

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0007 OF 1998S  
(High Court Civil Action No. HBC185 of 1992)

**BETWEEN:**

LATCHMAN BALA F/N BALA

*Appellant*

**AND:**

WASU DEWAN F/N DURGA

*Respondent*

**CORAM:**

The Hon. Sir Moti Tikaram, President  
The Rt. Hon. Sir Maurice Casey, Justice of Appeal  
The Hon. Justice Ian Roy Thompson, Justice of Appeal

**Hearing:**

Friday, 20 November 1998, Suva

**Counsel:**

Mr. B.C. Patel for the Appellant  
Mr. R.G. Bain QC with Mr. S. Maharaj for the Respondent

**Date of Judgment**

Friday, 27 November 1998

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**JUDGMENT OF THE COURT**

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This appeal is against a judgment of Lyons J. dismissing a claim for damages for breach of a contract to purchase a house. After hearing evidence of the parties and their witnesses, he preferred that of the plaintiff, the appellant in this appeal, and generally rejected that of the defendant, the respondent in this appeal, where it conflicted on material points with that of the plaintiff and the witnesses called by him. In our view he was entitled to do so and his findings of fact cannot be impugned.

He set them out as follows:

“The Plaintiff ( Bala) was a resident in Fiji for many years . During this time he acquired real property. He migrated to New Zealand on retirement in or about 1990. At the

time he was the registered owner of a house and land at 4 Sugar Avenue, Lautoka (Lot 38 on D.P. 3367 - CT 1359). On leaving Fiji, Mr Bala rented out the property. At the time of matters relevant herein, the property was rented to the Government of Fiji on a monthly tenancy. Notwithstanding this tenancy, it appears Mr. Bala was prepared to sell the property and thus complete his move to New Zealand.

In January 1991 Mr Wasu phoned Mr Bala in New Zealand and enquired if he was desirous of selling 4 Sugar Avenue. Wasu and Bala knew one another, no doubt as one does in a small town such as Lautoka. Bala explained his willingness to negotiate. Price was discussed and no figure was reached. About a month later ( in or about February/March 1991) Wasu again telephoned Bala and put to him an offer of \$100,000. Bala thought about it and, in or about late March, he phoned Wasu and advised him of his acceptance of that price.

Other matters were also discussed between the two. Wasu expressed his preference for vacant possession. I put it no higher than that. The general tenor of the memorandum of agreement, and Clause 6 in particular, (all adopted by Bala in this case) does not support a definite finding that Wasu requested vacant possession such as required the Sitting Tenant to be evicted. Exhibit 10, dated the 30/1/91, although a notice to quit, is not written in the time frame of the evidence and must relate to some other dealings or perhaps it was not followed through .

Mr Wasu indicated he wanted settlement as soon as possible. He also expressed the belief that his finance should be "OK ". Mr Bala suggested Young & Associates as solicitors for the settlement. Wasu indicated his willingness to use Young & Associates as well. It was then agreed that Mr Bala should journey to Fiji as soon as possible to complete the sale. Unfortunately Mr Bala suffered a reversal in his health and it was not until late May that

he was able to follow up the matter. There was some contact between Wasu and Bala during this time, to keep the matter "on the boil" as it were. Neither party expressed a reluctance to proceed with the sale/purchase.

Mr Bala eventually came to Fiji in late June/beginning of July 1991. Before he left New Zealand, he contacted the tenant, through the Commissioner Western, and, putting at its highest, advised of the probability of his need for vacant possession of 4 Sugar Avenue. Mr Bala and Wasu met on 1/7. It was arranged to meet at the house the next day. On 2/7 Mr & Mrs Wasu in the presence of Bala, viewed the house. Mr & Mrs Wasu discussed plans for the house, as, I expect, intending purchasers generally do. After this meeting Mr Bala, with Wasu's agreement, phoned Young & Associates and spoke to a Mr Kumar, a conveyancing clerk. Mr Bala gave Kumar the relative details necessary to prepare a contract of sale/purchase. The next day Bala spoke to Kumar who advised the agreement was ready.

On 4/7 Bala phoned Wasu and advised him the agreement was ready and arranged to meet at Mr Young's office to go over the documents with the solicitor. Mr Wasu agreed to this appointed time. On the 4/7 both attended on Mr Young. Mr Young gave both a copy of the agreement and gave both time to read through. At the conclusion of reading the agreement, Mr Young asked both if there was anything they wished to alter. Both said No. He then invited the parties to sign the agreement.

At this point Mr Wasu said that, whilst he did not have problems with the terms as best he could say, he wished to defer signing until he had written confirmation from his bank (WBC) as to the availability of finance, so that he could complete the deal. Properly, Mr Young saw no problem for this. Mr Wasu said he expected a letter in a day or so but he wanted to be "sure". Mr Bala suggested Wasu sign, but he (Wasu) preferred to be sure of finance before so

doing. Mr Wasu indicated that he would call back and sign if he received the written approval of finance from his bank. Bala signed the agreement and other relevant transfer documents.

On 7/7 Bala phoned Wasu and enquired why he still had not signed, Wasu said he was still awaiting a written confirmation from his bank. On 11/7 Bala attended upon Wasu at his office. Wasu told Bala that he would not proceed with the purchase of 4 Sugar Avenue. He gave the reasons as "economic uncertainties". Not surprisingly, Bala expressed some disappointment.

The Plaintiff (Bala ) subsequently sold 4 Sugar Avenue to another party for a consideration of \$75,000. The Defendant (Wasu) subsequently purchased a property at 66 Drasa Avenue for \$80,000."

In his defence the respondent had pleaded section 59 of the Indemnity, Guarantee and Bailment Act (Cap. 232) ("the Act"), which is essentially the same as section 4 of the Statute of Frauds. The agreement for the sale and purchase of the house was in writing, signed by the appellant but not by the respondent. The issue which Lyons J. had to decide was whether this was a case where the "authenticated signature fiction" concept was applicable, so that the agreement was to be taken to have been signed either by the respondent or by Mr Young as "a person thereunto by him lawfully authorised". He decided that it was not applicable and that the requirements of section 59 had not been met.

At this stage it is necessary to point out that, although the learned trial judge found that there was an oral agreement between the parties for the sale and purchase of the house and although the appellant had pleaded part-performance of that contract, his claim was for damages for breach of contract, a common law remedy; part performance, therefore, afforded no basis for obtaining it.

The grounds of appeal are

- “(a) The learned Judge was wrong to conclude there was no binding contract between the appellant and the respondent.
  
- (b) The learned Judge was wrong in not holding due compliance with section 59(d) of the Indemnity, Guarantee and Bailment Act because the evidence showed that the written Agreement prepared by Young & Associates containing his name was a subsequent note or memorandum of an earlier oral contract and the respondent had also approved that written Agreement before the appellant signed the Transfer prepared by their common solicitor in the presence of the respondent. The Transfer itself was a sufficient note or memorandum.
  
- (c) The learned Judge misdirected himself on the application of the “authenticated signature fiction” because the evidence was that:
  - (i) There was an oral contract for the sale and purchase.
  
  - (ii) The oral contract was not subject to finance because the respondent had assured the appellant that finance was not a problem.
  
  - (iii) Young & Associates acted for both the vendor and the purchaser in preparing the written Agreement and that written Agreement contained all the terms and conditions of the oral contract. It was not made subject to finance because the respondent did not so instruct his solicitors.

- (iv) The respondent approved the written Agreement before seeking to delay signing.
- (v) The respondent received written confirmation of approval from Westpac before he repudiated the contract.
- (vi) The written Agreement was intended to be a subsequent note or memorandum of the earlier oral contract and as such was a sufficient note or memorandum.
- (vii) The Transfer prepared by the common solicitor and signed by the appellant in the presence of the respondent was itself sufficient to satisfy the third requirement of the fiction.

In respect of the first ground, the facts found by the learned trial judge show that there was a broad oral agreement between the parties for the sale and purchase of the house. The terms as to parties, subject-matter and price were agreed. There was also agreement that the settlement should be "as soon as possible." However, we regard as significant the account of how they came to that agreement which is contained in Lyons J.'s findings of fact. The agreement was reached by a series of phone calls over a period of more than a month. The parties agreed to use a single firm of solicitors "for the settlement". However, when the appellant came to Fiji he did not instruct the solicitors simply to arrange settlement but to prepare a written contract. The respondent subsequently acquiesced in that. The contract as drafted contained provision for settlement on a fixed date and for penalties in default. There was no finding of fact that the parties ever orally agreed to either of those terms, although no doubt the first was consistent with the agreement that settlement should be as soon as possible.

In *Carruthers v. Whitaker* [1975] 2 NZLR 667 Richmond J., with whose judgment the other judges concerned, said at page 671:

*"It is established by the evidence to which I have earlier referred that at the time when the parties instructed their respective solicitors they all had in mind only one form of contract which would govern the sale and purchase of the farm, namely, a formal agreement in writing to be prepared and approved by the solicitors. When parties in negotiation for the sale and purchase of property act in this way then the ordinary inference from their conduct is that they have in mind and intend to contract by a document which each will be required to sign. It is unreasonable to suppose that either party would contemplate that anything short of the signing of the document by both parties would bring finality to their negotiations. Furthermore both parties would expect their solicitors to handle the transaction in a way which would give them proper protection from the legal point of view. There is no evidence whatever in the present case to rebut this prima facie inference. On the contrary, and as found by Wilson J, the parties in fact expected that the contract would eventually be signed by both vendor and purchasers. The Judge then observed that this expectation was "merely a reflection of common practice". With respect, I would prefer to put it that the parties intended to contract in accordance with common practice, which in New Zealand is to obtain signatures of both vendor and purchaser to both copies of the agreement, one copy being of course for the vendor and the other for the purchaser."*

In the present case there was no evidence of any standard practice in Fiji in respect of contracts for the sale of land. However, the appellant clearly envisaged that a formal agreement in writing would be drawn up and signed by himself and the respondent. Lyons J. made no finding whether there was a valid oral contract enforceable in equity. We are unable to conclude from the facts which he found that there was such an oral contract.

The "authenticated signature fiction" concept has been discussed by the courts in England and Australia but particularly by the courts in New Zealand; it has been developed as part of efforts by the courts in all those countries to prevent section 4 of the Statute of Frauds - and legislation derived from it - being used as an instrument of injustice. It is applied where one party, either personally or by his agent, has induced the other party to sign an agreement, or a note or memorandum thereof, by representing that he regards himself as bound by it even though neither he nor his agent has signed it.

In *Sturt v. McInnes* [1974] 1 NZLR 729 at 732 Wilson J. stated the conditions for application of the concept as follows:

- “(1) 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 authorised in that behalf, and must have that party’s name written or printed on it.
- (2) It must be handed or sent by that party, or his authorised agent, to the other party for that other party to sign.
- (3) 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 a complete and binding contract between the parties.”

The appellant has referred us to the English case of *Leeman v. Stocks* [1951] All ER 1043, which concerned the sale of land by auction. The purchaser signed a written form of private treaty in respect of the sale agreement, showing the vendor’s name; it had been prepared and handed to the purchaser by the auctioneer but the auctioneer had not signed it; the vendor was not present. Roxburgh J. held that there was evidence outside the language of the document to show that it was presented to the purchaser by the auctioneer as the vendor’s agent as a complete and perfect document in itself.

In *Bilsland v. Terry* [1972] NZLR 43 Quilliam J., stating that he was following *Leeman*, decided that an agreement sent by the vendor’s solicitor to the purchaser’s solicitor and signed by the purchaser was intended by the parties to be a complete and perfect document in itself, even though it was not signed by the vendor or his agent. In *Short v. Graeme Marsh Ltd* [1974] 1 NZLR 722 Haslam J.,

applying what he referred to as the principle in *Bilsland* but without further discussion of any authority, held that a written agreement, which was prepared to give effect to a prior oral agreement and was sent by the vendor's solicitor to the purchaser accompanied by a letter signed by the solicitor and which was then signed by the purchaser, was as enforceable as if the vendor had actually signed it and that the typed name of the vendor in the agreement constituted his signature.

Wilson J. in *Sturt* and Beattie J. in *Van der Veeken v. Watsons Farm (Pukupoto) Ltd.* [1974] 2 NZLR 146 were not willing to follow the decisions in *Bilsland* and *Short*. Wilson J. at page 732 of *Sturt* noted that in *Leeman v. Stocks* Roxburgh J. had found at page 1048 that "neither the purchaser nor the auctioneer, acting on behalf of the vendor, ever intended any other signature to be added to [the] document" and that "it was the intention of both the purchaser and of the vendor's agent, the auctioneer, that this should be the final written record of the contract". That distinguished the facts from those in *Hubert v. Treherne* (1842) 3 Man. & G. 743; 133 ER 1338 where an agreement in a form which provided for signature by both parties was held not to be binding on a party who did not sign it. It was on that basis that Wilson J. framed the principles set out above so as to include the third of those principles. In *Van der Veeden* Beattie J. approved of the principles as so framed; he pointed out that they were consistent with the decision of the High Court of Australia in *Neill v. Hewens* (1953) 89 CLR 1, where the statutory requirement was held not to have been met because the form of the agreement provided for signature by both of two trustees as vendors and one of them expressly declined to sign until certain conditions were met. We similarly regard Wilson J.'s reasoning to be soundly based.

Counsel for the appellant contends, however, that, while the principles enunciated in *Sturt* are appropriate in New Zealand, the third principle should not be applied in Fiji. He draws attention to a comment in a New Zealand text-book that the decision in *Sturt* reflects "the understanding of the New Zealand man in the street that his verbal commitment to a real estate contract is not binding

on him until the terms are recorded in writing and he has actually signed the document". He suggests that the understanding of the man in the street in Fiji is different and that he regards himself as bound by an oral agreement for the sale and purchase of land. By "understanding" we take him to refer to the expectation of those agreeing to sell and purchase land to which reference is made in *Carruthers* (supra). As stated above, there is no evidence in this case what the expectation is of people in Fiji.

The "authenticated signature fiction" concept is a gloss on a statutory provision. There is a danger in putting any gloss on a statutory provision. Unless cogent reasons are shown for expanding any gloss that has been applied by the courts, it would, in our view, be unwise and inappropriate to do so. Nothing which we have heard in this appeal causes us to believe that there is any cogent reason for doing so.

Accordingly, even if we had been persuaded that there was a valid oral contract, we should have rejected Mr. Patel's submission that, by application of the "authenticated signature fiction" concept to the instrument of transfer signed by the appellant, that instrument constituted a sufficient note or memorandum of the oral contract signed by the person to be charged, that is to say the respondent. The instrument of transfer was not required to be signed by the respondent. It was to be executed solely by the appellant in performance of the contract. It was not itself a contract. When executed it was to be held in escrow until the respondent paid the purchase price. We understood Mr Patel to concede that, if we found that the third principle enunciated in *Sturt* was applicable in Fiji, the "authenticated signature fiction" concept could not be called in aid to make the instrument of transfer a sufficient note or memorandum of either the written contract or a prior contract meeting the requirements of section 59 of the Act.

It is not entirely clear to us whether by the conclusion of the hearing Mr Patel was proceeding with any submission that Mr Young's presentation of the written agreement to the appellant for his signature gave rise to the "authenticated signature fiction" that the respondent had signed it. Undoubtedly an agent's conduct may give rise to the fiction that his principal has signed a

contract (see e.g. *Leeman (supra)*). However, his act can bind his principal only if it is authorised. When the written contract was presented to the appellant by Mr Young, the respondent was present. He expressly stated that he would not sign the contract for the time being. Mr Young was, therefore, not authorised to represent to the appellant that the respondent was to be taken to have signed the contract and, what is more, Mr Young accepted that he did not want to sign then. Clearly the "authenticated signature fiction" concept was not applicable and the written contract did not meet the requirements of section 59 of the Act.

We can well understand the dismay and dissatisfaction of the appellant with the conduct of the respondent. However, he did not establish in his action in the High Court that he was entitled to obtain damages from him. We are satisfied that there was no error in that regard in the judgment delivered by Lyons J.

The appeal is dismissed. The appellant is to pay the respondent's costs of this appeal, which we fix as \$1,500; that amount includes disbursements.

*Moti Tikaram*  
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 Sir Moti Tikaram  
 President  
*M. Casey*  
 .....  
 Sir Maurice Casey  
 Justice of Appeal  
*I.R. Thompson*  
 .....  
 Justice I.R. Thompson  
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