## LEISURE INVESTMENTS (GIBRALTAR) LIMITED v. FILM EXHIBITORS LIMITED

COURT OF APPEAL (Fieldsend, P., Huggins and Davis, JJ.A): November 8th, 1993

*Agency—authority of agent—ostensible authority—representation by person with actual authority that agent authorized to enter contracts of relevant kind on principal's behalf creates ostensible authority—statement by agent himself insufficient—company director prima facie authorized to act for company*

The respondent brought proceedings to enforce a contract for the purchase of a lease.

The appellant rented business premises from the respondent during the refurbishment of its own premises. The respondent held a 50-year sub-lease of Crown-owned land and received a weekly rent from the appellant. From time to time discussions took place between the appellant's directors and the respondent's managing director, B, regarding the purchase of the lease from the respondent, but no price was agreed.

N, the former managing director of the appellant, arranged a meeting with B, with the knowledge of F, the chairman of the appellant's parent company. N allegedly told B that he was "back in charge" and dealing directly with F, and made an offer to purchase the lease. N was now in business as an estate agent, and would receive an agreed commission from the respondent for arranging the sale. B made a counter-offer for the purchase and for the payment of weekly rent until completion. F was contacted by telephone and agreed the price, through N. B then said, so that F could hear: "I'm glad that we've done a deal."

A letter on the notepaper of the parent company was sent by N to B confirming the agreement, and signing himself as a consultant. N and B later discussed the payment of a deposit. N said that F had instructed that it should be left in the hands of the solicitors acting for them both. B then wrote a letter to N at the appellant company setting out in more detail the arrangements for payment of the purchase price and rent until completion, and N signed it after consulting F. Some weeks later, when it became apparent that the parent company could not finance the purchase, N told B that the appellant was no longer interested in the purchase. N was subsequently re-appointed as managing director of the appellant.

The respondent obtained an order for specific performance of the contract. The Supreme Court (Kneller, C.J.) held that a binding agreement had been reached, even though N had had no actual authority to

bind the appellant, since, from all the circumstances of the deal, he had acted with ostensible authority.

On appeal, the appellant submitted that (a) there had been no final agreement between the parties, since the details were uncertain; and (b) N had lacked ostensible authority to bind the company, since (i) his position had changed from managing director to consultant after he had agreed the sub-letting of the premises, (ii) previous discussions about the purchase had been of a very general nature, (iii) nothing that was said by N or by F could be relied on as a representation of authority from the appellant, since neither was a director of that company, (iv) nothing done by B constituted recognition of N's authority, and (v) there was no evidence that F had authorized N's letter.

The respondent submitted in reply that (a) the terms of the agreement were set out in writing in the letters of N and B, or could be ascertained from the other documents relating to the site, or from common practice; (b) N had had actual authority to bind the appellant in respect of the matters to which the contract related; (c) N had had ostensible authority from the parent company, which the respondent had relied on, since (i) he had verbally agreed the original sub-letting of the premises from the respondent, (ii) he had had past discussions with B about the prospective purchase, (iii) he had told B that his authority came directly from F, (iv) B had agreed the deal in F's hearing, and (v) F had allowed N to confirm the deal in writing, and to sign B's own letter; and (d) N's re-appointment as managing director after the event indicated the appellant's satisfaction with the deal he had concluded.

**Held,** allowing the appeal:

(1) The Supreme Court had properly held that the parties intended to enter a binding contract. Each party set out terms in writing to ensure that the other could not renege on the agreement, and B's letter to N stated that he had instructed solicitors to draw up a contract for signature that week. All the necessary terms had been agreed and nothing remained which could not be decided by the court in the event of a dispute (page 211, lines 23–26; page 219, lines 19–36).

(2) However, in order to claim specific performance of its agreement with the appellant, the respondent had to show that N had actual authority to conclude a contract on behalf of the appellant, or ostensible authority, which the respondent had relied on. On the evidence, the trial judge had properly rejected the contention that N had express authority to bind it, even to the limited extent of this particular transaction (page 208, line 40 – page 209, line 2; page 216, lines 7–13).

(3) Nor had it been shown that N had ostensible authority. That would exist only if a person with express authority to manage the appellant's business (generally, or in respect of the subject-matter of the contract) had represented to the respondent that N was authorized to enter contracts of that nature on the appellant's behalf. In fact, the appellant had made no

such representation. N's past negotiations with the respondent in his role as managing director had no bearing on his authority to act a year later, since he had resigned. That resignation would have been discoverable by the respondent on enquiry if it was not already known, and N had not misled the respondent, since he had signed his letter as "consultant." His own statement that he was in charge and answering directly to F was vague and could not, of itself, bind the appellant even if construed as meaning that he was once more managing director. His later re-appointment as managing director did not indicate the appellant's approval or sanction of the agreement (page 211, line 43 – page 212, line 6; page 213, line 40 – page 214, line 8; page 214, line 25 – page 215, line 3; page 215, lines 27–40; page 216, line 34 – page 217, line 22; page 221, lines 7–10).

(4) Furthermore, F, who held no office with the appellant, could not himself contract on its behalf and had no authority to hold out N as its agent. His consent to N's confirmation of the deal in writing and to N's signing B's letter could amount to no more than authority to agree terms for formal approval by the appellant. In any event, B had probably been unaware of F's involvement at that stage. Accordingly, the order for specific performance of the contract would be set aside (page 214, lines 10–24; page 215, lines 6–26; page 217, lines 26–43; page 219, lines 3–15).

**Cases cited:**
(1) *Biggerstaff* v. *Rowatt's Wharf Ltd.*, [1896] 2 Ch. 93; (1896), 65 L.J. Ch. 536, considered.
(2) *Freeman & Lockyer* v. *Buckhurst Park Properties (Mangal) Ltd.*, [1964] 2 Q.B. 480; [1964] 1 All E.R. 630, applied.
(3) *Smith* v. *Hamilton*, [1951] Ch. 174; [1950] 2 All E.R. 928.
(4) *Smith* v. *Hull Glass Co.* (1852), 11 C.B. 897; 138 E.R. 729; 7 Ry. & Can. Cas. 287, considered.

*I.E. Jacob* for the appellant;
*R.J. Powell-Jones* for the respondent.

**FIELDSEND, P.:** This appeal concerns an alleged sale by the appellant ("Leisure") to the respondent ("Film") of the unexpired term of 62 years in the leasehold of the Queen's Cinema, for the price of £2m. The sale was said to have been effected by a Mr. Napoli as the duly authorized agent of the appellant. Alternatively, it was alleged that Mr. Napoli had ostensible authority to effect the sale on the appellant's behalf. The learned trial judge found that "Film could not and did not prove that Napoli had Leisure's actual authority to enter into a binding agreement," and there was no cross-appeal on this finding of fact.

There were, therefore, two issues before this court:

1. Did Mr. Napoli have ostensible authority to enter into an agreement for sale of the leasehold?

2. Did the two documents relied on as constituting the sale amount to a legally binding contract?

*Facts*

Leisure is a Gibraltar-registered company, a wholly-owned subsidiary of an English company, Leisure Investments International, and this in turn is a wholly-owned subsidiary of Leisure Investments PLC ("PLC"). The chairman of the board of PLC is a Mr. Forsyth. Leisure's business in Gibraltar since 1988 has included the operating of a casino which it refurbished after purchase and, as part of its business, it has also run slot-machines and a bingo hall in the building known as the Queen's Cinema. Mr. Napoli was a director of Leisure and managing director from March 18th, 1988 to June 21st, 1989. He then became a consultant to Leisure and its associated companies and ceased to be a director. Mr. Forsyth was never a director of Leisure.

The respondent, whose managing director is a Mr. Benatar, holds a 50-year sub-lease of the site of the Queen's Cinema from A.R. Holdings Ltd., expiring in November 2005. This site forms a part of a larger site leased by A.R. Holdings Ltd. from the Crown under a lease expiring in March 2052, the rental of the whole being £245 a year.

In August 1988 there was an oral agreement between Mr. Benatar and Mr. Napoli whereby Film let to Leisure the Queen's Cinema for a year at a weekly rental of £2,500, for housing bingo and slot-machines whilst the casino was being refurbished. On August 7th, 1989, Mr. Benatar wrote to a Mr. Kushler, a director of Leisure, confirming a telephone conversation extending the lease of the cinema until December 31st, 1990 at a rental of £4,500 a week. Kushler confirmed this in a letter of August 22nd, 1989.

Messrs. Napoli, Lov and Harris, all of Leisure, were interested in acquiring the Queen's Cinema to house the bingo and slot-machine sides of their business, separately from the casino, and there were discussions from time to time between them and Mr. Benatar with no agreement as to price.

In September 1989 Mr. Benatar, for Film, agreed terms for the sale of the cinema for £2.2m. with prospective purchasers and wrote a letter dated September 15th, 1989 to their lawyer, setting out the basic terms and marked "Without Prejudice, Subject to Contract." The purchasers did not proceed with this transaction.

In the meantime, Mr. Napoli was still anxious that Leisure should acquire the cinema and he had telephone conversations with Mr. Forsyth and was, as he put it, told to "go ahead." On September 29th he telephoned Mr. Benatar to arrange a meeting to discuss a proposal.

*The alleged agreement*

The two met at Mr. Napoli's office where he ran an estate agency business known as Prime Valley (International) Ltd. There Mr. Napoli

said: "I am back in charge and I have made it a condition that I deal directly with Steven Forsyth." He then said that Leisure would buy the cinema, paying in 12 months' time, continuing to rent the premises at £3,000 per week instead of £4,500. Mr. Benatar said he had had another offer and would have to work out some figures. He returned at 5 p.m., asking for £2.5m. for the residue of the lease and £3,500 per week rent until completion in nine months' time. After bargaining, the position was reached that Mr. Benatar was asking for £2m. and Mr. Napoli offering £1.9m. Then Mr. Forsyth either telephoned or was telephoned, offering, through Mr. Napoli, £2m., provided that Film paid Mr. Napoli or his firm, Prime Valley (International) Ltd., £50,000. Mr. Benatar at once agreed to this, shouting, so that Mr. Forsyth could hear him: "I am glad we have done a deal." There followed some discussion over a guarantee for completion which, on the suggestion of a lawyer by telephone, was agreed to be a banker's guarantee.

Mr. Benatar wanted to leave for the Sabbath service but Mr. Napoli, who was leaving for Hong Kong in two days, insisted on having something in writing, apparently being fearful that Mr. Benatar might change his mind, because he had been told of the other offer. It was then that the letter of September 29th was written in Mr. Napoli's handwriting on paper headed Leisure PLC, addressed to Mr. B. Benatar, O.B.E., Film Exhibitors Ltd. and signed F.A. Napoli—Consultant. It reads:

"*Re: Queen's Cinema*

This is to confirm our agreement of today's date as follows:

Leisure Investments (Gibraltar) Ltd. will continue to rent the Queen's Cinema during a further period of 12 months from January 1st, 1990, at the agreed fixed rent of £3,500 per week, and agrees to purchase the leasehold site with 62 years to run at a price of £2,000,000 (two million) on or before January 1st, 1991."

On Mr. Napoli's return from Hong Kong the parties met again, Mr. Benatar asking when the deposit agreed in lieu of the guarantee would be put in place. Mr. Napoli said he had spoken to Mr. Forsyth and that the question of the deposit should be left to the lawyer, who was apparently acting for both parties. In the result, Mr. Benatar wrote a letter of October 10th, 1989 on Film's paper, addressed to Mr. Francis Napoli, Leisure Investments (Gibraltar) Ltd., which is in the following terms:

"*Re: Queen's Cinema*

*Residue of leasehold 62/63 years*

I confirm our meeting today, when after consultation with your principals we finally agreed on the following:

1. The purchase price is £2,000,000 (two million pounds) payable in full on completion not later than September 30th, 1990.

2. A deposit of £200,000 will be deposited by your principals, which will be forfeited if they do not comply by September 30th, 1990.

3. Interest on the deposit will be shared 50/50 by your principals and my company.

4. The rent payable by the casino will remain at £4,500 per week up to December 31st, 1989. From January 1st, 1990 to September 30th, 1990 the rent will drop to £3,500 per week.

5. All legal fees, including mine, stamp duty *etc*. will be for the account of your principals as agreed.

6. Your principals are to insure the premises forthwith for the real value in the name of my company with an insurance company agreed by my company.

I have informed Messrs. Hassan & Partners that we want to sign a contract on the above lines this week.

Please sign and return the enclosed copy if you agree that the above is what we have agreed."

This was signed by Mr. Napoli after its contents had been communicated to Mr. Forsyth, but there were delays over setting up the deposit and the insurance referred to in the letter, despite a meeting at the lawyer's offices.

Then, on November 22nd or 23rd, 1989 in those offices, Mr. Napoli said that Leisure was no longer interested in the purchase, and when told by Mr. Benatar: "But you have a contract with me," replied: "What can I say?"

In a full and careful judgment the Chief Justice found that these letters would constitute a binding agreement and I see no reason to differ from him, despite Mr. Jacob's attack upon his conclusion, and I adopt the reasons of Huggins, J.A. that I have had the opportunity to read.

This leaves the question of the ostensible authority of Mr. Napoli.

*Ostensible authority*

The court below held that Mr. Napoli did not have actual authority to bind Leisure. Mr. Powell-Jones has contended that the only basis for this finding is that as there was no resolution of the board of Leisure, actual authority could not be proved. This loses sight of Mr. Napoli's very clear and oft-repeated evidence that he was never authorized to do more than negotiate the terms of a purchase and not to conclude any agreement.

On this basis, there is no justification for invoking what has been called the "indoor management rule" type of ostensible authority. This is the ordinary classic case dealt with definitively by Diplock, L.J. (as he then was) in *Freeman & Lockyer* v. *Buckhurst Park Properties (Mangal) Ltd.* (2) ([1964] 2 Q.B. at 502–506), with the one qualification that, the principal being a corporation, it is necessary to consider whether the agent was authorized to make any representation that he had authority.

In brief, Film had to show—

"(a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be

> enforced was made to the contractor; (b) that such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates; (c) that [it] was induced by such representation to enter into the contract, i.e., that [it] in fact relied on it…" (*ibid.*, at 505).

Mr. Powell-Jones prefaced his argument upon what representations were made to Mr. Benatar by referring to the defence filed by Leisure. Paragraph 5 denied that Mr. Napoli had authority to bind Leisure to a formal agreement and alleges that—

> "Mr. Napoli was not a director of Leisure and was retained as a consultant for the purposes of the negotiation of an agreement which subsequently would have to be considered and ratified by the board of directors of the parent company in London before being executed by *Leisure*." [Emphasis supplied.]

Paragraph 12 alleged that "Mr. Napoli did not have ostensible authority to bind Leisure and was retained as a consultant to negotiate terms for ratification by Leisure Investments PLC as averred in para. 5 above, a fact of which the plaintiffs were aware."

He also referred to Mr. Napoli's evidence in which that witness said:

> "Leisure Investments PLC was my principal in this case, not Leisure Investments (Gibraltar) Ltd., because I was getting information from Mr. Forsyth from Leisure Investments PLC, its chairman but not a director of Leisure Gibraltar. Policy decisions were coming from Leisure Investments PLC."

This pleading, he said, was an admission, in effect, that Leisure had appointed PLC as its agent in any dealings over the purchase of the cinema and that any representations made by PLC were the representations of Leisure itself. It followed from this, it was contended, that representations from Mr. Forsyth, chairman of PLC, would bind Leisure, and that this was particularly so because on the evidence, Mr. Benatar was fully aware of Mr. Forsyth's dominant role in the affairs of Leisure after 1988. He said he knew he was "chairman, director or what I would call the boss of the casino set-up," and that "everyone knows he is Forsyth's right-hand man."

Mr. Forsyth's position is of importance for two reasons: First, because if Mr. Napoli's representations are to be taken into account there must be something to show that he had Leisure's authority to represent that he had authority. Secondly, because Mr. Forsyth's own representations, particularly over the telephone on September 29th, could be an indication that Mr. Napoli had authority to conclude an agreement.

The main factors relied upon by Mr. Powell-Jones as showing that Mr. Napoli had ostensible authority to bind Leisure, and upon which Mr. Benatar for Film relied, are as follows:

1. The fact that in August 1988 Mr. Napoli verbally agreed for Leisure a year's lease of the cinema at £2,500 per week. Against this it was argued that Mr. Napoli was then managing director of Leisure, a situation which, to Mr. Benatar's knowledge, changed when Napoli ceased to be a director in June 1989 and left to run his own estate agency business. He was from then only a consultant to Leisure.

2. Previous discussions between Mr. Benatar and Mr. Napoli over the possibility of Leisure buying the cinema, on many occasions. Against this it was argued that these were very general discussions involving not only the possibility of Leisure buying the cinema but of some new company, with Mr. Benatar and Mr. Napoli as shareholders, developing the site.

3. Mr. Napoli's statement on September 29th, 1989: "I'm back in charge and I have made it a condition that I deal directly with Steven Forsyth," and that he denied this in evidence. This could well be taken as meaning he was managing director again and subject only to Mr. Forsyth's control. Against this it was argued that, as a statement by the agent, it did not bind Leisure and, in any event, it did not mean that Mr. Napoli had authority to contract.

4. The involvement of Mr. Forsyth on the telephone while terms were being discussed and Mr. Benatar's calling out for Mr. Forsyth to hear: "I'm glad we've done a deal." Against this it was argued that nothing that was said represented that Mr. Napoli had any authority to complete a contract and, in any event, nothing that Mr. Forsyth said or did could be relied on as a representation by either Leisure or PLC.

5. Mr. Forsyth's silence following this meeting, which amounted to acquiescence after hearing Mr. Benatar say they had done a deal. Against this it was argued that none of this conveyed any recognition of Mr. Napoli's authority to complete and, in any event, a representation by Mr. Forsyth was not relevant.

6. Mr. Forsyth's permitting and instructing Mr. Napoli to sign the document of September 29th. Against this it was argued that as there was no evidence that Mr. Benatar knew of this, it could not amount to a representation to him. In any event, it was said that Mr. Napoli kept no copy of the letter and could not have shown it to Mr. Forsyth.

7. Mr. Forsyth permitted and instructed Mr. Napoli to sign the document of October 10th. Against this it was argued that there was no evidence that Mr. Benatar knew of this, so it could not amount to a representation to him.

Mr. Powell-Jones contended that the representations that were made by Mr. Napoli and/or Mr. Forsyth were made by persons who had "actual" authority to manage the business of Leisure either generally or in respect of those matters to which the contract related, and that therefore Diplock, L.J.'s second condition had been met. He had to go this far because as Diplock, L.J. said in *Freeman & Lockyer* (2) ([1964] 2 Q.B. at 505):

> "It follows that where the agent upon whose 'apparent' authority the contractor relies has no 'actual' authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his actual authority. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates."

This brings me back to Mr. Powell-Jones's reliance on paras. 5 and 12 of Leisure's pleaded defence. Even assuming that this pleading amounts to an admission that PLC had actual authority to bind Leisure to a contract—and I have doubts about that—it does not follow that Mr. Forsyth, as chairman of the board of PLC, had actual authority from PLC to bind it and hence Leisure. It is true that in a general way, Mr. Benatar regarded Mr. Forsyth as the moving spirit behind Leisure, which he undoubtedly was, but in my view that is not enough. One must not lose sight entirely of the formal set-up.

It may be on this basis that Leisure must be taken as having known that Mr. Napoli was acting on its behalf. But the question one asks is: "To do what?" Neither the pleading relied on nor the evidence shows that Leisure knew that Mr. Napoli was acting on its behalf to conclude a binding agreement. Indeed, the evidence of Mr. Napoli was that he was empowered to do no more than negotiate terms of sale, and not to conclude a final agreement.

On this basis it is necessary to examine the representations relied upon and as numbered above.

1. That Mr. Napoli as managing director of Leisure had orally agreed in August 1988 a year's lease of the Cinema at £2,500 per week is not a factor weighing heavily, if at all, in showing that, to Mr. Benatar's knowledge, he had similar authority in September 1989. Mr. Benatar seems to accept that he knew Mr. Napoli had left Leisure in June 1989 to run his own business, Prime Valley (International) Ltd. (Compare the finding of the court below.) In itself, this cannot be taken as any representation by Leisure that in September 1989 Mr. Napoli had authority to manage the business of Leisure either generally or in respect of the purchase of the cinema.

2. The previous discussions involving, *inter alia*, Mr. Benatar and Mr. Napoli about Leisure's possible purchase of the cinema similarly are of little, if any, weight. There were general discussions which came to nothing, between them and other persons, with one possibility being the formation of another company to take part.

3. Mr. Napoli's statement that he was back in charge with the condition that he deal directly with Mr. Forsyth is a statement by the agent only, not normally binding on his alleged principal unless the agent had authority to make such a representation. It cannot of itself amount to an operative

representation that he had authority to make it. Mr. Napoli certainly had no authority to represent that he was in control again at Leisure. He was not re-appointed as managing director until November 1989.

4. The involvement of Mr. Forsyth in the negotiations on September 29th, 1989 is the nearest that the conduct of anyone but Mr. Napoli came to a representation of Mr. Napoli's authority. Had Mr. Forsyth been managing director of Leisure, his intervention on the telephone and his apparent silence when he must have heard Mr. Benatar saying "I am glad we have done a deal" could legitimately have been taken by Mr. Benatar as indicating that a contract had been verbally concluded through Mr. Napoli, but not necessarily that he had authority to finalize it in writing. But as I have said, despite Mr. Powell-Jones's contention, I do not think that Mr. Forsyth had authority to bind Leisure to the contract or to represent that Mr. Napoli had authority to make a binding agreement. Mr. Napoli was, after all, an estate agent at that time, albeit a consultant of Leisure as well, and not an agent with authority to bind Leisure.

6. That Mr. Forsyth allowed Mr. Napoli to draft and sign the letter of September 29th can only be taken as a representation to Mr. Benatar if this was communicated to him. The fact that after the telephone conversation Mr. Napoli drafted and signed the letter does not necessarily mean that Mr. Benatar knew Mr. Forsyth had told him to do this. Even if he knew Mr. Forsyth had said "go ahead," this could have meant no more than "go ahead with settling terms for a formal contract."

7. That Mr. Forsyth allowed Mr. Napoli to sign the letter of October 10th is again no more than an authorization to go ahead with finalizing terms for the formal agreement.

Finally, it was contended that the re-appointment of Mr. Napoli on November 2nd, 1989 was an indication of Leisure's satisfaction with his negotiation of a concluded contract on Leisure's behalf. This does not follow. Although we and the court below have found that the letters constitute a binding agreement, it does not follow that everyone at Leisure would so regard it. His re-appointment is equally consistent with Leisure's satisfaction at his negotiation of terms for a binding contract to be prepared.

Taking each of the representations individually, and even taking them cumulatively and in the context of the situation known to the parties, and particularly to Mr. Benatar, I cannot find that there was a sufficient representation by Leisure, either directly or through PLC or Mr. Forsyth, upon which it could be said that Mr. Napoli had ostensible authority to bind Leisure to the purchase of the lease of the cinema.

**HUGGINS, J.A.:** The appellant ("Leisure") seeks to set aside an order of the Chief Justice granting specific performance of an alleged contract in writing for the assignment of the residue of that part of a Crown lease which relates to the Queen's Cinema. The contract was alleged to have

been signed by Mr. Napoli as the agent of Leisure. The respondent ("Film") also relied upon a further agreement in writing signed by Mr. Napoli by which Leisure was said to have "ratified and confirmed" the first agreement subject to modifications. By its defence, Leisure denied Mr. Napoli's authority to do more than negotiate the terms of a prospective agreement.

It has throughout been common ground that Mr. Napoli did not have express authority to bind Leisure. The Chief Justice rejected Mr. Napoli's evidence that his authority was limited to negotiating the terms of an agreement which would be signed by someone else on behalf of Leisure. His finding that Mr. Napoli had ostensible authority was an inference from all the circumstances, and there was no finding that Mr. Napoli thought his authority was unlimited. The Chief Justice stated the reasons for his conclusion as to ostensible authority as follows:

> "But taking into account (i) the background of Leisure's directors and Mr. Napoli's attempts to buy (the cinema) from Film before September and October 1989 and their failure, (ii) then Mr. Napoli's remarks about being in charge again with direct access to Mr. Forsyth this time, (iii) his telephone call to Mr. Forsyth on September 29th about the £2,000,000 price, (iv) Mr. Forsyth's orders to go ahead if Mr. Benatar paid Mr. Napoli £50,000, (v) Mr. Napoli's brisk drafting of the letter of that date to Mr. Benatar setting out that Leisure would pay that sum for it and (vi) then his signing Mr. Benatar's letter of October 10th stating that after consultation with his principals, he agreed that the letter contained what they had agreed about this sale, (vii) Mr. Forsyth's part in dealing with the form of guarantee or deposit and Mr. Forsyth's known position in Leisure Investments PLC (called the parent company or the mother company) and (viii) Mr. Napoli's position as Mr. Forsyth's *alter ego*, here I find that Film has proved on the balance of probabilities that Mr. Napoli had Leisure's ostensible authority to conclude a binding agreement with Film in this matter."

Most of those reasons involved Mr. Forsyth as a link between Mr. Napoli and Leisure and it will be necessary to consider what authority (if any) Mr. Forsyth had to bind Leisure. But first I refer to the fact that there had been a previous attempt by Mr. Napoli to negotiate on behalf of Leisure an assignment of the same property. There was one significant difference at that time: that Mr. Napoli was the managing director of Leisure and would have had ostensible authority to bind the company arising from his appointment to that office. He ceased to hold office in the company on June 21st, 1989, although he was re-appointed in November 1989. In the meantime, his sole direct connection with the company was as a consultant under a contract which admittedly did not authorize him to bind the company.

It was contended, and found by the Chief Justice, that Film was not aware that Mr. Napoli was not a director at the material time, but that information would have been available upon enquiry and there is no suggestion that Leisure misled Film into believing that Mr. Napoli did still hold office in the company: He signed the letter of September 29th, 1989 with the description "consultant." The fact that Mr. Napoli said to Mr. Benatar on September 29th, 1989: "I am back in charge! I have made it a condition that I deal directly with Steven Forsyth. As you know, I never wanted to take the bingo operation back to the casino. Leisure Investments Ltd. would like to remain in the cinema," could not bind Leisure even if it could be construed as a representation that Mr. Napoli had at that date been re-appointed managing director of the company, which he had not. In my view, the statement was, in any event, too vague to constitute a representation that Mr. Napoli had been granted authority to contract on behalf of Leisure.

Similarly, if Mr. Napoli did obtain express authority from Mr. Forsyth to sign the letter of October 10th, 1989 and this was relied upon by Mr. Benatar (and it is doubtful that both these conditions were fulfilled), Mr. Forsyth did not have the necessary authority from Leisure. In these circumstances, there was a clear break which disentitled Film to rely upon Mr. Napoli's previous activities as a representation that Mr. Napoli was still authorized to bind the company. For the same reason, the fact that Mr. Napoli had, on behalf of Leisure, in August 1988 negotiated a tenancy of Queen's Cinema from Film for one year cannot be relied upon as showing an ostensible authority to contract in September and October 1989.

If, therefore, Film is to succeed in establishing that Mr. Napoli had ostensible authority, that authority must come indirectly through Mr. Forsyth. Mr. Forsyth appears never to have held office of any kind in Leisure. He was the chairman of the board of Leisure Investments PLC, a company which wholly owned Leisure Investment International Ltd., which in turn wholly owned Leisure. The judge found that he was "probably the driving force behind all [PLC's] business activities," but that would give him no authority in relation to Leisure. It was urged that Mr. Forsyth, as chairman of the board of PLC, had ostensible authority to bind PLC and that, on Mr. Napoli's evidence, "policy decisions [for Leisure] were coming from Leisure Investments PLC."

Even if Mr. Forsyth did have ostensible authority to bind PLC (and in my view he did not) that was not enough to give PLC ostensible authority to bind Leisure. Mr. Benatar said in evidence that "Forsyth was the chairman, director or what I would call the boss of the casino set-up" but that clearly misrepresented the legal position at the material time: Mr. Forsyth was never chairman, director or boss of Leisure, although Leisure was the tenant of the casino. It is significant that Mr. Benatar failed to appreciate Mr. Forsyth's legal status in the light of a contention that Mr. Napoli, as an experienced businessman, could not have signed the letters

of September 29th, 1989 and October 10th, 1989 unless he was in fact authorized to bind Leisure. The fact is that businessmen sometimes do take a pragmatic view of the circumstances and overlook the legal niceties. It was not until it was discovered that PLC could not provide the finance that Leisure sought to consider the extent of Mr. Napoli's authority and thereafter declined to sign a formal contract. It was, indeed, PLC's insolvency which was the reason for the matter's not proceeding.

Film has sought to draw an unfavourable inference from the alleged failure of Leisure to call Mr. Forsyth as a witness. Mr. Jacob rightly argues that such an unfavourable inference would be unjustified. It was for Film to prove that Mr. Forsyth had been authorized by Leisure to appoint Mr. Napoli as its agent to contract on its behalf. There was no allegation of facts creating an ostensible authority which it was necessary for Mr. Forsyth to rebut. It was suggested that he was in some way involved in the "indoor management" of Leisure, so as to give rise to an ostensible authority to appoint Mr. Napoli as agent of the company, and reliance was placed on *Biggerstaff* v. *Rowatt's Wharf Ltd.* (1), part of the headnote to which in the *Law Reports* ([1896] 2 Ch. at 93) reads:

> "Persons dealing bonâ fide with a managing director are entitled to assume that he has all such powers as he purports to exercise, if they are powers which according to the constitution of the company a managing director can have."

Lindley, L.J. asked (*ibid.*, at 102):

> "What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him bonâ fide."

Lopes, L.J. referred (*ibid.*, at 104) to *Smith* v. *Hull Glass Co.* (4) in which:

> "…[I]t was held that a company registered under 7 & 8 Vict. c. 110, was liable to pay for goods ordered by persons in its employ, and that it was not necessary for the plaintiff to prove that those persons were authorized by the directors to order the goods in question. Maule J. went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing bonâ fide with such persons, have a right to assume that they have been duly appointed. This view is in accordance with later authorities."

In that case, before Maule, J., the alleged agent had been appointed manager of the company's works.

If Mr. Forsyth had been an officer of Leisure, these cases might have some relevance, but he was not. His appointment as chairman of the board of PLC did not make him an officer of Leisure and did not give him ostensible authority to contract on its behalf. There was nothing at all to suggest that he had apparent authority to appoint agents to bind the company and no question of any limitation of such an apparent authority arises. That being so, nothing he said concerning his authority to appoint Mr. Napoli as agent of the company could give him such authority. *A fortiori*, nothing that Mr. Napoli said as to his having been given authority by Mr. Forsyth to contract on Leisure's behalf could bind the company.

In so far as the appeal is based upon the issue of Mr. Napoli's authority to contract on behalf of Leisure, I therefore think that it should be allowed. It is not strictly necessary to deal with the arguments relating to the question whether what Mr. Napoli and Mr. Benatar had agreed would have constituted a concluded contract. However, I will do so as shortly as I can.

On the evidence, I think the Chief Justice was plainly right to find that a binding contract was intended. The protagonists were not entirely happy that the other would not renege upon the agreement or its terms. On September 29th, 1989 Mr. Benatar was anxious to get away to attend the synagogue, but Mr. Napoli held him back until the agreed terms had been reduced to writing. He did not insist that Mr. Benatar should sign the letter, but Mr. Benatar's indorsement by way of correction of the extent of the unexpired term of the Crown lease is admitted. The words: "I have informed Messrs. Hassan & Partners that we want to sign a contract on the above lines this week," in the letter of October 10th, 1989, do not indicate that anything else remained to be agreed but that the terms had been agreed and were to be put into formal shape. Mr. Benatar's evidence was that he wanted "to tie up" Mr. Napoli, by which I understand him to have meant that he did not want Mr. Napoli to wriggle out of the agreement they had reached by reason of some legal technicality.

All the vital terms had, in fact, been agreed and nothing remained which could not properly be decided by the court in the event of disagreement.

1. It was contended that the fact that the letter of September 29th, 1989 was written on the letterhead of PLC created a doubt as to the identity of the vendor. In my view, that was immaterial. From the wording of the text, it was sufficiently clear that the parties to the sale and purchase were to be the same as the parties to the tenancy, namely Film (to which the letter was addressed) and Leisure. It is common ground that the letter of October 10th, 1989 should be read together with the earlier letter and it is clear that the reference in it to Mr. Napoli's "principals" was understood to indicate Leisure.

2. The physical subject-matter of the agreement was the Queen's Cinema, which was known by the signatories to be clearly defined in the sub-lease from A.R. (Holding) Co. Ltd. to Film by an indenture dated February 16th, 1970. It is said that there is uncertainty as to the estate which was to be passed. It was clearly to be the residue of the Crown lease to the extent that it related to the site of the Queen's Cinema. The sale was obviously to be achieved by severance and assignment of the relevant part.

What constituted the residue could only be ascertained by completion of the sale and purchase agreed to be effected. What would be the Crown rent of the severed portions would not have been a matter for agreement between the parties to the sale and purchase. It would be a matter for the Crown and its lessees of the severed portions. The existing tenancy of Film would have merged in the greater estate it was to acquire, if not otherwise terminated.

3. The contention that the price was not certain was not pursued.

4. I agree with Mr. Powell-Jones that the deposit provided for by the agreement was not to be paid to a stake-holder, for a stake-holder "is not bound to pay interest: he retains the benefit of it…" (see *Smith* v. *Hamilton* (3) ([1951] Ch. at 184, *per* Harman, J.)). Here the interest on the deposit was to be shared 50/50 by the parties. It follows that the depositee was to be the agent of both parties. It was reasonably to be expected that the deposit would be paid on or before the date of exchange of formal contracts and, in the absence of provision to the contrary, I would have thought that the deposit was payable to the solicitor acting for the vendor.

5. The complaint about the provision as to insurance was not made in the court below and is not mentioned by the Chief Justice in his judgment. Therefore it could not avail the appellant. As the point was argued, I would say that I see no difficulty. The agreement required the vendor "to insure the premises forthwith for the real value in the name of [Film] with an insurance company agreed by [Film]."

"The premises" must have been intended to mean the premises which would be assigned, namely the Queen's Cinema for the residue of the Crown lease. The apportioned part of the Crown rent was so small that the fact that it had not yet been ascertained could not conceivably have affected the fixing of an appropriate premium. Film would have had an insurable interest not only under its sub-lease but also one derived from the contract from the moment the contract was made: see 25 *Halsbury's Laws of England*, 4th ed., para. 638, at 330. In the absence of other words indicating the contrary, by "the real value," the parties must have intended the value on the open market of the insured interest. In the ordinary case that would, I think, *prima facie* be the contract price, although here there may have been special considerations affecting the value. The other matters relating to insurance were clearly expressed.

6. The absence of any term as to the consent of the Crown to the intended assignment cannot affect the validity of the agreement. It was the vendor, Film, which was obliged to obtain consent, and Mr. Napoli was satisfied that there would be no refusal of consent. There was nothing to prevent Film's taking the risk of contracting to assign without the consent being first obtained.

If Mr. Napoli had had authority to contract on behalf of Leisure, I would have held that the appeal ought to have been dismissed. As it is, I would set aside the order for specific performance and enter judgment for the appellant.

In the course of his argument, Mr. Powell-Jones asked rhetorically: "Who (on behalf of Leisure) was to sign the formal contract if not Napoli?" It was, of course, a question which cannot be answered with certainty. There is no doubt that Mr. Benatar would have been content if Mr. Napoli had signed it. On the judge's finding that there was already a concluded contract, Mr. Napoli (who signed on behalf of Leisure) must have been empowered to do so. One can only assume that the parties' legal advisers would have asked the same question that Mr. Powell-Jones posed and would initially have answered: "Someone expressly authorized by the Board of Leisure." Since completion was to be before Mr. Napoli's re-appointment as managing director of Leisure, if it had been suggested to them that he should sign, the solicitors would surely have concluded that there was at the very least some doubt as to his authority and have insisted upon another signatory. They would hardly have been prepared to approve a signature by someone with as remote a connection with Leisure as either Mr. Napoli or Mr. Forsyth.

**DAVIS, J.A.** concurred.

*Appeal allowed.*

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