MEDIUM PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 258/89

BETWEEN CROMWELL CORPORATION LIMITED

Appellant

A N D SOFRANA IMMOBILIER (N.Z.) LIMITED

Respondent

Coram: Hardie Boys J
Gault J
McKay J

Hearing: 31 July 1991

Counsel: C R Carruthers QC and I Carter for Appellant
H Fulton and P Kiely for Respondent

Judgment: 10 September 1991

JUDGMENT OF THE COURT DELIVERED BY McKAY J

This is an application by the appellant for special leave to admit further evidence. The additional evidence referred to in the application included an affidavit by Rowan Brookes Moss, a former employee of Sofrana Unilines (NZ) Ltd which is an associate company of the respondent. The application came before a Court comprising Casey, Hardie Boys and Gault JJ on 20 June 1991. The Court was informed that proceedings were pending in the High Court at Auckland in which the Sofrana companies challenged the right of Mr Moss to disclose any information about the group's records and activities on the grounds that in so doing he would be in breach of his obligation not to

disclose confidential information and to observe good faith towards them. For reasons set out in a minute of the Court by Casey J, the application was adjourned to enable counsel for the appellant to consider the position.

On 31 July the matter came before the Court as at present constituted. The Court was then informed that the appellant would no longer pursue the application to have Mr Moss' affidavit admitted in evidence, and would pursue the application only in a more limited way. The Court was informed that following discussions between counsel -

(a) It was agreed that the resolution of the Board of Sofrana Unilines Wallis SA of 23 March 1988 would be admitted by consent.

(b) The appellant would seek leave to admit the Articles of Association of Sofrana Unilines Wallis SA, but this would be opposed by the respondent. It was accepted, however, that the articles which were exhibited to the affidavit of Mr P C Delhaye were the relevant articles and no formal proof of them would be required.

(c) The appellant would also pursue its application in relation to proof of French law concerning the resolutions and articles. For this purpose a substitute affidavit from M. F Vignaud would be lodged. The respondent would oppose this application also.

(d) If the application were successful, counsel for the respondent would wish to consider the respondent's position in relation to French law.

In order to understand the present application it is necessary to make reference to the judgment and to the basis of the appeal and cross-appeal from it.

The litigation arises out of negotiations in late 1987 and early 1988 for the sale of a multi-storeyed office building then in course of erection in Customs Street, Auckland. The building was being erected through a subsidiary of the appellant. A head lease of the whole building to the respondent was negotiated and a formal document executed. Lengthy negotiations then ensued between the appellant and senior representatives of the French holding company of the respondent who had expressed interest in purchasing the building. These negotiations culminated in an exchange of facsimile letters on 6 and 7 April 1988. The appellant alleged that oral agreement was reached on 5 April subject to Board approval on each side, that such approval was obtained and communicated and that the agreement was recorded by the exchange of the facsimile letters. It brought the proceedings to obtain an order for specific performance.

The respondent in its statement of defence denied that the negotiations had reached the stage of a binding

contract. It further denied that M. Gubbay, who signed the relevant facsimile letter, had either actual or ostensible authority to enter a contract on its behalf. In the alternative, the respondent pleaded that any contract was subject to conditions and, as a further alternative, raised matters going to the Court's discretion.

In the High Court Wylie J held that the respective representatives of the parties had intended to become bound by an oral agreement reached between them on 5 April, and confirmed by the exchange of facsimile letters on 6 and 7 April. The references in those letters to formal documentation was merely intended to record the contract in greater detail and was not a pre-condition. He found, however, that M. Gubbay did not have either actual or ostensible authority to bind the respondent, and the action accordingly failed. In case he should be found wrong on that issue, he dealt briefly with the other points raised. Any contract was in his view subject to implied conditions as to the statutory consents required. He rejected the points raised in respect of the exercise of the Court's discretion. He would, however, have held the contract to be unlawful and void by reason of Regulation 15(1) of the Overseas Investment Regulations 1985.

The further evidence which the appellant seeks to have admitted is directed only to the issue of the

authority of M. Ravel as President and M. Gubbay as his assistant to bind the respondent as one of the Sofrana group of companies.

The admission of further evidence is covered by Rule 36 of the Court of Appeal Rules 1955. The granting of special leave is a matter for the discretion of the Court, but the approach adopted has been summarised by McGregor J in Sulco v E S Redit [1959] NZLR 55 (CA) at 72 as follows:

> "Subject to there being such special grounds, the admission of fresh evidence is discretionary; but certain principles may be extracted from the authorities. As a general rule, leave to admit fresh evidence should not be given if the party making the application could, with due diligence, have discovered the evidence before the trial: Leeder v Ellis [1935] AC 52, 66 [1952] 2 All ER 814, and the cases there referred to. The weight or cogency of the evidence must be such 'that the evidence, if admitted, would necessarily have been conclusive of the matter or at least have an important influence on the result'(ibid., 67; 818)."

Similar considerations apply to the granting of a new trial in the High Court on the basis of the discovery of fresh evidence. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, that if given it would probably have an important influence on the result, although it need not be decisive, and the evidence must be credible: Dragicevich v Martinovich [1969] NZLR 306 (CA). The same principles have been approved by the House of Lords in respect of the corresponding rule, 0.59 r 10, in Skone v

Skone [1971] 2 All ER 582. Lord Hodson, in a judgment with which the other Law Lords agreed, said at 586:

> "The guidance given by Lord Loreburn LC was discussed and amplified by the Court of Appeal in Ladd v Marshall and the language of Denning LJ has been accepted as representing a good test of special grounds within the meaning of the rule. He said:
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> > '... to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.'"

For the appellant it was submitted that the evidence now sought to be adduced satisfied these tests.

The course of the negotiations and the status of the persons involved have been set out fully in the judgment of Wylie J. The principal negotiator for the appellant was a Mr Lekner, a director of the appellant and an executive director of Brierley Cromwell Property Ltd. This is an associate company which undertakes a management role in respect of the plaintiff's business. Mr Bringans, who is the chief executive and a director of Brierley Cromwell Property Ltd, and a director also of the appellant, was involved to a lesser extent. The main negotiator for the respondent was M. Gubbay, described as assistant to M. Ravel, chairman of the board and chief executive of the Sofrana group of companies of which the

respondent is one. Sofrana is an international shipping group with its ultimate holding company in France. M. Ravel was also personally involved, as was M. Varnier, an executive vice-president.

Substantial affidavit evidence was provided by all the persons mentioned. Mr Bringans, Mr Lekner and M. Gubbay were cross-examined at length. Wylie J recorded that, subject to the usual qualifications for occasional confusion and faulty recollection, he found the viva voce evidence of Messrs Bringans and Lekner convincing, but was unable to say the same for that of M. Gubbay. Where they differed in material respects, he had no hesitation in accepting the versions given by the former.

The negotiations took place over a period from late January until early April 1988 with meetings taking place both in Auckland and in Sydney. The crucial meeting at which oral agreement is alleged to have been reached was held in Sydney on 5 April 1988. The negotiations prior to that date include correspondence with Sofrana Unilines (Australia) Pty Ltd and other communications addressed merely to "Sofrana Group". At one stage Sofrana was contemplating a purchase by Sofrana Unilines (NZ) Ltd. The present respondent appears to have been identified as the purchaser at a late stage. It is named as purchaser in the formal agreement for sale and purchase drawn up by the solicitors on 7 April 1988, although never executed.

The subject of the negotiations was the building in Customs Street, Auckland. What was being discussed and is alleged to have been agreed on 5 April, however, was the sale of all the shares in Cromcorp Customs Street Ltd, a subsidiary of the appellant and the owner of the land and building. What was being sold was not the land but the company, which was to own the land and building as its only assets and was to have no liabilities as at settlement.

During March the appellant gave a verbal option to Sofrana which expired later in the month. Proposals and counter proposals were exchanged. Alternative "counter offers" were sent by M. Gubbay of Sofrana to the appellant on 25 March "subject to our Board's approval". The letter asked for the appellant's views. Mr Lekner on behalf of the appellant was concerned as to what the words "subject to our Board's approval" might involve. He telephoned M. Gubbay, and recorded that M. Gubbay informed him that he was instructed to proceed with the negotiations, and that ratification of any final position was required only via MM. Ravel and Vanier verbally to him. Mr Lekner confirmed this understanding the same day by facsimile to M. Gubbay, while at the same time proposing a higher price.

The arranging of the meeting of 5 April, and the events at that meeting, are recorded by Wylie J in his judgment as follows:

"On 30 March M. Gubbay was in Auckland. He indicated the defendant was likely to make another offer. Arrangements were made for Mr Lekner to go to Sydney at Easter - early in April. They in fact met to discuss the purchase on 5 April. There was some difficulty fixing a time as M. Gubbay was conferring during the day with M. Ravel and M. Varnier, but in the late afternoon they had lengthy negotiations and eventually agreed on a price of $23 million. They also agreed on terms of payment. Both understood and accepted that approval of their respective Boards was required. Mr Lekner says that in relation to the plaintiff, that meant his obtaining Mr Bringan's approval, the latter being authorised by the plaintiff's Board to approve such transactions. He says that in reliance on what he had earlier been told by M. Gubbay he believed the latter needed only M. Ravel's approval, he too being authorised to act for the defendant's Board. He appears to have thought that with the presence of M. Varnier in Sydney his approval would be implicit in any approval given by M. Ravel. He arranged with M. Gubbay that the latter would get M. Ravel's approval that evening and advise him (Mr Lekner) by telephone by 7.30 the following morning. M. Ravel was in the meantime flying to Hong Kong, and Mr Lekner was flying to Brisbane that evening. Mr Lekner undertook to M. Gubbay that as soon as he had confirmation of M. Ravel's approval he would telephone Mr Bringans to obtain the plaintiff's approval.

At about 7.20am the following morning M. Gubbay rang Mr Lekner as arranged and confirmed that M. Ravel had approved the terms they had agreed the previous day. According to Mr Lekner nothing was said to suggest that this was not "Board approval" and no indication was given that any further approval was required or contemplated. Also according to Mr Lekner, M. Gubbay told him that the defendant's plans for finance were well advanced and he gained the impression the finance could be taken up at the defendant's option. Mr Lekner then rang Mr Bringans in Auckland, obtained the plaintiff's approval and rang M. Gubbay back in Sydney to confirm. Mr Bringans gave evidence that he had a general authority from his Board to give its approval to this kind of transaction. Mr Lekner was in no doubt that he conveyed to, and it was understood by, M. Gubbay that Mr Bringan's approval was in fact Board approval so far as the plaintiff was concerned. This is not in dispute."

Mr Lekner had asked M. Gubbay to send by facsimile a written offer to him in Brisbane recording the terms of

their agreement. He received a facsimile which fell short of confirming a concluded agreement. Mr Lekner was dissatisfied and communicated with M. Gubbay making it clear that what he wanted was a document recording their agreement. He offered to draft the document he wanted which could then be put onto Sofrana Unilines letterhead and returned by facsimile after signature by M. Gubbay. This was duly done. The document was in the form of an offer "for the purchase of Sofrana House, Auckland" at a named price and terms as to payment and with a three year rental guarantee as had been agreed. This took place on 6 April. Mr Lekner returned to New Zealand that afternoon and the following day sent by facsimile a letter on Brierley Cromwell Property Ltd letterhead advising his Board's acceptance of the offer "in accordance with the terms agreed and as otherwise to be contained within the formal purchase agreement to be prepared mutually by our mutual solicitors". This letter also recorded that the transaction was to be achieved by way of the sale of the shares in the company.

The appellant then gave instructions to its solicitors to prepare the formal documents. This was done promptly but on 27 April Sofrana denied that any binding contract was in existence.

As mentioned earlier, the further evidence which the appellant seeks to have admitted is directed only to the

issue of the authority of M. Ravel as president and M. Gubbay as his assistant to bind the respondent.

The evidence sought to be admitted has been identified earlier in this judgment as comprising a board resolution of Sofrana Unilines Wallis SA of 23 March 1988, the articles of association of that company, and certain evidence of French law. Sofrana Unilines Wallis SA is described in one of the affidavits as the holding company of the group. The resolution purported to place certain limitations on the authority of the company executives and listed certain matters which could only be concluded with the approval of the Board of Directors, or with an express approval given between board meetings on the joint signatures of the president or vice-president and the general manager. Included in the matters which required approval were investments of a value exceeding 2,000,000 French francs. It was accepted that the transaction in issue is well in excess of that figure.

It was submitted that the articles of association required to be admitted in order to be able to understand the effect of the resolution. It was further submitted that the evidence of French law was required for the same purpose. The evidence was said to be relevant to the issue of authority, but to be supplementary only to the existing evidence, and in no way in conflict with it.

The first question is whether the further evidence could with due diligence have been put forward at the trial.

The minutes of the meeting in which the resolution was passed were not disclosed by the respondent on discovery, although the relevant portion of the actual minute was made available. We were told that the actual minute book, which is in French, was shown to appellant's counsel moments before the trial commenced, but merely to verify the extract. It was argued for the appellant that there was no hint that the resolution was going to be relied upon by the respondent as a limitation on the authority of MM. Ravel and Gubbay which prevented the respondent from being bound by any agreement reached on 5 April 1988. The statement of defence denies that M. Gubbay obtained Board approval and alleges that M. Gubbay, to the knowledge of Mr Lekner, had no actual or ostensible authority to create any agreement binding any company and the Sofrana group. The resolution of the Board of Sofrana Unilines SA was not pleaded.

The resolution was referred to in the affidavit of M. Gubbay as follows:

> "15. ON 23 March the holding company which owns Sofrana Unilines NZ which in turn owns the Defendant passed resolutions restricting the authority of any single director to enter into contracts or incur expenditure on behalf of any company in the group if that exceeded two million French Francs. This was a consequence of new shareholders being introduced to the Group being principally Delmas Vieljeux, and

> Delanglade. That minute is document 56. This had been explained to the Plaintiff at the meetings on 26 February (D4, p4)."

It was referred to also in the affidavit of M. Ravel, the chairman and chief executive of the Sofrana group of companies. He said in his affidavit:

> "My authority to bind the company was limited and that limitation of authority was confirmed at a board meeting on 23 March 1988 at Sydney. In general terms no director could commit the company to expenditure in excess of two million French francs which it required board approval."

Counsel for the appellant argued that there was nothing in these circumstances to alert it to the relevance of the full minutes of the meeting, of the articles or of French law.

Although the resolution was not referred to in the pleadings, the issue of authority was clearly raised. The affidavits refer to the resolution as imposing an express limitation on the authority of executives including MM. Ravel and Gubbay. It is true that the full minutes of the meeting at which the resolution was passed were not disclosed, but the full minutes do not appear to us to add anything of significance to the extract which had been made available.

The essence of the evidence sought to be adduced however, is directed to the powers of the president of a French company under French law, and the inability of the company by resolution to restrict or limit those powers

as against third parties. The articles of association of Sofrana Unilines Wallis SA refer to the powers of the president in article 19 "General Manager - Delegation of Powers - Company's Signature". The relevant portion of the article reads as follows:

> "1. The president of the board of directors shall be responsible for and personally liable for the general management of the company and shall represent the company in its relations with third parties with the widest powers, subject to the powers specifically given by law to general meetings, and to the powers specially reserved by law to the board of directors as well as to the provisions of law concerning endorsements of bills of exchange, indemnities or guarantees.
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> No limitation of the above powers by a resolution of the board of directors shall be of any avail in respect of third parties.
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> The president of the board of directors shall bind the company even by acts which are not directly related to the company's objects, unless the company proves that the third party was aware that act exceeded the company's objects or that the third party could not be unaware of it under the circumstances, provided however that the mere fact of the publication of the articles of association shall not suffice to constitute such proof."

These articles are the second of the documents which it is sought to have admitted. The other is an affidavit of M. Vignaud, a French lawyer. The affidavit is directed to the relevant French law as to the power of the president of a French company to bind the company in dealings with third parties. M. Vignaud refers to Article 113 of the law which vests in the president "the broadest powers to act in any circumstances in the name of the company", and expressly states that "provisions of the articles of association or decisions of the board of

directors limiting such powers shall not be binding on third parties".

In our view there was nothing in the pleadings or the affidavits, and nothing in the extract from the minutes which recorded the resolution purporting to restrict the powers of executives, which should be expected to have alerted the appellant to these matters. We do not think the appellant can be criticised for any lack of diligence in not having become aware of the status which French law gives to the president of a French company in respect of dealings with third parties. We also agree with Mr Carruthers that the fact that the articles were not disclosed on discovery was an indication that they were not relevant.

The next issue is as to the cogency of the evidence.

Wylie J considered the evidence from M. Ravel and M. Gubbay as to the limitation placed on their authority by the resolution of 23 March 1988. He rejected the evidence of M. Gubbay that Messrs Bringans and Lekner had been informed of this resolution, preferring their evidence to the contrary. He said, however:

> "I do not think that even before the resolution of 23 March I would have been justified in finding that M. Ravel had either actual or implied authority by virtue of his position as Executive President of the international Sofrana group to commit the group or any company within it to a capital investment of $23 million dollars in New Zealand notwithstanding his apparent control of or influence on 52 per cent of

> the shareholding. This was no mere management decision to purchase an asset in the ordinary course of management. It was by any standard a major capital investment. There was no direct evidence of such actual authority and I do not think it can be implied, at any rate on the principles of company law as we know them in New Zealand. ...
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> So much for the position prior to the resolution of 23 March. From that date it is clear that M. Ravel, either alone or with M. Varnier, did not have actual authority whether express or implied."

The negotiations appear to have been carried on with Sofrana group rather than any particular company in the group. The appellant alleges, however, that when agreement was finally reached on 5 April 1988 the respondent was identified as the intended purchaser. The respondent is a New Zealand company, so that the ultimate issue would appear to be one of the authority of M. Gubbay and M. Ravel to bind the New Zealand company. That is not a matter that can be governed by French law. Actual authority to bind a New Zealand company could only be given by the board of the New Zealand company, unless otherwise provided in the articles of association: Black White and Grey Cabs Ltd v Fox [1969] NZLR 824 CA. So far as ostensible authority is concerned, however, the position of M. Ravel as president of the ultimate holding company of the group is clearly of importance. His position of authority in the holding company is defined by French law and is apparently much greater in respect of dealings with third parties than that of a board chairman under New Zealand law.

Mr Fulton, for the respondent, pointed out that the statement of claim did not raise the issue of apparent authority. It alleged actual approval by the respondent's board. However the respondent's own statement of issues in the High Court includes an issue as to "whether D J Gubbay had any actual or ostensible authority to bind any company in the Sofrana Group".

Mr Fulton also relied on the principle that ostensible authority can be given only by a person who has actual authority: Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 481 per Diplock LJ at 504-5; British Bank of the Middle East v Sun Life Assurance Co of Bermuda (UK) Ltd [1983] 2 Lloyds Rep 9 per Lord Brandon at 16; The Raffaella 1985 2 Lloyds Rep 36 per Kerr LJ at 43. Mr Carruthers contended, however, that M. Ravel had implied actual authority to bind the respondent, and hence to clothe M. Gubbay with apparent authority. The distinction between implied actual authority, inferred from the conduct of the parties and the circumstances of the case, and ostensible or apparent authority, was recognised in Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549 per Lord Denning MR at 583, Lord Wilberforce at 588 and Lord Pearson at 592-3.

No doubt questions could arise as to how far the actual authority of M. Ravel as president of the holding company could affect his ostensible authority to bind a New Zealand company when the people dealing with him were

not aware of the authority which French law gave to him. If he had implied actual authority to bind the New Zealand company that problem would disappear. It also appears from the affidavits filed in respect of the present application that there may well be some degree of conflict of evidence as to what the precise position is under French law. We think these are all issues that must be dealt with on the substantive hearing of the appeal and which cannot be properly addressed at the present stage.

Bearing in mind that in a case of this complexity the real impact of the evidence will emerge only upon full consideration of the appeal, we think that on the material presently before us the test of cogency is satisfied and that the evidence sought to be adduced should be admitted. No issue as to credibility arises, nor can it be suggested that admission of the evidence will cause any difficulties of a practical nature.

We accordingly grant the application and admit the resolution of 23 March 1988 (by consent), the articles of association of Sofrana Unilines Wallis SA, and the proposed affidavit of M. Vignaud as to French law. At the same time, we give leave to the respondent to file an affidavit as to French law if, after considering M. Vignaud's affidavit, it wishes to do so.

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for Appellant
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