IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 286 of 2017

IN THE MATTER of sections 109 and 114 of the Land Transfer Act 1971.

AND

IN THE MATTER of an application to remove Caveat No. 844599 lodged by Avoser Challenge Limited and placed on iTaukei Lease No. 13796, the property of Dubbo Limited, and for compensation related thereto.

BETWEEN : **DUBBO LIMITED** a company incorporated in Fiji and having its registered office at c/-PricewaterhouseCoopers, 52 Narara Parade, Lautoka.

PLAINTIFF

AND : **AVOSER CHALLENGE LIMITED**, whose registered office is at Unit 01 2A, Commercial Complex, Port Denarau, Nadi.

DEFENDANT

Counsel : **Mr. J. Apted, Ms. Chen W. for the Plaintiff**
Mr. D. Sharma for the Defendant
Date of Hearing : **22nd November, 2017**
Date of Judgment : **27th November, 2017**

JUDGMENT

INTRODUCTION

1. This is the summons filed by the solicitors for the Defendant seeking recusal of the Plaintiff's lawyers from the matter. The action is filed by the Plaintiff seeking removal of caveat lodged by the Defendant. The caveat is lodged by the Defendant relating to a property where the lessee (the Plaintiff) is a subsidiary of Farleigh Ltd, whose shares held

by Fiji Cayman Holding (Vendor) were on offer for sale. A Share Sale Deed was entered between the Vendor and the Defendant. In pursuant to that agreement Defendant was required to deposit an amount. This amount was deposited with the vendor's solicitor who is appearing for the subsidiary of the entity whose shares were offered for sale, in this proceedings for removal of the caveat lodged by the Defendant. The inter partes summons of the Defendant seeks that the solicitors for the Vendor to be recused as they are '*stakeholders of the Defendant*'. This is based on Plaintiff's solicitor holding money in pursuant to a Deposit Deed. In the said Deposit Deed the Defendant and the solicitor for the Plaintiff (the vendor) are parties, and certain obligations are contained under said agreement. The Defendant was fully aware that the Plaintiff is represented by the solicitors of the vendor who had filed the present application for the Plaintiff. The solicitors for the Vendor had represented them and at no point had represented Defendant. There was no reason for the Defendant to divulge any confidential information to the lawyers of the Plaintiff. So mere retention of money in terms of a Deposit Deed cannot be a reason to recuse them as 'stakeholders'. It should also be noted that this application for recusal was filed one day before hearing of the application for removal of caveat, thus preventing hearing of removal of caveat on that day. No issue of recusal was raised any time before this application, though solicitors for the vendor was a party to the Deposit

FACTS

2. The Plaintiff is a subsidiary of Farleigh Ltd, whose shares were on offer for sale by the shareholder, Vendor (Fiji Cayman Holding).

3. The share sale offer was accepted by the Defendant and a Share Sale Deed was entered between the Defendant and Vendor.

4. In terms of the said Share Sale Deed a certain amount of money was required to be deposited and this amount was deposited with the Vendor's solicitor.

5. A Deposit Deed was entered and both Defendant and Vendor's solicitor became parties under said agreement.

6. Defendant contend that being a party to the said Deposit Deed the solicitors are a 'stakeholder' and should be recused.

7. No provision in the said Deposit Deed indicate that Defendant had any conflict with the Plaintiff's solicitors.

ANALYSIS

8. The objection of the Defendant's solicitor to the appearance of the Plaintiff's solicitor is that they had become a '*stakeholder of the Defendant*', due to they being a party to the Deposit Deed. This is a vague statement and cannot be considered as a ground for recusal. A party to a Deposit Deed ipso facto not to be recused unless there are some reasons to believe conflict of interests. No provision is said Deposit Deed was referred in summons or in written submissions.

9. The Deposit Deed was entered in pursuant to share Share Sale Deed entered between the Vendor and the Defendant in regard to sale of the shares in Farleigh Ltd. The Solicitors for the Plaintiff represent the Vendor.

10. The Plaintiff's solicitors had represented Vendor and the Defendant was fully aware of the said relationship and it had not objected to that at all. Plaintiff is a subsidiary of the entity on which shares were offered by the Vendor. So now the Vendor's solicitor is appearing for a related company of theirs and Defendant cannot object to that choice based on the deposit of money, unless some provision in Deposit Deed caused a conflict of interest.

11. The Defendant's allegation for recusal is without merit. The Vendor's solicitor who accepted deposit in terms of Share Sale Deed is not representing them or holding any confidential information, of the Defendant. When the Defendant accepted the solicitor for the Vendor to deposit money it had full knowledge of them representing the Vendor and or subsidiaries of the entity on which shares were sold.

12. The Defendant had consented to the Vendor's solicitor accepting money in pursuant to Share Sale Deed and accordingly there was an informed consent on the part of the Defendant for the solicitor of the Vendor to act on behalf of them and also to be a party to the Deposit Deed. This is the relationship the Defendant is now categorizing as 'stake holder'. If there was an issue of Vendor's solicitor being accepted as party to Deposit Deed it would have been raised at that time or latest by the time dispute arose among the parties in relation to Share Sale Deed. The solicitors of the Vendor, being a 'stake holder' or a party to the Deposit Deed, was voluntarily accepted by all the stakeholders to the said Deposit Deed, and that position remained so till the day before the hearing of the application for removal of caveat.

13. The Deposit Deed is only relating to the money held with them in pursuant to Share Sale Deed. Hence, such deposit cannot create a conflict in relation to the same solicitors appearing and representing a subsidiary of the entity on which shares were offered for sale by the Vendor.

14. Being a 'stakeholder' is not sufficiently described, to consider in a conflict of interest matter. The burden is with the Defendant to prove that being a party to the Deposit Deed precludes them in terms of Deposit Deed prevents them from representing the Plaintiffs in this matter.

15. The counsel for the Defendant could not even indicate any practice where a solicitor who had accepted a deposit being considered as having a conflict of interest of the depositor /purchaser in a litigation regarding a dispute between vendor and purchaser. In this instance the relationship is even further as the parties to the action are subsidiary of an entity whose shares were on offer.

16. The Defendant relied on a US report regarding escrow accounts. In my mind this article which is annexed to the written submission is *non sequitur*. First, the said report made in 1986 relating to US practice rules, does not state that there will be conflict of interests in all instances where the law firms that act to deposit money under a deed. When vendor

and purchaser both knowingly accepts a deposit in pursuant to a Share Sale Deed, they are fully aware of the consequences. It only states that it is desirable to have a clause in such a deed allowing them to appear for one party in relation to a dispute as to the funds deposited. Importantly, there is no dispute as to the funds in this matter. The said opinion inter alia refers to US provisions DR5-105(C); N.Y. County 573(1969), DRs 5-101 and 5-102, DR 4-101(A), DR 4- 101 (c), NY. County 413(1953); ABA 393(1961); N.Y. County 377(1975); N.Y. City 312 (1934); Michigan CI-389(1979); Tennessee 81-F-20(1981). The said opinion had also referred to conflict of interest contained in N.Y. City 80-56 and also Cannon 4, Cannon 7. The counsel for the Defendant had not provided these for the perusal of the court. It is a dangerous thing to apply some **opinion** of a committee made in 1986, regarding a foreign law without even not knowing the said foreign law. It is more dangerous when it is a non-commonwealth country like US where civil law codes are applied in the area of conflict. So a careful reading of such US codes are needed before application of a report made in 1986. The burden of submitting relevant foreign law was with the counsel for the Defendant. Secondly, such an informed consent is not needed in the present instance as the Plaintiff's solicitor had represented the Vendor of the share sale even prior to the entering of Share Sale Deed and present action is not regarding Deposit Deed. This is an application by the Plaintiff who seeks to remove caveats lodged by the Defendants. The Plaintiff is the lessee of the land where a caveat is lodged.

CONCLUSION

17. The solicitors for the Plaintiff need not be recused on a mere allegation that they are a party to a Deposit Deed in pursuant to Share Sale Deed between the Defendant and the Vendor. This is an application filed by the Plaintiff seeking removal of caveats lodged by the Defendants and the Plaintiff is the lessee of the said property. The summons seeking recusal filed on 16th November, 2017 is struck off. The cost of this application is summarily assessed at $2,500.

FINAL ORDERS

a. The summons filed on 16th November, 2017 seeking recusal is struck off.

b. Cost of this application is summarily assessed at $2,500.

Dated at Suva this 27th day of November, 2017

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Justice Deepthi Amaratunga
High Court, Suva