

210

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

CIVIL APPEAL NO. ABU0071 OF 2006S
(High Court Civil Action No. HBC191 of 1998L)

BETWEEN:

SUN INSURANCE COMPANY LIMITED

Appellant

AND:

1. **BANK OF BARODA**
2. **NATIONAL MBF FINANCE (FIJI) LIMITED**

Respondents

Coram: Powell, JA
Lloyd, JA

Hearing: Thursday, 2nd April 2009, Suva

Counsel: S. Maharaj for the Appellant
V. Mishra for the Respondents

Date of Judgment: Friday, 3rd April, 2009, Suva

JUDGMENT OF THE COURT

History of the matter

- [1] In August of 2005 judgment in civil proceedings in the sum of \$774,423.66 was awarded in favour of the plaintiff, the Bank of Baroda ('the Bank'), against the defendant, National MBF Finance (Fiji) Limited ('National'). Thereafter in December 2005, and in an effort to recover its award, the Bank applied for an ex parte order (under Order 50 of the High Court Rules) that a large quantity of shares held by National in a company called Sun Insurance Company Limited ('Sun Insurance') be charged and National be asked to show cause as to why it's

interests in the Sun Insurance shares should not be applied to satisfy the judgment debt. Sun Insurance was formerly known as NMBF Insurance (Fiji) Company Limited ('NMBF'). NMBF was named as second defendant in the Order 50 proceedings but Sun Insurance was not named as a party to the proceedings.

- [2] The Bank's ex parte application came before Finnigan J in the High Court. On 3 March 2006 Finnigan J made the charging order nisi sought by the Bank and, pursuant to Order 50 rule 2, made a 'show cause' order concerning the Sun Insurance shares the subject of the charging order. Under rule 4(2), unless the High Court otherwise directs (which in this case it did not), a notice of the making of the order to show cause, together with a copy of the charging order, must be served as soon as practicable after the making of the order on the company concerned (Sun Insurance).
- [3] Under rule 6 of Order 50, on further consideration of the matter, the High Court shall, unless it appears that there is sufficient cause to the contrary, make the charging order absolute. After further considering the matter, on 8 June 2006 Finnigan J ordered the earlier charging order be made absolute.
- [4] It would appear from the limited material before us that a week or so after the order was made absolute Sun Insurance for the first time became aware of its existence. From the papers filed by the parties in this Court it became apparent that there was no actual proof that Sun Insurance had been properly served with a copy of the earlier charging order nisi as required by rule 4. As allowed by rule 7 of Order 50, on 25 July 2006, NMBF then made application by way of summons to the High Court for, inter alia, an order discharging the order absolute on the basis that the earlier order nisi had not been properly served on Sun Insurance. It would seem that Sun Insurance, arguably an 'interested party', could also have made an application under rule 7 for the discharge of the order absolute, but it did not do so. Instead, on 13 July 2006, Sun Insurance appealed the making of the order absolute to this Court.

[5] Pending the appeal coming on for hearing in this Court, on 9 March 2007, NMBF's summons seeking a discharge of the order absolute came on for hearing before Phillips J in the High Court. Given Sun Insurance's appeal to this Court was pending, Phillips J understandably refused to determine the merits of the discharge application. In a ruling dated 16 November 2007 Phillips J stated '*it would be inappropriate to vary or discharge the [charging] orders until the Fiji Court of Appeal has determined the appeal respecting the grant of those orders*'. Phillips J did however order that enforcement of the order absolute be stayed until the determination of this appeal.

Locus standi and the merits of this appeal

[6] The appellant in this Court, Sun Insurance, was not actually at any stage a party to the proceedings in the High Court leading to the obtaining of the charging orders nisi or absolute, or for that matter to the proceedings in the High Court seeking the discharge of those orders. Clearly it may well have been an interested party to those proceedings as shares issued by it were the subject of the proceedings. But put quite simply, Sun Insurance has no locus standi (standing) to bring any appeal to this Court from the proceedings concerning the charging orders in the High Court. The mere fact that Sun Insurance shares were the subject of the charging orders does not give Sun Insurance standing to appeal to this Court the grant of those orders. It follows that we have no alternative but to dismiss this appeal.

The proceedings before Phillips J

[7] In dismissing this appeal we should say something about the proceedings before Phillips J. It follows from everything we have said above that the merits of NMBF's summons seeking, inter alia, the discharge of the charging orders should be dealt with by the High Court under Order 50 rule 7 of the High Court Rules. It would seem sensible that the matter go back before Phillips J as she is familiar with the matter. But we make no formal order in this regard.

[8] The merits of NMBF's summons application seeking orders discharging the charging orders nisi and absolute is clearly a matter for a judge of the High Court to determine. We have not heard full argument concerning the merits, nor closely examined the volume of documentation put before us by the parties relevant to the matter. But from the documents we have perused, it would appear at first sight that Sun Insurance has not been properly served with notice of the show cause order and charging order nisi as required under Order 50 rule 4, giving rise to an arguable case that the order absolute should be discharged under rule 7.

Costs

[9] It seems to us that Sun Insurance could well have initiated proceedings in the High Court seeking the discharge of the charging order absolute pursuant to Order 50 rule 7. It should not have initiated this appeal where it has no standing. We do not feel the respondent is in any way responsible for the appellant's forensic decision to initiate these proceedings. We see no reason why costs should not follow the event.

Orders

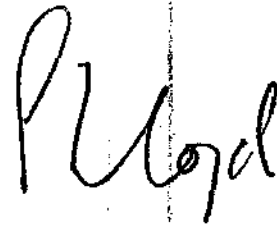
[10] For the above reasons we make the following orders:

1. The appeal is dismissed.
2. The appellant is to pay the respondent's costs of the appeal in the sum of \$2,500.00.
3. The enforcement of the charging order absolute made on 12 May 2006 and sealed on 8 June 2006 is stayed until High Court civil proceedings number HBC 191 of 1998L are determined.

4. The 999,994 Sun Insurance Company Limited shares the subject of the charging orders nisi and absolute shall not be sold, transferred or otherwise assigned in any manner whatsoever until High Court civil proceedings number HBC 191 of 1998L are determined.



Powell, JA



Lloyd, JA

Solicitors:

**Suresh Maharaj and Associates, Lautoka for the Appellant
Mishra Prakash and Associates, Lautoka for the Respondents**