

JUDGMENT : HER HONOUR JUDGE FRANCES KIRKHAM : TCC : 22nd October 2004

1. This is an application by the Defendant, pursuant to CPR Part 3.4(2)(a) for parts of the claimant's claim to be struck out and CPR Part 24 for summary judgment on those parts of the claimant's claim.
2. In April 2000 the defendant was successful in the government auction of 3G technology licences. The claimant and defendant negotiated with a view to the claimant working in connection with the acquisition, design and construction of approximately 1,900 of the defendant's sites to allow use of 3G technology. It is common ground that the claimant began work on the proposed upgrade in 2000, in about June or July of that year. In issue between the parties is whether or not they entered into a contract. Although a draft bespoke contract document was prepared, and indeed ultimately ran to some 15 versions, this was never signed by either party.
3. The defendant engaged McCreadies, a firm of quantity surveyors, in connection with the project. At material times, Mr Griffiths was employed by the defendant; Mr Lewis is said to have been an associate then a partner with McCreadies; Mr Gulvin worked for McCreadies; and Mr Hurt was employed by the claimant. The scope of McCreadies' authority is in issue between the claimant and the defendant.
4. The claimant's case is that there was a concluded contract between the parties. The claimant contends that Mr Lewis had authority to bind the defendant to a contract with the claimant by (a) express actual authority (b) implied authority (c) ostensible (apparent) authority. Further, the claimant relies on estoppel and ratification by the defendant. In relation to this application, the court is concerned only with the question of ostensible (apparent) authority. As matters stand at present, the other issues will be dealt with at trial.
5. I refer to some of the events and correspondence dating from June 2000 which the parties consider relevant to this application.
6. Mr Gulvin attended a meeting on 26 June 2000, at which it appears he was authorised by the defendant to discuss a schedule of rates for the construction element of work to be carried out.
7. On 22 August 2000 the defendant sent the claimant a letter of intent. The letter provides as follows:
"Further to our negotiations for the above service, I would like to confirm that it is the intention of [the defendant] to engage your company as an acquisition, design and build contractor to our 2000/2001 cellbuild programme subject to the following
 1. *Terms and conditions of contract to be agreed.*
 2. *Contract rates for the work to be agreed but based on your priced document submitted as part of your Phoenix tender.*
 3. *You entering into a formal contract with [the defendant] based on a suitable form of contract to be agreed.....*
.....
This letter and our obligations under it will cease and determine when the formal contract is entered into."
The claimant countersigned the letter.
8. Subsequently various meetings took place between Mr Lewis of McCreadies and Mr Hurt. They negotiated terms. It is common ground that in some cases Mr Lewis agreed terms without reference to the defendant and in other cases he referred back to the defendant for instructions.
9. The claimant's case is that, by 12 September 2001, all terms had been agreed between the parties except for an agreed list of the sites to which the contract was to apply. By early 2002 the claimant had been instructed in relation to 1,997 sites.
10. By e-mail dated 4 February 2002 (resent on 15 February 2002) Mr Hurt wrote to Mr Lewis as follows:
"I think the only item left to agree on the contract is the list of sites making up the project. Attached is a list of those 1997 sites instructed to date which I suggest are appended to the contract with a suitable reference. Can you give me a call to discuss please."
11. The claimant contends that Mr Lewis and Mr Hurt then agreed that the list of sites should be one which referred to 1,923 sites and which had been provided earlier. The claimant's first alternative case is that, by the end of that discussion, the parties had concluded a contract.

12. On 6 June 2002 Mr Lewis sent Mr Hurt version 15 of the contract, asking for the claimant's signature on the document.
13. On 26 July 2002 the claimant was placed into administrative receivership.
14. A dispute arose as to the claimant's entitlement to damages consequent upon the defendant's purported omission and/or suspension of work. On 28 April 2004 the claimant gave notice of adjudication in relation to that dispute. An adjudicator was appointed. The defendant challenged the adjudicator's jurisdiction to deal with the dispute. The adjudicator took the view that there was a concluded contract between the parties and proceeded with the adjudication. By her decision dated 16 June 2004, the adjudicator concluded (amongst other matters) that the claimant was entitled to payment of £5,762,691 plus interest.
15. On 1 July 2004 the claimant issued proceedings to enforce that decision. The matter was initially listed for trial in November; that date has been adjourned to a date early in 2005.
16. In its particulars of claim, the claimant contended:

"By a bespoke contract entered into by the [claimant] and the defendant on a date during the period 4 February 2002 to 6 June 2002 ... the claimant agreed to undertake the "Acquisition, Design, Installation and Testing for the Upgrading of 1,923 Existing Cellsites (as listed within Appendix E) with Infrastructure to Support the Installation of UMTS Cellular Radio Equipment in locations throughout the United Kingdom."

17. The defendant sought further information. By its reply of 28 July 2004, the claimant contended as follows.:

"The contract was entered into either

(first alternative) on or after 4 February 2002 but by 15 February 2002 or shortly thereafter. That contract was concluded orally between the parties and following the dispatch of the claimant's e-mail of 4 February 2002, and which was re-sent on 15 February 2002. The contract was concluded orally by the telephone conversation between Mr Hurt and Mr Lewis; Mr Lewis agreed that a list of sites be appended to the contract, but was of the view that this should be the original list of 1,923 sites. Mr Hurt agreed to this whereupon the contract was concluded."

Or

"(second alternative) the contract was concluded on or around 6 June 2002, upon the defendant dispatching to the claimant by post a copy of the contract."

In relation to both the first and the second alternative contracts alleged by the claimant, the claimant's case is that Mr Lewis of McCreadies had express, implied or ostensible authority. The claimant pleads: "As a minimum, David Lewis had ostensible (apparent) authority. The claimant reserves its position in respect of the existence of express and implied actual authority until the conclusion of disclosure."

So far as ostensible authority is concerned this is said (in the further information which the claimant supplied) to arise:

"As a consequence of the conduct of Peter Griffiths and Peter Wardle, both of the Defendant, who by their conduct represented to the Claimant, that McCreadies (specifically Kevin Gulvin and later David Lewis) had authority to act on behalf of the Defendant and specifically to bind the Defendant in relation to the Contract between the parties.

This representation was a continuing representation, which occurred over the period 8 June 2000 to on or around 6 June 2002.

The representation occurred and was repeated on various dates over the period and include 8 June 2000, 6 October and 15 December 2000, 12 January 2001, 9 February 2001 and 9 March 2001.

The representation consisted of the following:

- (1) Where McCreadies were not authorised to agree a matter or a term of the Contract reference was to be made by McCreadies to the Defendant (specifically Peter Griffiths or Peter Wardle) in respect of that matter or term.*
- (2) Where McCreadies were authorised to agree a matter or a term of the Contract no reference was required to the Defendant in respect of that matter or term.*
- (3) In the event that McCreadies did not refer a matter or term to the Defendant McCreadies had authority to agree that matter or term.*

(4) In the event that no reference was made by McCreadies to the Defendant in respect of a matter or a term, the Defendant was to be bound by the agreement reached by McCreadies and the Claimant, in respect of that matter or term agreed by McCreadies.

(5) In the event that reference was made by McCreadies to the Defendant in respect of a matter or a term and in the event that such matter or term was not amended by the Defendant (and specifically by Peter Griffiths or Peter Wardle) the Defendant was to be bound by the un-amended agreement in respect of that matter or term."

18. The defendant pleaded a detailed case. It denies that McCreadies had authority to conclude a contract on its behalf. Its case is that McCreadies had authority to be involved in the preparation of draft contract documents and to negotiate terms. But McCreadies did not have authority to bind the defendant to a contract and at no time did the defendant represent that it would be bound by any agreement reached between McCreadies and the claimant. The defendant reserved the right to apply to dismiss the claim based on ostensible authority.

19. The claimant served a reply to defence and defence to the counterclaim. By that, they contended as follows:

"8.....The conduct of the Defendant through its servants and/or agents Mr Griffiths, Mr Wardle, Mr Gulvin and/or Mr Lewis was sufficient to represent to the Claimant that McCreadies and/or Mr Lewis did have authority to enter into a binding agreement on behalf of the Defendant.

Particulars

8.1 McCreadies were employed by the Defendant to negotiate the terms of the Contract.

8.2 Agents are commonly employed by parties to negotiate and enter into contracts of this nature.

8.3 At no time was the Claimant informed by McCreadies and/or the Defendant of any restriction upon the extent of McCreadies' authority.

8.4 McCreadies did agree terms with the Claimant without reference to the Defendant.

8.5 Mr Hurt, at all times, believed that McCreadies had authority to bind the Defendant. This belief originated from and was reinforced by the facts that:

8.5.1 On occasions, during the discussions between Mr Hurt and Mr Lewis, Mr Lewis informed Mr Hurt that he would need to consult Mr Griffiths in relation to the issue in question. However, the majority of the terms of the Contract were agreed by Mr Lewis and Mr Hurt without reference to any employee of the Defendant. By reason thereof, it was clear that Mr Lewis did have authority to bind the Defendant save in circumstances where he referred the issue to Mr Griffiths and/or another employee of the Defendant.

8.5.2 By reason of the aforesaid, in the event that McCreadies did not refer a matter or term to the Defendant, the Claimant was entitled to assume that McCreadies/Mr Lewis had authority to agree that matter or term.

8.5.3 The Defendant implemented terms of the Contract after they had been agreed by Mr Lewis, for example the terms as to payment for construction works and the provisions of clause 1.9.6.

8.5.4 As stated above, by February 2002 all terms of the Contract had been agreed by Mr Lewis and Mr Hurt. Version 15 of the Contract, the final version, was sent by Mr Lewis to the Claimant on 6 June 2002. Version 15 was not referred to as a draft and/or 'subject to contract'. It is averred that McCreadies did not state at any time that the Contract would be referred to the Defendant for approval.

8.8 Mr Hurt, at all times, believed that a binding agreement had been entered into in February 2002.

8.7 The Claimant relied and acted upon McCreadies apparent authority, as referred to in paragraph 7 above."

Paragraph 7 refers to the e mail of 4/15 February 2002 and the telephone conversation between Mr Hurt and Mr Lewis when the 1,923 sites were discussed.

20. Some matters are common ground. The defendant does not contend that, for the purposes of this application only, for a contract to be entered into, the signature of both parties is required. Further, it is accepted that at no stage did the defendant inform the claimant that Mr Lewis or McCreadies had no authority to conclude a binding agreement on behalf of the defendant. The defendant accepts that it engaged McCreadies to negotiate the terms of the contract on its behalf. The real issue is whether Mr Lewis/McCreadies had the power to bind the defendant to the terms of the contract which McCreadies had negotiated.

21. CPR Part 3 provides that the court may strike out a case if it appears to the court that the statement of case discloses no reasonable grounds for bringing the claim. CPR Part 24 provides that the court may give summary judgment in relation to an issue if it considers that the claimant has no real prospect of success and there is no other compelling reason why the issue should be disposed of at trial. I am reminded that it is enough for the claimant to show that there is some prospect of succeeding on the issue, and that that prospect is real, not false, fanciful or imaginary; the claimant does not have to show that it will probably succeed at trial. The application is not to be treated as a mini-trial.
22. A necessary element of ostensible authority is a representation by the principal that the "agent" had authority to bind the principal. The description in **Bowstead on Agency** (17th edition, paragraph 8-103) is as follows: *"Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as agent on the faith of such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority."*
23. The matter is put similarly in **Chitty on Contracts** (29th edition paragraph 31-056): *"Where a person by words or conduct represents to a third party that another has authority to act on his behalf, he may be bound by the acts of that other as if he had in fact authorised them. This doctrine, called the doctrine of apparent or ostensible authority, applies to cases where a person allows another who is not his agent at all to appear as his agent, to cases where a principal allows his agent to appear to have more authority than he actually has, to cases where a principal makes a reservation in his agent's authority that limits the authority which such agent would normally have but fails to inform the third party of this"*
24. The learned authors of both **Hudson's Building & Engineering Contracts** (11th edition at paragraphs 2.057, 2.061 and 2.064) and **Keating on Building Contracts** (7th edition at paragraphs 13-16, 13-17 and 13-22) both have helpful sections on the authority of construction industry professionals and the extent to which they can bind their employer in relation to third parties. It is said in **Hudson** that an architect or engineer in private practice has no implied authority to make a contract with a contractor or to vary or depart from a concluded contract. Paragraph 2-064 states: *"An owner who by some conduct or statement has misled a contractor into thinking that the architect has full authority may well be held either actually to have authorised the architect to contract on his behalf or, if not, to have clothed him with ostensible authority to contract. This, of course, would depend on the particular facts, but does not detract from the general principle that an architect, even if instructed to obtain tenders, has no **ostensible** authority to conclude a contract, and strong facts would be needed to rebut the presumption."*
25. Similarly, it is said in **Keating** that *"in the absence of some express power acceptance [of a tender] should be by the employer. It seems reasonably clear that an architect engaged [for the purpose of inviting tenders] has no implied power to bind an employer by acceptance of a tender.." The authors go on to say "If an architect exceeds the authority of his employment, the employer is not liable for his acts unless there is apparent or ostensible authority..."*
26. It is not suggested that the same principles would not apply to a quantity surveyor as are described in **Hudson** and **Keating** in relation to an architect.
27. Mr Nissen relies on the judgment of Robert Goff J (as he then was) in **Cleveland Manufacturing v Muslim Commercial Bank** [1981] 2 Lloyds 646. In that case, the court made a distinction between the preparation by an agent of draft documents and authority to indorse documents. Although the agent had authority to prepare documents, and where appropriate to sign on behalf of the plaintiff, there was no implied representation that the agent was authorised to indorse a document the effect of which was to procure payment directly to the agent.
28. I have been taken to **First Energy (UK) Limited v Hungarian International Bank Limited** [1993] 2 Lloyds Reports 194. In his judgment, Steyn LJ (as he then was) observed (at page 201) that *"the law does not recognise, in the context of apparent authority, the idea of a self-authorizing agent"*.
29. Mr Khangure referred me to **DMA Financial Solutions Limited v BaaN UK Limited , BaaN International BV and BaaN Company NV** 28 March 2000. In that case the issue was whether a concluded contract had come into existence. Park J concluded that the negotiations between the

parties had been such that the parties had become contractually bound in the course of the negotiations and before execution of a written agreement. Mr Khangure relies on this decision in support of the claimant's case, for example, that for some two years the defendant had held McCreadies out as having authority to negotiate on their behalf, with the consequence that by that conduct the defendant represented that McCreadies had authority to conclude a contract on behalf of the defendant. In **DMA**, there had been no indication that there was a limit on the negotiator's authority. So in this case, Mr Khangure submits.

30. Here, the claimant does not allege representation by words. The claimant's case is that the representation was made by conduct. The conduct alleged in the pleading is that of either Mr Griffiths or Mr Wardle, both of the defendant, or by Mr Gulvin or Mr Lewis, both of McCreadies. As pleaded, the claimant's case in part is that McCreadies' behaviour gave the impression that they had authority to bind the defendant. The difficulty with that argument is that the claimant is there relying on conduct by the "agent" and not by the defendant. That does not assist the claimant. The claimant cannot rely on conduct by McCreadies as a representation by the defendant. Indeed, at paragraph 10 of the Reply the claimant disavows any suggestion that McCreadies' own actions constituted a representation by or on behalf of the defendant.
31. That leaves conduct by the defendant itself. The claimant relies on the defendant's engagement of McCreadies to negotiate the terms of the contract. This allegation is true. However, I accept Mr Nissen's submission, which accords with the authorities to which I have referred, that there is a significant difference between negotiating terms, on one hand, and entering into a contract whose terms have been agreed, on the other.
32. The claimant relies on the defendant's not having informed the claimant that there was a restriction on McCreadies' authority. In this context, silence alone on the part of the defendant is not sufficient to constitute conduct amounting to a representation by the defendant. Further, I do not consider that silence in conjunction with the defendant's engagement of McCreadies to negotiate terms is sufficient. These together do not, in my judgment, amount to a representation by the defendant that McCreadies had authority to bind the defendant to a contract.
33. The claimant relies on the fact that McCreadies were able to and did agree a number of terms on behalf of the defendant but without reference to the defendant. Mr Khangure submits that because, in the course of the negotiation, McCreadies agreed terms without reference back to the defendant, this gave the impression that they had authority to bind the defendant. To the extent that this point relies on conduct by McCreadies, of course it does not assist the claimant. To the extent that this is a representation by the defendant made through McCreadies, I accept that this may be capable of amounting to a representation by the defendant. However, as the claimant accepts, McCreadies did in fact have to refer back to the defendant on some matters. In my judgment this, if anything, is an indication that there was a limit on McCreadies' authority. It does not support the claimant's argument that this gave the impression that McCreadies had ostensible authority to bind the defendant to a contract.
34. The claimant alleges at paragraph 8.2 of its particulars that agents are commonly employed to negotiate and enter into contracts of this nature. There is as yet no evidence, whether expert or otherwise, to substantiate this sweeping suggestion. It was suggested that the claimant may seek permission to call expert evidence on this point, but I have yet to see an application or hear submissions on the question of expert evidence.
35. The claimant relies at paragraph 8.4 on Mr Hurt's belief. But Mr Hurt's subjective belief is irrelevant to the issue.
36. As the defendant accepts for the purposes of this application only, it is not necessary that a contract document be signed for a contract to come into existence. The point here is whether the letter is part of a process whereby the defendant represented that McCreadies had authority to bind the defendant to a contract. I accept Mr Nissen's submission that the indication given by the August 2000 letter of intent is that McCreadies did *not* have ostensible authority to bind the defendant to a contract. The letter

envisaged a two-stage process. First, the claimant and defendant were to agree terms; this is indicated by point numbered 1 in the letter. As a separate stage, there was to be formal execution of a contract: see point numbered 3 in the letter. In my judgment, the letter of intent does not support the claimant's case; rather, it supports the defendant's.

37. Mr Khangure in his submissions relies on the fact that the letter dated 6 June 2002 is not subject to any conditions, consideration or approval. The letter refers to the contract having been completed and requiring signature by both parties. However, the claimant does not rely on that letter as part of its pleaded case. In any event, if anything, the letter assists the defendant. It is clear from the letter that the document requires signature by the defendant. Accordingly, the impression it gives is that McCreadies do not have authority to bind the defendant to the agreement. In my judgment, and only so far as ostensible authority is concerned, the letter does not support the claimant's case.
38. The claimant relies on the contract document which the parties negotiated and which was sent to the claimant by Mr Lewis in June 2002. In the articles of agreement McCreadies are shown as the Employer's Agent. The terms and conditions provide that the Employer's Agent has power in relation to various matters. For example, by clause 1 the Employer's Agent may give instructions in relation to variations. However, the claimant cannot rely on wording in the contract document in support of its contention that McCreadies had ostensible authority to bind the defendant to a contract. That is, as Mr Nissen put it, a bootstraps argument. Further, it is not the claimant's pleaded case.
39. Paragraph 8.5.3 of the Reply refers to events in connection with implementation of the "contract". These do not assist. Post-"contract" events cannot be relevant
40. A distinction must be made between the authority of an agent to negotiate and agree terms and his authority to bind a principal to a concluded contract. The evidence in this case indicates that McCreadies had authority to do the former but did not have ostensible authority to bind the defendant to a contract. On the basis of the pleadings and evidence, the claimant cannot demonstrate conduct which amounts to a representation by the defendant that McCreadies had authority to bind them to a contract with the claimant. It is clear from the extracts from **Hudson** that "strong facts" would be needed to rebut the presumption that a professional such as a quantity surveyor has no ostensible authority to conclude a contract. Here, there is no evidence to support the claimant's case, let alone "strong facts".
41. In my judgment, the requirements of both Part 3.4(2) and 24 are met. The claimant has no real prospect of succeeding on its claim that McCreadies had ostensible authority to enter into a binding agreement on behalf of the defendant. It is not suggested that there is any other compelling reason why the issue should be disposed of at trial. In circumstances where there is no real prospect in respect of this head of claim, it is desirable that this head of claim be struck out and/or that summary judgment be given in favour of the defendant in respect of that the head of claim, so that time and money are not expended to no purpose in preparing for trial of that issue.

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