IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 191 of 1998L

BETWEEN : **BANK OF BARODA**

PLAINTIFF

A N D : **NATIONAL MBF FINANCE (FIJI) LIMITED**

DEFENDANT

A N D : **SUN INSURANCE COMPANY LIMITED**

APPLICANT/CHARGEE

A N D : **ROCKLYN LIMITED, DEVEN P. SHARMA, PADAM RAJ LALA, DEWAN CHAND MAHARAJ, SUN INVESTMENT LIMITED, SUSHIL CHAND MAHARAJ, SURESH CHAND MAHARAJ, DEWAN HOLDINGS LIMITED** and **JANCOURT LIMITED**

SHAREHOLDERS

Appearances:	Mr. Mishra for the Plaintiff Mr. Narayan for the Shareholders Mr. Katia for the Applicant / Chargee
Date of Hearing:	03.07.2018
Date of Ruling:	29.10.2020

RULING

BACKGROUND

1. The background to this case is set out in my earlier rulings (see **Bank of Baroda v National (MBF) Finance Fiji Ltd** [2016] FJHC 221; HBC191.1998 (8 April 2016)[i] and **Bank of Baroda v National MBF Finance (Fiji) Ltd** [2017] FJHC 695; HBC191.1998L (22 September 2017)[ii].

2. At the heart of this case now, is a charging order absolute (**"COA"**) granted on 12 May 2006 by Mr. Justice D.D. Finnigan[iii].

3. That COA was granted in favour of the Bank of Baroda (**"Baroda"**) in execution of a money judgment in the sum of $774,423.66 entered in August 2005 against the National (MBF) Finance Fiji Limited (**"NMBFL"**) by Mr. Justice John Connors.

4. The asset which is charged under the COA is a block of 999,994 shares in an insurance company called National (MBF) Insurance Limited (**"NMBIL"**). This block of shares was held by NMBFL. NMBFL was the majority shareholder in NMBIL. At the time, NMBIL had a paid up capital of 1,000,000 shares at $1 each. As holder of 999,994 out of 1,000,000 issued shares – clearly, NMBFL held the controlling interest in NMBIL.

5. The remaining six issued shares were held by Lionel Ding Sun Yee, Francis Chung, Akuila Savu, Kenneth John Clemens, Priyaraj Lakmal Munasinghe, and Daniel Elisha at 1 nominal share each.

6. NMBIL is now known as Sun Insurance Company Limited (**"SICL"**). The change of name happened around February 2000. Henceforth, in this ruling, I will refer to NMBIL as **NMBIL/SCIL** for convenience.

APPLICATION BEFORE THIS COURT

7. There is pending before me now an application to dismiss the said COA. Since the filing of the application, I have adjourned it twice and given two written directions calling for further evidence and joining the current shareholders of NMBIL/SCIL (see paragraph 1 above).

8. Although there was, and still is, objection by Mishra Prakash & Associates about the joining of the current shareholders, I have power under Order 15 Rule 6(2)(b) to order the joinder of any party *"whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon"* or if there exists *"a question or issue arising out of or relating to or connected with any relief or remedy*

which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter".

THE RECORDS AT THE REGISTRAR OF COMPANIES AT THE TIME THE CHARGING ORDERS WERE MADE

9. As highlighted in **Bank of Baroda v National (MBF) Finance Fiji Ltd** [2016] FJHC 221; HBC191.1998 (8 April 2016), it is common ground that prior to filing the application for charging order *nisi* in execution of the money judgment in question, Mishra Prakash & Associates (**"Mishra"**) had conducted a company search on NMBIL/SCIL in late 2005 and early 2006 at the Office of the Registrar of Companies. What Mishra found was that the last Annual Return filed for the company was that for the year 1998 which recorded that NMBFL held the controlling interest in NMBIL/SCIL.

10. Relying on the 1998 Annual Return, Mishra then filed the application for charging orders *nisi* on the 999,994 shares in 2005. The charging orders *nisi* was granted on the basis of the shareholding record in the 1998 Annual Return.

11. I agree with Mr. Mishra that Baroda was entitled to rely on the 1998 Annual Returns. I also accept that NMBIL/SCIL was entirely at fault in not updating its company records in terms of its Annual Returns. It is common ground that NMBIL/SCIL did settle a monetary penalty with the Registrar of Titles on account of its inadvertence in this regard.

12. However, what I do not accept is that NMBIL/SCIL's shareholders should be estopped from asserting any *bona fides* beneficial entitlement – if in fact one had already accrued to them beforehand – merely because the company had neglected to file its Annual Returns.

AS OF TODAY, THE 999,994 SHARES ARE NO LONGER BENEFICIALLY OWNED BY NMBFL

13. It is common ground that the 999,994 shares which NMBFL once held in NMBIL/SCIL are now owned by "other parties". The process which saw the passing of the ownership of those shares from NMBFL was a long-drawn-out one. This process actually began in early 1999.

14. The passing of the beneficial entitlement from NMBFL to the other parties was never intended to insulate the shares from Baroda's execution on its money judgment. At the time when this process began, the money judgment was still to happen for a few more years yet.

15. By the time the money-judgment was entered in August 2005, the process was already in its sixth year – and - in its seventh year at the time the charging orders *nisi* and the COA were made in 2006.

16. I accept that the transfer of legal ownership of the shares to the current shareholders was finally completed in July 2006. This happened when the instruments of transfer were stamped. I also accept that this happened after the COA was granted.

17. However, there are two points to note on this. The first is that before the current shareholders ever acquired full legal interest over the shares in 2006, the charged shares were already vested in a nominee company that was holding the shares on trust for them. Almost a decade earlier, that nominee company had paid some consideration for the shares.

18. The second is this. The issue is not about whether legal ownership had passed after the charging order absolute was made. Rather, the issue is whether or not the *"beneficial entitlement"* in the shares had passed before or after the charging order absolute was made.

19. If the beneficial interest had already passed before the charging order absolute was granted, then the charging order absolute would be irregular and must be discharged under Order 50 Rule 7.

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.*

20. However, if beneficial interest only passed after the charging orders were made, this would then raise a priorities dispute. The main question then will be, whether the equitable interest created by the charging order in favour of Baroda should prevail over the interest of the "new" shareholders and whether the "new" shareholders were *bona fide* purchasers for value without notice.

21. Still, there is authority that an equitable interest created out of a charging order is a "volunteer interest" and not one created for valuable consideration. As such, it will not prevail over a competing equitable interest created out of valuable consideration (see **Hughman's Solicitors v Central Stream Services Ltd – In Liquidation & Stephen Hunt** [2012] EWHC 1222 (Ch); **United Bank of Kuwait plc v Sahib** [1997] Ch 107).

22. Briggs J in **Hughman's** followed the precedent in **United Bank of Kuwait plc v Sahib** and said as follows:

> 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.
>
> 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 modernization 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."

23. If I were to follow this authority, I would hold that Baroda's interest in the COA was as a volunteer and which must be weighed against the interest of the intended purchasers (who are now the new shareholders) who acquired the shares as bona fide purchasers for value.

24. But before I even get to that stage, the basic rule governing competing equitable interests is that, all things equal, equitable interests are ranked in the

order of their creation so an equitable interest which has accrued to a bona fide purchaser for value would have priority anyway over an equitable interest that has accrued over a COA which followed in time.

How Was The Issue First Raised?

25. The evidence which first raised the possibility that the beneficial entitlement in the shares may have already passed from NMBFL at the time the COA was granted is contained in the affidavits of one Dewan Chand Maharaj sworn on 21 July 2006 and in an affidavit sworn by one Bruce Sutton on 03 October 2006.

26. Maharaj is one of the current shareholders in NMBIL/SCIL. He was one of the first parties for whose benefit the shares were purchased from NMBFL by the nominee company (see further below).

27. Sutton, was a Chartered Accountant in the firm of KPMG in Suva. KPMG did play a key role in providing consultancy and management services throughout the entire process of the valuation of, and in the sale and purchase of the shares in question.

28. The facts which Maharaj and Sutton deposed in their affidavits are all consistent with material contained in an affidavit sworn by Ms. Wati Seeto on 18 May 2016 and also one sworn by one Deven Prasad Sharma on 14 March 2018.

29. Ms. Seeto is the Manager Legal of the Reserve Bank of Fiji. Her affidavit outlines NMBIL/SCIL's course of dealings with RBF in seeking regulatory consent for the sale and transfer of the shares in question. I had referred to her affidavit in **Bank of Baroda v National MBF Finance (Fiji) Ltd** [2017] FJHC 695; HBC191.1998L (22 September 2017). She attaches contemporaneous documentary evidence from the relevant files in the custody of RBF.

30. Sharma, like Maharaj, is one of the current shareholders in NMBIL/SCIL. He was one of the first parties for whose benefit the shares were purchased from NMBFL (see further below).

31. Maharaj, Sutton, Seeto and Sharma all base and support their respective accounts by copies of documentary material annexed to their affidavit. None of them has annexed an original document.

32. There has been no reason whatsoever put before me sufficient to raise a doubt in my mind that these are copies of original documents which did exist at some point in time, or that the missing originals were validly executed, nor have I been given any reason to doubt the truth of any statement in the copies.

33. In my view, the documentary material which Ms. Seeto annexes in her affidavit from RBF archives is sufficiently authenticated by her in terms of section 10(b) of the Civil Evidence Act 2002[iv]. What was actually happening in this case was a takeover of NMBIL/SCIL. As regulator, RBF is expected to be the repository of all crucial documentation.

34. Furthermore, because Ms. Seeto's affidavit complements rather than refutes the facts deposed to in the affidavits of Maharaj, Sutton and Sharma, I am compelled to accept as true every the material in all these other affidavits. Below, I reconstruct the relevant chronology as I gather from these affidavits.

CHRONOLOGY

Negotiations To Purchase

35. In early 1999, NMBFL made known that it wanted to sell its shares in NMBIL/SCIL. This attracted the interest of Sharma and some others, namely Anthony Ross Thomas, Peter Alan Harris, Padam Raj Lala, and Dewan Chand Maharaj (**"intended purchasers"**).

36. Thomas and Harris were not Fiji residents.

37. The intended purchasers then engaged the accounting firm of KPMG for professional advice, later after securing a deal, to navigate the "takeover" and all related transactions. Sharma deposes that he was involved in negotiations.

Nominee Company – Veritatem Nominees Fiji Limited

38. On the advice of KPMG, a nominee company was set up to purchase the shares from NMBFL and other former shareholders - for the benefit of the intended purchasers. This nominee company was none other than Veritatem Nominees Fiji Limited (**"VNFL"**).

39. It would appear that the deal, in essence, entailed a takeover of NMBIL/SCIL by the intended purchasers - as I have said above. NMBIL/SCIL is an insurance company incorporated in Fiji. The intended purchasers were a group of local and non-resident investors.

Regulatory Compliance

40. Obviously, the insurance regulatory scheme under the Insurance Act 1998 would have to be complied with, not to mention compliance with the foreign exchange regulatory regime in the Foreign Exchange Act, and the Companies Act.

41. The arrangement was that VNFL would purchase the shares and then hold the shares on trust for the intended purchasers pending these regulatory compliances.

25 August 1999

42. Pursuant to that arrangement, three things happened on 25 August 1999.

43. Firstly, VNFL entered into an Agreement For Sale And Purchase of Shares with the shareholders of NMBIL/SCIL. 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 NMBIL/ SICL as vendors.

44. Secondly, VNFL executed, separately with each intended purchaser, a Deed. Each Deed documented that VNFL would purchase shares, and hold the

shares on trust for, the said intended purchaser (a copy of each Deed is annexed to Sharma's affidavit).

45. The total purchase price which VNFL had to pay for the 1,000,000 shares in NMBIL/SCIL was $150,000-00.

46. Thirdly, VNFL did pay an initial cash deposit of $25,000 on the signing of the Agreement on 25 August 1999 – as stipulated in the Agreement. This was paid into the trust account of KPMG in Suva. Sharma has a copy of a letter dated 15 September 1999 from KPMG which confirmed the said payment.

> ***Strictly private & confidential***
> *Mr. Anthony R Thomas*
> *Anthony R Thomas*
> *Barristers & Solicitors*
> *NML Centre*
> *11th Floor*
> *41 Shortland Street*
> *Auckland*
> *New Zealand*
>
> *15 September 1999*
>
> *Dear Sir*
>
> ***National MBF Finance (Fiji) Limited and Veritatem Nominees (Fiji) Limited***
> - ***Agreement for Sale and purchase of shares***
> - ***In NMBF Insurance (Fiji) Company Limited***
>
> *We confirm that the full deposit funds of FJD25,000 as required by the above agreement have now been received in our trust account.*
>
> *We attach one copy of the original agreement for your records. One copy has been forwarded to Mr. K Clemens of National MBF Finance (Fiji) Limited. The third copy has been retained for the records of Veritatem Nominees (Fiji) Limited.*
>
> *We also attach a copy of the original deed of trust in respect of your shares in NMBF Insurance (Fiji) Company Limited.*
>
> *We advise that as requested, we have purchased a shelf company, Eltham Limited, to hold your shares. We attach a copy of the invoice from the solicitors in this regard. We would be grateful if you would remit FJD710.00 (inclusive of $10 bank charges) to our Trust*

Account number 01271991 at ANZ Bank, ANZ House, Suva and send an authorization by facsimile to enable us to settle the solicitors fees.

Should you require any further information please do not hesitate to contact us.

Yours faithfully

Bruce Sutton
Partner

47. KPMG would hold the sum of $25,000 as stakeholder and pay it out to the vendors at settlement, together with the balance, when the transfers were provided by NMBFL to VNFL.

The Arrangement Between The Intended Purchasers

48. The arrangement between the intended purchasers was that the purchase price would be shared equally between them.

49. If one or more of the intended purchasers was unable to raise the necessary funds to pay for their shares, they would forfeit their shares which would then be available to the remaining beneficiaries to purchase.

50. Sharma deposes that Mr. Anthony Ross Thomas and Mr. Peter Alan Harris, for one reason or another, failed to make funds available for settlement.

51. Accordingly, Padam Raj Lala, Dewan Chand Maharaj and Mahendra Sharma funded a further $20,000 each to complete the settlement and the transfer of all shares of NMBFL to VNFL.

Reserve Bank Of Fiji Approvals For Sale & Transfer From NMBFL Shareholders To VNFL

52. On 01 October 1999, the Reserve Bank of Fiji granted approval in principle for the sale and transfer of shares in NMBIL. This is deposed to in the affidavit of Ms. Wati Seeto sworn on 18 May 2016.

53. According to Ms. Seeto, on 27 October 1999, the RBF sent a letter to a Mr. Ahmed Zabidi, CEO of NMBFL highlighting two matters relating to the solvency position of NMBFL. On 23 December 1999, the RBF received notification of the change of name from NMBIL to SICL.

54. A week later, on 30 December 1999, a letter was written by RBF to Ahmad Zabidi concerning the shareholding structure and setting other conditions of NMBFL license.

55. On 19 January 2000, the RBF received a letter from Mr. Lala addressing the conditions of license of 01 October 1999 and seeking approval for transfer of remaining shares and changing of name to SICL.

56. According to RBF records, on 22 February 2000, there was a letter by Reserve Bank of Fiji to Mr. Lala who was the Chairman of NMBIL. In that letter, the RBF was conveying its approval for the sale and purchase of shares in NMBIL and for the name of NMBIL to be changed to SICL. This letter makes reference to the following:

> *Mr. Padam Lala*
> *Chairman*
> *NMBF Insurance (Fiji) Company Limited*
> *GPO Box 16976*
> ***SUVA***
> *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 licence for the year 2000.

Yours faithfully

I R Naiyaga
Chief Manager
[Financial Institutions]

57. On 23 February 2000, RBF granted a license to SCIL to conduct Insurance business and on 06 March 2000, SICL applied to the Minister for approval under section 3 of the Motor Vehicles (Third Party) Insurance Act to undertake the compulsory third party insurance business. This was gazetted by the Minister on 09/05/00.

58. Between 09 March 2000 to 30 November 2001[v], RBF continued to engage with SICL on the following:

    (i) compliance with the conditions of the license to SICL
    (ii) update on SICL's shareholding proposal for the transfer of shares from VNFL to the new shareholders

Transfer Of Shares From VNFL To Local Shareholders

59. Ms. Seeto deposes that the shares were actually transferred from VNFL to the local shareholders on 10 May 2000. Notably however, the instruments of transfer were only stamped by the Commissioner of Stamp Duties in July 2006 after the COA.

60. Apparently, Mr. Anthony Ross Thomas and Mr. Peter Alan Harris failed to make funds available towards their share of the settlement sum. As a result, the other intended purchasers (Padam Raj Lala, Dewan Chand Maharaj and Mahendra Sharma) funded a further $20,000 which allowed matters to proceed to settlement – and following which – the shares were then transferred to VNFL where they were held on trust.

61. On 2 July 2003, Mr. Lala, Mr. Sharma and Mr. Maharaj wrote to VNFL requesting VNFL to transfer the 400,000 shares (which VNFL was holding on trust for Thomas and Harris) to the three of them equally.

62. This letter, apparently, would cause a stir. Thomas and Harris refused to consent to the transfers of those 400,000 shares.

63. As a result, VNFL would file an Originating Summons in Suva (High Court Civil Action Number HBC 227 of 2000) to compel the two gentlemen to honour the agreement. Sharma deposes that he was also involved in proceedings in New Zealand with Thomas.

High Court Civil Action HBC 227 Of 2000

64. I have managed to retrieve a copy of each relevant court document filed in the above case from the Civil Registry of the High Court in Suva.

65. An Originating Summons was filed on 10 May 2000 by Parshottam & Parshottam on behalf of VNFL against Anthony Ross Thomas, Peter Allan Harris, Padam Raj Lala, Rocklyn Limited, Dewans Holdings Limited, Devan Sharma and Jancourt Limited.

66. By that Summons, VNFL was seeking determination of the following questions:

1. Whether VNFL holds any shares in Sun Insurance Limited (formerly NMBFIL in trust for the first and second defendants and, if so:

   (a) which of the said shares are held in trust.
   (b) the identity of the beneficiary or beneficiaries of the said trust

2. Whether any trusts by the plaintiff in respect of the said shares have failed

3. How else the said shares should be dealt with.

AND, if in the premises the plaintiff is found to be the trustee of any of the said shares, the plaintiff claims against the defendants:

1. A declaration that the plaintiff is entitled to be exonerated out of the said shares or, otherwise indemnified by the beneficiaries thereof, for the costs and expenses of acquisition of the said shares and administering the said trusts.
2. An order for sale of the said shares
3. Such further or other relief as appears just or expedient
4. An order for costs on a trustee basis

67. Ross and Harris filed a statement of defence on 28 July 2003 through Howards Lawyers by which they admitted that VNFL carries on business as trustee and that they have a beneficial interest in the $400,000 ordinary shares in NMBFI/SCIL.

68. Lala, Rocklyn, Dewans Holdings Limited, Devan Sharma, Jancourt Limited, Dewan Chand Maharaj, Mahendra Sharma filed a Statement of Defence on 06 October 2003 through Wm Scott Grahame & Co by which they admitted to all the dealings in the purchase of the NMBFL shares in NMBIL/SCIL and their stake in the dealings.

69. The above actions were settled out of Court on 07 March 2004. Thomas and Harris would agree to the transfer of the 400,000 shares to Lala, Maharaj and Sharma equally in return for payment of $140,000. Sharma deposes that the sum of $140,000 was paid and duly receipted on 28 May 2004. He annexes to his affidavit a copy of the receipt of payment marked "DP2-31" and a copy of the Board Resolution dated 28 May 2004 marked "DPS-32".

70. Sharma deposes that when Thomas and Harris sold their beneficial entitlement to their block of shares in SICL in settlement of HBC 227 of 2000, their shares were then purchased by the remaining intended purchasers through their nominee companies. I understand that these nominee companies are Rocklyn Limited, Sun Investment Limited, Dewan Holdings Limited and Jancourt Limited.

Current Shareholding Of SCIL

71. Below is the current shareholding after the above nominee companies were added.

Name	*Date*	*No. of Shares Now Held In NMBIL/SCIL*
Rocklyn Limited	*28/05/04 (from VNFL)* *Further shares transferred from Padam Lala on 08/06/04*	*283,300*
Deven P.Sharma	*27/04/01*	*200,000*
Padam Raj Lala	*27/04/01 (from VNFL)*	*50,000*
Dewan Chand Maharaj	*27/04/01 (from VNFL)*	*200,000*
Sun Investment Limited	*28/05/04 (from VNFL)*	*100*
Sushil Chand Maharaj	*03/09/04 from Dewan Holdings Limited*	*50,000*
Dewan Holdings Limited	*28/05/04 (from VNFL)*	*33,000*
Jancourt Limited	*28/05/04 (from VNFL)*	*133,000*
Suresh Chand Maharaj	*03/09/04 from Dewan Holdings Limited*	*50,000*
TOTAL		*1,000,000 issued shares*

NMBFL Under Receivership

72. A Receiver was appointed for NMBFL on 30 November 2001 pursuant to a debenture held by the National Bank of Fiji. Apparently, as Sharma deposes, the sale and transfer shares from NMBFL to VNFL took place before the appointment of the Receiver/Manager. The only transactions that took place after the appointment of the Receiver were the transfers from VNFL to the "intended purchasers" or their nominees.

BARODA'S POSITION

73. The above chronology is not seriously challenged. What is asserted though by Mr. Mishra is that the process which led to the transfer of the shares was yet inchoate at the time the charging orders were made.

74. Mr. Mishra paints Baroda as an innocent member of the public which obtained a charging order *nisi* and the COA on the money judgment based on the information retrieved from their search of the company register in 2006.

75. Mishra's main points of contention appears to be built around the following:

(i) that the onus is on the shareholders of NMBIL/SICL to show that the beneficial entitlement had passed to them. It is not for NMBIL/SICL to litigate on behalf of its shareholders.

(ii) the only way the shareholders can succeed in (i) above is by showing that VNFL had presented lawful stamped transfers to NMBIL/SICL's Board of Directors.

(iii) the charging orders *nisi* and the COA were granted on the basis of the 1998 Annual Returns.

(iv) the 1998 Annual Returns showed that NMBFL was still the holder of the 999,994 shares in NMBIL/SCIL. NMBIL/SCIL is now estopped from denying the shareholding structure recorded in the 1998 Annual Return which was in the company file records with the Registrar of Companies in 2006.

(v) the shares in question had not been lawfully transferred from NMBF when the charging orders *nisi* and COA were made. The memorandum of transfers were not stamped until later in July 2006.

(vi) Clause 4.1 of the of the Sale Agreement between the shareholders of NMBFL and VNFL stated that the agreement was conditional upon the intended purchasers' accountant's investigation into NMBIL/SCIL. The Accountants failed to detect Baroda's charging order absolute.

THE LAW

76. Under Order 50 Rule 2 of the High Court Rules 1988, a charging order may only be imposed on **"any interest to which the judgment debtor** (i.e. NMBFL) **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.*

Beneficial Entitlement

77. The phrase "beneficial entitlement" as used in Order 50 Rule 2 must mean the right to the benefits of a property. Generally, the rights to the benefits of a property will go hand in hand with full legal title. When legal ownership is transferred, the beneficial ownership of the property passes also in the process.

78. However, equity, recognizes that beneficial entitlement may not necessarily coincide with legal title at all times. The most common example is when a legal owner who holds shares as a bare trustee for some beneficiaries.

When Does Beneficial Entitlement Pass In A Sale & Purchase Transaction?

79. In any given sale and purchase transaction, equity may determine that the accrual of a beneficial entitlement in the purchaser will occur at a point preceding the assignment of full legal title.

80. For example, if A enters into an agreement with B to purchase from B some property (whether land or stock in a company or whatever), A may actually acquire an equitable interest in the property either at the point of agreement, or shortly after agreement, even though the completion of the conveyance to A of the full legal interest or title over the property is pending.

81. The exact point in time at which an equitable interest will accrue to a purchaser is that point when the sale and purchase agreement becomes specifically enforceable. As it is often said, the scope of that equitable interest is commensurate with the relief which equity will grant to protect that interest (see **Brown v Heffer** [1967] HCA 40; (1967) 116 CLR 344); **In Re Rudge, Curtain v Rudge** [1949] NZLR 752)

82. Hence, in **Reg. v. Australian Broadcasting Tribunal; Ex parte Hardiman** [1980] HCA 13; (1980) 144 CLR 13 the Australian High Court as per Gibbs, Stephen, Mason, Aickin and Wilson JJ at 31 said 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."*

83. In **Legione v. Hateley** [1983] HCA 11; (1983) 57 ALJR 292 Gibbs C.J. and Murphy J. said, at page 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."*

84. 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."*

85. 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 noted a slightly different view. That view is that a purchaser's equitable interest is commensurate with her ability to protect her interest **"by injunction or otherwise"**.

*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] HCA 29; (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.

86. Query whether the phrase *"by injunction or otherwise"* contemplates that a purchaser's equitable interest could also be held to be commensurate with her ability to protect her interest by such restitutionary equitable relief as constructive trust.

No Equitable Interest Can Arise When A Regulatory Consent Is Pending In A Sale & Purchase Agreement

87. It is trite that no equitable interest can arise out of a sale and purchase agreement if that agreement is yet conditional upon the consent of a regulatory authority which is yet to be obtained (see **Brown v Heffer** [1967] HCA 40; (1967) 116 CLR 344).

Equitable Interest May Still Accrue Notwithstanding Non-Compliance With Articles Of Association So Long As Consideration Has Passed

88. In **Hawks v McArthur & Ors** [1951] 1 All ER 22, Hawks held a charging order over some shares held in the name of McArthur. McArthur had actually sold the shares to Roberts and Fraser before Hawks obtained the charging order.

89. However, at the time the charging orders were obtained, Roberts and Fraser were yet to be registered as holders. At that time, they had paid money towards the purchase. Furthermore, the transfer to Roberts and Fraser did not comply with the company's articles of association.

90. The issue as defined by Vaisey J was:

> *... whether the alleged agreements ..... operated so as to amount in equity to a transfer of the shares ....., 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.*

91. Vaisey J acknowledged that there were two competing equitable interests.

> *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.*

92. In balancing the two competing equitable interests and determining which one should prevail, Vaisey J said as follows:

> *..... the question is whose rights should prevail. A not irrelevant 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.*

93. The headnotes summarizes the decision reached by Vaisey J as follows:

> ***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.*

What If Instruments Of Transfer Were Not Stamped? What If The Transfers Were Not Entered In Company Share Register At COA?

94. Mr. Mishra highlights that the transfer instruments were actually executed in 1999 but were not stamped until 14 July 2006 well after the charging order absolute was made in June 2006. He argues that the beneficial interest over the shares could only have passed at the point of stamping.

95. Accordingly, beneficial interest had remained with NMBFL, at the time the charging orders were made. Baroda's equitable interest should, therefore, be prioritized over the interest created through the Standard Transfer Forms.

96. As I have said in my earlier ruling, I have a problem with this argument for two basic reasons.

97. Firstly, Order 50 Rule 2 is about the charging of an asset over which a judgment debtor has "beneficial entitlement". It does not say that a COA can only be imposed on an asset which is fully legally owned by a judgment debtor. As the cases have said, beneficial entitlement can pass even at the point of the sale and purchase agreement, provided the agreement is specifically enforceable.

98. Secondly, generally, stamp duty is levied on instruments and not the underlying transactions to which they give effect. It is the underlying transactions upon which the passing of an equitable interest is based. Simply put, for the benefit of all, the accrual of an equitable beneficial entitlement is unaffected by whether or not a transfer instrument has been duly stamped.

99. Justice Mason in the Australian High Court case of **DKLR Holdings (No. 2) Pty Ltd v Commissioner of Stamp Duties** [1982] HCA 14; (1982) 149 CLR 431 at 449-52, said:

> 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.

ANALYSIS

100. It is clear to me that the beneficial interest in the shares in question no longer vested in NMBFL at the time the charging order absolute was made. I am of the view that the beneficial interest actually passed at the time when RBF approval was given on the sale and transfer of shares to VNFL.

101. The Agreement for the Sale and Purchase of the Shares between the original shareholders of NMBIL/SCIL and VNFL was made on 25 August 1999. VNFL also paid a deposit and signed a Deed of Trust for the benefit of the intended purchasers on the same date.

102. RBF granted approval in principle for the sale of the shares to VNFL on 01 October 1999. On 22 February 2000, RBF granted full approval for the sale of the shares in NMBIL.

103. By 22 February 2000, the following had already happened:

1999	Negotiations for the sale and purchase of shares between NMBFL and the original intended purchasers.
	KPMG engaged by intended purchasers
	Nominee company VNFL set up to purchase shares and hold shares on trust for intended purchasers
25/08/99	Agreement For Sale & Purchase of Shares between VNFL & shareholders of NBFIL/SCIL
	Deed executed by VNFL to record trust arrangement between VNFL and intended purchasers
	$25,000 paid by VNFL as deposit towards purchase price. Payment to KPMG as agreed with vendors.
01/10/99	RBF approval in principle given for sale of shares to VNFL

27/10/99	RBF letter to NMBFL highlighting solvency compliance issues.
23/12/99	RBF received notification of change of name from NMBIL to SCIL.
30/12/99	RBF letter to NMBFL regarding shareholding issues.
19/01/00	Letter to RBF from GP Lala addressing conditions of license imposed by RBF.

104. As I have said, the money judgment was granted in August 2005. Between the time RBF approval was granted on 22 February 2000 to the date the money judgment was handed down, the following had happened:

23/02/00	RBF granted license to SCIL to conduct insurance business.
06/03/00	SCIL applied to the Minister for approval under s. 3 of the MV(TP) Insurance Act to undertake compulsory third-party insurance business.
01/05/00	VNFL filed HBC 227 of 2000. Thomas and Harris issues surfacing.
09/05/00	Minister gazetted.
10/05/00	Instruments of Transfer of Shares from VNFL to New Shareholders
March 2000 to November 2001	RBF engaging with SCIL re compliance and also transfer of shares from VNFL to new shareholders.
07/03/04	Settlement on HBC 227 of 2000 and Thomas & Harris beneficial interest in VNFL 400,000 shares sold to other co-parties.

105. After the money judgment was entered in August 2005, Mishra would later that year search the company records of NMBIL/SCIL at the Registrar of Companies to begin execution - only to find that the Annual Returns had not been updated since 1998.

106. With all that was happening from 1999 in the takeover of NMBIL/SCIL, it is not hard to imagine that the filing of Annual Returns would easily slip the radar of the company secretariat. While this does/did not excuse NMBIL/SCIL from accountability - perhaps it gives some perspective and context as to why in 2006, the last Annual Return filed was that for the year 1998.

107. One thing that is clear is that from as early as 1999, NMBFL had made up its mind to sell its controlling interest in NMBIL/SCIL. Negotiations started immediately thereafter and an agreement was signed the same year with a deposit paid. The transfers to VNF were also executed the same year.

108. In saying all this, I am highlighting that aspect of the background to this case that convinces me that the takeover of NMBIL/SCIL by the new owners from NMBFL was all *bona fides*. There is nothing in the background to this case that remotely suggests that the motive in the takeover was to avoid any creditor action by Baroda.

109. In my view, it was when RBF gave its full regulatory approval on 22 February 2000 when a specifically enforceable equitable interest in the shares had fully accrued to VNFL, for the benefit of the then intended purchasers who are now shareholders along with the nominee companies of some of them (less Thomas and Harris).

CLOSING REMARKS

110. As I had said in **Bank of Baroda v National (MBF) Finance Fiji Ltd** [2016] FJHC 221; HBC191.1998 (8 April 2016), the background to Connors J's money judgment is a story of how SICL was hard done by.

111. However, I must take also into account the interest of the current shareholders of NMBIL/SCIL who, by all accounts, and from all accounts, were *bona fide* purchasers for value of the shares in question and were equally "innocent" in all that were to happen later.

DECLARATIONS/ORDERS

112. For reasons I have stated above, I declare that the beneficial entitlement in the 999,994 shares that are charged under the Charging Order Absolute granted by Finnigan J in 2006 had were no longer vested in NMBFL (the judgment debtor) at the time the charging orders nisi and the Charging Order Absolute were granted in 2006.

113. The Charging Order Absolute over the 999,994 shares in question is must therefore be discharged under Order 50 Rule 7 of the High Court Rules 1988, and I do so order accordingly.

114. While costs usually follow the event, I think the issues that arose in this case would not have happened had NMBIL/SCIL updated its Annual Returns at all

material times. I think it is only fair that NMBIL/SCIL pay Baroda's costs in the charging Orders proceedings which I summarily assess at $10,000-00 (ten thousand dollars).

.....

Anare Tuilevuka

JUDGE

Lautoka

29 October 2020

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[i] http://www.paclii.org/fj/cases/FJHC/2016/221.pdf

[ii] http://www.paclii.org/fj/cases/FJHC/2017/695.pdf

[iii] charging order *nisi* and absolute which were granted by Mr. Justice Finnigan on 03 March 2006 and 12 May 2006 respectively.

[iv] Section 10 of the Civil Evidence Act 2002 provides:

> Part III-DOCUMENTARY EVIDENCE
> Proof of statements contained in documents
> 10.-(1) If a statement contained in a document is admissible as evidence in civil proceedings, it may be proved-
> (a) by the production of that document; or
> (b) whether or not that document is still in existence, by the production of a copy of that document or the material part of it, authenticated in a manner the court approves.
> (2) It is immaterial for the purpose of this section how many extracts there are between a copy and the original.

[v] The following happened:

09/03/00	RBF wrote to SICL enclosing Insurance License in name of SICL and informing SICL that conditions of license stipulated in 30/12/99 letter remained in force until fully satisfied.	(see affidavit of Ms. Wati Seeto sworn on 18 May 2016)
04/04/00	RBF wrote letter to SICL seeking update on shareholding proposal for sale and transfer of shares held in trust by VNFL.	(see affidavit of Ms. Wati Seeto sworn on 18 May 2016)
10/05/00	RBF received letter from SICL advising that 600,000 shares have been transferred from VNFL to local shareholders and that 400,000 shares were in the process of being transferred upon receipt of the relevant Court Order.	(see affidavit of Ms. Wati Seeto sworn on 18 May 2016)