



3. The respondent submitted a tender and on 16 August 2000 he was informed by the Secretary of the Northern Tenders Board ("the Board") that his tender had been approved. The contract for his security services was to run for one year at an hourly rate of \$2.87.
4. On 18 August 2000 the respondent came into the office of the Board. He was asked to sign a contract and pay a performance bond of \$5,000 ("the performance bond").
5. The respondent paid the performance bond but then, on 5 September 2000, the Board wrote to the respondent informing him that the tender had been withdrawn due to financial constraints.
6. The appellants attempted to refund the performance bond to the respondent but the respondent refused to accept its return and he sued the appellants for breach of contract, commencing proceedings in March 2001.
7. The respondent's evidence was that on 18 August 2000, at the offices of the Board, he signed a contract which had already been signed on behalf of the Ministry. He said that he was told that a copy of the contract would be forwarded to him.
8. The appellants denied that any contract had been signed but Singh J found, on the balance of probabilities, that it had been executed by both parties.
9. The trial judge, in coming to his finding that the contract had been executed by both parties, relied on the respondent's direct evidence, on an internal document of the respondents dated 22 August 2000 that stated "*Pioneer Security Services have signed contract documents*" and a memorandum dated 23 August 2000 from the Director, Land & Water Resource Management to a senior Agricultural Officer which stated "*We are surprised that the Tender Committee has signed the contract agreement with Pioneer Security Services.*"

10. The trial judge noted that the contract had not been produced to the Court. He noted that it ought to have been retained and produced by the appellants as it was a central piece of evidence. The trial judge said *"In the absence of the contract, which may or may not have assisted the (appellants), I find on (the) balance of probability that the contract was executed by both parties."*
11. The trial judge concluded that a binding agreement existed and rejected the appellants' submissions that the contract could only be signed by the Ministry and not the Board, holding that *"to an outsider including the plaintiff it would seem logical that since the Tender Board called for tenders it would be the logical entity to sign contracts."*
12. The trial judge proceeded to assess damages for breach of contract in the sum of \$18,040, together with interest at 6% (\$6,322). He ordered the appellants to refund the performance bond (\$5,000). Accordingly, on 25 October 2006, he entered judgment against the appellants in the sum of \$29,362 and ordered them to pay the respondent's costs of \$5,000.
13. There are four grounds of appeal, namely that the trial judge erred (1) in holding that a contract had been executed by the appellants and the respondent (2) in finding *"in the absence of the contract, which in his Lordship's view may or may not have assisted the defendants and finding on the balance of probability that the contract been executed by both parties"* (3) in concluding that a binding agreement existed and (4) in misapplying the doctrine of ostensible authority to the facts before him.
14. Grounds 1 and 2 are challenges to findings of fact. It is only in rare cases that an appeal court could be satisfied that a trial judge's finding of fact was unreasonable or wrong: ***Benmax v Austin Motor Co Ltd*** (1955) AC 370.

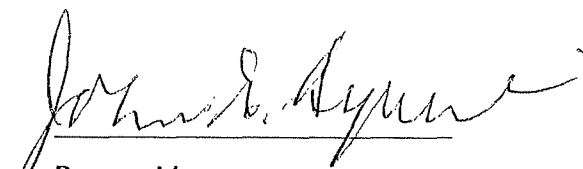
15. In this case the trial judge was impelled to find that the contract had been executed by both parties. The respondent said so and the appellants' internal documents said so. The trial judge did not hold the failure of the appellants to produce the contract against the appellants, observing that it may or may not have assisted them.
16. In the view of this Court the trial judge took a very generous approach to this failure by the respondents produce to or account for the contract. The contract was in the appellants' control and possession when last seen by the respondent. The trial judge was entitled, in view of the unexplained failure to produce this crucial document, to infer that it could not have assisted the appellants. The appellants can hardly complain when the trial judge instead took a neutral view of its absence.
17. In relation to Ground 3 the appellants rely on a number of authorities, in particular *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313. Those cases are authority for the proposition that invitations to tender are simply offers to treat with no contractual obligation crystallising until the tender is accepted. However the cases have no bearing on the facts here where the respondent was told that his tender had been accepted and a written contract was then executed.
18. In relation to Ground 4, the appellants contend that the Board had no ostensible authority to contract on behalf of the Ministry. This Ground assumes that the contract was signed by the Board.
19. The trial judge's finding referred to at paragraph 11 above, was more than open. It seems to this Court that the Ministry as principal had represented by its conduct (the furnishing of a contract to the Board, who had conducted the tender process on behalf of the Ministry) that the Board had authority to execute the contract and authority to submit the contract to the respondent for his execution. The respondent acted upon this representation by signing the contract and paying the performance bond.

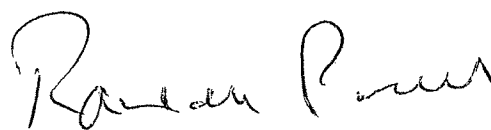
20. Accordingly the Board had ostensible authority to execute the contract and to submit it to the respondent for execution.

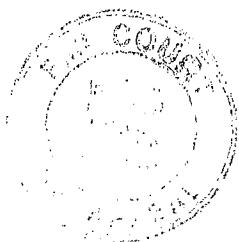
21. In their written submissions the appellants make a brief submission challenging the trial judge's assessment of damages. However there is nothing in the Notice of Appeal that challenges on damages and the Court will not entertain an appeal on damages at this late stage.

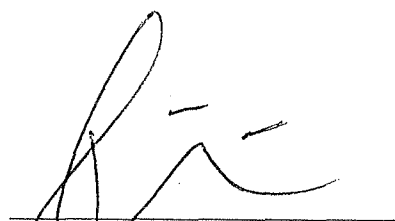
22. The orders of the Court are:

1. Appeal dismissed;
2. The appellants to pay the respondent's costs as taxed or agreed

  
Byrne, JA

  
Powell, JA



  
Hickie, JA

Solicitors:

Office of the Attorney-General's Chambers, Suva for the Appellants  
Kohli and Singh, Suva for the Respondent