SA* [1986] AC 717 (HL) [*The Ocean Frost*] at 777.

15 *Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA) at 503 and 505; and *Pharmed Medicare Private Ltd v Univar Ltd* [2002] EWCA Civ 1569, [2003] 1 All ER (Comm) 321 at [9].

16 *Mountain Lake Holdings Ltd v Darrell McGregor (Contractor) Ltd* (2007) 8 NZCPR 85 (HC) at [36].

17 *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd* [1985] 2 Lloyd's Rep 36 (CA) at 48.

18 *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 (CA) at 204 per Steyn LJ, at 207 per Evans LJ, and at 207–208 per Nourse LJ.

19 *Egan v Ross* (1928) 29 SR (NSW) 382 (SC) at 386.

[22] No representation by the agent can create ostensible authority without something more. However an agent's authority may emanate from the joint actions of both the principal and the agent where the principal appoints an agent to a position that enables the agent to then bolster its authority in dealings with a third party.[20]

[23] It is necessary, therefore, to examine closely the course of dealing leading up to the parties entering into the transaction in question to see whether the words or conduct of the Ministry amounted to a representation of authority.

The course of dealing leading up to the renewal negotiation

[24] The fresh evidence provides useful detail as to the nature of Mr Benjamin's authority. Mr Benjamin had worked for the Ministry on property matters since approximately 1989. On 2 June 1999, in the context of a situation where a business unit manager had given undertakings to a landlord without the knowledge of the corporate office, Mr Grindey sent an email to various persons including Mr Benjamin. He recorded with emphasis:

> Paul Benjamin, the branch's property consultant, is the **only person** authorised to negotiate property matters with landlords or their agents.
>
> I am the primary property contact person in the branch and may act in Paul Benjamin's absence or indisposition.
>
> Neville Harris is the only person in the branch who may sign legally binding documents relating to property.

[25] In the second email, sent on 11 June 2001, Mr Grindey recorded that:

> We use a property consultant, Mr Paul Benjamin, to deal with all formal lease matters and Paul liaises with Gray Thompson and myself as required.

[26] The email went on to explain that Mr Benjamin was a very able negotiator who had the complete confidence of the Ministry. Attached was a letter of 2 May 2001 in which Mr Harris, at that time the Deputy Secretary of the Operations Branch of the Ministry, recorded that all communications concerning lease provisions, rents and similar high level matters were to be dealt with by Mr Grindey, Mr Benjamin or

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[20] Ian Brown "The Agent's Apparent Authority: Paradigm or Paradox?" [1995] JBL 360 at 368–9.

himself. He stated that no other Ministry personnel, agent or lawyer had his delegated authority to act on his behalf on property matters.

[27] Thus, the level of delegation to Mr Benjamin to negotiate on behalf of the Ministry was high – at the highest level below Mr Harris – but in the internal communications a clear line was drawn between negotiating transactions with third parties and legally binding the Ministry, which could only be done by Mr Harris. Mr Thompson was not aware of any of this correspondence.

[28] From the time Pascoe purchased Levin House Mr Thompson dealt with Mr Benjamin "almost exclusively". There has been no suggestion of any formal initial meeting between Mr Thompson and Mr Benjamin. However, in relation to the recurring problem of leaks in the building, it was Mr Benjamin who liaised with Pascoe. Mr Benjamin sent a number of documents to Pascoe that he said were "on behalf of the Ministry of Economic Development". In a letter of 1 September 2004, Mr Benjamin wrote to Pascoe saying: "We act as property managers for the Ministry of Economic Development (MED)". In a letter of 2 August 2005 he wrote in near identical terms, stating: "We are the property consultants for the Ministry of Economic Development". Formal notices of breach of lease, signed by Mr Benjamin, were sent from 25 August 2003, and at the foot of each notice was the following:

> Signed by)
> **Her Majesty the Queen** **)**
> acting by and through the)
> Business Services Branch)
> of the Ministry of Economic)
> Development by its duly)
> authorised agent, P M Benjamin)
> in the presence of:) _____

[29] These documents do not prove ostensible authority as they were all sent by Mr Benjamin himself and not the Ministry. However, the Ministry was aware of Mr Benjamin's actions, which as the emails show were in accord with his actual authority.

[30] Therefore, at the time the parties turned their minds to renewal, the Ministry had put Mr Benjamin in a position where he could negotiate lease issues and sign

and send important notices to the landlord as the Ministry's duly authorised agent. Indeed, Mr Benjamin in his evidence stated that he was given authority to negotiate lease issues (but not bind the Ministry), a fact Mr Harris (who was the only witness from the Ministry) confirmed.

The course of dealing through the renewal negotiation

[31] The parties turned their minds to the issue of renewal of the lease in October 2005. In the first written correspondence on the topic, a letter of 17 October 2005 from Mr Benjamin to Pascoe, it was observed by Mr Benjamin that there had been a discussion between Mr Thompson and Mr Grindey regarding "our intentions about the right of renewal".

[32] In his written brief of evidence, Mr Thompson did not mention this discussion with Mr Grindey. However, during his oral evidence in chief, in response to a general question about Mr Benjamin's authority, he stated that: "Mr Grindey had informed me that Mr Benjamin was the party who I should be dealing with regarding this matter and had the authority to do so".

[33] In cross-examination, counsel for the Ministry turned to this issue. The following exchange occurred:[21]

> Q And no one from the Ministry ever said to you that Mr Benjamin had the Ministry's authority to bind it to a renewal?
>
> A Well my impression was Mr Grindey gave me that, ah, when I spoke with him about it, about a lease renewal, that he was authorised to, ah, negotiate it, so …
>
> Q So do you recall what Mr Grindey's words were?
>
> A Not exactly, no.
>
> Q *I think you gave evidence earlier that he, you say, "He told me to deal with Mr Benjamin", is that right?*
>
> A *Yeah, he, he said that Mr Benjamin would be, um, he would, doing the negotiations or whatever, in regard to this matter. Something along those lines.*

[21] Emphasis added.

Q But he didn't say to you, did he, that Mr Benjamin had authority to commit the Ministry?

A Well I believe he did but, um, it was a phone call and I've got nothing in writing, so I'm afraid I, ah, can't prove that either way.

Q Well I – you believe he did – can you give us any sense of the words that he used?

A Well, I, I, from memory, or from trying to remember, I would imagine that *he would've said that, um, Mr Benjamin is our property, um, contractor and, um, you'll be negotiating the lease renewal with him.*

Q Negotiating the lease renewal with him?

A *Which once, in normal commercial practice, once they're negotiated and agreed to and we got letters back agreeing to things, that's, ah, when they're on paper agreed to, that is, normally means there's been a renewal, or whatever, including the fact they asked us to provide the new rental, so there was sheer evidence there that they believed that it had been renewed as well, from my point of view.*

[34] We do not agree with Simon France J that Mr Thompson's account of what Mr Grindey said to him was hearsay evidence. "Hearsay statement" is defined in s 4 of the Evidence Act 2006 as being a statement that (a) was made by a person other than a witness, and (b) is offered in evidence to provide the truth of its contents. We agree that the evidence was a statement made by a person other than a witness, as Mr Grindey was not called by the Ministry. However, the statement was not offered in evidence to prove the truth of its contents and was therefore not hearsay. Whether Mr Grindey was correct that Mr Benjamin actually had authority to negotiate was irrelevant. The question was whether Mr Grindey had, on behalf of the Ministry, represented to Mr Thompson that Mr Benjamin had authority to deal with the renewal of lease.

[35] The Judge, in addition to finding the evidence was hearsay, observed that although Mr Thompson was an honest witness, he did not focus on exact words but rather tended to assume meanings.[22] The Judge also noted that the allegation by Mr Thompson was only raised in his oral evidence, and that it could have been expected to have been pleaded and addressed in the written brief.

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22 *Pascoe Properties Ltd v Attorney-General*, above n 1, at [42].

[36] We cannot see why this evidence should have been controversial in the context of the issues. The Ministry did not call Mr Grindey to contest it, and we can see why. The evidence is consistent with what Mr Harris and Mr Benjamin said in their evidence in chief, that Mr Benjamin had authority to negotiate lease issues. It is also consistent with the earlier emails about Mr Benjamin's authority to deal with property matters.

[37] Mr Thompson did say at one point in cross-examination that he was told Mr Benjamin had authority to commit the Ministry, but then he said that while he believed Mr Benjamin had such authority, he could not prove Mr Grindey explicitly said so. When we view the cross-examination as a whole, we do not consider Mr Thompson was going so far as to assert under oath that he was expressly told Mr Benjamin had authority to bind the Ministry to a renewal of lease. He was saying he was told that Mr Benjamin could negotiate the renewal, and assumed Mr Benjamin could bind the Ministry. Thus, what he was told was consistent with the authority the Ministry had actually given Mr Benjamin, though without the qualification that he could not bind the Ministry.

[38] The Judge did not address the issue of Mr Grindey's ability to cloak Mr Benjamin with ostensible authority, which does not appear to have been put in issue by the Ministry. It is an important issue to which we now turn.

[39] It was stated by the High Court in *Savill v Chase Holdings (Wellington) Ltd*:[23]

> It is also important to recognise in this field that the conduct of the person claimed to be bound as principal, which is said to have created apparent authority in the agent, must, in the case of a corporation, be conduct at a sufficient level of authority to bind the alleged principal. It must be conduct of an officer or servant of the alleged principal of a sufficient level of seniority to constitute a representation binding on the principal that the agent has the asserted authority.

[40] In our view Mr Grindey had sufficient seniority to make a representation about Mr Benjamin's authority that was binding on the Ministry. He was a senior executive of the Ministry and a person who, as demonstrated by the internal emails, had authority to carry out particular actions on its behalf. Unlike Mr Benjamin,

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[23] *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 (HC) at 274.

Mr Grindey was a senior employee of the Ministry and could be expected to speak for it.

[41] Following the exchange with Mr Grindey, correspondence in relation to the renewal commenced with Mr Benjamin's letter of 17 October 2005 to Mr Thompson. The letter stated that there were several matters giving "us" concern about the property, including the leaks. It continued:

> We may consider exercising our Right of Renewal, however the above matters would need to [be resolved].
>
> I suggest that we meet in Wellington soon and see if we can reach an agreement. It would be helpful if you could supply the information I requested …

[42] It is to be noted that Mr Benjamin used the words "we" and "our" in this letter, indicating that he and the Ministry were one and the same in terms of dealing with the listed issues. It is also important that Mr Benjamin referred to "our Right of Renewal", giving the impression that the right of renewal was something over which Mr Benjamin had control.

[43] On 7 December 2005, following a meeting and a phone call between the two men, Mr Thompson wrote to Mr Benjamin. He set out Pascoe's position on the Ministry's proposed conditions as to the work to be done on the property. Mr Benjamin responded on the matters of detail on 9 December 2005, and Mr Thompson responded in handwriting.

[44] On 20 February 2006 Mr Benjamin wrote to Pascoe, for the attention of Mr Thompson, stating:

> We write on behalf of the Ministry of Economic Development.
>
> This letter sets out the agreed basis for the MoED exercising its right of renewal on 1 August 2006 for a further term.
>
> You have agreed to do the following:
> - Install and make operational a lift, stair and floor security system, as detailed in the quotes from Waterfords, dated 4th March 2005 (confirmed as current).
> - Maintain and operate a comprehensive lift service contract, the terms of which must be satisfactory at all times to the MoED.

- Make a one off payment of $50,000 plus GST for new carpet to be laid on one of the floors, being a minimum weight of 40oz commercial grade. Payment to be made no later than 31st July 2006 or such earlier date if the MoED renders a GST invoice.
- To carry out the delayed repairs and maintenance immediately to the walls and columns in a workmanlike finish.

All the other terms and conditions of the lease to remain the same, except to give effect to the rent review which will be due and the exercised right of renewal.

I suggest you prepare a variation of lease incorporating the above details for execution by MoED. In the meantime could you please countersign this letter signifying your acceptance of the above terms.

[45] Mr Thompson responded on Pascoe's behalf on 10 March 2006. He signed the letter for Pascoe as requested, but set out a number of handwritten comments that related to the specific proposals for work to be done on the lifts, carpet and leaks as part of the agreement to renew.

[46] Mr Benjamin's office, through its property manager Ms Breedon, then responded on 9 May 2006 to Mr Thompson's countersigned letter as follows:

We write on behalf of the Ministry of Economic Development.

Thank you for forwarding the countersigned letter outlining the agreed basis for the MOED exercising its right of renewal at [Levin House]. Can you please now prepare a variation of the lease incorporating both your written comments and those listed in type. Once ready for execution, can you please forward the appropriate copies to this office so we can arrange execution.

[47] Mr Benjamin in his evidence stated that he copied the Ministry into this correspondence.

[48] He also said he had explicitly told Mr Thompson he had no authority to bind the Ministry to a renewal, both by letter and in a conversation at the outset of the negotiation. Mr Thompson said he never received such a letter and did not recall such a conversation. As Simon France J observed, Mr Benjamin surprisingly was unable to produce the letter or a letter of its type. The Judge was satisfied that no such letter was sent by Mr Benjamin to Mr Thompson.[24] As to the oral communication, the Judge, while not questioning Mr Benjamin's honesty, was not

[24] At [27].

satisfied with his recollection after the time that had passed and did not accept that Mr Benjamin ever explained the limited nature of his role to Mr Thompson.[25]

Analysis of the course of dealing

[49] In our consideration of whether Mr Benjamin had ostensible authority, we take into account the evidence of an expert, Mr O'Regan, about commercial practice in relation to renewals of leases. Mr O'Regan is an experienced Wellington commercial property lawyer.

[50] Mr O'Regan deposed that renewals of leases do not involve the same considerations as what he called "ab initio transactions", such as agreements for sale and purchase and agreements to lease. In such transactions, the parties have to settle all important terms of the arrangement, and there is a general expectation amongst the commercial community and lawyers that the parties will not be bound until such time as all the important terms of the arrangement are committed to writing and a contract is signed. Mr O'Regan stated that there is no such expectation in the case of renewals of leases. An explanation for this is that the parties have already agreed the contractual framework and the key terms, and the question is just whether the lease on existing terms is to be renewed. In his experience it is very common for lessors and lessees to operate on the basis of a notice of renewal without any contractual document or formal deed of renewal.

[51] The Ministry did not call any expert evidence to counter that of Mr O'Regan. One witness called by the Ministry, Mr Faherty, gave some opinion evidence in his written brief, but he acknowledged in oral evidence that he was not an expert.

[52] Mr O'Regan's evidence is important in considering ostensible authority in terms of what could be reasonably expected by a party dealing with the Ministry. A person experienced in property dealings might expect that certain ab initio transactions, such as agreements to lease, would be documented by full contracts. However, that party could well have a different expectation in relation to the less formal process of renewal.

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[25] At [28]–[29].

[53] Simon France J considered that there was "no sufficiently clear assertion of authority by Mr Benjamin known to the Ministry that justifie[d] weight being placed on the failure of the Ministry to correct it".[26] He did not consider that Mr Benjamin's notices, signed on behalf of the Ministry, could be equated with an ability to commit the Ministry to a three year lease. He concluded that the claim of ostensible authority failed.

[54] It is our assessment that the background course of dealing, and the specific interactions Mr Thompson had with Mr Grindey and Mr Benjamin, show through words and a course of conduct a representation by the Ministry that Mr Benjamin had authority to bind it to a renewal of lease. Our reasons for that conclusion are as follows:

(a) Mr Grindey, a senior employee of the Ministry able to make representations regarding Mr Benjamin's authority, indicated to Mr Thompson that Pascoe should deal with Mr Benjamin regarding the renewal of lease. He did not qualify that advice by saying that Mr Benjamin could not, however, commit the Ministry to a renewal.

(b) Consistent with the authority he had been given, Mr Benjamin proceeded to act for the Ministry in relation to property matters to a high level. He referred to the Ministry and himself as "we" and went so far as to, on his own volition and under his own signature, send out formal documents "for and on behalf of the Ministry".

(c) While the internal communications state Mr Benjamin could not bind the Ministry, there were no communications of this qualification to Mr Thompson. Mr Benjamin's evidence that there were was rejected by the Judge. It was reasonable in our opinion for Mr Thompson to assume that if Mr Benjamin had authority to negotiate the renewal of the lease, he would also have authority to bind the Ministry to the final agreement.

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[26] At [43].

(d) Mr Benjamin stated that he copied the Ministry in to his correspondence with Pascoe and kept it informed. The Ministry was aware of Mr Benjamin's actions and correspondence referring to an agreement, but took no steps to make it clear that he could not bind it.

[55] Thus, it is our conclusion that the Ministry represented to Mr Thompson that Mr Benjamin had authority to act on its behalf in relation to the renewal. It did not qualify that authority. It was therefore bound by the acts of Mr Benjamin in relation to the renewal. We consider it was reasonable for Mr Thompson not to perceive a condition that the negotiation and acceptance of a written offer by Mr Benjamin was subject to a formal deed being signed later by the Ministry itself.

[56] Therefore, if Mr Benjamin had signed a formal renewal of lease contract on behalf of the Ministry, we would have concluded that he had ostensible authority to do so. However, he did not. No formal document was executed and we now turn to whether the parties did reach a binding agreement.

Was there an agreement to renew the lease?

The correspondence

[57] We have already referred to the evidence of Mr O'Regan, who deposed that it is common for lessors and lessees to renew a lease by informal notice without ever entering into a formal deed of renewal. Mr O'Regan said it frequently occurs that there is an expired agreement to lease or deed of lease and the only documentation supporting the current occupancy of premises is a notice of renewal. This is not regarded as a problem provided there is a paper trail showing exercise of the right of renewal.

[58] The deed of lease for Levin House dealt with renewal at cl 33 of the second schedule. Clause 33 provided:[27]

> **IF** the Tenant has not been in breach of this lease and *has given to the Landlord written notice to renew the lease at least three (3) calendar months*

[27] Emphasis added.

before the end of the term then the Landlord will at the cost of the Tenant renew the lease for the next further term from the renewal date as follows:

(a) The annual rent shall be agreed upon or failing agreement shall be determined in accordance with clause 2.7 but such annual rent shall not be less than the rent payable during the period of twelve (12) months immediately preceding the renewal date.

(b) Such annual rent shall be subject to review during the further term on the review dates or if no dates are specified then after the lapse of the equivalent periods of time as are provided herein for rent reviews.

(c) The renewed lease shall otherwise be upon and subject to the covenants and agreements herein expressed and implied except that the term of this lease plus all further terms shall expire on or before the final expiry date.

(d) Pending the determination of the renewal rent the Tenant shall pay the old rent and upon determination of an appropriate adjustment shall be made.

[59] Clause 35 provided:

> **IF** the Landlord permits the Tenant to remain in occupation of the premises after the expiration or sooner determination of the term, such occupation shall be a monthly tenancy only terminable by one month's written notice at the rent then payable and otherwise on the same covenants and agreements (so far as applicable to a monthly tenancy) as herein expressed or implied.

[60] There was no requirement of a formal deed of renewal. This was consistent with the evidence as to commercial practice. Providing the tenant was not in breach and had given the landlord written notice to renew at least three calendar months before the end of the term (which would have to be unconditional), the landlord would at cost to the tenant renew the lease for the next further term.

[61] The Ministry did not follow the process of simple notification under cl 33. It chose instead to propose a renewal on terms. It was willing to renew, but on the basis that Pascoe would agree to carry out certain work on the building. In the absence of an unconditional notice of renewal following the procedure in the lease, the proposal to renew must be seen as a contractual offer to vary the lease contract on the new terms proposed. The ordinary principles that apply to contract formation must apply when construing the exchange in which the parties sought to reach an agreement.

[62] Whether there was a contract to renew the lease turns primarily on an interpretation of the communications of 20 February 2006, 10 March 2006 and 9 May 2006.

[63] As outlined above, the letter of 20 February 2006 started by stating that it set out the "agreed basis" for the Ministry exercising its right of renewal. It raised repair of the leaks, a new lift and new carpet as conditions of renewal. Importantly, it stated: "All the other terms and conditions of the lease to remain the same, except to give effect to the rent review which will be due and the exercised right of renewal." It invited acceptance by Pascoe.

[64] On 10 March 2006, with the qualification "subject to comments above", Mr Thompson signed that letter for Pascoe and returned it. Those comments were responses to various specific requirements as to work to be done and payments to be made. We will not set them all out. Mr Thompson appeared to accept all the proposals for work to be done, but set out the specific ways in which Pascoe would meet those requirements. For instance, in relation to a proposed payment of $50,000 for new carpet, he stated that he wanted to see the new rent go through before he paid that sum. In relation to re-plastering the walls he stated that he did not wish to do so until he found any leaks that were there. Although the variations from the offer contained in his handwritten additions were minor, this can be seen as a counter-offer.

[65] The letter written by Ms Breedon on behalf of Mr Benjamin on 9 May 2006 thanked Mr Thompson for the countersigned letter outlining "the agreed basis" for the Ministry "exercising its right of renewal". This sentence followed:[28]

> Can you please *now* prepare a variation of the lease incorporating both your written comments and those listed in type. *Once ready for execution* can you please forward the appropriate copies to this office *so we can arrange execution*.

[28] Emphasis added.

Analysis of the correspondence

[66] Simon France J did not consider that the letter of 9 May 2006 represented a concluded contract.[29] He held:

> [35] Even accepting, as Mr O'Regan testified, that these things are often done by letter, for the 9 May letter to constitute a concluded binding agreement to exercise [the] right of renewal, in the circumstances of this case, I would expect it to say just that. It does not, but instead confirms that the parties have reached agreement as to the basis on which the renewal will be exercised. That is not the same thing as exercising it. Further, the letter again refers to the need to prepare documentation, a point made earlier in the February letter.

[67] For a contract to be formed the parties must have an intention to be bound at the point when the bargain is said to have been agreed.[30] Whether a party has intended to enter into a contract and whether it has succeeded in doing so are questions to be determined objectively.[31] It must be recognised that there can be a difference between parties reaching an agreement on all the relevant terms of an agreement, and reaching an agreement that they are bound. As a matter of practice, it can be the case that it is understood between the parties that although they may reach agreement on all relevant terms, there can be no binding contract until there is a written agreement.[32] There may also be cases where the lead up to the parties reaching an agreement shows that they will not be bound until a particular event, such as the drafting of a formal deed and written execution, occurs. The distinction between agreement on the terms and agreement to be bound was expressed by Mahoney JA in *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd*:[33]

> The only question considered by the [trial Judge] was whether there was a binding contract between the parties. In considering this question … it is of assistance to distinguish between three questions: did the parties arrive at a consensus?; (if they did) was it such a consensus as was capable of forming a binding contract?; and (if it was) did the parties intend that the consensus at which they arrived should constitute a binding contract?

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29 *Pascoe Properties Ltd v Attorney-General*, above n 1, at [31].

30 *Electricity Corp of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2002] 2 NZLR 433 (CA) at [53(a)].

31 *Electricity Corp of New Zealand Ltd v Fletcher Challenge Energy Ltd*, above n 30, at [54].

32 *Carruthers v Whitaker* [1975] 2 NZLR 667 (CA).

33 *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 (SC) at 326 as cited in *Verissimo v Walker* [2006] 1 NZLR 760 (CA) at [26].

[68] In considering these questions it is necessary to consider the correspondence as a whole, against the backdrop of commercial practice. The commercial practice is that there is a degree of informality about the process of lease renewal. However, the parties here were not following the orthodox route, where the lessee gives a simple notification of renewal. Rather, the Ministry chose to offer a variation of lease. In the penultimate sentence of the letter of 20 February 2006, having set out the "agreed basis" for the Ministry exercising its right of renewal (which must mean in the context the proposed basis for agreement), Mr Benjamin asked for a "variation of lease" incorporating the details for execution by the Ministry. He stated in the final sentence: "In the meantime could you please countersign this letter signifying your acceptance of the above terms."

[69] While agreement was being sought on the proposed terms, it was agreement "[i]n the meantime". The penultimate sentence made it clear that during that "meantime" two events should happen: a variation of lease should be prepared, and it should be executed by the Ministry. So in all, three further steps to vary the lease were referred to by Mr Benjamin: first, agreement on the terms by countersigning; second, the preparation of a variation of lease; and third, its execution by the Ministry.

[70] As it transpired, Pascoe did not accept the terms proposed. Mr Thompson inserted handwritten qualifications to the proposed terms on 10 March 2006. At this stage, therefore, none of the three steps had been completed.

[71] The Ministry's letter of 9 May 2006 accepted the new terms. So the first step was then complete. However, consistent with the letter of 20 February, it referred to there being an "agreed basis" for the Ministry "exercising its right of renewal". The reference to an agreed basis was in the present tense, but the expression "exercising its right of renewal" on its own was ambiguous as to whether it was in the present or future tense. Read in context, however, it is clear the exercise of renewal was to happen in the future. The sentence that followed stated that a variation of lease should be prepared incorporating Mr Thompson's handwritten comments as well as those listed in the typed letter of 20 February 2006.

[72] As at 9 May 2006, therefore, only the first of the three steps had been completed. Agreement had been reached on the terms, but that does not create a contract in the absence of an intention to be bound. When viewed objectively, the parties anticipated two further steps before there would be a binding contract: the preparation of a variation of lease, and its execution.

Subsequent actions

[73] It is permissible when considering contract formation to look at the subsequent words and conduct of the parties towards one another.[34] Analysis of the subsequent words and conduct of the parties in this case supports the above interpretation of the correspondence.

[74] If the lease was not renewed, it came to an end on 31 July 2006. The Ministry did not vacate on that day, but continued to occupy the premises and pay rent at the amount under the existing lease. Mr Thompson made no effort to have a formal document prepared, which can be seen as consistent with his position that there was an agreement, or as consistent with the parties having allowed the occupation to continue as a monthly tenancy on the same terms as the earlier lease, in accordance with cl 35 of the second schedule.

[75] On 7 September 2006 Mr Benjamin sent a notice of breach of the "lease dated 25 August 2003" due to a failure to repair leaks contrary to cl 43. Again, this is consistent with the lease having been renewed or with it continuing as a monthly tenancy.

[76] On 27 September 2006 Mr Grindey put arrangements in train for paying a new increased renewed rental rate on the property. This included preparing the necessary automatic bank payments. The Ministry sought invoices from Pascoe at the new rate. However, for reasons that were not explained in evidence, rent continued to be paid at the old rate. These actions are explicable if the parties did not regard themselves as bound by the renewal at that point, but thought that they would be in due course. If there had been a renewal, it could be expected that the

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[34] *Electricity Corp of New Zealand Ltd v Fletcher Challenge Energy Ltd*, above n 30, at [56].

new agreed rent would be paid or demanded. The setting up of the new payment arrangements, but failure to implement them, is more consistent with a renewal being expected but not yet coming into force.

[77] There is also no evidence of other actions being carried out consistent with the new terms. Pascoe did not carry out the promises made in the 10 March 2006 correspondence, and in particular did not pay $50,000 plus GST for new carpet by 7 August 2006. There is a suggestion in the evidence that some work may have been done on the lifts, although when is not clear.

[78] In the meantime, on 25 August 2006, Mr Benjamin wrote to Pascoe forwarding a lease renewal document that he had prepared "incorporating all the matters that [had] been discussed and agreed". He stated towards the end of the letter:

> This variation is subject to the approval and ratification by Mr Neville Harris in his capacity as Deputy Secretary of Ministry of Economic Development, within seven days of which we receive the executed copy from you.

[79] That statement is inconsistent with there being an existing agreement for renewal by August 2006. A four page deed of renewal was attached that set out the renewal of the term and the confirmation of the lease covenants, along with the specific covenants Pascoe had undertaken to perform in the previous correspondence.

[80] Mr Benjamin then wrote on 3 November 2006 asking for Pascoe to sign and return the deed of renewal. Mr Thompson, on behalf of Pascoe, ultimately did so. On 23 November 2006 Mr Benjamin informed Pascoe that he was forwarding the documents on to Mr Harris for his approval and ratification. Mr Benjamin's conduct at this point is consistent with there being no binding agreement, as is Mr Thompson's conduct in not disagreeing with the statement that there still had to be formal execution.

[81] Then, on 5 December 2006, Mr Benjamin told Mr Thompson that Mr Harris had refused to approve or ratify the renewal and that the premises were accordingly occupied by the Ministry on a monthly tenancy. Mr Thompson queried why the

Ministry did not approve the renewal and then later asked "what the problem is as I thought we had an agreement".

[82] Less weight can be placed on this statement and what followed, as a dispute was developing and the parties were taking positions.

Conclusion on agreement to renew

[83] In our opinion, viewed as a whole and objectively, the exchange between the parties ending on 9 May 2006 does not show a concluded contract renewing the lease. While there was an agreement reached between Mr Benjamin (on behalf of the Ministry) and Pascoe as to the terms, there was no deed prepared and execution was still required. That conclusion is supported by reference to the parties' subsequent conduct. Like Simon France J, therefore, we conclude that a binding agreement to renew the lease was never formed.

[84] We accordingly dismiss the appeal.

Damages

[85] Although it is not necessary to do so, we briefly consider this issue.

[86] In the High Court, the Judge rejected the Ministry submission that Pascoe had not satisfied its duty to mitigate its losses.[35] He held that the evidence, although sparse, was sufficient to prove an inability to lease the building and the subsequent claimed losses.

[87] Although there was no cross-appeal, Mr Andrews for the Ministry pressed in his submissions the proposition that there was a failure to mitigate. Like Simon France J, we see no merit in this submission. Mr Thompson in his oral evidence expanded on the efforts made by Pascoe to re-let the building and instruct Colliers and other agents. Signs were placed on the building and the best rental possible obtained. The Ministry did not call any evidence to rebut this.

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[35] *Pascoe Properties Ltd v Attorney-General*, above n 1, at [47].

[88] The total loss claimed comprised unpaid rental, less rental received, and came to $511,494.04. There has been no suggestion that this calculation was arithmetically incorrect. However, we were informed that $78,521 plus GST should also be deducted, as expenses that were not incurred. Thus, the net amount of loss was $421,194.89. Pascoe having failed to establish liability, we make no damages award.

Result

[89] The appeal is dismissed.

[90] Pascoe has succeeded on the issue that took the most time on appeal, but the appeal has not been allowed, so it may be that costs should lie where they fall. Counsel for the respondent is to file submissions on costs by 26 January 2015, and counsel for Pascoe within five working days of the date of filing by the respondent.

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