[2013] UKPC 11
**Privy Council Appeal No 0031 of 2012**

# JUDGMENT

# New Falmouth Resorts Limited (Appellant) *v* International Hotels Jamaica Limited (Respondent)

## From the Court of Appeal of Jamaica

**before**

**Lord Neuberger**
**Lord Walker**
**Lord Mance**
**Lord Sumption**
**Sir Alan Ward**

## JUDGMENT DELIVERED BY

## SIR ALAN WARD

## ON

## 7 MAY 2013

**Heard on 30 January 2013**

*Appellant*
Tracy Angus QC
Juliet Mair Rose
Jamaican Bar

(Instructed by Harcus Sinclair)

*Respondent*
Dr Lloyd Barnett
Weiden Daley
Tracey Long
Jamaican Bar
(Instructed by Charles Russell LLP)

**SIR ALAN WARD:**

***Introduction***

1. This appeal concerns the right to possession of 4 ¾ acres of land known as Lot 3A adjacent to the Starfish Hotel in the parish of Trelawny in Jamaica. The appellant, New Falmouth Resorts Ltd, seeks possession of the land from the respondent, International Hotels Jamaica Ltd, and claims damages for its wrongful use and occupation. On 20th February 2009 Hibbert J sitting in the Supreme Court of Justice of Jamaica in Civil Division held that the appellant's claims must fail and judgment was accordingly entered in favour of the respondent with costs. On 15th April 2011 the Jamaican Court of Appeal dismissed the appellant's appeal with costs but later on 23rd January 2012 granted final leave to appeal to Her Majesty in Council.

***The issue in the appeal***

2. It was as long ago as 17th February 1982 that the appellant agreed to sell Lot 3A to National Hotels and Properties Ltd ("NHP") for $184,000 payable by way of a deposit of $62,000 with the balance to be paid on completion which was fixed for 31st March 1982. A remarkable feature of the case is that completion has still not taken place. This agreement was signed on the appellant's behalf by John H. Phelan III, ("John"). The central issues which arise on the appeal are whether John was authorised to sign on the company's behalf, alternatively whether the company ratified the agreement on 21st June 1982 at a properly constituted meeting of the board of directors.

***The background***

3. Although the issue relates to the validity of the agreement for the sale of the land, the underlying dispute is, and for decades has been, a facet of a long battle that has been waged in a number of actions between Mr James Henry Chisholm ("Mr Chisholm") and John and other members of the Phelan family over control of the appellant company. The company was incorporated in 1967 as a vehicle for the Phelan family who were resident in Texas to conduct real estate business in Jamaica. John was the principal shareholder and he was one of the first directors appointed to the board. Frank Phelan ("Frank") also acquired shares in the company and he was appointed a director on 6th July 1970. A third brother, David, was appointed a director on 26th January 1973 and later became chairman. At that same meeting Mr Chisholm was appointed to the board as managing director.

4. Mr Chisholm's involvement in the company seems to have come about in this way. The company owned large tracts of property in western Jamaica and, in order to

develop the land, needed to procure the injection of additional funds to put in the necessary roads, water supply and other infra-structure. The Phelans heard of Mr Chisholm who was an established realtor in Jamaica with connections in the USA, in particular in Florida where he had a licence to engage in real estate business. As an inducement for Mr Chisholm to raise the necessary finance, the appellant seems by a letter dated 26th October 1972 to have offered him a 51% shareholding in the company upon his providing the company with a loan commitment for $1 million to provide the working capital for the development of the lots in the first phase. It was also suggested that on payment of the sum of $10,000 Mr Chisholm would take over management of the project as managing director. He was accordingly appointed to the board as manager on 26 January 1973 at the same meeting when David was appointed. He is now in control of the company: indeed he describes it as "my company".

5. John was adjudged bankrupt by an order of the United States Southern District Court for Texas on 12th July 1972 but discharged from bankruptcy by a later order of the same court made on 30th October 1974. By virtue of article 97 of the Articles of Association the office of the director shall be vacated if he becomes bankrupt. In any event, John admitted in evidence in one of the rounds of litigation involving these protagonists that he had resigned as a director of the company during the course of 1971 and that he had "thereafter had no dealings with the company as a director or other officer thereof till after I had been discharged from bankruptcy". Whether or not he was ever validly reappointed is a matter of dispute in this appeal.

6. The Trelawny Beach Hotel, later known as the Starfish Hotel, was built on land adjacent to Lot 3A. NHP had purchased the Trelawny Beach Hotel in 1978. At the time of the purchase and for many years thereafter, it was thought that Lot 3A upon which the hotel tennis courts were situated formed part of the land that had been acquired by NHP. However, in 1981 at a time when NHP was considering a sale of the hotel it was discovered that Lot 3A was not in fact part of the hotel property but was still owned by the appellant. Contact was accordingly made with the appellant and Mr Moses Matalan acting for NHP had some negotiations with Mr Chisholm for the purchase of Lot 3A for $184,000. In Mr Chisholm's absence the appellant's attorney, Mrs Brown Young, prepared an agreement of sale and Mr Rodney signed it on behalf of NHP. Mr Chisholm refused to sign because he believed the land was subject to a lease with an option to renew and to purchase. He also considered that the offer was far too low. It seems, however, that John then entered into discussion with NHP regarding the sale. Mr Chisholm became aware of these negotiations. He had also been informed that John and Frank had purported at a board meeting of the company held on 24 November 1981 to appoint John as managing director and to dismiss him, Mr Chisholm. He wrote to NHP on 12th January 1982 informing them that he was "the appointed legal Managing Director" and shareholder of the company and that John and Frank were not shareholders or directors and that NHP should not negotiate with them for the purchase of Lot 3A. What action, if any, NHP took after receipt of that letter is not clear. It seems that Mr Vincent Chen, an attorney-at-law and partner in the firm of Clinton Hart & Co, representing, or purporting to represent, the appellant, prepared an agreement in almost identical terms to Mrs Brown Young's whereby the appellant agreed to sell and NHP to purchase Lot 3A for the sum of $184,000 payable by way of a deposit of $62,000 on

the signing of the agreement and the balance on or before 31 March 1982. John signed this agreement on 17 February 1982, giving no indication of the capacity in which he signed on the company's behalf nor of the position he held in the company. It is the validity of this agreement that lies at the heart of this appeal.

7. When completion did not take place as scheduled, Mr Chen, who under the terms of the agreement had carriage of the sale, wrote to NHP's attorneys informing them that: "We have consulted with Mr John Phelan, the Managing Director and duly authorised agent of the company who has authorised us to advise you that your client may take possession of the land purchased under the Agreement for Sale." NHP continued in occupation. In due time a sewage treatment pond and treatment plant was built on part of the land beyond the tennis courts. By a deed of assignment dated 20th December 1989 NHP assigned the agreement to Linval Ltd which in turn assigned the agreement to the respondent on 22nd May 2000.

8. A judgment of Edwards J in other litigation cleared the way for the appellant to give good title to the purchaser and in August 2001 the respondent requested the appellant to take immediate steps to bring the agreement to completion by the execution of a transfer of Lot 3A in the respondent's favour in exchange for the balance of the purchase price net of the deposit of $62,000 due to the appellant under the agreement. Mr Chisholm, describing himself as "chairman and managing director" of the appellant asserted in response that neither the appellant nor "its legally appointed managing director from January 1973" was a party to "any purported agreement of sale" to NHP. As a result there was more litigation, this time a claim by the respondent against the appellant for specific performance of the agreement. In its defence to that claim the appellant challenged John's authority to sign the agreement as well as the efficacy of the chain of assignments pursuant to which the respondent claimed to be entitled to maintain the action against the appellant. There is, therefore, an obvious overlap between the issues in that suit and this claim and, as the Court of Appeal observed, it is not at all clear, and no reason was given, as to why that action had not been brought on for trial.

9. This claim for possession commenced on 24th October 2002 after the appellant served notice to quit. The defence pleaded the respondent's entitlement to be registered as the proprietor of the land by virtue of the agreement of 17th February 1982, the benefit of which had been assigned to the respondent as set out above. By an amendment the respondent alleged that as it and its predecessors had been in continuous possession of the land since 1982, the appellant was barred by section 3 of the Limitation of Actions Act from bringing any action for the recovery of the land and that any right or title to the land had been extinguished by section 30 of that Act. Another curiosity of this litigation is that no reply was filed but in its pre-trial memorandum the appellant indicated that it would contend that the respondent was not entitled to rely on the agreement because at the material time John was not authorised to sign any agreement on the appellant's behalf, that the agreement was statute barred and that the respondent was not a proper assignee of NHP.

10. The trial was before Hibbert J for 5 days in July and 4 days in November 2006 and a day in January and February 2007. Hibbert J gave judgment on 20th February 2009. He concluded that:

> "The evidence presented to the Court, particularly the contents of the Annual Returns made to the Registrar of Companies and the minutes of the meetings of the Board of Directors clearly demonstrates that at the time of the agreement for sale, John Phelan III was regarded by N.F.R. as a director of the company."

He held further that even if there was a defect in the appointment or qualification of John Phelan III the acts of a director or manager were nonetheless valid notwithstanding any defect that might afterwards be discovered in his appointment or qualification by virtue of section 172 of the Companies Act 1965. He concluded:

> "Moreover, I am of the opinion that the ratification of the Agreement for Sale at the meeting of the Board of Directors held on 21st June 1982 should lay to rest any question as to the validity of the Agreement for Sale."

He was satisfied that the agreement had been validly assigned. He dismissed the argument that the respondent was affected by laches and he accordingly found that the respondent was not a trespasser but was entitled to possession.

11. Four issues were raised in the appeal to the Court of Appeal:

i) the validity of the agreement;

ii) the effect of the assignments;

iii) the position of the respondent as occupiers of Lot 3A; and

iv) the question of laches and limitation.

The Court of Appeal held that the assignments were valid, that the respondent was not a trespasser, that limitation had not been pleaded by either party so it was not clear how it would arise on the facts of this case and that there was no basis for the appellant's "distinctly obscure statement … that "the purchaser is guilty of laches, and the contract would be outside the limits permitted by the statute of limitations"."

12. Morrison JA giving the lead judgment with which Panton P and Phillips JA agreed, held at [36]:

> "Although the evidence does not point directly to his [John's] reappointment as a director, there was, it seems to me, considerable evidence to suggest that, by the time of the signing of the agreement in 1982, Mr Phelan was regarded, treated and held out by NFR as a director of the company."

As for the argument that section 172 served to validate John's acts, he held:

> "[40] In the instant case, there being no evidence whatever of any purported (or defective) reappointment of Mr Phelan as a director in the post-1974 period, I therefore agree with Miss Davis [counsel for the appellant] that section 172 cannot apply in these circumstances."

But that was not the end of the matter because:

> "[44] … by its representation to the world at large in the successive annual returns filed with the Registrar of Companies that Mr Phelan was a director of NFR during the relevant period, the company is estopped from denying to IHJ that he had the authority to enter into the agreement on behalf of the company."

Finally, he agreed with Hibbert J's conclusion that:

> "[46] … The actions of Mr Phelan were validly ratified and the agreement properly approved by the Board at its meeting of 21st June 1982."

The appeal was dismissed accordingly.

***The issues on this appeal***

13. Much of what was in dispute has fallen by the wayside during the long progress of this case through the courts. All that is left are the issues of John's authority to enter into a contract of sale; alternatively the issue of ratification.

***Authority***

14. To quote Diplock LJ from his seminal judgment in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 502:

> "It is necessary at the outset to distinguish between an 'actual' authority of an agent on the one hand, and an 'apparent' or 'ostensible' authority on the other. Actual authority and apparent authority are quite independent of one another. Generally they co-exist and coincide, but either may exist without the other and their respective scopes may be different."

***Did John have the actual authority of the company to act on its behalf?***

15. A concise description of actual authority is given by Lord Denning MR in *Hely-Hutchinson v Brayhead Ltd* [1967] 1 QB 549, 583:

> "… actual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the other circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office."

16. Article 87 of the Articles of Association of the company provides that the business of the company shall be managed by the directors but under article 118 the directors may entrust to or confer upon a managing director all or any of the powers exercisable by them. In considering whether or not John had any *express* authority, it does not much matter whether or not he was a director since an ordinary member or employee of the company may be expressly authorised by the board or the managing director to transact company business, even to enter into a contract for the sale of the company's land. There is, however, no evidence whatsoever that John was given any such express authority pursuant to any resolution passed by the board.

17. He may have had implied authority if he were, as he said he was, the duly appointed managing director of the company as at 17th February 1982 when he signed the agreement on the company's behalf. Leaving aside for the moment the question whether he was duly re-appointed a director of the company after his bankruptcy, he was not its managing director as at that time. That office was held by Mr Chisholm who was appointed on 26th January 1973 when Mr Charles Swann was relieved of his duties as manager and it was decided to appoint Mr Chisholm as manager of the company with immediate effect. At a meeting of the directors held on 22nd February 1973 it was resolved:

> "8. … that the managing director of New Falmouth Resorts Ltd, Mr J. Henry Chisholm, shall have the absolute authority of his Co-

> Director/Directors and the company as from the date of this meeting to:-
>
> > (a) Sign Contracts and Transfers for the purchase of real estate, for the company and for the sale of real estate owned by the company. …
> >
> > 11. … Mr J. Henry Chisholm shall have the absolute authority as from the date of this meeting to carry negotiations for the sale of real estate and other assets owned by the company, determine the sale price thereof and pay commissions thereon, for and on behalf of the company."

It is convenient now to note that at that meeting David was elected chairman and it was resolved that he should have:

> "the absolute Authority of his Co-Director/Directors and the company as from the date of this meeting to remove the Managing Director of New Falmouth Resorts Ltd without any prior notice; if, the Managing Director fails to carry out satisfactorily the duties as Managing Director, and to immediately appoint a successor."

18. By virtue of article 116 of the Articles of Association a director appointed to the office of Managing Director would not, whilst holding that office, be subject to retirement by rotation or to be taken into account in determining the rotation of retirement of other directors. His appointment would, however, be determined automatically if he ceased from any cause to be a director.

19. The annual return for the company made up to 24th October 1972, i.e. before Mr Chisholm was appointed, was filed on 10th February 1973 but thereafter there is a woeful failure to comply with the company's obligations to file returns and absent any evidence that he had ceased to be a director, it must be assumed that Mr Chisholm continued in office as the company's managing director.

20. A handwritten document entitled "Minutes of the Board Meeting of November 24th 1981 between Frank D. Phelan and John H. Phelan III" may be some evidence to the contrary. That document records that:

> "We have decided to appoint John H. Phelan III managing director of New Falmouth Resorts Ltd. Mr Jim Chislom (sic) is not any longer with the above mentioned company."

The document appears to have been signed by John and Frank. It certainly suggests that the company had been treating him as the Managing Director at that time but in other respects it is a document of questionable validity. At a meeting of the Board held on Monday June 21st, 1982 under the heading "Minutes of Last Meeting" the chairman, David, sought to obtain confirmation of the "Directors' meeting held on November 24th 1981" but the minutes then record that "Mr Chisholm raised objections and the chairman withdrew his request. The minutes of May 28th 1976 were taken by the meeting as the last properly constituted minutes of the company." In the light of those minutes, the purported dismissal of Mr Chisholm can be ignored. The minutes of the meeting of 21 June were signed by David as chairman but there is another document where each of David, John, Frank and Mr Chisholm signed above their typed name and the word "director" was then written alongside their signature. The document states that:

> "the undersigned being directors of New Falmouth Resorts Limited do hereby waive all requirements as to the length of time for the holding of a Directors' Meeting and all formalities in relation to the giving of notice in respect of the said meeting" [to be held on 21st June 1982].

21. At that meeting it was resolved by three votes to one, Mr Chisholm being the dissenting voter, that John be appointed managing director "as of November 24th 1981, the date when Mr James H. Chisholm was dismissed from the post." The retrospective effect of that resolution will be discussed in due time when ratification is considered. The important point is that the minutes acknowledge that it was Mr Chisholm who was in fact in office as Managing Director when the agreement of sale was signed in February 1982, not John.

22. John may have described himself in the negotiations for the sale as managing director but his own assertion cannot confer authority on him: it is the board's actions which give rise to the necessary implication. There is no evidence that Mr Chen, the attorney, was authorised to describe John as the managing director when later giving the licence to occupy. In those circumstances, it is impossible to see how John could claim to be clothed with implied actual authority to sign the agreement of sale.

***Did John have ostensible authority?***

23. The judgment of Diplock LJ in *Freeman & Lockyer* has stood the test of time. He said at 503-505:

> "'apparent' or 'ostensible' authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the

> principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. … The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. …
>
> The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into. …
>
> The commonest form of representation by a principal creating an 'apparent' authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have 'actual' authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is fact permitted to do usually enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the 'actual' authority of the board of directors, and unless the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such 'apparent' authority that the agent had authority to contract on behalf of the company."

24. There was nothing on the face of the contract for sale to indicate what position John held in the company. He was certainly not held out as the managing director. Hibbert J found and the Court of Appeal accepted that there was considerable evidence to suggest that by the time of the signing of the agreement in 1982 John was "regarded, treated and held out by NFR as a director of the company". He was named as a director in the 1972 annual return even though his own evidence was that he resigned in 1971 but no further return was filed until the annual return was made for the year ending 31st December 1981. He was named as a director in that return and again in the return for the year ending 31st December 1982. The Court of Appeal relied on those returns to

justify their conclusion that he was a director during the relevant period and so the company was estopped from denying that he had authority to enter into the agreement. The difficulty about that conclusion is that the 1981 and 1982 returns were not filed until 7th February 1992, a decade and more after the contract was made. The representations contained in those late returns could not have been made with the intention that that they be acted upon or that they were in fact acted upon by the purchaser. Mr Chisholm's letter denouncing John may be another reason, not discussed in the courts below, for doubting whether NHP relied on John's assertions that he was the true managing director. There is no other conduct other than the returns for 1981 and 1982 capable of constituting the representation by the company necessary to create some apparent authority vesting in John as a mere director to enter into contracts on the company's behalf.

25. There is, moreover, an even more fundamental hurdle to overcome. As set out above, John on his own admission ceased to be a director in 1971. He was made bankrupt in 1972 with the consequence that he was disqualified from holding office. He was discharged from bankruptcy in 1974 but there is absolutely nothing to show that he was re-appointed except for his signing the dubious minute in November 1981 and his attending the important meeting in June 1982 and signing in as "Director". There is nothing to show when or by whom he was re-elected. The Court of Appeal was, therefore, correct in concluding that there was "no evidence whatever of any purported (or defective) reappointment of Mr Phelan as a director in the post-1974 period." Section 172 of the Companies Act 1965, which was in force at the time, to the effect that "the acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification" cannot rescue John because the section "cannot be utilized for the purpose of ignoring or overriding the substantive provisions relating to such appointment", per Lord Simonds in *Morris v Kanssen* 1946 A.C. 459, 472. The Court of Appeal was right to conclude that where "the evidence pointed to non-appointment of the affected persons as directors, rather than to a defective appointment," then section 172 could not be prayed in aid to validate their appointments.

26. In those circumstances, it cannot be said that John had ostensible authority to bind the company.

***Did the company, nevertheless, ratify the sale?***

27. At the crucial meeting of the Board on June 21st 1982 the sale of the land to National Hotels and Properties came up for discussion and Mr Chen, attorney-at-law, who was representing the Phelan family confirmed that there was a sale agreement signed by John. The minutes of the meeting record:

> "The meeting at three to one voted to approve the following resolution moved and seconded by Messrs David and Frank Phelan respectively.

RESOLVED

> That the sale agreement dated February 17th, 1982 and presented at this meeting be approved and that the authority vested in John Phelan by the board of directors to act for and on behalf of the board in such transaction be endorsed."

The dissenting voice was Mr Chisholm's. In this appeal both John's and Frank's appointments as directors have been questioned. If neither was validly appointed, voting would have been split between David and Mr Chisholm and article 106 provides that: "In case of an equality of votes, the chairman [David] shall have a second or casting vote." It is submitted by Ms Tracy Angus QC for the appellant that it is apparent on the face of the resolution that the chairman did not consider the need to cast and did not cast a second vote. If Frank were a properly appointed director, that interesting argument need not be considered.

28. Frank was appointed a director on July 6th 1970 at a meeting of the directors, John, Mr Charles Swann and Mr Hugh Hart, whose firm of attorneys were acting for the company at that time. The annual return made up to 28th July 1971, signed by Mr Hart and filed on 3rd January 1972, shows Frank as a director. So does the return to 24th October 1972 signed by Mr Hart and lodged with the registrar on 10th February 1973. It thus seems that he was re-elected at the next following annual general meeting after his appointment would have automatically expired pursuant to article 104. It is true that there is no record of Frank having been re-elected at the next following annual general meeting, but the company's records as to such meetings were exiguous, and subsequent documentary evidence strongly suggests that he was duly re-elected as a director. The returns for December 1981 and December 1982 albeit belatedly filed in 1992 as already set out above still show Frank as a director. Unlike John, there was no supervening event which would have disqualified Frank from holding office. Under the articles of association one third of the directors must retire each year but under article 100 a retiring director is eligible for re-election. Article 101 provides that the company at the meeting at which a director retires may fill the vacated office by electing a person thereto but in default the retiring director shall if willing to continue in office be deemed to have been re-elected unless at such meeting it is expressly resolved not fill such vacated office or unless a resolution for the re-election of such a director shall have been put to the meeting and lost.

29. In conclusion on this issue, there is a document recording Frank's election in 1970, there are a number of subsequent formal documents recording him as a director (see paras 20, 27 and 28 above), he was competent to continue as a director, there is no resolution declining to re-elect him, he behaved as if he were a director, and the only reason for doubting whether he was a director in 1982, the absence of a document formally recording his re-election, is explicable by the very limited and patchy nature of the company's record-keeping. In those circumstances the proper conclusion to be drawn, at any rate on the unusual facts of this case, is that Frank had not ceased to be a director before the end of 1982. In those circumstances there is nothing to suggest that

Frank ceased to be a director. If he was in post on June 21, 1982, then the resolution approving the sale agreement was properly passed by a majority of at least 2-1 and no casting vote was needed to carry the resolution.

***Conclusion***

30. The Court of Appeal was, therefore, correct to decide that "the acts of an agent on behalf of the principal outside his actual authority may be adopted and ratified" and that "if there is ratification, it has retrospective effect, i.e. it renders the transaction with the company binding on it from the time it was entered into by the agent." There was a clear ratification of the contract for the sale of Lot 3A to NHP which cures any original want of authority for John to have entered into it as he did. The sale is valid. The respondent is entitled to possession of the land and the appellant's claims were rightly dismissed. For that reason the Board will humbly advise Her Majesty to dismiss the appeal with costs.