

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. **HBC 104** of **2013**

BETWEEN : **DOMINION FINANCE LIMITED** a limited liability company having its registered office at 231 Waimani Road, Suva.

PLAINTIFF

AND : **SKYKING INVESTMENTS LIMITED** a limited liability company having its registered office at 7 Waimanu Road, Suva, in Fiji.

1ST DEFENDANT

AND : **HF RESIDUAL OBLIGATIONS LIMITED** a company incorporated under the laws of New Zealand.

2ND DEFENDANT

BEFORE : **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Sharma D.** for the Plaintiff

Mr. Singh R. with Mr. Nand A. for the 1st and 2nd Defendants

DATE OF DECISION: 24th September, 2024

DECISION

[Inter parte summons for Recusal]

At the outset, this Court notes that the substantive matter was initiated in 2013 and remains impending to the current for the obvious reasons best known to the parties to the proceedings.

Introduction

(1) The Plaintiff filed an Inter Parte Recusal Summons coupled with an Affidavit in Support deposed by Nitesh Lal on 16th August 2023 and sought for the following Orders:

1. **That Munro Leys**, the solicitors for the First and Second Defendant **be recused from acting for the First Defendant** in this proceedings;
2. Any other relief this Honorable Court may deem just; and ,
3. Costs on an indemnity basis.

(2) The Grounds of seeking **Recusal** can be summarized as follows:

1. Munro Leys never obtained instructions from the 1st Defendant;'
2. There is a Conflict of Interest between the First and Second Defendants once the Directors of the First Defendant blames the Second Defendant for the failure of their project in Fiji; and
3. Munro Leys wrongfully objected to the application of the Plaintiff to seek summary judgment against the First Defendant as the First Defendant does not deny the debt owed by it to the Plaintiff.
4. Munro Leys representing the Defendant(s) did not file any affidavit to the Plaintiff's recusal application as it was incumbent upon them to file and serve an answering Affidavit to respond to the issues raised by Brent Gibson, a Director of the First Defendant Company.

Mark Hotchin's Affidavit (summarized)

(3) However, Mark Hotchin holding himself out as a Director of the second Defendant, HF Residual Obligations Limited [HFROL] filed a responding affidavit to the Plaintiff's recusal application.

- (4) In terms of the Recusal application in the present proceedings [HBC 104 of 2013] Dominion issued proceedings against Skyking (First Defendant) and HF Residual Obligation Limited [Second Defendant] seeking Judgment from the Principal and interest under the Dominion loan in the sum of FJ \$3,748,061.59. Dominion is seeking orders **inter alia** that:
- (a) Dominion mortgage be registered over the Certificate of Title ; and
 - (b) Dominion be allowed to sell the Certificate of Title free from all encumbrances".
- (5) Dominion is now seeking Munro Leys, as solicitors for the First and Second Defendants, to recuse itself from acting for the First Defendant, Skyking in this proceedings.
- (6) Apart from the other matters he further deposed that "as per the mortgage no. 579405, Skyking had irrevocably appointed HF Residual Obligations Limited (As mortgagee) to be its **attorney** to, **inter alia**, secure or give effect to the rights of the mortgagee. This is reflected in clause 12.1 of the memorandum annexed to the registered mortgage no. 579405 which was executed by Skyking as the **Power of Attorney**.
- (7) Based on this, HF Residual Obligations Limited has instructed Munro Leys to act for Skyking [First Defendant], in order to protect HF Residual Obligations Limited's interest as the First registered mortgagees under the HF Residual Obligations Limited mortgage.
- (8) Munro Leys has represented both the **First and Second Defendants** in the proceedings on instructions from HF Residual Obligations Limited.

Munro Ley's Contention (Summarized)

- (9) On 7th May 2013, Munro Leys filed an Acknowledgment of Service on behalf of Skyking (First Defendant).
- (10) HF Residual Obligations Limited had instructed Munro Leys to act for Skyking (First Defendant) in order to protect HF Residual Obligations Limited's interests as the First registered mortgagees under the HF Residual Obligations Limited mortgage.

- (11) The Plaintiff Dominion is not entitled to ask this Court to remove Munro Leys from acting for the First Defendant. This entitlement remains with the First Defendant, Skyking. If the First Defendant wants to change its solicitors, it can do so by complying with *Order 67 Rule 1* of the High Court Rules, 1988.
- (12) This should bring this matter to an end. Dominion's application for Recusal should be struck out with costs.
- (13) The Power of Attorney in this case came into existence through the HF Residual Obligations Limited mortgage document no. 579405.
- (14) The mortgage document was executed by Skyking Directors, although varied twice, the operative clause, and the memorandum (together with the Power of Attorney) remained valid.
- (15) Munro Leys did not need to obtain instruction from Skyking (First Defendant), since Munro Leys was appointed by HF Residual Obligations Limited to Act for the First Defendant in the proceedings.
- (16) The mortgagor under HF Residual Obligations Limited mortgage was Skyking and mortgagee was Hanover Finance Limited (now HFFOL, Second Defendant).
- (17) The affidavits filed herein together with the Parties written submissions, coupled with oral submissions were all taken into consideration for Court to make a determination on the impending issue.

Determination

- (18) The issues this Court needs to determine are the following:
 - [i] Whether Munro Leys as Solicitors for the First and Second Defendants, should recuse itself from acting for the First Defendant in this proceedings?**
 - [ii] Whether there are compelling reasons why Munro Leys should be recused from acting for the First Defendant?**

- (19) By this Recusal application, Dominion is seeking to remove Munro Leys from acting for the First Defendant, Skyking. Dominion asserts that, amongst other things, the First Defendant never instructed Munro Leys to act for it in this proceedings. Dominion is invoking the Inherent jurisdiction powers of this Court to seek the abovementioned **order for Recusal**.
- (20) The question that I ask to myself are:
- (i) **Is the Plaintiff [Dominion] entitled to ask this Court to remove Munro Leys from acting for the First Defendant [Skyking]; or**
 - (ii) **Is it that this entitlement remains with First Defendant [Skyking] who if desires to seek Recusal then can invoke order 67 rule 1 of High Court Rules 1988.**
- (21) For clarity reasons, it must be understood that this is not the First Defendant's application for recusal. Rather, Skyking has not applied to remove Munro Leys as its lawyers.
- (22) However, it is the Plaintiff, Dominion [Plaintiff with vested interested in the matter] seeks the orders for Recusal in terms of the Grounds enumerated at paragraph 2 (1), (2) (3) and (4) of my Decision hereinabove accordingly.
- (23) The Power of Attorney in this case came into existence through the HF Residual Obligations Limited registered mortgage document no. 579405.
- (24) The mortgage document was executed by Skyking's directors as 'proprietors' since Skyking owned the Titles that were being mortgaged.
- (25) Dominion had at no time challenged the validity of the Mortgage document. As such, the Power of Attorney that was part of the mortgage and created by the mortgagee or mortgage document was equally valid and effective.
- (26) The only basis on which Dominion is challenging the mortgage document is that it was not a valid contract because it has never been executed by Hanover Finance Limited, (now HFROL), the Second Defendant].

- (27) The Plaintiff's Solicitors had received a Statutory Declaration from the Director of the First Defendant, Skyking who gave a background about the loan from the Plaintiff to the First Defendant and also stated '**they had never** instructed Munro Leys at act for them. They do not deny and or dispute the debt and interest owed by the First Defendant to the Plaintiff.
- (28) The Statutory Declaration was sent for Response to Brent Gibson's by Munro Leys and on 06th June 2023, Munro Leys replied *"we act for the Defendants....concerning Brent Gibson's assertions, second Defendant HF Residual Obligations Limited [HFROL] was irrevocably appointed as Attorney of **Skyking Investment Limited** by virtue of registered mortgage no. 579405 given by Skyking [First Defendant]. **Variations were further registered in December 2006 to 28 November 2007 to reflect further advances.HF Residual Obligations Limited's mortgage is the First registered mortgage which gives it priority over others. The recognitions of the priority of registered interests over properties is not new. Mr. Gibson's evidence is subject to cross-examination. Given that much of what he has stated in his statutory declaration is currently in dispute and is a matter of law, the trial is to be appropriate forum to deal with Mr. Gibson's assertions. Further, we disagree that there is any conflict between Skyking and HF Residual Obligations Limited.Pleadings show there is no cross claim between the Defendants.....summary judgment application was withdrawn by you on behalf of the Plaintiff after the application was heard and based on our submissions before the Court, you subsequently amended your claim.... the Plaintiff's caveats were removed on 04th May 2020."***
- (29) I find that Munro Leys did not need to obtain any instruction from the First Defendant, Skyking, since Munro Leys was appointed by HF Residual Obligations Limited (2nd Defendant) to act for the First Defendant in this proceedings.
- (30) It is clear HF Residual Obligations Limited (Second Defendant) acted on the power of attorney that has been irrevocably granted to it under the HF Residual Obligations Limited mortgage no. 579405 which was Skyking's [First Defendant]. And the mortgagee was Hanover Finance Limited (now HF Residual Obligations Limited, the Second Defendant) acting in terms of clause 12 of the HF Residual Obligations Limited mortgage.
- (31) The Power of Attorney gave a wide discretionary power to HF Residual Obligations Limited to 'do any other act or thing that the attorney shall, in the attorney's absolute discretion deem

necessary or expedient.” This included appointing a Legal representative Munro Leys in the proceedings to act for the Mortgagor (Skyking - first defendant) to secure its rights as the First registered mortgagee accordingly.

- (32) Under clause 12.1, if supposedly HF Residual Obligations Limited empowered to appoint a lawyer to represent Skyking in this case and had failed, then any Judgment entered against Skyking [1st Defendant] in absence of representation would have resulted in the taking of the secured properties away from HF Residual Obligations Limited and given to a third party without HF Residual Obligations Limited being able to benefit from the rights it had as the First registered mortgagee.
- (33) Hotchin's affidavit confirms at paragraph 25 and 26 that “HF Residual Obligations Limited (second defendant) appointed Munro Leys to act for Skyking (First Defendant) by acting without the powers that was granted to it by the Power of Attorney accordingly.
- (34) The Court also notes the fact that HF Residual Obligations Limited had acted on within its powers of Attorney to instruct Munro Leys to oppose the Plaintiff's Summary Judgment application, which was later withdrawn by the Plaintiff.
- (35) The Plaintiff relying on the two (2) statutory declarations from the director of Skyking (First Defendant), Brent Gibson based its assertion that 'Munro Leys cannot continue to act for both, Skyking (First Defendant) and HF Residual Obligations Limited (Second Defendant) due to the issue of conflict arising between the two parties.
- (36) The declarations do not confirm whether Mr. Gibson is still a Director of Skyking and/or whether he was a Director in 2013 when Munro Leys represented the First Defendant.
- (37) I find that Mr. Brent Gibson's both statutory declarations are irrelevant and any assertions made on its basis, are a mere conjecture since they speak and/or depose of facts and matters prior to 2010, and not the current time when Munro Leys first came on record representing Skyking (First Defendant).
- (38) After perusal of the entire Court Record two, (2) statutory declarations, coupled with the substantive matter and the affidavit filed together with the written and oral submissions made to this Court on the Plaintiff's application seeking for Recusal of Munro Leys from

representing Skyking (First Defendant), I do not find that there is any conflict between the First and Second Defendants as asserted by the Plaintiff herein.

(39) Accordingly, the Plaintiff's application seeking for Recusal of Munro Leys from representing Skyking (First Defendant) is doomed to fail and accordingly dismissed.

In Conclusion

(40) Second Defendant, HF Residual Obligations Limited was irrevocably appointed as Attorney of Skyking Investment Limited [Second Defendant] by virtue of registered mortgage no. 579405 given by Skyking.

(41) HF Residual Obligations Limited's mortgage is the first registered mortgage which gives it priority over others.

(42) Mark Stephen Hotchin in his Affidavit in Response of the Plaintiff's Recusal application, stated that he is irrevocably appointed as the Attorney of Skyking.

(43) Based on above, HF Residual Obligations Limited had instructed Munro Leys to act for Skyking, in order to protect HF Residual Obligations Limited's interests as the first registered mortgagee under the HF Residual Obligations Limited mortgage.

(44) On 17th September 2015, HF Residual Obligations Limited was added as a Second Defendant to this current proceedings and Munro Leys has represented both the first and second defendants on instruction from HF Residual Obligations Limited.

(45) There was no objection and or recusal application filed by the Plaintiff than until the Plaintiff lawyers received a statutory declaration deposed by Brent Gibson on 26th July 2023. That prompted the Plaintiff to file the current Recusal application.

(46) The subject substantive matter of the present proceedings is the Certificate of Title where HF Residual Obligations Limited has a first registered mortgage over the Certificate of Title.

(47) Pursuant to HF Residual Obligations Limited mortgage, Skyking (First Defendant) has provided the Power of Attorney to HF Residual Obligations Limited to act on Skyking's

behalf, in HF Residual Obligations Limited's absolute discretion, to secure its rights under the HF Residual Obligations Limited mortgage.

- (48) I see no reason why Munro Leys Lawyers cannot act for Skyking (First Defendant) when HF Residual Obligations Limited (second Defendant) has been empowered by Skyking (First Defendant) through the Power of Attorney pursuant to the HF Residual Obligations Limited mortgage to act on Skyking's behalf and instruct Munro Leys to act for Skyking to protect HF Residual Obligations Limited's interest as First registered mortgage under the HF Residual Obligations Limited mortgage.
- (49) The Plaintiff's application /summons seeking for Recusal of Munro Leys from acting for the First Defendant, Skyking in this proceedings has no merits and therefore stands dismissed accordingly.

Costs

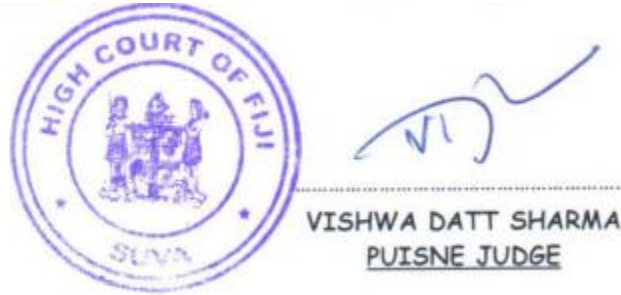
- (50) The application proceeded to full hearing with parties to the proceedings filing affidavit, written submissions and orally argued the matter.
- (51) The Plaintiff is ordered to pay the First Defendant, Skyking a summarily assessed costs of \$1,500 to be paid within 14 days timeframe.

Orders

- (52) The Plaintiff's Summons seeking Munro Leys, as solicitors from the First and Second Defendant, to recuse itself from acting for the First Defendant in this proceedings is dismissed in its entirety.
- (53) The Plaintiff is ordered to pay the First Defendant Skyking a summarily assessed cost of \$1,500 within 14 days timeframe.

(54) The substantive action being a 2013 [HBC No. 104 of 2013] matter impeding in the court system for about 11-12 years, to be assigned with a hearing/trial date and determined expeditiously.

Dated at **Suva** this **24th** day of **September**, 2024.



CC: R Patel Lawyers, Suva
Munro Leys Solicitors, Suva