IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT
LAUTOKA

Civil Action No. 191 of 1998L

BETWEEN : **BANK OF BARODA**

Plaintiff

AND : **NATIONAL MBF FINANCE (FIJI) LIMITED**

Defendant

AND : **SUN INSURANCE COMPANY LIMITED**

Applicant/Chargee

AND : **RESERVE BANK OF FIJI**

Nominal Defendant

Counsel Appearing : Mr. Vipul Mishra for the Plaintiff
N/A for Defendant
Mr. James Sloan for the Applicant/Chargee
Mr. Chandar for the Reserve Bank of Fiji

INTRODUCTION

1. Under Order 50 Rule 2 of the High Court Rules 1988, a charging order may only be imposed on **"any interest to which the judgement debtor is beneficially entitled"**.

> **Order imposing charge on securities** (O.50, r.2)
> 2.-(1) The Court may for the purpose of enforcing a judgment or order for the payment of an ascertained sum of money to a person, by order impose on any interest to which the judgment debtor is **beneficially entitled** in such of the securities to which this rule applies as may be specified in the order, a charge for securing payment of the amount due under the judgment or interest and interest thereon.

2. The question has arisen as to whether or not the related interest in this case was beneficially owned by the judgement debtor at the time the charging order concerned was imposed. There is every indication in the evidence before me that the interest is now no longer beneficially owned by the judgement debtor. The evidence which raise this possibility is set out herein below.

3. Suffice it to say for now that, if beneficial ownership had passed at the time the Court was considering whether or not to make charging orders *nisi*

absolute, then the Court should not have made the charging orders absolute because a charging order cannot validly charge the beneficial interest of any person who is not the judgement debtor. If, however, beneficial interest had passed after the charging orders were made, then the case may very well turn into a priorities dispute, the overarching issue being, whether the equitable interest created by the charging order in favour of Baroda should prevail over the interest of the "new" shareholders.

BACKGROUND

4. A more detailed background to this case is set out in my earlier ruling (**Bank of Baroda v National (MBF) Finance Fiji Ltd** [2016] FJHC 221; HBC191.1998 (8 April 2016).

5. At some point in time, National (NMB) Finance Limited (**"NMBFL"**) was the majority shareholder in a company called Sun Insurance Company Limited (**"SICL"**)[1]. In fact, NMBFL used to hold 999,994 (**"the shares"**) out of the total 1,000,000 issued shares in SICL. The remaining six issued shares were then held by six nominal individuals. In August 2005, NMBFL had a money judgement entered against it in this Court by Mr. Justice Connors in the sum of $774,423.66 in favour of the Bank of Baroda (**"Baroda"**). To recover the said judgement debt, Baroda would later obtain a charging order absolute from this Court in 2006 against the 999,994 shares that NMBFL held in SICL. However, that charging order was made without Baroda having served SICL a copy of the application.

1. When SICL was known by its former name which I have not used in this ruling to avoid confusion.

6. SICL then applied under Order 50 Rule 7 of the High Court Rules 1988 to set aside the charging orders on the ground that Baroda had not complied with Order 50 Rule 4(2)(b)[2].

7. It was argued that, because of Baroda's failure, the charging order absolute was made without an opportunity to SICL to be heard on two crucial affidavits it had filed (one sworn by Bruce Sutton on 03 October 2006 and the other by Dewan Chand Maharaj on 21 July 2006). By these affidavits, Sutton and Maharaj had sworn:

   (a) that the 999,994 shares in question were sold by NMBFL to a company called Veritatem Nominees Fiji Limited (**"VNFL"**) on 20 October 1999.

   (b) that NMBFL had been under receivership since 30 November 2001.

8. The above was supported by relevant documentary evidence annexed to Sutton's and Maharaj's affidavit.

9. It is argued that, had these alleged facts been placed before Finnigan J, there is every likelihood that he would have postponed the granting of a charging order absolute pending proof of those alleged facts.

10. In my ruling dated 08 April 2016, I was of the view that the prejudice to SICL resulting from Baroda's failure to comply with Order 50 Rule 4(2)(b) was remediable by simply affording SICL an opportunity to argue whether or not the charging order absolute in this case should be varied or discharged on account of the facts alleged in Sutton's and Maharaj's affidavit.

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2. According to Order 50 Rule 4(2)(b) of the High Court Rules 1988 (which I reproduce below), SICL was entitled to be served with a Notice of the order *nisi*:

Service of notice of order to show cause (O.50, r.4)

4.-(2) Notice of the making of the order to show cause, with a copy of that order, must as soon as practicable after the making of the order be served-

(a) .....

(b) where the order relates to other stock, on the company concerned.

11. Order 50 Rule 7 3 provides as follows:

> **Order 50 Rule 7 provides that:**
> **Discharge, etc. of charging order (O.50, r.7)**
> 7. The Court, on the application of the judgment debtor or any other person interested in the securities to which an order under rule 2 relates, may at any time, whether before or after the order is made absolute, discharge or vary the order on such terms (if any) as to costs as it thinks just.

12. I should state here that there is currently in place an Order of the Fiji Court of Appeal to the effect that the enforcement of the charging order is to remain stayed until the above issues are resolved.

13. The hearing (by which SICL was afforded the opportunity to argue under Order 50 Rule 7) was held on 26 August 2016 before me. Submissions were filed on 24 November 2016 (for SICL) and on 02 December 2016 (for Baroda). The basic fact that emerges from Sutton's and Maharaj's affidavit is that the judgement debtor (NMBFL) was no longer beneficially entitled to the shares at the time the charging orders were granted. As I have said, this alleged fact is supported by documentary evidence annexed. Notably, Mr. Mishra has never questioned the truth of these documents.

THE FACTS ALLEGED IN THE SUTTON & MAHARAJ AFFIDAVITS

14. The allegation that NMBFL was no longer beneficially entitled to the shares at the time the charging orders were made is supported by the following evidence:

    (i) A duly executed and stamped Agreement For Sale & Purchase of Shares dated 20 August 1999 for the sale of the shares to a company called Veritatem Nominees Limited (**"VNFL"**).

    (ii) Reserve Bank of Fiji correspondence indicating that the RBF had been aware of these Agreements from as early as 1999.

    (iii) RBF approval of the above scheme as early as 2000.

(iv) A Notice of Appointment of a Receiver/Manager of NMBFL dated 30 November 2001 by a debenture holder.

AGREEMENT FOR SALE & PURCHASE OF SHARES – STAMPED TRANSFER INSTRUMENT

15. There is evidence in Sutton's affidavit that the 999,994 shares in question were sold by NMBFL to VNFL on 20 October 1999. Maharaj's affidavit annexes a photocopy of the **Agreement For Sale And Purchase of Shares** between VNFL (as purchaser) and all those original shareholders of SICL as vendors.

16. It is not clear whether the above shareholders are now registered in SICL's share register. If they were, that registration would be *prima facie* evidence that beneficial ownership of the shares has passed to them. However, this evidence has not been forthcoming because the focus between counsel, and by the court, has hitherto been on other issues.

RESERVE BANK OF FIJI APPROVAL

17. As I had noted in my last ruling, Maharaj's affidavit annexes the following letter dated 22 February 2000 from the Reserve Bank of Fiji to one Padam Lala, Chairman of, NMBF Insurance (Fiji) Limited (SICL's former name).

> Dear Sir,
> INSURANCE ACT 1998
>
> SALE AND PURCHASE OF ALL SHARES IN NMBF INSURANCE (FIJI) LIMITED
>
> We have completed examining your response to our letter of 1 October 1999. Our examination reveals that you have satisfied the conditions relating to the initial approval granted in principle by the Reserve Bank of Fiji as to the scheme of sale and purchase of NMBf Insurance.
>
> In accordance with Part IX of the Insurance Act 1998, approval is formally granted on the sale and purchase of all shares in NMBf Insurance (Fiji) Limited and the change of the company's name to Sun Insurance Company Limited.
>
> We note that the local partners in the Veritatem Nominees Limited are negotiating with your overseas partners with the intention to purchase their shares in Veritatem

Nominees Limited. You advised that in this respect, this proposed shareholding arrangements should be resolved no later than 31 March 2000.

Could you please also refer to our letter dated 30 December 1999 stipulating the condition of your insurance license for the year 2000.

Yours faithfully.

(Sgd)
IR Naiyaga
Chief Manager
[Financial Institutions]

18. The above letter would have been written because, under sections 153 and 154(3) and 154(4) of the Insurance Act 1998, no controlling interest in an insurer incorporated in Fiji can be disposed of, or acquired, except under a scheme approved by the RBF. In the original shareholding structure of SICL, the 999,994 shares that stood in the name of NMBFL (and which are the subject of the charging orders in this case) constituted more than 99.9% of the total issued shares of the company.

19. Ms. Wati Seeto, RBF's Manager Legal, swore an affidavit on 18 May 2016 by which she outlines SICL's course of dealings with RBF in seeking regulatory consent for the sale and transfer of the shares. Notably, RBF had approved the transfer of the shares to VNFL and also the transfer from VNFL to other shareholders. Ms Seeto's affidavit annexes official correspondence from RBF which confirm that RBF was aware that VNFL had acquired the said shares, on trust, for some individuals in Fiji and abroad, to whom a block of shares would be transferred in due course:

1. I am the Manager Legal at the Reserve Bank of Fiji and am duly authorised by it to make this Affidavit.
2. According to documents in our files, on 1 October, 1999 approval in principle was granted by the Reserve Bank for the sale and transfer of shares for the shares in NMBF Insurance (Fiji) Company Limited (hereinafter referred to as "NMBF") conditional on the satisfaction of certain conditions.
   Annexed and marked as **"A"** is a copy of the said letter dated 1 October, 1999 signed by Mr I R Naiyaga, Chief Manager Financial Institutions.
3. On 27 October, 1999, a letter was addressed to Mr Ahmed Zabidi, Chief Executive

of NMBF highlighting two matters relating to the **solvency position of NMBF** which were to be discussed in a pre-arranged meeting scheduled for 28 October, 1999.

Annexed and marked as **"B"** is a copy of the said letter dated 27 October, 1999 signed by Mr Petero Daurewa on behalf of Mr I R Naiyaga, Chief Manager Financial Institutions.

4. On 23 December, 1999 the Reserve Bank received notification from NMBF of the change of name from NMBF to Sun Insurance Company Limited.

   Annexed and marked as "C" is a copy of the said letter dated 23 December, 1999 signed by Mr Ahmad I Zabidi.

5. On 30 December, 1999 a letter was addressed to Mr Ahmad I Zabidi noting the advice on the shareholding structure and setting other conditions on NMBF license including the satisfactory fulfilment of the conditions placed of 1 October, 1999 by 30 January, 2000.

   Annexed and marked as "D" is a copy of the said letter dated 30 December, 1999 signed by Mr I R Naiyaga, Chief Manager Financial Institutions.

6. On 19 January, 2000 the Reserve Bank received a letter signed by Mr Padam Lala addressing the conditions of license of 1 October 1999 and **seeking approval for the transfer of remaining shares** and the changing of the name to Sun Insurance Company Limited (hereinafter referred to as "SICL").

   Annexed and marked as "E" is a copy of the said letter dated 19 January, 2000.

7. **22 February, 2000 approval was granted for the sale and transfer of the shares in NMBF and the name change to SICL.**

   Annexed and marked as "F" is a copy of the said approval letter dated 22 February, 2000.

8. **On 9 March, 2000 the Reserve Bank wrote to SICL enclosing the Insurance license in the name of SICL and informing SICL that the conditions of license stipulated in the letter of 30 December, 1999 remained in force until fully satisfied.**

   Annexed and marked as "G" is a copy of the said letter dated 9 March, 2000 signed by Mr I R Naiyaga, Chief Manager Financial Institutions.

9. **On 4 April, 2000 the Reserve Bank again wrote to SICL seeking an update on the shareholding proposal for the sale and transfer of shares held in trust by Veritatem Nominees Limited.**

   Annexed and marked as "H" is a copy of the said letter dated 4 April, 2000 signed by Mr I R Naiyaga, Chief Manager Financial Institutions.

10. **On 10 May, 2000 the Reserve Bank received a letter from SICL advising that 600,000 shares have been transferred from Veritatem Ltd to local shareholders and that 400,000 shares were in the process of being transferred upon receipt of the relevant Court Order.**

    Annexed and marked as "I" is a copy of the said letter dated 10 May, 2000 signed by Mr Padam Lala.

12. The Reserve Bank is aware that an Originating Summons (Civil Action No. HBC 227 of 2000) dated 10 May, 2000 was filed seeking, *inter alia*, an order for the sale of shares.

13 It has been over fifteen years since this matter was in issue and given the lapse in time it has been difficult to locate any further relevant information pertaining to the issue of the sale of the shares.

20. When the RBF approval is taken together with the Standard Transfer Forms, there is a strong indication that the 999,994 shares that NMBFL

held in SICL were transferred to VNFL long before even Connors J's money judgement was entered in 2005.

NMBFL UNDER RECEIVERSHIP

21. There is also evidence in Sutton's affidavit that NMBFL had been under receivership since 30 November 2001. Needless to say, that was well before even the charging order *nisi* was granted. This evidence appears to be unrefuted.

22. An affidavit of one Ajay Kumar sworn on 21 September 2006 filed for and on behalf of Baroda annexes the following **Notice of Appointment of Receiver and Manager** issued to the Registrar of Companies by MBF Asset Management Bank (**"Asset Bank"**) pursuant to a Debenture:

> **MBF ASSET MANAGEMENT** gives you notice that on the 30th day of November 2001 it appointed VISHNU DEO (father's name Sukh Deo) Chartered Accountant, 157 Vitogo Parade, Lautoka, to act as **RECEIVER AND MANAGER** of **NATIONAL Mbf FINANCE (FIJI) LIMITED** in pursuance of their powers contained in a Debenture dated 24th day of August 1995.

ANALYSIS - WHAT FACTS CAN BE DEDUCED FROM THE ABOVE EVIDENCE?

Agreement For Sale & Purchase/Transfer of Shares

23. Generally, when legal ownership of shares is transferred by one party to another, the beneficial ownership of the shares passes also in the process. Ordinarily, "beneficial entitlement" in a property goes hand in hand with full legal title. However, equity recognises that sometimes, beneficial entitlement may not necessarily coincide with legal title. For example, a legal owner who holds shares as bare trustee for others would not have beneficial entitlement over the shares. Also, the passing of beneficial ownership may actually precede the assignment of legal title in any given

sale and purchase transaction. The question is – at what point exactly would that happen?

24. Generally speaking, a sale and purchase agreement may confer upon the purchaser sufficient equitable proprietary claim on the subject matter of the agreement. In my view, this would happen when consideration has been paid and all that is necessary to complete the related transaction has been done, including the obtaining of any regulatory consent or approval since no equitable interest can arise out of a sale and purchase agreement alone if that agreement is yet conditional upon the consent of a regulatory authority which is yet to be obtained (see **Brown v Heffer** (1967) 116 CLR 344). In such a case, the equitable proprietary interest that arises from the agreement and from the consideration paid and/or performed would bestow a beneficial entitlement.

25. Sir Nicholas Browne-Wilkinson V-C in **Bristol Airport Plc v Powdrill** [1990] Ch 744, 759D, said:

> "The basic equitable principle is that if, under a contract, A has certain rights over property as against the legal owner, which rights are specifically enforceable in equity, A has an equitable interest in such property. I have no doubt that a court would order specific performance of a contract to lease an aircraft, since each aircraft has unique features peculiar to itself. Accordingly in my judgment the 'lessee' has at least an equitable right of some kind in that aircraft which falls within the statutory definition as being some 'description of interest ... arising out of, or incidental to' that aircraft."

26. In Fiji[3], the Courts have followed the authority of **Brown v Heffer** to the effect that the scope of that equitable interest is commensurate only with the relief that equity will grant to protect that interest, which usually, will either be the remedy of specific performance, or, the remedy of an injunction.

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3 Gordon v Inshad - Ruling [2015] FJHC 918; HBC223.2013 (25 November 2015); Bi v Bi [2015] FJHC 919; HBC69.2014 (19 November 2015); Naidu v Wati [2010] FJHC 136; Civil Action 001.2009 (21 April 2010); Ali v Wati [2012] FJHC 849; HBA01.2012L (1 February 2012); Dynex Holdings Ltd v B W Holdings Ltd [2015] FJHC 376; Civil Action 316.2008 (25 May 2015).

27. In this case, it is not refuted that the **Agreement For Sale & Purchase of Shares** were signed in 1999. Whether or not consideration was paid, I do not know. There is evidence before me though that the transfers were not stamped until 14 July 2006.

28. The question is - whether that point in time when beneficial entitlement in the shares passed to VNFL - actually preceded the granting of the charging orders?

29. As I have said, I do not know if valuable consideration was paid for the transfer, let alone when consideration was paid. Again, this evidence has not been forthcoming because the focus hitherto has always been on some procedural issues. However, having said that, paragraph 10 of Ms Seeto's affidavit suggests that, at least by 10 May 2000, 600,000 shares had been transferred from VNFL to some local shareholders.

> 10. **On 10 May, 2000 the Reserve Bank received a letter from SICL advising that 600,000 shares have been transferred from Veritatem Ltd to local shareholders and that 400,000 shares were in the process of being transferred upon receipt of the relevant Court Order.**
> Annexed and marked as "I" is a copy of the said letter dated 10 May, 2000 signed by Mr Padam Lala.

Reserve Bank of Fiji Approval

30. It is clear from the affidavit of Ms Seeto that the sale of the shares to VNFL was completed at some point prior to 10 May 2000 and that VNFL had held the shares on trust for certain individuals. I gather that, in due course, the said shares were then transferred by VNFL to those individuals. Apparently, 600,000 of the issued shares were eventually transferred to some local shareholders by 10 May 2000 and that the remaining 400,000 shares were, as at 10 May 2000, awaiting a certain Court Order for their transfer to (presumably) some offshore shareholders. The details of this

other Court proceeding are not clear to me. They had never been considered hitherto in this case, nor were they placed before Finnigan J at the show-cause hearing. In any event, the evidence is significant because it suggests that the regulatory approvals were already in place long before the money judgement was entered in 2005, and even long before the charging orders were made in 2006.

NMBFL Under Receivership

31. The fact that the judgement debtor (NMBFL) was under Receivership long before the charging orders were made is significant. It is yet unclear to me whether or not the shares in question were part of the assets charged under the debenture. It is also unclear to me if the purported sale and transfer of the shares were actually carried out by the Receiver/Manager of NMBFL acting under his powers under the debenture.

32. If the debenture was a floating charge over NMBFL's assets, as one would presume it was, then the appointment of the Manager/Receiver would signal the crystallisation of the floating debenture into a fixed charge. This is important because, at that point of crystallisation, any beneficial entitlement that NMBFL might have hitherto enjoyed over any charged asset, including the shares, would have been superseded by the interest of the debenture holder. Had this information been placed before Finnigan J at the show-cause hearing, I am certain that his Lordship would not have granted charging order absolute. I base this on the authority of the House of Lords in **Roberts Petroleum v Bernard Kenny** [1983] 1 All ER 564 that the liquidation of a company in the period after the order *nisi* was a sufficient reason for refusing to make the order absolute.

33. In any event, assuming the shares were in fact charged under the debenture, it follows that any subsequent charging order over the shares would have to:

(i) rank below the prior equitable proprietary interest conferred under the debenture, and

(ii) have doubtful force in any event as the beneficial interest, arguably, by then, had been superseded by the security interest of the debenture holder i.e. NMBFL (judgement debtor) no longer had any interest in the shares at the date of the charging order.

34. It is trite that a mortgage or a debenture would give the holder an equitable proprietary interest. The following sentiments of Lord Wrenbury in the Privy Council case of **Palmer v Carey** [1926] A.C 703 at 706 are useful:

> This is but an instance of a familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a Court of equity will decree specific performance.

35. That a charging order would rank below the interest of a prior mortgagee or a debenture holder is also trite (see further discussion below). The cases of **Re Anglesly** [1903] 2 Ch. 727 and **Re Bell** (1886) 34 W.R. 363 are useful. **Re Anglesly** is cited in the White Book as authority for the proposition that:

> An order appointing a receiver by way of equitable execution has priority over a subsequent charging order.

36. **Re Bell** (1886) 34 W.R. 363 is also cited in the White Book as authority for the proposition that:

> ..a judgement creditor cannot by obtaining a charging order upon a fund in Court belonging to his debtor, acquire priority over a previous mortgagee.

FURTHER COMMENTS

37. To reiterate, because a charging order can only be imposed on an interest to which a judgement debtor is beneficially entitled, a charging order imposed at a time when beneficial entitlement has already passed from the judgement debtor, will not be sustainable. Also, it means that a charging order that charges shares which are held by a judgement debtor as bare trustee for others, will not be sustainable.

38. As Vaisey J said in **Hawks v McArthur & Ors** [1951] 1 All ER 22:

> There is, undoubtedly, a basic principle that a charging order only operates to charge the beneficial interest of the person against whom the order is made, and that it is not possible, for instance, to obtain an effective charging order over shares where the person against whom the order is made holds them as a bare trustee. The charging order affects only such interest, and so much of the property affected, as the person whose property is purported to be affected could himself validly charge. Jeffreys v Reynolds would seem superficially, to throw some doubt on that general basic proposition, but I think that the only effect of that decision is that the true owner of shares cannot, as a matter of procedure, discharge the charging order after it has been made absolute, and his remedy for asserting and establishing his true rights must be of some other character. For the general proposition it will be sufficient for me to refer to Gill v Continental Gas Co . The headnote, which I think is accurate, reads:
>
> > *"In an action, under [the Judgments Act, 1838], s. 15, against a company for permitting the transfer of shares after notice of a charging order nisi, and before the making of it absolute, it is a good answer to show that the judgment debtor in whose name the shares stood had no beneficial interest in them."*
>
> (my emphasis)

39. In **Gill v The Continental Union Gas Company Limited** [1872] L.R. 7 Exch 332, Bramwell B said:

> The only stock that is to be charged is stock standing in the name of the judgement debtor in his own right, and if an order is made otherwise it is not within the competence of the judge to make it.

40. The indications are there in the affidavit of Ms Seeto that the shares in question were transferred to VNFL sometime in late 1999 or early 2000. VNFL was then to hold the shares on trust for some local and offshore

persons who were to eventually acquire them once regulatory compliance is completed.

41. As I have said above, beneficial interest may pass at the time of execution of a sale and purchase agreement.

42. In **Lysaght v Edwards** (1876) 2 ChD 499, Sir Jessel MR said:

> The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money and a right to retain possession of the estate until the purchase money is paid, in the absence of the express contract as to the time of delivering possession.

43. In **KLDE Pty Ltd v Commissioner of Stamp Duties** (Qld) [1984] HCA 63; (1984) 155 CLR 288 (23 October 1984), the High Court of Australia said thus:

> Where the contract is capable of being specifically performed the vendor, pending payment of the balance of purchase price, is not a bare trustee (he has been described as a trustee sub modo: see **Chang v. Registrar of Titles** [1976] HCA 1; (1976) 137 CLR 177, at pp 184-185). However, so far as the interest of the purchaser is concerned, this Court was clearly of the view in **Reg. v. Australian Broadcasting Tribunal; Ex parte Hardiman** (1980) 144 CLR 13 that:
>
> > "a purchaser who can by way of specific performance compel a transfer of shares under a contract is a beneficial owner of the shares." (at p. 31 per Gibbs, Stephen, Mason, Aickin and Wilson JJ.).
>
> More recently in **Legione v. Hateley** [1983] HCA 11; (1983) 57 ALJR 292 Gibbs C.J. and Murphy J. said, at p 298:
>
> > "There is no doubt that when the purchasers executed the contract and paid the deposit the beneficial ownership of the land passed to them subject to the payment of the purchase money."
>
> Mason and Deane JJ. on the other hand took a slightly different view saying at pp. 307-308:
>
> > "In this Court it has been said that the purchaser's equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance of the contract (Brown v. Heffer [1967] HCA 40; (1967) 116 CLR 344, at p 349). ...
> > A competing view - one which has much to commend it - is that the purchaser's equitable interest under a contract for sale is commensurate, not with her ability to obtain specific performance in the strict or primary sense, but with her ability to protect her interest under the contract by injunction or otherwise (Tailby v. Official Receiver (1888), 13 App Cas 523, at pp 546-549; Redman v. Permanent Trustee Co. of New South Wales Ltd. [1916] HCA 47; (1916), 22 CLR 84, at p 96; Hoysted v. Federal Commissioner of Taxation (1920), 27 CLR 400, at p 423; Pakenham Upper Fruit Co. Ltd. v. Crosby [1924] HCA 55; (1924), 35 C.L.R. 386, at

pp. 396-399; Jordan, Chapters on Equity (6th ed., 1945), p. 52,n. (e)). ... However, for the purposes of this case we are prepared to accept the correctness of the statement in Brown v. Heffer."

These differences of view do not detract from the force of the statement that a purchaser under a contract for the sale of land which is specifically enforceable has a beneficial interest in the land, albeit one conditional on, amongst other things, payment of the price.

44. The case of **Hawks v McArthur & Ors** [1951] 1 All ER 22 illustrates how a purhcaser's equitable interest over the purchased shares, despite the resulting ownership not having been registered in the company share register at all material times, was still prioritised over a subsequent charging order over the same shares.

45. The plaintiff held a charging order affecting some shares. Those shares were held in the name of one McArthur. Before the charging order was obtained, McArthur had sold the shares to Roberts and Fraser. However, at the time the charging orders were obtained, Roberts and Fraser were yet to be registered as holders. Furthermore, the transfer to Roberts and Fraser did not comply with some requirement of the articles of association of the company. The case turned on the question as to whether the plaintiff's interest arising out of the charging orders took priority over that of Roberts and Fraser? The head notes read as follows:

By an agreement, made on 12 August 1949, between M and W L & Sons Ltd, a private company, it was agreed that M should resign from his office of director of the company, that he should receive a sum of money as compensation for loss of office, and that the company should find a purchaser for his five hundred ordinary shares of £1 each in the company at a price of £3 per share. On 7 September F, the chairman of the board of directors, agreed to purchase three hundred of the shares and to hold them as beneficial owner if no other member of the company wished to purchase them, or, if any other member or members desired to exercise the right of pre-emption under art 13 of the company's articles, to hold the shares as trustee for such member or members. On the same day R, the company's manager, entered into a similar agreement in respect of the remaining two hundred shares held by M. The company's articles contained stringent provisions restricting the transfer of shares. By art 12 no shares should be transferred until the rights of pre-emption contained in art 13 had been exhausted, and one of the requirements of art 13 was that, on receiving

the transfer notice from the vendor, the board should forthwith give notice of the intended transfer to all the members of the company, stating inter alia the price of the shares to be sold (such price to be agreed by the vendor and members, or, in default of agreement, to be fixed by the auditors), and invite each member to state in writing, within one month from the date of the transfer notice, whether he was willing to purchase any, and, if so, how many, of the shares. None of these provisions was complied with. On 16 September M executed a transfer of two hundred shares in favour of R, and on 21 September he executed a transfer of three hundred in favour of F. R and F paid to M the full purchase price for the shares, but the shares were still registered in the name of M. On 4 October 1949, the plaintiff (who was also a member of the company) recovered judgment for £539 2s 4d and costs in an action against M, and was granted leave to proceed under the judgment. On the same day he obtained a charging order nisi on the shares in the company standing in M's name, and on 17 October the charging order was made absolute. F and R claimed that by 4 October the beneficial interest in the shares was in them and that M had no interest therein on which the charging order could operate.

Held – Notwithstanding the complete failure to comply with the company's articles in regard to the procedure to be followed before shares could be transferred, F and R, having paid to M the full consideration for the shares, had obtained equitable rights therein, and, as their rights accrued earlier than the equitable right of the plaintiff under the charging order, their rights must prevail over his claim.

46. The court started by saying that a charging order only operates to charge the beneficial interest of the person against whom it is made (see paragraph 38 above).

47. The issue, as stated by Vaisey J was:

> The real question in this case, I think, is whether the alleged agreements (which, I think, I must consider to be the agreements between Mr McArthur and Mr Roberts and between Mr McArthur and Mr Fraser, respectively) operated so as to amount in equity to a transfer of the shares held by Mr McArthur, as to two hundred of them to Mr Roberts, and as to three hundred of them to Mr Fraser, or whether the failure or neglect to follow the code laid down by arts 11, 12 and 13 completely vitiates the whole transaction, so that the transfers are worthless and there has been a total failure of consideration for the moneys which were admittedly paid over by Mr Roberts and Mr Fraser to Mr McArthur. It is suggested on behalf of Mr Roberts and Mr Fraser that, notwithstanding the complete failure to comply with the articles, the transfers and the antecedent agreements which must have been made—for one does not execute a transfer without a previous intention to do so—did, in fact, operate as a sale by Mr McArthur to Mr Roberts and Mr Fraser of, at any rate, the beneficial interest in the shares—otherwise the result would be that Mr Roberts and Mr Fraser paid their money and got nothing for it....

48. Vaisey J, in balancing the two competing equitable interests, said as follows:

> Admittedly, Mr McArthur is still the legal owner of the shares. Admittedly, the plaintiff's rights under this charging order are in the nature of equitable rights. And admittedly, the rights of Mr Roberts and Mr Fraser, if they have any rights, are also equitable rights. As I have come to the conclusion that Mr Roberts and Mr Fraser have some rights and that what they did was not a complete nullity, the question is whose rights should prevail. A not irrelevant
> [1951] 1 All ER 22 at 28
> circumstance is that the equitable rights of Mr Roberts and Mr Fraser precede the equities or quasi-equitable rights under the charging order. In my opinion, the rights of Mr Roberts and Mr Fraser had already accrued at the time the charging order was obtained, and I think, as between the merits (not moral merits, but legal merits) of the plaintiff and the defendants, the rights of the second and third defendants, Mr Roberts and Mr Fraser, must prevail over the claims of the plaintiff. As a result of my decision, the only thing I can do is to dismiss this summons. The result is, I suppose, to record my decision that the charging order is nothing but a charging order nisi. I propose, however, to dismiss the summons without costs, because I think that the trouble has arisen largely through the fault of Mr Roberts and Mr Fraser.

49. Vaisey J then held that even though the requirements of the articles with respect to the transfer of shares had not been complied with, the sale of the shares to Fraser and Roberts vested them with the beneficial interest in those shares, which prevailed over the competing equitable rights of the holder of the subsequent charging order.

Stamping of Transfer Instruments

50. Mr. Mishra highlights that the transfer documents in this case were actually executed in 1999 but were not stamped until 14 July 2006. This was well after the charging order absolute was made. He argues that the beneficial interest over the shares could only have passed at the point of stamping and so, accordingly, beneficial interest had remained with NMBFL, at the time the charging orders were made. Baroda's equitable interest should, therefore, be prioritised over the interest created through the Standard Transfer Forms.

51. That argument is faulty for two basic reasons. Firstly, Order 50 Rule 2 is about the charging of "beneficial entitlement" rather than "legal ownership". As the cases have said, beneficial entitlement can pass even at

the point of the sale and purchase agreement. Secondly, generally, stamp duty is levied on instruments and not the underlying transactions to which they give effect. As Justice Mason said in the Australian High Court case of **DKLR Holdings (No. 2) Pty Ltd v Commissioner of Stamp Duties** (1982) 149 CLR 431 at 449-52:

> It is a fundamental principle of the law relating to stamp duties that the duty is levied on instruments, not on the underlying transactions to which they give effect.

52. What this means of course is that a change in (equitable) beneficial ownership or beneficial interest may well have happened first before the formal transfer instrument (which would then effect the transfer the legal interest) is even drawn up. As I have said above, the equitable beneficial interest would have passed much earlier at the point when a deposit was paid for the sale of the shares and when RBF regulatory consent was in place. Hence, the stamping of the instrument on 14 July 2006 would be of no significance in the creation of an equitable interest, although admittedly, the payment of stamp duty is crucial in the process of transfer of the legal interest.

53. In **Kumar v Attorney General** [2001] FijiLawRp 7; [2001] 1 FLR 31 (18 January 2001), the headnote would read as follows:

> Stamp duty is not a tax on transactions as such, but a tax on documents which record and give effect to certain transactions. *Ad valorem* duty is payable on a document which has the effect of transferring or creating a beneficial interest.

Equitable Interest Created Under A Charging Order Cannot Override An Earlier Interest Under a Mortgage

54. The evidence suggests that NMBFL was already in receivership at the time the charging orders were made.

55. All relevant case authorities I have cited above confirm that (i) a charging order creates an equitable interest in favour of the recipient, and (ii) that the equitable interest created under a charging order cannot have priority over the interest of a first-in-time mortgagee.

56. There are some very good reasons why an equitable interest created under a charging order cannot have priority over an equitable proprietary interest of a prior mortgagee. Firstly, as a general rule, all things equal, equitable interests are ranked in the order of their creation so a prior mortgagee would have priority in time anyway. Secondly, a mortgagee has an equitable proprietary interest over a charged asset akin to that of a *bona fide* purchaser for value. In comparison, a recipient of a charging order has, in some cases, been treated as a volunteer (as opposed to being a *bona fide* purchaser for value). As such, equity would rank a volunteer-interest below the interest of a competing *bona fide* purchaser for value.

57. Having said that, the same principle would apply in favour of the current shareholders who, presumably, acquired their respective blocks of shares as *bona fide* purchasers for value prior to the charging orders.

58. In **Hughman's Solicitors v Central Stream Services Ltd – In Liquidation & Stephen Hunt** [2012] EWHC 1222 (Ch), the plaintiff solicitors had a judgement entered on 27 August 2010 against a Mr. Davidson on account of some outstanding professional fees. The plaintiff obtained a final charging order against a certain real property owned by Davidson.

59. Some two years earlier, on 13 June 2008, Davidson had agreed that he would sell the property and pay the net proceeds thereof to the Liquidator of Central Stream Services Limited (**"CSSL"**). The said agreement was

made in settlement of a claim of SCCL against Davidson. That settlement was achieved through what is known in the UK as a "Tomlin Order" (akin to a consent order). The details of the mechanics of the settlement terms, including the payment of the net proceeds to CSSL, were set out in a Schedule to the Tomlin Order.

60. The issue for the court was whether the Schedule gave rise to a proprietary interest in favour of CSSL and, if so, if it should rank in priority over CSSL's interest? Mr. Justice Briggs concluded that the Schedule conferred to CCSL a beneficial interest in Davidson's property by way of a trust.

61. Briggs J then considered the relevant UK legislation which provided that priority between competing equitable interests was determined by the order in which they were created and that priority for a latter interest over an earlier interest is conferred by registration, if, but only if, the latter interest is a disposition made for valuable consideration. If so, the earlier interest loses its priority if not protected on the register. If it is not, then priority is governed by the order of their creation.

62. Briggs J followed the precedent in **United Bank of Kuwait plc v Sahib** [1997] Ch 107 :

> 23.Most equitable charges are of course made for valuable consideration, and their enforcement in equity may depend upon that. Nonetheless, some equitable charges may be conferred voluntarily rather than for valuable consideration: see **Megarry & Wade's Law of Real Property (8th Edition)** at paragraph 24-042. It would therefore be wrong in my judgment to read section 3(4) as containing within it an unspoken presumption or deeming provision to the effect that a charge imposed by a charging order should, for the purposes of the Land Registration Act 2002 or otherwise, be treated as having been created for valuable consideration.
>
> 24.The question whether a charging order should be so treated arose directly in **United Bank of Kuwait plc v Sahib** [1997] Ch 107. The case concerned a competition between two banks for priority in respect of their competing alleged equitable interests in freehold registered land. The defendant bank claimed an equitable charge by the proprietor's deposit of the land certificate in its favour. The claimant bank relied upon a subsequently obtained charging order. Chadwick J held that the charging order was obtained by the claimant bank as a volunteer, rather than for

valuable consideration, for the purposes of the rule in **Dearle v Hall**. Nonetheless since, following the coming into force of the Law Property (Miscellaneous Provisions) Act 1989, there could be no equitable charge created by deposit of title deeds, the claimant bank succeeded. The Court of Appeal upheld Chadwick J's decision on the issue as to the effect of the 1989 Act. It heard no argument, and therefore expressed no view, on the question whether the recipient of a charging order is a volunteer. Chadwick J's conclusion to that effect was based upon his analysis of the effect of **Scott v Lord Hastings** (1858) 4 K & J 633, which decided that a judgment creditor under a charging order (under section 14 of the Judgments Act 1838) obtained thereby no priority over an earlier equitable assignment of the debtor's interest in the relevant property. He concluded that the modernisation of the language in section 3(4) of the Charging Orders Act 1979 gave rise to no difference in substance, and continued, at page 119G:

> "If a charging order is to be treated as an equitable charge created by the judgment debtor, regard must be had to the circumstances in which it is created. The analogy must take into account the fact that the debtor receives no consideration from the judgment creditor at the time that the charge is created. The judgment creditor, as chargee, is a volunteer.
>
> ...
>
> The volunteer could take no more than the assignor or chargor was able to give: see *Justice v Wynne* (1860) 12 I. Ch. R. 289, 299, 304-305."

25. In seeking to uphold Hughmans' claim to priority by virtue of its charging order, Mr Warwick was constrained to submit that I should not follow Chadwick J's analysis, namely that the recipient of a charging order under the Act of 1979 is a volunteer, and gives no valuable consideration. But he could provide no persuasive reason why I should not do so. On the contrary, I consider that Chadwick J's analysis is compelling and correct. It seems to me most unlikely that the draftsman of the 1979 Act was unaware of **Scott v Lord Hastings**, still less that it was part of the purpose of the 1979 Act to confer upon the recipient of a charging order any priority over the holder of a prior beneficial interest in the relevant property, even if unprotected by registration.

63. If the shares in question were charged under Asset Bank's debenture and the said debenture was made for valuable consideration, then applying **United Bank of Kuwait**, it would follow that Asset Bank would have an equitable proprietary interest over the shares which would rank above Baroda's subsequent equitable interest as volunteer arising from the charging orders.

64. If, as one might presume, Asset Bank's debenture was duly registered with the Registrar of Companies pursuant to Part IV Division 1 of the old Companies Act (Cap 247), then, Baroda should have had notice of Asset

Bank's equitable proprietary interest prior to registering its charging order *nisi*.

65. I had noted in my last ruling that the relevant company files for the NMBFL were missing from the Registrar of Companies at the time that Baroda was seeking to register its charging orders. There is no suggestion in any affidavit filed, or by either counsel, that this was, in any way, due to some act of impropriety on the part of any staff member of the Registrar of Companies or SICL.

66. In my view, assuming that Asset Bank did in fact register its debenture as aforesaid, the fact that Baroda might have had no notice of Asset Bank's interest on account of the missing files would not in the least have prejudiced any priority of Asset Bank's equitable proprietary interest over the shares. All it would prove is that Baroda had no notice of Asset Bank's prior interest on account of the missing files.

CONCLUSION

67. Under Order 50 Rule 7, I have authority to discharge or vary a charging order at any time before or after the order is made absolute, on the application of the judgment debtor or any other person interested in the securities.

68. The application before me was made by SICL as a person interested in any affair concerning its issued shares. However, I think that the best way to resolve the issues I have raised is to order that the new shareholders be added as parties.

69. I have set out above all the evidence, and the facts which may be deduced from them, which tend to confirm that beneficial entitlement in this case

had passed from NMBFL long before the money judgement was entered by Connors J in 2005 and well before the charging orders were granted by Finnigan J in 2006. Nothing however is conclusive on the evidence before me now.

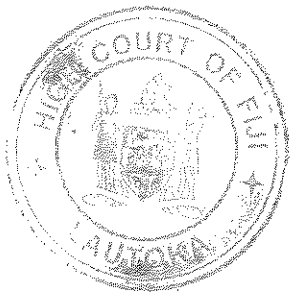
ORDERS

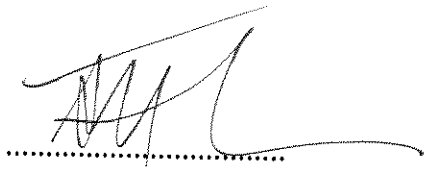
70. I so exercise the power I have under Order 15 Rule 6(2) of the High Court Rules 1988 and so direct that the current shareholders of SICL each be added as a party to this case. I will make directions on the evidence I require on the next call over date.

71. SICL is to serve it's every shareholder a copy of this Ruling and also a sealed copy of the Orders in 28 days.

72. The case is adjourned to **26 October 2017 at 10.30 a.m.** for directions.

73. Parties to bear their own costs.





Anare Tuilevuka
JUDGE
22 September 2017.