IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0066 OF 1995S
(High Court Civil Case No.214 of 1982)

BETWEEN:

AMBIKA NAND ALIAS BABU RAM
F/N KALIDIN

Appellant

- and -

MOHAMMED SAMSUDIN SAHU KHAN
AND MOHAMMED SADRU-DIN SAHU KHAN
BOTH F/N ABDUL HUSSAIN SAHU KHAN

Respondents

Mr.V Mishra for the Appellant
Mr. G.P. Shankar for the Respondents

Date and Place of Hearing	:	6 August 1997, Suva
Date and Delivery of Judgment	:	14 August 1997

JUDGMENT OF THE COURT

In a civil action commenced in 1982 in the Supreme Court (as the High Court was then called) the appellant was the plaintiff. The respondents were his solicitors. Cullinan J. gave judgment on 20 February 1987 awarding him $1,278. Early in March 1987 the judgment debtor's solicitor sent a cheque for that amount to the respondents in order to discharge the judgment debt. The respondents paid it into their trust account and issued a receipt endorsed to the effect that the money was received subject to the appellant's right to appeal against the judgment. The money was not paid out to the appellant who instructed the solicitors to appeal. When the appeal came on for hearing in this Court the other party raised a preliminary issue, whether the judgment debt had been discharged and the appellant had in consequence lost his right of appeal. The Court (Tuivaga C.J., Kermode and Tikaram JJ.A.) held in 1990 that the

respondents had accepted payment of the judgment debt on the appellant's behalf so that the judgment had been satisfied; the cause of action had merged in the judgment and the appellant, therefore, no longer had a right to appeal. Accordingly it dismissed the appeal.

In 1991 the appellant commenced an action against the respondents claiming that he had suffered loss as a result of their negligence in paying the cheque into their trust account. The action eventually came on for hearing in September 1994. Judgment was delivered in October 1995. Sadal J. found that the respondents had not been negligent in paying the cheque into their trust acocunt. He expressed doubt regarding the Court of Appeal's decision but was, of course, bound by it. The appellant appealed to this Court against it in November 1995. It has taken 21 months for the appeal to come on for hearing.

There were initially five grounds of appeal; five more were added later. In the circumstances of this appeal it is not necessary to set them out.

The appellant's case depended on the correctness of the 1990 decision of this Court that he lost his right of appeal because the respondents paid the cheque into their trust account. Generally, a Court other than the highest in the jurisdiction is bound by its own previous decisions (Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718). However, there are exceptions to that general rule. The first is where the Court has inadvertently given two conflicting decisions; it clearly cannot be bound by both. The second is where the previous decision is inconsistent with a decision of a court higher in the hierarchy of courts in the jurisdiction. The third is where the decision was given ***per incuriam,*** that is to say where

statutory provisions or a binding decision of a higher court have been overlooked.

The effect of acceptance of money paid under the terms of a court judgment on the right to appeal against that judgment was considered by the House of Lords in **Lissenden** v. **Bosch Ltd.** [1940] A.C. 412 Prior to that case the English Court of Appeal had held in a number of its decisions that the right of appeal was lost. The House of Lords held that it was not. At pages 426 - 430 Lord Atkin said:

> ***"In support of the contention that a party cannot appeal from a judgment after he has taken any benefit under it, the respondents relied on two practice cases decided in 1845 and 1849.....***
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> ***But I also share the difficulty which I think all your Lordships feel as to the application of what has been called the doctrine of "approbation and reprobation." The noble Lord on the Woolsack has to my mind clearly shown the limitations of that doctrine as defined in the law of Scotland from which it comes. In this country I do not think it expresses any formal legal concept: I regard it as a descriptive phrase equivalent to "blowing hot and cold." I find great difficulty in placing such phrases in any legal category: though they may be applied correctly in defining what is meant by election whether at common law or in equity. In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other. Election between the liability of principal and agent is perhaps the most usual instance in common law.***
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> ***The doctrine of election could have no place in the present case. The applicant is not faced with alternative rights: it is the same right that he claims but in larger degree. In Mills v. Duckworth [1988] 1 All E.R. 318,321, a plaintiff who had been awarded damages for negligence had taken the judgment sum out of a larger sum paid into Court and then had appealed against the quantum of damages and was met by a similar objection to his appeal. Lord Fairfield in overruling the objection pointedly said: "The plaintiff said I am not going to blow hot and cold. I am going to blow hotter'." Here the applicant is not faced with a choice between alternative rights: he has exercised an undisputed right to compensation: and claims to have a right to more. You have not lost your rights to a second helping because you have taken the first.***
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> ***It may be the case that the receipt of a remedy under a judgment may be made in such circumstances as to preclude the appeal. I do not think it necessary to discuss in what circumstances the statutory right of appeal may be lost. I only venture to say that when such cases have to be considered it may be found difficult to apply this doctrine of election to cases where the only right in existence is that determined by the***

judgment: and the only conflicting right is the statutory right to seek to set aside or amend that judgment: and that the true solution may be found in the words of Lord Blanesburgh in Moore v. Cunard Steamship Co. 28 B. W. C. C. 162: "It constantly happens that orders appealed against to this House and here set aside have been acted upon in the meantime. In such a case, by appropriate direction of this House any mischief so done is undone." In other words, it is possible that the only question is whether the party appealing has so conducted himself as to make restitution impossible or inequitable. However, I have formed and express no final opinion on the matter."

At page 419 Viscount Manghorm, after discussing the circumstances in which there is a requirement to elect between remedies, said:

"My Lords, I am quite unable to see how this doctrine can be made to apply to the rights of a litigant to appeal either from a judgment or from an award of a county court judge made under the Workmen's Compensation Act, 1925. For the present purpose there is no difference between the two. Both are the result of judicial proceedings. The Arbitration Act does not apply to arbitrations under the Workmen's Compensation Act. The powers of a county court judge in such a case are practically the same as in an ordinary action in the county court, though he remains an arbitrator and having made his award is functus officio. The position as to enforcing the award and as to appealing on points of law from it are in substance the same as those which obtain in the case of High Court judgments.

Finally, at page 436 Lord Wright said:

"*In the cases of equitable election, the conscience of the defendant is affected because, in the language of Lord Cairns L.C. quoted by Viscount Maugham from Codrington v. Codrington L.R. 7 H.L. 854,861, it would be inequitable that he should "accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them." It is in my judgment impossible to apply any such idea to the present case. The appellant was doing nothing inequitable or inconsistent. In taking the moneys which the respondents sent him in satisfaction of the sums actually awarded, he was exercising a legal right to be paid what was admittedly due to him ; in serving his notice of appeal he was exercising another and independent legal right, namely, to claim that the award should be reversed or varied in part, that is, because it did not give the further relief to which he claimed to be entitled. I cannot see how the maxim or formula in any judicially recognized meaning can apply to this case. There is no question here of alternative or mutually exclusive rights between which the appellant had to choose."*

The relevant law in Fiji is derived from the common law of England. By virtue of section 22 of the High Court Act (Cap. 13), read together with section 168 of the 1990 Constitution of Fiji, the Courts here should generally apply the common law of England unless it has been changed in that jurisdiction since 2 January 1875 or it has been changed in Fiji by statute law, including the Constitution. In the area of the common law with which we are concerned here there have been no such changes, only clarification by the Courts in England.

When this Court made its decision in 1990 Lissenden was not brought to its attention. That is not altogether surprising as the catchwords and headnote of that report do not disclose that it deals with the point of law with which the Court was concerned in that case, and is concerned in this appeal. In view of the clear and strong terms in which their Lordships dealt with the issue, we have no doubt that it is authoritative and that it should be followed in Fiji. We also have no doubt that, if it had been brought to the attention of this Court in 1990, this Court would have considered itself bound then to follow it. We have come to the conclusion, therefore, that this is one of the rare instances when we are not bound to follow this Court's previous decision.

As in England, a right of appeal from a decision of the High Court sitting in first instance is conferred by statute (Court of Appeal Act (Cap. 12) s. 12 (1) (a)). Notwithstanding the 1990 decision of this Court, we are bound to find that the payment of the cheque by the respondents into their trust account did not deprive the appellant of his right to appeal against Cullinan J.'s judgment. They were not negligent and did not breach any duty owed to him in contract or at common law by paying in the cheque. His action in the High Court, therefore, could not succeed.

Accordingly, the appeal must be dismissed. Before completing this judgment, however, we wish to pay tribute to Mr Mishra for the skill with which he presented the appeal and to Mr Shankar for his assiduous preparation of his case and the help he gave the Court by bringing to its attention the previously overlooked decision of the House of Lords in Lissenden.

The appeal is dismissed. The appellant is to pay the respondents' costs of the appeal.

I.R. Thompson

Mr Justice I.R. Thompson
Justice of Appeal

Savage

Mr Justice R. Savage
Justice of Appeal

Mr Justice J.D. Dillon
Justice of Appeal

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