

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

CIVIL APPEAL NO. ABU 0058 of 2015
(High Court No. HPP 269 of 2010)

BETWEEN : SURUJ KUAR

First Appellant

AND : ROSALINE SHARIKA DEO

Second Appellant

AND : RAM DEO

First Respondent

AND : THE REGISTRAR OF TITLES

Second Respondent

AND : ATTORNEY GENERAL OF FIJI

Third Respondent

Coram : Calanchini, P
Lecamwasam, JA
Jameel, JA

Counsel : Mr. R.K. Naidu for the 1st and 2nd Appellants
Mr. S. Chandra for the 1st Respondent
Ms. S. Taukei for 2nd & 3rd Respondents

Date of Hearing : 13 February 2018

Date of Judgment : 8 March 2018

JUDGMENT

Calanchini, P

- [1] I have read in draft form the judgment of Jameel JA and agree that the appeal should be dismissed with costs to the First Respondent in the sum of \$5000.00.

Lecamwasam, JA

- [2] I agree with the reasoning and the conclusions of Jameel JA.

Jameel, JA

Introduction

- [3] This is an appeal from the Judgment of the High Court of Suva dated 7 July 2015, allowing the claim of Ram Deo ('the original Plaintiff'). The learned trial Judge cancelled the transfer of title dated 8 July 2008, in the estate property ('the property'), from Suruj Kuar, the 1st Appellant, (original 1st Defendant) to Rosaline Sharika Deo the 2nd Appellant, (original 2nd Defendant); and the registration of same by the Registrar of Titles (original 3rd Defendant). The court also found that Suruj Kuar was in breach of section 23 of the Trustee Act, and in the result, removed Suruj Kuar as trustee of the deceased's estate, and appointed Ram Deo as executor and trustee of the estate. The learned Judge declined the Counterclaim of Suruj Kuar, made order that Suruj Kuar is entitled to life interest in the estate property, and awarded a sum of \$3500 as costs to be paid by Suruj Kuar to Ram Deo, the original Plaintiff.
- [4] The deceased Ujahir Singh ('the deceased'), and the 1st Appellant Suruj Kuar ('Suruj Kuar') were married and had no children. The only estate property of the deceased was the subject matter of this appeal, namely State Lease No. 949, on which stood a double-storey concrete house at 62, Ruve Street, Samabula, and Suva. The deceased was the lessee. The deceased executed two Wills. The first Will was dated 4 March 2004 ('the first Will'), and had two beneficiaries, namely, the Ram Deo and one Kushma Singh. The second Will was dated 8 June 2004, ('the second Will'), and Ram Deo was the only beneficiary. Suruj Kuar was given life interest in both Wills. The 1st Respondent is the nephew of Suruj Kuar and was adopted by the deceased and Suruj Kuar. The testator died on 26 May 2005. The said Will was proved, Probate registered on 7 September 2005, and

the Public Trustee was appointed as the sole executor. Subsequently, on an application of Suruj Kuar, she was appointed as the Administratrix with Will, on 7 April 2006. On 8 July 2008, Suruj Kuar transferred the estate property to Rosaline Sharika Deo.

The Relief claimed in the High Court - 1st Respondent's Statement of Claim

- [5] The 1st Respondent, (Ram Deo), filed Writ of Summons dated 2 September 2010, and Statement of Claim dated 31 August 2010 against the 1st Appellant (Suruj Kuar), and the 2nd Appellant (Rosaline Sharika Deo), the 2nd Respondent (The Registrar of Titles), and the 3rd Respondent (The Attorney General).

- [6] Ram Deo referred to the deceased as his father. He claimed *inter alia* that his father, the deceased, executed a Will dated 8 June 2004 wherein he named the Public Trustee of Fiji, as the sole Executor and Trustee of his Will, and devised and bequeathed all his real and personal properties to the trustee upon trust for Suruj Kuar during her lifetime, and upon her death, to Ram Deo. Upon the death of the deceased testator, Probate was issued on 7 December 2005, to the Public Trustee, who was appointed Executor and Trustee of the estate.

- [7] In 2006, Suruj Kuar applied to the High Court Suva in Probate Action 44035 to be appointed as Executor of the estate of the deceased, and on 7 April 2006, by consent, she replaced the Public Trustee as sole Executor and Trustee of the estate of the deceased, (RHC page 153).

- [8] Subsequently, on 6 July 2008, Suruj Kuar fraudulently, dishonestly, with intent to deprive him of his contingent interest in the estate property, and in breach of the Trustee Act Cap.65, transferred the estate property to the Rosaline Sharika Deo, 'by way of natural love and affection and in consideration of a sum of \$10.00'.

[9] In respect of the Registrar of Titles, Ram Deo claimed that he had acted in breach of the Land Transfer Act Cap.13, by registering the said transfer, when he knew, or ought to have known, that it would deprive Ram Deo of his beneficial and contingent rights in the estate property, and that the actions and or, omissions of Suruj Kuar, Rosaline Sharika Deo, and the Registrar of Titles, had caused loss and damage to him.

[10] The relief claimed was pleaded as follows: -

- (a) *An order that the transfer from the first Defendant to second Defendant registered on 1st July 2009 be expunged from the register;*
- (b) *An order that the first Defendant be removed as the trustee of the estate of Ujagir Singh;*
- (c) *An order that the Plaintiff to be appointed and registered as the sole Executor and Trustee on the only property of the estate being State Lease No. 949;*
- (d) *Declaration that in terms of the provisions of the will be (sic) the first Defendant remain as the holder of the life interest in the property,*
- (e) *Costs of this action on an indemnity basis;*
- (f) *Such other relief this Honourable Court deems just and fit in the circumstances of the case.*

Suruj Kuar's Statement of Defence and Counterclaim

[11] Suruj Kuar in her Statement of Defence and Counterclaim dated 14 October 2010, pleaded that she was married to the deceased, and they had no children from the marriage. Ram Deo is her nephew, being the son of her sister. Rosaline Sharika Deo is the daughter of Ram Deo. The deceased executed two Wills. The first Will was dated 4 March 2004. It was a conditional Will and had two beneficiaries, namely, Ram Deo and one Kushma Singh, (who is not a party to these proceedings). Ram Deo objected to the

inclusion of the said Kushma Singh as a beneficiary, and exerted undue influence on, and coerced the deceased to execute a second Will.

- [12] Under threat, coercion and undue influence by Ram Deo, the deceased executed a second Will dated 8 June 2004, by which the deceased bequeathed all his assets, both real and personal unto the 1st Appellant for her lifetime, and upon her death to Ram Deo as sole beneficiary.
- [13] Suruj Kuar admitted that she transferred the estate property to the 2nd Appellant, Rosaline Sharika Deo, and claimed she did so because Ram Deo intended to dispose of the estate property so as to permanently deprive her of her interest in the property, and that she wanted to save it from being disposed of, by Ram Deo.
- [14] In her Counterclaim, Suruj Kuar challenged both Wills. She claimed that Ram Deo was excluded from taking any benefit under the first Will for failing to comply with its condition that he take care of her upon the demise of the deceased.
- [15] In respect of the second Will dated 8 June 2004; she pleaded that Ram Deo is not entitled to any interest in the estate because the Will is invalid as it had been executed by the deceased under undue influence, force, threats, and coercion by Ram Deo.
- [16] Suruj Kuar thus called upon the court to pronounce upon the validity of both Wills, or in the alternative order, that Ram Deo and the said Kushma Singh be excluded from benefitting under the first Will for failing to fulfil the condition therein, namely, of taking care of Suruj Kuar. She also sought vacant possession of the estate property occupied by Ram Deo, and indemnity costs.

Reply of Ram Deo to the Statement of Defence and Counterclaim of Suruj Kuar

- [17] In reply to Suruj Kuar's Statement of Defence, Ram Deo replied that Suruj Kuar had been appointed Administratrix of the estate of the deceased by virtue of clause 4 of the

second Last Will, and continued to maintain that she was entitled to life interest in the said estate, whilst having legal obligations arising from the said Will, and any deviation from it required her as Trustee, to follow the procedure laid down in law. Ram Deo denied that he had, at any time attempted to deprive Suruj Kuar of her interest in the estate property, He however maintained that Suruj Kuar as Trustee and Administratrix with Will, had no authority to dispose of the estate except in accordance with the Will.

- [18] It is significant, that in paragraph 3 (d) of the Statement of Defence and Counterclaim, Suruj Kuar pleaded that she executed the impugned instrument of transfer after obtaining legal advice from her former Solicitors. This becomes relevant to the discussion that follows in respect of the grounds of appeal urged, and will be more fully adverted to later.

Statement of Defence of the 3rd and 4th Defendants

- [19] The Registrar of Titles was the original 3rd Defendant, and in his Statement of Defence admitted the registration of the impugned transfer on the ground that all the requirements under the Land Transfer Act, Cap 131 had been met, and denied having breached same. The impugned transfer was dated 8 July 2008 (RHC 141). The endorsement of the Registrar of Lands is dated 16 July 2008. It appears that there had been no compliance with section 13 (i) of the State Lands Act 1945, as the prior written consent of the Registrar of Lands had not been obtained. However, there is no consequence that flows from this because in any event, Suruj Kuar had no title to transfer the estate.

The Judgement of the High Court

- [20] The learned Judge of the High Court granted all the relief sought by Ram Deo. His judgement was based in the finding that Suruj Kuar did not have the power to dispose of the estate property without the consent of the sole beneficiary under the second Will dated 8 June 2004, and that the transfer of the lease was a contravention of section 23(4) of the Trustee Act, Cap.65. The learned trial Judge also found that although Suruj Kuar was entitled to vacant possession of the property as holder of the life interest in it, Ram

Deo was in occupation of one flat of the house built thereon. Accordingly, he made order that Suruj Kuar is entitled to vacant possession of the property comprised in Crown Lease No.949. In my view, for the reasons that will be explained below, the learned trial Judge was correct.

The Notice of Appeal

[21] In their Notice of Appeal, the Appellants seek to partially set aside the judgment of the High Court and seek the following Orders from this Court and have pleaded as follows:

- “(1) An Order that the case be remitted to the High Court for a retrial; or alternatively;*
- (2) An Order that the court shall pronounce the validity of the will dated 08 June 2004.*
- (3) An Order that the court shall pronounce against the validity of the will dated 04 March 2004. Alternatively, A Declaration (or an order) that the First Respondent and Kushma Singh are excluded from taking any benefit under the will dated 04 March 2004 for failing to take care of the first appellant.*
- (4) A grant to the first Appellant of Letters of Administration of the estate of the deceased Ujagir Singh”.*

Grounds of Appeal and Issues for Determination

The first ground of appeal

[22] The essence of the first ground of appeal is that the learned Judge misdirected himself by failing to assess the evidence adduced on behalf of the Appellants challenging both Wills, and to properly determine the Counterclaim of the Appellants.

[23] The determination of the first ground of Appeal required an analysis of the evidence in the court below. However, this court remains unable to consider this ground in the absence of the transcripts containing the evidence in the court below, which were therefore not included the Court of Appeal Record.

- [24] The Judgement of the High Court was delivered on 7 July 2015. The Notice of Appeal is dated 18 September 2015. Annexed to the written submissions of the Appellants before this Court, was some correspondence between the Solicitors for the Appellant, and the Court of Appeal Registry. The first letter available in chronological sequence is letter dated 15 November 2016, whereby the Registry informed the Solicitors for the Appellants that there was no recording done of the proceedings in the High Court, and that therefore transcripts could not be made available. The Solicitors were therefore told to proceed to file a draft court record for vetting by 29 November 2016, and a final Court Record on 13 December 2016. It is uncertain whether this was done.
- [25] In response, the Solicitors for the Appellants, by letter dated 5 December 2016, inquired from the Registry, whether the notes of evidence recorded by the trial Judge were available for typing, so that they could form part of the court record.
- [26] In response the Registry sent email dated 8 December 2016 informing the Solicitors that when audio recording is unavailable, the Registry relies on the Judge's handwritten notes, but because in this case, there were only very brief Judge's notes they could not be typed. It is not clear why they could not be typed, nor is it clear as to why there was no record of the proceedings.
- [27] This was followed by email dated 7 December 2016 from the Registry informing the Solicitors that in the absence of audio recording of the proceedings, the Judge's notes and transcripts could not be made available.
- [28] According to the Registry, the deadline applicable for the compilation of the Court Record was 13 December 2016. It appears that efforts to secure the transcripts then came to an end, and the Appellants filed the appeal, without the transcripts of the evidence that was led in the court below.

- [29] Though not imperative to state the obvious, it is, at this juncture, useful to be reminded of the inter-active role to be played between the Registry and the Appellant in the preparation of the record on the appeal.

Rule 18 (1) (a) of the Court of the Court of Appeal Rules, as amended by the 1999 Amendment Rules provides as follows-

“The primary responsibility for the preparation of the record on appeal rests with the appellant, subject to the directions given by the Registrar.

(b) the Registrar is responsible for the preparation of the transcript of the Judge’s notes,

(2) The record consists of the following documents-

(d) the official transcripts of the Judge’s notes or record, if any, of such of the evidence given in the court below as is relevant to any question at issue on the appeal;”

- [30] Although the primary responsibility for the preparation of the record rests with the Appellant, and the responsibility of preparing the transcripts of the Judge’s notes lies with the Registrar, it is clear that the required steps cannot be taken in the absence of the Judge’s notes.

- [31] Whilst this court sympathises with the Appellants, it has no choice except to hold that the first ground of appeal cannot be determined in the absence of the Judge’s notes or record if any, of such of the evidence given in the court below as is relevant to the first ground of appeal. For this reason, the first ground of appeal cannot be considered by this court.

The Second ground of appeal

- [32] The second ground of appeal consisted of two questions, which are thus considered separately, although there is an overlap.

(a) Must waiver be pleaded and raised in order for the Judge to base judgment on it?

- [33] The second, ground of appeal was that the learned trial Judge acted arbitrarily and misdirected himself in law by considering the issue of waiver and the principle of approbating and reprobating, since they were both not pleaded and raised in this case.
- [34] Black's Law Dictionary is a good starting point, and the 10th edition defines and describes 'waiver' as follows: -

'The voluntary relinquishment or abandonment – express or implied- of a legal right or advantage; FORFEITURE (2), <waiver of notice>

The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.

The term 'waiver' is one of those words of indefinite connotation in which our legal literature abounds; like a cloak, and covers a multitude of sins.' William R. Anson, Principles of the Law of Contract 419 (Arthur L. Corbin ed. 3d. Am ed. 1919).

"'Waiver is often inexactly defined as 'the voluntary relinquishment of a known right'. When the waiver is reinforced is often said to rest on 'estoppel' ...Since the more common definition of estoppels is limited to reliance on a misrepresentation of an existing fact, reliance on a waiver or promise as to the future is sometimes said to create a 'promissory estoppel'. The common definition of waiver may lead to the incorrect inference that the promisor must know his legal rights and must intend the legal effect of the promise. But ... it is sufficient if he has reason to know the essential facts.'" Retirement (Second) of Contracts 5 84 cmt. B (1979).

'Although it has often been said that a waiver is 'the intentional relinquishment of a known right, 'this is a misleading definition. What is involved is not the relinquishment of a right and the termination of the reciprocal duty but the excuse of the non-occurrences off or a delay in the occurrence of a condition of a duty.' E. Allan Farnsworth, Contracts.S. 8.5 at 561(3d ed. 1999)."

- [35] In their Written Submissions, the Appellants relied on the decision in **M/S Motilal Padampat Sugar Mills Co. (P) Ltd. V State of Uttar Pradesh & Ors.** Supreme Court of India, 12 December 1978 where it was held that: -

'Waiver is a question of fact and it must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for it is laid in the pleadings'

- [36] The Appellants also relied on the following dicta of Major J. in **Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.**, [1994] 2 S.C.R. 490 at p.500:

Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

- [37] I observe that in **Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.** (*supra*) relied upon by the Appellants, it is clear that what is necessary to establish evidence of waiver is an unequivocal and conscious intention to abandon any rights. In other words, what is required is an informed decision, made based on full knowledge of one's rights.
- [38] The court must take a sensible view of what constitutes full knowledge, viewed in the context of the admitted documents and evidence, taken in conjunction with the conduct of the parties and the reasonable inferences that may be drawn therefrom.
- [39] There is no legal requirement for the word 'waiver' to be specifically recorded in either the Minutes of the Pre-Trial Conference, or even for parties to specifically make submissions on it. If the evidence demonstrates that the conduct of the party in question amounts in act to waiver, the Judge may properly take it into consideration.
- [40] In this case, in paragraph 5 of the Statement of Claim, Ram Deo pleaded that Suruj Kuar made an application for, and succeeded in having herself replaced as Trustee of the estate of the deceased. I consider this as a sufficient plea of waiver and notice to Suruj Kuar that Ram Deo was founding his claim on her having waived the right to thereafter challenge

it. Thus, at this point of time, and by that act, Suruj Kuar had waived her right, if any, to challenge the second Will.

- [41] I am therefore not attracted by, and find no merit in the argument of the Appellants, that waiver must be both, pleaded and taken up at the trial. Thus, despite the absence of a specific plea of waiver being reflected in the pleadings, if the contents of the pleadings, and, or the evidence taken as a whole, disclose the factual foundation of waiver, it can fairly, be the foundation of a determination, and need not necessarily or invariably be required to be separately put to the party. The pleadings filed on behalf of Ram Deo satisfied the tests in both M/S Motilal Padampat Sugar Mills Co. (P) Ltd. V State of Uttar Pradesh & Ors. (*supra*), and Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co. (*supra*).
- [42] In this case, Suruj Kuar maintained in her Statement of Defence and Counterclaim that as far back as 2004, when the second Will was executed (RHC page 149), it was done under coercion, threats and undue influence exerted by Ram Deo on the deceased. If this were indeed so, there appears to be no basis as to why in 2007, shortly after she was appointed Trustee, she executed her own Will, wherein she named the Ram Deo and said Kushma Singh referred to above, as Executors, Trustees and beneficiaries of her estate.
- [43] It is now relevant to consider the contents of the application Suruj Kuar filed to have herself substituted in place of the Public Trustee. By Originating Summons, she moved the High Court and, in her affidavit, dated 21 March 2004, and affirmed as follows-

- ‘4. That the deceased UJHIR SINGH father’s name Basawa Singh died on 26 May 2005 and Probate No. 44035 was granted to Public Trustee of Fiji. A copy of the said Probate is annexed hereto and marked with the letter “B”.
5. That I have a beneficial interest in the said estate and am a beneficiary in the said estate and should be appointed the Executor and Trustee in the Estate of UJAHIR SINGH father’s name Basawa Singh.’ [Emphasis added]

- [44] Suruj Kuar's application was taken up by the learned Judge of the High Court in Chambers on 7 April 2006, and he made order (of consent), on the affidavit dated 21 March 2006, substituting her as the Administratrix of the Estate of the deceased, in place of the Public Trustee. This order was sealed on 13 April 2006.
- [45] Suruj Kuar subsequently filed an affidavit dated 20 June 2006 (RHC page 147-148), in which she pleaded *inter alia* as follows: -

2. *That on the 7th day of September 2005, Probate No. 44035 in the Estate which by law devolves in and vests in the personal representatives of the deceased was granted by the High Court of Fiji to the PUBLIC TRUSTEE OF FIJI as sole Executor and Trustee of the Estate. Annexed hereto and marked with the letter 'B' is copy of the said Probate.*
4. *That I am the only surviving beneficiary of the late UJAHIR SINGH father's name Basawa Singh. (emphasis added).*
5. *That an application was instituted in the High Court being the Probate Action No. 44035 to remove the Public Trustee of Fiji as the Trustee and Executor of the Estate of late UJAHIR SINGH father's name Baswa Singh.*
6. *That an Order was made by His Lordship Justice Winter on 7th April 2006 to remove the Public Trustee of Fiji as the Trustee and Executor of the late UJAHIR SINGH father's name Basawa Singh and I was appointed as the Trustee and Executor in the Estate of UJAGIR SINGH father's name Basawa Singh and I am entitled to the grant of the Probate of the said Estate. Annexed hereto marked with the letter 'D' is a copy of the said Order.*
7. *That I hereby request for cancellation of the Probate No. 44035 forthwith a new Probate be granted in my favour as the Trustee and Executor in the Estate of UJHIR SINGH father's name Basawa Singh.*
8. *That I will administer according to law all the unadministered part of the Estate which by law devolves and vests in the personal representatives of the said UJAGIR SINGH father's name Basawa Singh.*

10. *That I will exhibit a true and perfect Inventory of the said Estate and render a just and true account when required by law to so do and further deliver up to the High Court of Fiji grant of Probate when required'. (Emphasis added)*

[46] It is to be noted that in paragraph 4 of the Affidavit dated 20 June 2006, she falsely claimed to be the only surviving beneficiary of the estate. Having invoked the jurisdiction of the High Court to get herself appointed as Executor and Trustee, in place of the Public Trustee under the second Will of the deceased, she cannot possibly now claim that she was unaware that she was entitled challenge the said Will, particularly, if her claim of invalidity based on undue influence on the part of Ram Deo were indeed genuine. The fact that she chose not to challenge either Will, despite her claim that both Wills were executed under undue influence and coercion exerted on the deceased by Ram Deo, renders her position improbable and unworthy of credit. The submissions made in this regard on her behalf therefore have no basis in law that merits further consideration. I therefore reject her position.

[47] Another matter worthy of note is the Will of Suruj Kuar herself, executed in 2007, (RHC 193) in which she specifies as follows: -

' I hereby appoint my adopted son Ram Deo (fathers name Dukh Ranjan) of 62 Ruve Street, Samabula, Suva in the Republic of Fiji Islands, Sales Representative and my adopted daughter Kushma singh (father's name Jalim Singh) of 1615 Military Avenue, Seaside, California, USA, Domestic Duties to be the Executors and Trustees of this my Will', [Emphasis added].

[48] It was only subsequent to this that Suruj Kuar executed the impugned transfer to Rosaline Sharika Deo in 2008.

[49] In addition to this, as set out previously in this judgment, Suruj Kuar specifically pleaded in paragraph 3(d) of her Statement of Claim, that she executed the instrument of transfer in favour of Rosaline Sharika Deo, after obtaining legal advice from her former Solicitors.

[50] Accordingly, the conduct of Suruj Kuar clearly shows that she applied to be appointed as Executor and Trustee on the basis of the Will dated 8 June 2004, and made a conscious and informed decision based on personal knowledge and legal advice. Therefore she clearly waived her right to challenge the said Will with full knowledge of her rights, and benefitted by becoming a trustee.

(b) Could the court have considered the principle of approbating and reprobating if not pleaded and raised in the proceedings?

[51] I reiterate the reasoning set out above in respect of Ground 2 (a) of the Appeal, and for the reasons that will be set out below, hold that the learned trial Judge was entitled to consider the principle of approbating and reprobating, and that there was no breach of the rules of natural justice.

[52] Despite her belated plea that the second Will is invalid on the basis of undue influence, by electing to have herself substituted as Executor and Trustee of the estate, Suruj Kuar, waived her rights to challenge the said Will. The second Will was executed in 2004, and it was not until she filed her Statement of Defence on 14 October 2010, did she opt to challenge the said Will.

[53] For the sake of completion, and in the hope of putting the matter to rest as far as this appeal is concerned, it is fitting that I make some reference to this Common Law doctrine, of 'approbate and reprobate', which first took root under Scottish Law, and is enshrined in the Latin maxim '*Qui approbat non reprobat*'. The word; *approbate*;' means 'to approve', *reprobate* means 'to express or feel disapproval of'.

[54] Black's law Dictionary 10th edition, defines it as follows:

'[fr. Latin approbare et reprobare to 'approve and reprove] (18c)
Scots Law.

To (impermissibly) approve in one proceeding and then reject in a later proceeding (a contractual term, the interpretation of a legal

instrument, etc.). The principle is similar to that of equitable election and to estoppel.'

- [55] A series of decisions have considered this doctrine, and I will refer to some of them here. One of the earliest decisions in which the doctrine of election was considered was the decision of the House of Lords in **Benjamin Scarf v Alfred George Jardine** (1881-82) 7 Appeal Cases 345, where Lord Blackburn said:

' ... a party in his own mind has thought that he would choose one of the two remedies even though he has written it down on a memorandum or has indicated in some other way, that alone will not bind him; but as soon as he has not only determined to follow one of his remedies, but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further.'

- [56] In **Kaprow & Co. Ltd. V Maclelland & Co. Ltd.** [1977] 1 K.B. 618 it was held that a court may in its discretion relieve a party from the effects of an election made by mistake. For the reasons set out above, it is clear that no such facts exist in this case.

- [57] The principle was upheld in **Express News Papers plc v New (UK) Ltd & Others** [1990] 3 All ER 376 at pgs.383, 384, in which Lord Nicholas Browne – Wilkinson VC said:-

'There is a principle of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them, and having elected to adopt one stance, cannot be permitted thereafter to go back and adopt an inconsistent stance.'

- [58] In paragraph 7.12 (3) of the Appellants' Written Submissions, learned Counsel contends that 'although Suruj Kuar was appointed trustee under the second will, she was removed and that therefore she has not derived any benefit, as a benefit must be real and definite'. This argument is without merit, as it is based on the premise that since Suruj Kuar's conduct was set aside by the High Court, what she did before was not illegal. On the

contrary, it was set aside by the High Court precisely because it was contrary to the Trustee Act, Cap. 65. This argument on behalf of the Appellants therefore fails.

- [59] The simple answer to the question as to what Suruj Kuar gained is the benefit of freedom, albeit unfairly, of being able to deal with the property, as if it was not encumbered by the beneficial interest of Ram Deo. It was this benefit of freedom that she used to execute a transfer of the estate to the Rosaline Sharika Deo. I am therefore unable to accept this argument of the Appellants, and this submission is therefore rejected.

The Third Ground of Appeal

- [60] The third ground of appeal is that the learned trial Judge acted arbitrarily and erred in law by considering the issue of waiver and the principle of approbating and reprobating, without first affording Counsel the opportunity to address the court on that issue. In other words, the Appellants' raised the issue of a breach of Natural Justice. It must be noted that there is an overlap between the third and fourth grounds of appeal. The Appellants' argument is two-fold- that it was improper for the trial Judge to have considered the issue of waiver and the principle of approbation and reprobation, and that in any event, the application of the principles to the facts of the case, was wrong.
- [61] Counsel's argument went on to say that the trial Judge was in breach of the rules of Natural Justice in dismissing the Appellant's Counterclaim on the basis of waiver, when the Appellants had not been 'given any notice', and that the Appellant's Counsel was 'not given an opportunity to consider the matter and meet that case'.
- [62] In this regard, Counsel for the Appellants relied on a passage in **Native Land Trust Board & Anr v Prakash** (Civil Appeal No. ABU 0021 of 2003S (14 November 2003) which said:

'That order was made without there being any claim for relief in the proceedings raising s.40 of the Constitution, without any

reference in the proceedings before his Lordship to that provision and without any submissions thereon being sought from counsel for the parties. When proceedings are conducted in this way, in direct breach of the rules of natural justice, they invariably go astray.

- [63] At the outset, I must say that for the reasons that are set out below, I do not find this decision useful in the context of this appeal. That dictum must be taken in the context of the case before it. Merely because there were no specific submissions sought on a point, it does not preclude the Judge from considering the legal implications of same, if the evidence before him establishes the point, particularly when Counsel has covered it in the course of submissions, as was the case here.
- [64] In order to determine whether the learned trial Judge in this case acted in breach of the rules of Natural Justice by not giving notice to the Appellant that the legal consequence of waiver, could feature in the final determination of the matter before him, it is necessary to consider at the written submissions of the Appellants, in the court below.
- [65] The contents of paragraph 8.01 of the written submissions filed in the lower court on behalf of the Appellants (RHC page 131), states as follows: -

‘8.01 Probate of the second will was granted to the Public Trustee on 07 September 2005. In 2006 Mrs. Singh’s former solicitors Sherani & Co applied for an order to substitute Mrs Singh as the Administratrix of the Estate of Ujahir Singh in place of Public Trustee of Fiji which order was made on 07 April 2006 and Probate was granted to Mrs Singh on 03 July 2006. Mrs Singh did not receive any advice from Sherani & Co. to challenge the 2 wills. Mrs Singh filed a counterclaim challenging the validity of the wills only when she received advise in this regard from her new solicitors Naidu Law. Hence, she filed a counterclaim in these proceedings to challenge the validity of the 2 wills. We submit Mrs Singh is entitled to challenge the validity of the wills at this late stage even though she applied to be substituted and was substituted as the Administratrix of the estate of Ujahir Singh under the second will. All that probate does is to give title and powers to the executor or

administrator of an estate, it does not affect testamentary dispositions. In this regard the authors of Tristram & Coote's, Probate Practice, 27th Edn at page 4 say:
'A grant of probate is conclusive evidence of the executor's title to all property in the estate and of the right of the executor or administrator to administer the estate'.
(Emphasis added).

[66] This submission warrants close examination, and reveals the following:

- (a) Suruj Kuar obtained legal advice from her Solicitors before applying to be substituted in place of the Public Trustee.
- (b) Had Suruj Kuar instructed her previous Solicitors Sherani & Co, that she wished to challenge both Wills, or even one Will on the basis on which she now seeks to, namely undue influence, and had there in fact been sufficient grounds to do so, it is very unlikely, and I would say, even impossible, to assume that her Solicitors prevented her from challenging the Wills, on that basis.
- (c) There was no evidence that Suruj Kuar told her Solicitors that she knew, or suspected the Wills were not executed voluntarily, and that despite that, she was advised not to challenge them.
- (d) Sherani & Co. having made the application in 2006 on behalf of Suruj Kuar to be substituted in place of the Public Trustee based on the second Will, are most unlikely to have advised her that she could now challenge the very same Will.
- (e) This may be an indication as to why Suruj Kuar did not obtain the services of the previous Solicitors in a matter that flowed from the previous application for substitution.

- (f) That waiver, was a matter that featured in the pleadings and trial and can be regarded as having been properly considered by the Appellants' Counsel is evident from the submission made on behalf of the Appellants that:

'We submit Mrs Singh is entitled to challenge at this late stage even though she applied to be substituted and was substituted as the Administratrix of the estate of Ujahir Singh under the second will'(Emphasis added).

[67] It is this submission that establishes that the Appellants were defending themselves in regard to waiver. In other words, this submission that despite having applied to be substituted, Suruj Kuar was yet entitled to challenge the Wills, was definitely a reference to the trial Judge considering the issue of waiver, though it was not elaborated upon by the Appellants in the court below. That does not preclude the trial Judge from holding as he did.

[68] Having considered the contents of paragraph 8.01 of the Written Submissions in the court below, I am of the view that Suruj Kuar has no basis to now complain that the issue of waiver was not 'put' to the Appellants, or that they had notice of same. I therefore reject that submission.

[69] In order to determine whether, as claimed by Counsel, the Appellants were taken by surprise, I must consider the relevant portion of the Judgment. It is contained in paragraph 9 h. and states as follows:

'In my view, the 1st defendant is not entitled to challenge the will of 8 June 2004, since she accepted its legality, by applying to be executor and trustee under that will and acting thereunder. She waived her right to challenge the will of 8th June 2004, by her conduct'.

[70] For the reasons set out above, it is clear that there was no element of surprise to either the Appellants or their Counsel in the manner in which the learned trial Judge dealt with the issues before him. I therefore dismiss the third ground of appeal.

The Fourth Ground of Appeal

[71] The fourth ground of appeal is that the learned trial Judge erred in law in wrongly applying the principle of approbating and reprobating.

[72] Counsel for the Appellants relied on the principles relating to election and waiver set out in **LSI LOGIC Corporation of Canada Inc. v Logani** 204 DLR (4th Ed) 443 at p.469., and reproduced only paragraph [73] of the judgement. I have however thought it fit to consider a larger extract from the same judgment which is: -

'Election

[70] *LSI Canada also relies on the doctrines of election, estoppel and waiver to prevent the Shareholders from challenging the lawful corporate authority of the going private transaction and the court's jurisdiction to hear the fair value proceedings.*

[71] *These doctrines overlap. It would seem that LSI Canada's argument is best encapsulated under the general heading of election. Spencer Bower and Turner, in The Law Relating to Estoppel by Representation, 3rd ed. (London: Butterworths, 1977) describe election in the conduct of litigation at 333:*

If by words, or (as is almost invariably the case) by conduct or inaction, he represents to the other party litigant his intention to adopt one of the two alternative and inconsistent proceedings or positions, with the result that the latter is thereby encouraged to adopt or persevere in a line of conduct which he would otherwise have abandoned or modified [...] the first party is estopped, as against his antagonist, from resorting afterwards to the course or attitude which, of his free choice, he has waived or discarded.

[72] *Election is not a new principle. In the 1873 case of **Smith v. Baker** (1873), L.R. 8. C.P. 350 (C.A.) at 357, the court explained:*

A man cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for securing some further advantage.

*Election applies to preclude a subsequent challenge even when there is an arguable case that the court originally lacked jurisdiction to make its decision: **Carlton Realty v. Manitoba** (1987), 50 Man. R. (2d) 191 (Q.B.). Election requires "that the promise has knowledge of the facts which give rise to the right to elect": Anson's *Law of Contract*, 27th Ed. (Oxford: Oxford UP, 1998) at 500.*

[73] *For election to apply three requirements must therefore be met: (i) there must be two alternative and mutually exclusive courses of action; (ii) the party that elected must have known of the facts giving rise to a right to elect between them; and (iii) the other party must have relied on the election to its detriment, in that it adopted or persevered in a line of conduct that it otherwise would have abandoned or modified. (Emphasis added).*

[73] In considering the applicability of the three- point test contained in **Logani** (*supra*) quoted above, to the facts of this appeal, the following is clear. In regard to the first limb, Suruj Kuar had two inconsistent courses of action, available to her, that is, she could have either challenged the Will or accepted it. By making a deliberate choice to be appointed as Executor, she chose one option, namely to accept the Will, without challenge.

[74] In regard to the second limb, if what Suruj Kuar says is true, (that Ram Deo unduly influenced the deceased to execute the second Will), then the grounds on which she could challenge the second Will were known to her, because the matters relating to undue influence in respect of the second Will, were pleaded by her in her Counterclaim, to have occurred at the time of the execution of the Will. It is not as if the information relating to undue influence, came to light only after she applied for substitution, for her to take refuge under this second limb.

- [75] The third limb of the test in **Logani** (*supra*) is that the other party must have relied on the election to his detriment, and continued on that particular course. Applying that limb to the facts of this appeal, had Ram Deo known that the intention of Suruj Kuar in having herself substituted was to enable her to conduct herself as she did, that is, by denying his beneficial interest under the Will, he could have objected to the substitution. However, this was not the case. Therefore, under the third limb of **Logani** (*supra*) too, Suruj Kuar is precluded from challenging the Will, in the belated manner in which she did.
- [76] In my view, the Appellants' argument that the learned Judge erred in law when he considered the issue of approbating and reprobating without giving Suruj Kuar the opportunity to lead evidence to establish that she elected to apply to become the Executor without knowledge of all material facts and the consequences of electing one course of action over another, is without basis and is contrary to the material that was available to the learned Judge of the High Court.
- [77] At paragraph 7.11. (2) of the Appellant's written submissions in this Court, Counsel states that: '*the Appellant needed to know that she had a right to challenge the two wills' Indeed she did not know this until she sought legal advice from Naidu Law and challenged the validity of the 2 wills*'. (Emphasis added).
- [78] At this stage it is relevant to examine the Statement of Defence and Counterclaim filed by Suruj Kuar. Ram Deo claimed in paragraph 5 of his Statement of Claim that Suruj Kuar upon her application replaced the Public Trustee, and thus assumed the role of a Trustee of the estate. If these submissions of the Appellants before this Court are to be taken to their logical conclusion, then this would have been the opportune and relevant point at which Suruj Kuar could have claimed, what Counsel now refers to, namely, lack of knowledge that she could have challenged both Wills. Instead, in reply, Suruj Kuar admitted the totality of paragraph 5 of the Statement of Claim, and did not take up the position that she did not have any knowledge about having the right to challenge the two Wills. Nor did she take up the position that she received advice from her former Solicitors, *not* to challenge the Will. The ground of lack of knowledge has been put

forward only as a matter of submission of Counsel during the appeal, and is not borne out by the pleadings. This must therefore be rejected.

- [79] On the contrary, what Suruj Kuar does say is that she transferred the estate property because Ram Deo intended to deprive her permanently of her interest in the property. She also did not plead that she applied for substitution because she was advised that she was precluded from challenging the Wills. This cuts across the position now sought to be taken.
- [80] In these circumstances, Ram Deo cannot have been expected to plead up-front that Suruj Kuar has waived her right to challenge the said Will, because he cannot have expected her to claim undue influence against him, when the very act he challenged was something that flowed from her having been appointed under the very same Will.
- [81] In relying on waiver, the learned trial Judge correctly relied on the dicta of Lord Radcliffe in decision in **Kok Hoong v Leong Cheong Kweng Mines Ltd** ([1964] A.C. 993, PC) [1964] AC 993 at pg 1018, where his Lordship said:

‘ ... a litigant may ... have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself in such circumstances that the court has no option but to hold him to his conduct and refuse to ...

Although it has often been said that a waiver is ‘the intentional relinquishment of a known right,’ this is a misleading definition. What is involved is not the relinquishment of a right and the termination of the reciprocal duty but the excuse of the non-occurrence of or a delay in the occurrence of a condition of duty”. E. Allan Farnsworth, Contracts S 8.5, at 5 61 (3d ed. 1999).

- [82] On a consideration of the above, the pleadings filed and the Minutes of the Pre-Trial Conference, I see no other course left for me, in determining this issue, but to hold that the learned trial Judge was correct in his application of the principle of approbation and


reprobation, to the facts of the case before him. The fourth ground of appeal must also therefore fail.

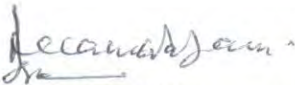
- [83] The conduct of Suruj Kuar taken in its totality, precludes her from claiming that she is entitled to challenge the second Will. In the result, the learned Judge of the High Court was entitled to reject the counterclaim of Suruj Kuar for the reasons that he did. I therefore see no basis to set aside the judgment of the High Court. The Orders sought by the Appellants in their notice of Appeal have no legal basis, and are refused. I therefore dismiss the appeal.


Orders of the Court:

1. *The appeal is dismissed, and the judgment of the High Court dated 7th July 2015, is affirmed.*
2. *The 1st and 2nd Appellants are ordered to pay a sum of \$2500.00 each, to the 1st Respondent being the costs of the appeal.*




.....
Hon. Mr. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL


.....
Hon. Mr. Justice Susantha Lecamwasam
JUSTICE OF APPEAL


.....
Hon. Madam Justice Farzana Jameel
JUSTICE OF APPEAL