EDITORIAL NOTE: NO SUPPRESSION APPLIED.

**IN THE DISTRICT COURT**
**AT AUCKLAND**

**CIV-2015-004-000043**
**[2016] NZDC 6008**

| | |
|---|---|
| BETWEEN | CONSOLIDATED ENGINEERING COMPANY LIMITED<br>Plaintiff |
| AND | HUB STREET EQUIPMENT PTY LIMITED<br>Defendant |

Hearing: 23 February 2016

Appearances: Ms Rawcliffe for Plaintiff
Mr Chisholm for Defendant

Judgment: 1 June 2016

---

**RESERVED JUDGMENT OF JUDGE L I HINTON**

---

[1] The plaintiff, Consolidated Engineering Company Limited (Consolidated Engineering), claims in this proceeding that it entered into a contract dated 14 April 2014 with the defendant, Hub Street Equipment Pty Limited (Hub Street Pty), for the fabrication and supply of a mirrored stainless steel cladding assembly for a floodlit pool to be installed at Skycity. That contract has been performed by Consolidated Engineering and some of the contract price of $38,000.00 paid under it.

[2] In this proceeding Consolidated Engineering sues Hub Street Pty for $25,590.00, the balance owing under the contract.

[3] Hub Street Pty says it is not liable because it is not actually the contracting party. Rather, the contracting party was Hub Street Equipment NZ Limited (now in liquidation) (Hub Street NZ), a related company of Hub Street Pty.

[4] In a nutshell, Hub Street Pty says that its name and contract terms (under a purchase order) were used without its authority by Hub Street NZ or employees of Hub Street NZ when Hub Street NZ contracted with Consolidated Engineering. Those employees had neither actual nor ostensible authority to bind Hub Street Pty. So that the contract Consolidated Engineering has is with Hub Street NZ.

[5] Ms Rawcliffe appeared for the plaintiff and Mr Chisholm for the defendant at the hearing of this matter. Counsel supplied written submissions to which they spoke at the conclusion of the hearing.

[6] There was no issue here that there was a contract entered into by Consolidated Engineering and that that contract has been performed by Consolidated Engineering, which is entitled to the balance of the contract price outstanding under the contract. The sole issue is whether or not the defendant is a party to the contract.

[7] Hub Street Pty can be the party to the contract if committed to it by its agent(s) with actual or ostensible authority.

**The contract**

[8] On the face of it at least, the contract is one between Consolidated Engineering and Hub Street Pty, as they are the contracting parties named on the contract. The front page, at the top, has the titles Purchase Order and Hub Street Equipment – Hub Street Equipment Pty Limited. It has project and order detail headings which are completed.

[9] The front page purchase order notes that the supply of goods or services under the order implies acceptance of the attached Hub purchase order terms and conditions. There is a section headed Authorisation which names an "employee" Bevan Thomas, and "director" Jon Harrison. There appear to be signatures by each of those persons in the space provided, evidently on behalf of Hub Street Pty. There is a note under the authorisation section which states:

> Note: For purchases greater than $1,000.00, director's approval required.

[10] The standard terms and conditions of purchase annexed to the purchase order form is titled Hub Street Equipment Pty Limited – ABN52 109 882 617– standard terms and conditions of purchase.

[11] Clause 1 of the standard terms and conditions provides that:

> The parties agree that this Purchase Order (Order) constitutes the entire agreement between Hub Street Equipment Pty Limited (Hub) and the supplier nominated in the Order (Supplier) for supply of the subject goods.

[12] The purchase order had been preceded by email correspondence between Consolidated Engineering personnel and Mr Bevan Thomas, seemingly on behalf of Hub Street Pty. Various emails from Mr Thomas described Mr Thomas as the project manager for Hub Street Pty. Mr Ian McDonald, a director and general manager of Consolidated Engineering, referred in his evidence to the initial call from Mr Thomas in relation to a requested quotation for the job. Mr McDonald had thereafter limited dealings with Mr Thomas, although he did see the purchase order emailed to Andre at Consolidated Engineering on 14 April 2014.

[13] Mr McDonald had subsequently attempted to contact Hub Street Pty's Sydney office in relation to the outstanding payment.

[14] Mr McDonald confirmed in his evidence his understanding that Consolidated Engineering had contracted with Hub Street Pty. He referred to the various emails and to the purchase order. He had concluded that he was dealing with an Australian company, named in the Purchase Order. He said that the contract was not a particularly large one and a deposit was being required. Mr McDonald said that, in the circumstances, he did not see the need for any particular enquiries to be made in relation to Hub Street Pty.

[15] Mr Scott Williams, a director of Hub Street Pty and Hub Street NZ, who gave evidence for the defendant, seemed to me unrealistically hesitant in accepting that a counterparty to the contract might consider that the deal entered into was in fact with Hub Street Pty. There seemed to me no question at all that on the face of it the deal seemed to have been sought by, negotiated by and entered into by Hub Street Pty. The correspondence preceding the contract indicated the involvement of Hub Street

Pty without doubt, with the explicit recognition of Hub Street Pty in the contract documents coming then as no surprise to Consolidated Engineering.

**Actual authority**

[16] The crux of the matter, however, with actual authority is evident agreement between principal and agent conferring actual authority to contract. Consolidated Engineering bears the burden here of proving that the acts of Mr Thomas and Mr Harrison in fact bound Hub Street Pty to this agreement as a party.

[17] It is not enough that the plaintiff can point to assertions by Mr Thomas and Mr Harrison as to their status, authority or actions. The plaintiff must prove that in fact they had actual authority to bind Hub Street Pty. As Katz J put it at paragraph [38] of *The Roofing Specialists Limited v BLM Engineering Company Limited*[1]:

> Actual authority is a legal relationship between principal and agent created by consensual agreement to which they alone are parties.

[18] For Consolidated Engineering, Ms Rawcliffe pointed to the fact that all documentation before the Court indicated that the defendant was a party to the agreement. She noted in her closing written submissions that:

> (a) The Purchase Order is in the name of Hub Street Equipment Pty Limited;
>
> (b) The terms and conditions attached to the Purchase Order are those of Hub Street Equipment Pty Limited; and
>
> (c) The email communications regarding the project are signed off by Hub Street Equipment Pty Limited.

[19] Ms Rawcliffe noted that there was no documentation before the Court in the name of Hub Street NZ, and that Hub Street Pty had failed to produce any evidence to support its assertion that Bevan Thomas was not authorised to enter into contracts on behalf of the defendant.

[20] For the defendant Mr Chisholm submitted that the plaintiff had led no evidence to support the allegation of actual authority despite having the onus to do

[1] [2012] NZHC 3391

so. He referred to the evidence of Mr Williams, as a director of both Hub Street NZ and Hub Street Pty, that neither Mr Harrison nor Mr Thomas were employed by, or had any authority to act on behalf of, Hub Street Pty in relation to the Skycity contract (or any other project). Mr Harrison's evidence was also that no director, representative or employee of Hub Street Pty was involved in the Skycity project.

[21] Although I did not find Mr Williams a particularly convincing witness, I could not find the plaintiff had discharged the onus of proving actual authority.

**Ostensible authority**

[22] Ostensible or apparent authority arises where a person has by words or conduct represented, or permitted it to be represented, that another person has authority to act on his behalf. The leading case on ostensible authority is *Freeman & Lockyer v Buckhurst Park Properties*[2], where Diplock LJ stated at page 503:

> An 'apparent' or 'ostensible' authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the apparent authority, so as to render the principal liable to perform any obligations imposed upon him by such a contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is relevant whether the agent had actual authority to enter into the contract.

[23] Both counsel referred also the recent Court of Appeal decision *Pascoe Properties Limited v Attorney-General*[3]. In that case, the Court stated:

> [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. The representation of authority can be effected through a course of dealing that is sufficiently frequent and understood. It also may arise where an agent is vested with a particular office and that office is of the kind that could reasonably be

[2] [1964] 2 QB 480.
[3] [2014] NZCA 616.

> expected to carry the authority. The perception of authority by the other party must be reasonable. Specific limitations on the authority of an agent may not be effective if the actions of the principal have created the representation of authority.

[24] The Court of Appeal in *Pascoe Properties* referred also to the Court of Appeal decision in *New Zealand Tenancy Bonds v Mooney*[4] and the statement of Richardson J giving judgment of the Court:

> As *Bowstead* goes on to emphasise (page 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.

[25] Mr Chisholm submitted that ostensible authority is a form of estoppel, which as I noted in argument is one but not the universal analysis of ostensible authority. Further, Mr Chisholm pointed to the necessity of a "representation" by the principal. Again, that representation can be constituted by authorising conduct in certain circumstances that allows the "authority" relied on to arise. It seems to me that accords with the legal policy underpinning ostensible authority consistent with the cases.

[26] The argument for the plaintiff was that the purchase order had emanated from the defendant's system following access by, or on behalf of, Mr Thomas and/or Mr Harrison. Alternatively, that documentation including the purchase order form had been provided to them at their request. Mr Williams allowed in his evidence that Mr Thomas/Mr Harrison had access to the server and could use the document. Ms Rawcliffe submitted, to put it briefly, that in so allowing access or use the defendant had led the plaintiff to believe that the agents had authority to bind the defendant to the transaction.

[27] The defendant's proposition was that it was not tenable on the facts that Hub Street Pty had permitted the conduct of Mr Thomas and Mr Harrison. Hub Street Pty did not permit its purchase orders to be (actually) utilised in the form a purchase order was used here. It was not possible to permit conduct to occur that the principal, Hub Street Pty, had no knowledge of. There was no express

[4] [1986] 1 NZLR 280

knowledge of relevant emails or use of the purchase order form on the part of Hub Street Pty.

[28] Moreover, Mr Chisholm noted that the purchase order provided for a limited representation of authority for purchases greater than $1000.00, director's approval being required (see para [9] above). The submission was that Mr Harrison was a director of neither company and that it was impermissible to rely on Mr Harrison's own representation as to his authority. There was, moreover, no actual representation by the appropriate level of authority that Mr Harrison could purport to execute the purchase order as director.

[29] Mr Williams' evidence was that he had been a director of Hub Street Pty since 2006 and was a beneficial shareholder of that company, holding also a beneficial interest in Hub Street Equipment NZ Trust, which was established in New Zealand to carry on business for the benefit of the shareholders of Hub Street Pty. Hub Street NZ was the sole trustee of Hub Street Equipment NZ Trust.

[30] Hub Street Pty was an Australian company which had operated exclusively in Australia in the design and supply of street equipment since 2004. Mr Williams said that Hub Street Pty would tender for projects outside of Australia and, if successful, the shareholders would establish a new entity within the relevant region for the purpose of providing goods and services in the relevant region under the brand "Hub Street Equipment". So that such entities were established in Australia, New Zealand, Qatar and UAE.

[31] Hub Street NZ employed seven staff at its busiest time. Jon Harrison was Regional Manager and Bevan Thomas was Project Manager. Mr Williams said he was aware of the Skycity project as a director of Hub Street NZ through Hub Street NZ's internal reporting procedures, but he said his fellow directors and himself had no involvement in the Skycity project.

[32] In cross-examination by Ms Rawcliffe, Mr Williams referred to the Hub brands having a strong reputation, and agreed that marketing was done under the Hub brand with then any contract entered into with the local entity. He accepted that

there was no document before the Court showing that the New Zealand entity entered into a contract with the plaintiff, apart from, he said, a purchase order which refers to the Hub Street NZ GST number. He was not clear that a person considering the contract would regard it as a contract with Hub Street Pty – concerningly, he considered that it could be looked at "either way".

[33] Mr Williams was not convincing in relation to the status of Mr Thomas or in relation to Mr Harrison. He said that he was aware of the Skycity project through internal reporting to him as a director. He said he would not have seen the emails from Mr Thomas, but allowed that he would have received a report from Mr Harrison detailing all of the business that was on. He conceded, but again was not straightforward in relation to this concession, that Mr Thomas or Mr Harrison would have had access to the documentation on Hub Street Pty's server.

[34] I did not regard Mr Williams as a particularly convincing witness. He was certainly defensive and not willing to make sensible or obvious concessions immediately. He was, for example, alternatively evasive or uncertain, in my view, on where Mr Thomas worked, and he was not at all convincing on his knowledge of Mr Thomas' emails describing Mr Thomas as of Hub Street Pty.

[35] Of course, the reality is that Mr Williams was appearing to champion as somehow decisive (Hub Street Pty's intentions concerning) a not unusual corporate structure or method of operation. Leaving aside the Hub Street Trust (concerning which there was little evidence or relevant reference) Hub Street Pty had simply intended from 2005 to have its separate business arm operated in New Zealand by its subsidiary or associated company, Hub Street NZ. Those intentions do not mean Hub Street NZ is the party to Hub Street Pty's contract here. Mr Williams referred to apparent successes of Hub Street Pty adding to the Hub brand. Mr Williams was a director on both boards, although he did not say when he commenced on the Hub Street NZ board. Certainly, he was there at the time of the Skycity project.

[36] In any event, notwithstanding the length of time Hub Street NZ had been operating, it is plain that its employee, Mr Thomas, was still stating on emails his link to, and status with, Hub Street Pty. Also, there was obvious access to Hub Street

Pty's server and documentation and evident use of contractual documentation of Hub Street Pty without alteration. In that regard, the insertion of an NZ GST number (if it were Hub Street NZ's GST number) matters little, if anything. The plain fact of the matter is that this whole scenario looked (other than to Mr Williams) like Hub Street Pty was contracting.

[37] It would have been very easy to have ring-fenced Hub Street NZ as the contracting party for contracts in New Zealand. It is routinely done. Some rather obvious steps could have been made to acquaint staff with relevant requirements and establish systems and documentation in New Zealand and preclude access to the Australian server or documentation.

[38] Likewise, the fact that some emails may have had (or as Mr Williams preferred it, may have "referenced") a New Zealand telephone number or a New Zealand address which in fact happened to be the address of, or telephone number of, Hub Street NZ does not matter either. For the relevant emails and contractual documentation self-evidently referred to Hub Street Pty. And Hub Street Pty could obviously, and an Australian company with a presence in New Zealand would be likely to, have had a New Zealand telephone number or address.

[39] It seems to me that Hub Street Pty has permitted its purchase order form to be accessed and has permitted its employees to represent that they are employees of Hub Street Pty. Mr Williams accepted in evidence that access to the system was permitted and that it was access to relevant documentation which was obtained. I accept that there is no actual permission granted for use of the purchase order in the manner in which it was used. But Hub Street Pty has put its employees or employees of its related New Zealand company in the position where they represent Hub Street Pty. I did not find Mr Williams convincing in relation to the contrary proposition.

[40] It seems to me that Hub Street Pty had impliedly authorised the necessary authority by "permitting the agent to act" in the conduct of the principal's business. As it was explicitly put in the *Pascoe Properties* decision.

[41] The lack of any explicit "representation", if it is a requirement, is not problematic. Effectively here, this situation is reasonably on all fours with the leading authorities. There is conduct by Hub Street Pty which amounts to permitting it to be represented that the agents had authority. That amounts to the "representation". That is expressly stated in *Freeman & Lockyer*. It is different where an actual express representation (usually by words) is made – as in *Pascoe Properties* or in *Savill v Chase Holdings (Wellington) Ltd*[5], where precise examination of the representation or authorising source is made.

[42] A finding that the agents here had ostensible authority to bind Hub Street Pty is not affected by a statement in the purchase order that purchases over $1000.00 required a director's approval. The fact is that the use by the agents here carries with it the not surprising assumption that (the standard) condition had been complied with if it applied. Ostensible authority overall cannot be denied because there was no "actual" authority in relation to that (standard) condition. The point is that the agents had ostensible authority to bind Hub Street Pty. Mr McDonald summed it up – he assumed authority in the circumstances, with the signature stated to be a director's being that of a director.

[43] I should note in this regard that where a principal has permitted relevant actions a representation of the agent can establish ostensible authority. It is put this way in *Bowstead*:

> It is usually said that a representation by the agent himself that he has authority cannot create apparent authority in him, 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. (Para 8 – 020 page 386)

[44] That statement was paraphrased by Richardson J in *New Zealand Tenancy Bonds.* And with respect to the defendant's position here that there was no representation made by Hub Street Pty, I have found that there was a "representation" or permitting that established the ostensible authority.

---

[5] [1989] 1 NZLR 257

[45] I find also that, to follow the estoppel analogy, Consolidated Engineering relied on the representation(s) when it did business with Hub Street Pty and entered into the contract. Such reliance is sufficient. Consolidated acted in response to the representation(s) self-evidently.

[46] Moreover, I think the plaintiff acted reasonably. I accepted Mr McDonald's evidence. He was a very forthright and intelligent witness, in my view. He assessed any risk. He thought he was dealing with an Australian company, this was not a big order, he was getting a deposit, and he considered no further security steps were required. The fact that Mr McDonald was not aware of ABN or ASIC numbers is immaterial. A finding that the plaintiff acted unreasonably in not in effect monitoring the inadequacies of Hub Street Pty's systems would be unacceptable in the circumstances. The plaintiff here has acted reasonably, not unreasonably as was the case in *Roofing Specialists,* which is clearly distinguishable. In that case there was actual (and fatal) knowledge of limitation of authority, continued dealings antithetical to the ostensible authority argued for, and overall not reasonable reliance.

[47] So that the result is that Consolidated Engineering is entitled to recover the amount claimed and interest from Hub Street Pty pursuant to the contract I find they were parties to. The plaintiff is entitled to costs and if the parties cannot agree costs then memoranda should be filed by the defendant within two weeks and the plaintiff within three weeks.

L I Hinton
District Court Judge