IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0044 OF 2012
(High Court No. HBC 285 of 2010)

BETWEEN	:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP**
		Appellant
AND	:	**1. VISION PROPERTIES LIMITED**
		2. NORTHERN PROPERTIES LIMITED
		Respondents
Coram	:	**Lecamwasam JA** **Kotigalage JA** **Corea JA**
Counsel	:	**Mr. J. Apted for the Appellant** **Mr. S. C. Parshotam for the 1st Respondent** **Mrs. S. Levaci for the 2nd Respondent**
Date of Hearing	:	**25 September 2014**
Date of Judgment	:	**27 February 2015**

JUDGMENT

Lecamwasam JA:

[1] This is an appeal against the judgment of Learned High Court Judge at Suva dated 18/5/2012 and the order of the Learned Master dated 5/4/2011. The facts briefly are as follows:-

(i) The First Respondent, Vision Properties, filed an action before the Master of High Court, Suva, against the 2nd Respondent, Northern Projects Fiji Limited in terms of order 86 for a specific performance summary judgment for the sale of freehold property viz: Lot 1 on DP 8349 comprised in Certificate of Title No. 23768, in extent 2 hectares 260 square meters. Northern Projects Fiji Limited was the registered proprietor who had mortgaged the property in issue to the intervener Australian and New Zealand Banking Group Ltd (ANZ Bank).

(ii) Northern Projects, desirous of disposing the property, apparently to settle other commitments, entrusted the sale of the property to a real estate agent, namely Bayleys Real Estate Agents. The agents, having searched for potential buyers had come across Vision Properties and offered the property for sale. Vision Properties and the Real Estate Agents had continued negotiations mostly by way of emails. However there was no direct communication between Vision Properties and Northern Projects Limited for the sale of the property. On the apparent request of Northern Projects Limited, their solicitors prepared the Sales and Purchase Agreement and emailed the same to four persons including Mr. Phillip Toogood, an employee of Bayleys, who was the chief handler of matters related to this transaction. The same email was copied to Susan Pritchard who is an assistant to Phillip Toogood. The solicitors did not forward this email to anyone at Vision Properties. However, Mrs Susan Pritchard had forwarded the email to a Director of Vision Properties. Vision Properties have filed this action for specific performance of the agreement on the strength of the said email relying on the doctrine of Authenticated Signature fiction. The learned Master of the Suva High Court ordered Northern Projects Limited to transfer the property to Vision Properties Limited free of all encumbrances on the payment of the purchase price and to extend the caveat that was in force. There was no direct order against the intervener bank.

[2] Being aggrieved by the above order the appellant, who was an intervener before the Master, filed an appeal with the High Court. When the matter was taken up for argument the learned High court Judge held that as there was no order against the bank, that intervener bank cannot maintain the appeal.

However, I find that the learned Master as well as the Learned High Court judge had failed to advert their attention to the rights of a registered mortgagee. They have conveniently overlooked those rights and held against the intervener jeopardising the statutory rights of the mortgagee in an act of tunnel vision.

[3] Adverting to the Learned High Court Judge's judgment under the heading "Determination" he is of the opinion that the learned Master had not made an order against the ANZ Bank and that an appeal lies only against '*judgments, decrees, orders and sentences and not against reasons.*' But he has not delved into the rights of a mortgagee and the impact or effect of an order of court on a mortgagee. Despite the absence of an order or judgment against the intervener, it is irrefutably an affected party. Though the order is directly against Northern Projects Limited, all the parties before court are bound by such an order. The intervener is not only bound but also affected to a great extent by not being able to exercise its rights under the mortgage bond. Hence in these circumstances if an affected party cannot file an appeal there remains no other avenue for such party in seeking relief.

[4] Therefore fairness demands that a person or a legal entity must be able to canvass an order before a court of law if he/it is affected by such order notwithstanding that the impugned order judgment or decree was not issued against him/it. On that premise, I over rule the judgment of the learned High Court Judge dated 18/5/2012 and hold that a person affected by an order of court is entitled to lodge an appeal against such an order.

As I have dealt with the judgment of the learned High Court Judge it is suffice to send the instant matter back to the High Court for a fresh trial before another High Court Judge and direct him to make an order on the merits of the case. However, as this is an appeal against the order of the master as well, in the interests of justice I deem it necessary to deal with the ruling of the Master.

[5] In making the order for specific performance the learned Master having relied on the doctrine of the "authenticated signature fiction". Adverting to the judgment in **Stuart v Mcinnes,** the learned Master dhas referred to the conditions of the application of the concept laid down by Wilson J as follows:

> *"The contract or the memorandum containing the terms of the contract must have been prepared by the party sought to be charged, or by his agent*

duly authorising on behalf and must have the party's name written or printed on it.

It must be handed or sent by that party, or his authorised agent, to the other party for that other party to sign.

It must be shown, either from the form of the document or from the surrounding circumstances that it is not intended to be signed by anyone other than the party to whom it is sent and that, when signed by him, it shall constitute the complete and binding contract between the parties".

[6] There is no dispute that the sales and purchases agreement is only a draft. It is stated thus even in the email forwarded to Mr. Toogood. A Draft, according to the Oxford dictionary is a *'rough written version of something that is not yet in its final form'*. Therefore the document contained in this email is undeniably not the final copy. A document which is generally meant for signature maybe construed as a final copy.

The email sent by Juris Gulbis of Pacific Chambers (Solicitors of Northern Projects Fiji Limited) addressed to Milan Raniga, Phillip Toogood, Barbara Malimali, Greg Carr and copied to Susan Pritchard on 27th July 2010 at 11.45am is significant in these proceedings. It reads thus:

> *"Dear Milan,*
> *Please find **attached** hereto a **draft** of sales and purchase agreement for the above property. Please note that we have to this hour not being able to carry out a registry search. This is due to this particular batch of titles being bound. We have now requested the Registrar of Titles to have the title available to us in the next day or so. Please let us know if you have any changes and/or additions to this document. Yours faithfully,*
> *Juris Gulbi – for Pacific Chambers."* (emphasis added)

[7] This email is not directly addressed to Susan Pritchard but only copied to her. Her role as assistant to Mr. Toogood may have necessitated copying her in the email for administrative purposes.

[8] According to the said email it is apparent that Juris Gulbis of Pacific Chambers was seeking further instructions, mainly from Milan, an officer of Northern Project Fiji Limited when he requested for suggestions as to changes and/or additions to the document contained in the email. It is therefore crystal clear that the email was exclusively meant for internal circulation.

[9] It had come to light in further evidence that Mrs. Susan Pritchard had forwarded a copy of the email to a director of Vision Properties, namely, Mr. Patel. There had been neither a direct nor an implied request nor direction for her to forward the email to Vision Properties or to any other party. It is my view that she had forwarded the email to the Director concerned on her own volition and in an arbitrary manner.

[10] The learned Master had not taken into consideration the contents of the email dated 27 July 2010 (21.47 pm) sent by the Defendants' Solicitors to the Plaintiff's solicitors, even though he had alluded to it in his determination. The email *inter alia* states:

> *"...the directors of Northern Project will be meeting in Australia this Friday to discuss your offer. We anticipate to be informed of their final decision on the sale of this property by mid-day Monday 02nd August 2010. We will keep you informed of the Board's decision shortly thereafter. Kind Regards Barbara Malimali".*

[11] This email, which is accepted to have been received by Vision Properties, is testimony to the fact that the defendants' solicitors knew or ought to have known that the matter was still under consideration and had not been finalized by 21.47Hrs on 27 July 2010. Therefore, we cannot allow Vision Properties to seek refuge behind the email received at 11.44Hrs from Susan Pritchard, which was prior to the email received at 21.47hrs. Further, we have not come across any evidence throughout the proceedings requesting Susan Pritchard to forward the email to

Vision Properties. She has had no authority to inform Vision Properties of the matter under consideration.

[12] Moreover, the affidavit evidence of Mr. Patel dated 20 October 2010 is to the effect that he had requested a sale and purchase agreement from Mr. Toogood to have it 'vetted' by the solicitors to advance the transaction. A final document necessarily implies the consent of both parties involved. The need to 'vet' the document out by the solicitors of the purchaser is indicative of the fact that the draft of the sale and purchase agreement had not been treated as a finalized document and therefore could not have been ready for signature of the intended purchaser i.e. Vision properties. , Therefore, I cannot treat this as anything more than a draft intended only for internal circulation.

[13] The other significant feature is the absence of the signature of the intended purchaser. Hence even if it was the final copy there was no contractual obligation sans the signature of Vision Properties. The learned Master should not have rushed to apply the doctrine of authenticated signature fiction to the above facts.

[14] The learned master has made this maverick judicial pronouncement apparently mesmerized by the relatively novel application of the authenticated signature fiction advanced by Mr. Parashotam, thus this cannot be allowed to stand.

[15] On the basis of the above reasoning, I hold that there was no final document sent by Northern Project to Vision Properties, thus failing to fulfil the second requirement laid down by Wilson J. In ***Stuart v. McInnes*** viz. "*It must be handed or sent by that party, or his authorised agent, to the other party for that other party to sign*" Therefore the learned Master was in error applying the authenticated signature fiction and thereby

allowing the application of vision properties. I therefore set aside the judgment of the learned High Court Judge and the ruling of the learned Master.

[16] The order of this court is incomplete unless we address the issue of the caveat in force. Once a ruling/order is set aside any thing stemming from such a ruling/order automatically becomes inoperative. Hence a separate order annulling the caveat becomes redundant. However, in the interest of justice, exercising the inherent powers of this court, I order the removal of the caveat forthwith.

[17] In view of the appellant having suffered for nearly four years, being deprived of its mortgagee rights as a result of the extension of the caveat by the ruling of the learned Master, it is not correct and will cause further injustice to order the Appellant to follow the procedure contained in Section 109 (2) of the Land Transfer Act, hence I order the removal the caveat forthwith and I order the payment of costs by Vision Properties to the appellants which is fixed at F$4000.00.

[18] **Kotigalage JA:**

I agree with the judgment and orders made by Lecamwasam JA.

[19] **Corea JA:**

I have considered the draft judgment. I agree with the findings and conclusions of the judgment of Lecamwasam JA.

The Orders of the Court are:

1. *I set aside the ruling of the learned Master dated 05.04.2011 and the judgment of the learned High Court Judge dated 18.05.2012.*
2. *The Appeals are allowed.*
3. *Order the removal of the caveat.*
4. *Order costs payable by the 1st respondent- original plaintiff to the appellant fixed at F$4000.*

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice C. Kotigalage
JUSTICE OF APPEAL

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Hon. Justice M. Corea
JUSTICE OF APPEAL