

**IN THE HIGH COURT OF FIJI**  
**IN THE WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 274 of 2005L**

**BETWEEN** : **FORUM HOTELS LIMITED**

**PLAINTIFF**

**A N D** : **NATIVE LAND TRUST BOARD**

**1<sup>ST</sup> DEFENDANT**

**A N D** : **REGISTRAR OF TITLES**

**2<sup>ND</sup> DEFENDANT**

**A N D** : **ATTORNEY GENERAL OF FIJI**

**3<sup>RD</sup> DEFENDANT**

**Appearances** : **Mr Ritesh Singh for the plaintiff**  
: **Mr Josefata Cati for the first defendant**  
: **The second and third defendants did not take part in the proceedings.**  
: **Mr Niko Nawaikula for the interested party**

**Hearing** : **Tuesday, 28<sup>th</sup> January, 2020.**

**Ruling** : **Friday, 21<sup>st</sup> February, 2020.**

**RULING**

**[A] Introduction**

(01) On 30<sup>th</sup> May, 2019, Tokatoka Nadrau Development Trust (the Trust) filed Summons under Order 15, rule 4 of the High Court Rules, 1988 seeking leave of the court to join as plaintiff in the action.

The application for joinder is supported by an affidavit sworn by Ratu Taito Nalevukaya, the legal representative of Tokatoka Nadrau Development Trust.

- (02) The application for joinder is vigorously opposed by the plaintiff and the first defendant. The plaintiff and the first defendant filed the affidavit in opposition on 22<sup>nd</sup> October, 2019 and 30<sup>th</sup> October, 2019 respectively.

Regrettably, the interested party, Tokatoka Nadrau Development Trust, did not file an affidavit in reply.

**[B] Background Facts**

- (01) In January, 1998 Enormous Investment Ltd was granted a Native Lease bearing No. 24345 by NLTB in respect of land called Legalega, Lot 1, Plan No. 3578 in area 8486 square meters situated in Nadi and it was to take effect from 1<sup>st</sup> January, 1996. Out of the clauses contained in the lease, two clauses are relevant to the issues before the court, viz clause 2 (k) and clause 2(o). Clause 2 (k) requires Enormous Investment Ltd to build on the land an industrial building within 2 years from the 1<sup>st</sup> January, 1996 to the satisfaction of the lessor. Clause 2(o) required the lessee to keep the said land clear of refuse, rubbish, weeds and unsightly growth to the satisfaction of the lessor. Enormous Investment Ltd failed to erect a building within the stipulated period of 2 years and in the year 2000 with the consent of the NLTB, the plaintiff Forum Hotels acquired the lease as a purchaser in the exercise of the power of sale by the mortgagee of the said lease and the subsequent lease was registered on the 2<sup>nd</sup> May, 2000. As Forum Hotels too failed to erect any building within 2 years or within a reasonable period, the first defendant NLTB in exercising its right of re-entry issued a notice under Section 105 of the Property Law Act on the 7<sup>th</sup> February, 2005 and informed the plaintiff Forum Hotels to remedy the breach mentioned in the notice within a period of 30 days. As the plaintiff failed to remedy the breaches, the first defendant exercised the power of re-entry on the 8<sup>th</sup> of March and cancellation of the lease was registered by the 2<sup>nd</sup> Defendant on the 14<sup>th</sup> March, 2005. Aggrieved by the above acts of re-entry and the cancellation of the lease the plaintiff filed Civil Action in the High Court challenging the above said re-entry and the registration of the cancellation of the lease.
- (02) The matter was tried before Justice (Ms). Gwen Phillips on 26<sup>th</sup> June, 2007 and was adjourned to 14<sup>th</sup> and 15<sup>th</sup> August, 2007 for continuation of hearing. It was further adjourned to 21<sup>st</sup> August, 2007, 22<sup>nd</sup> August, 2007, 29<sup>th</sup> October, 2007, 8<sup>th</sup> February, 2008 and 5<sup>th</sup> May, 2008 and the matter was adjourned for judgment on 26<sup>th</sup> September, 2008 but it was further adjourned to 17<sup>th</sup> July, 2009 for judgment. The judgment in this matter was not delivered by the trial Judge as Her Ladyship's appointment as a judge came to an end at the time of abrogation of the Constitution in April 2009. She had heard the case over 4 days finally completing on 21<sup>st</sup> August, 2007. The matter eventually came before Mr Justice Inoke on 14<sup>th</sup> August, 2009 for the parties to inform him whether they agree for him to deliver Judgment on the trial Judges' notes, which were very comprehensive, or the matter be heard de novo. The Defendants wanted a hearing de

novo. The plaintiff's representative was overseas so could not give instructions to its counsel on what the company preferred.

However, the plaintiff's Solicitors filed a Summons on 30<sup>th</sup> September, 2009 pursuant to O.33, rules 3 and 7 of the High Court Rules 1988 for Mr. Justice Inoke to rule on certain preliminary issues which were:

- (i) *Whether the application for cancellation of the plaintiff's Native Lease 24345 by the 1<sup>st</sup> Defendant and registration thereof by the 2<sup>nd</sup> Defendant was unlawful, void and/or ineffectual due to non-compliance with the procedure for cancellation required under section 57 of the Land Transfer Act Cap 131.*
- (ii) *If the issue above determines in favour of the Plaintiff the Court proceed to grant such reliefs consequential thereon including assessment of damages.*
- (iii) *Evidence for the trial of the above issue or preliminary issue be by way of affidavits with the liberty of the parties to call oral evidence limited to the trial of the above preliminary issue.*
- (iv) *Costs of this application be costs in the cause.*

(03) Mr. Justice Inoke, instead of dealing with the preliminary issue, on the 31<sup>st</sup> August, 2011 gave a final judgment wholly dismissing the plaintiff's claim and also awarded \$5,000.00 costs to each of the first and second defendants.

(04) The plaintiff appealed against the said decision of Justice Inoke to the Court of Appeal on 12<sup>th</sup> October, 2010 and the hearing of the appeal (Civil Appeal No. ABU 0046 of 2010) was concluded on 15<sup>th</sup> February, 2013.

(05) On 13<sup>th</sup> March, 2013 the Court of Appeal delivered its decision wherein Justice Lecamwasam whilst delivering his judgment with whom the other Appeal Judges agreed at paragraph 37 said;

*"Having considered the overall circumstances of this case especially the fact that the learned Judge had failed to address his mind to some of the grounds of appeal adequately, I am of the view that the orders made by the learned Judge should be set aside. Hence the appeal allowed. This is sent back for retrial before another Judge."*

(06) The plaintiff's action was instituted in the High Court on 22<sup>nd</sup> September, 2005. The case went up to the Court of appeal and the matter reverted back to the High Court for re-trial on 13<sup>th</sup> March 2013. The parties to the action went for mediation on 15<sup>th</sup> May, 2019 and they are on the verge of executing a new lease to conclude the matter.

[C] Preliminary Issue

- (01) I do not wish to go into the merits of the application for joinder at this stage, because prior to the matter proceeding counsel for the plaintiff raised as a preliminary issue that counsel for the interested party had a conflict of interest and should be disqualified from acting in the proceedings.
- (02) The plaintiff says; (Reference is made to paragraph 04 of the affidavit in opposition of Himmat Lodhia, the director of the plaintiff company sworn on 21/10/2019.)
- (i) *Messrs Nawaikula Esq acted for the plaintiff and the Statement of Claim on behalf of the plaintiff in this action was filed by Mr Nawaikula's office. A copy of the Writ of Summons is annexed herein and marked with the letter 'B'.*
  - (ii) *On 01/06/2005, Messrs Nawaikula Esq as Solicitors for the plaintiff wrote to the First Defendant (hereinafter referred to as NLTB) requesting NLTB to reissue the lease under the old terms and conditions without further requiring an additional rent and premium. Annexed herein and marked with the letter 'C' is a copy of the said letter.*
  - (iii) *On 06/06/2005, NLTB responded to Messrs Nawaikula Esq, informing them that NLTB cannot revert back to the former legal relationship with the plaintiff since it has been re-entered and terminated unlawfully. Annexed herein and marked with the letter 'D' is a copy of the said letter.*
  - (iv) *On 07/06/2005 and 08/06/2005, Messrs Nawaikula Esq wrote to NLTB seeking their assistance to discuss and resolve these issues. Annexed herein and marked with the letter 'E' are copies of the said letters.*
  - (v) *On 17/06/2005, I received a letter from Messrs Nawaikula Esq informing him of the plaintiff's prospects of obtaining a settlement with NLTB. Annexed herein and marked with the letter 'F' is a copy of the said letter.*
  - (vi) *On 01/07/2005, NLTB wrote to Messrs Nawaikula Esq informing them that after reviewing the terms upon with the plaintiff's lease was terminated, by way of re-entry, it was irregular and requesting a meeting. Annexed herein marked with the letter 'G' is a copy of the said letter.*
  - (vii) *On 12/07/2005, Messrs Nawaikula Esq wrote to the plaintiff seeking instructions on a proposal for settlement by NLTB. Annexed herein marked with the letter 'H' is a copy of the said letter.*

- (viii) *On 18/10/2005, Messers Nawaikula Esq also wrote a letter to the plaintiff giving an update on the matter. Annexed herein and marked with the letter 'I' is a copy of the said letter.*
  - (ix) *Messrs Nawaikula Esq issued a Bill of Costs to the plaintiff, a copy of which is annexed herein and marked with the letter 'J'.*
  - (x) *Messrs Nawaikula Esq has acknowledged receiving payment of the costs in subparagraph (ix) above. A copy of the Acknowledgment is annexed herein and marked with the letter 'K'.*
- (3) In reply, Mr. Nawaikula says that the interested party, Tokatoka Nadrau Development Trust were not a party to the action and therefore, there is no conflict of interest.

**[D] Consideration and the Determination**

- (01) The plaintiff was the lessee of the lease no – NL 24345. As I understand the pleadings, the plaintiff's cause of action is unlawful termination and cancellation of the lease. The plaintiff alleges that the purported termination of the lease by the first defendant and the registration of the cancellation of the lease by the second defendant were null and void.
- (02) The interested party, Tokatoka Nadrau Development Trust is opposing the plaintiff's claim. The Trust says that no lease to be re-issued to the plaintiff. The Trust says that consequent to the re-entry, the land reverted back to the Trust for the use and occupation of the Native Fijians under section (9) of the ILTB Act.

Therefore, the plaintiff's interests conflict with the interests of the Interested Party, the Trust.

Reference is made to paragraph (8) and (9) of the affidavit in support for joinder application.

- (8) *That in response to iTLTB letter dated 2<sup>nd</sup> March, 2018 we clearly indicated that iTLTB in its failure in its procedures taken in relation to the breach and re-entry process done to Forum Hotels then resulted in the new lease given to Sun Beach since 2005 till its cancellation in 2017. In the same light we raised a number of questions as to why iTLTB now wants to reinstate Forum Hotels who was a bad lessee. I annex here marked "RTN 6" in detail our position of the Tokatoka Nadrau Development Trust our letter dated 12<sup>th</sup> March, 2018.*
- (9) *That accordingly our Solicitors advised iTLTB stating that their re-entry was due to the many breaches by Sunbeach Ltd. That it was by this breach the land has reverted back to us the Tokatoka Nadrau*

*Development Trust for use and occupation under Section 9 of the iTaukei Land Trust Act. I annex "RTN 7" here a copy of the letter dated 29<sup>th</sup> January, 2019.*

(03) The paragraph 4(i) to (x) of the affidavit of Himmat Lodhia, the director of the plaintiff company clearly shows that Mr. Nawaikula was writing and liaising on behalf of the plaintiff with the first defendant.

- (i) *Messrs Nawaikula Esq acted for the plaintiff and the Statement of Claim on behalf of the plaintiff in this action was filed by Mr Nawaikula's office. A copy of the Writ of Summons is annexed herein and marked with the letter 'B'.*
- (ii) *On 01/06/2005, Messrs Nawaikula Esq as Solicitors for the plaintiff wrote to the First Defendant (hereinafter referred to as NLTB) requesting NLTB to reissue the lease under the old terms and conditions without further requiring an additional rent and premium. Annexed herein and marked with the letter 'C' is a copy of the said letter.*
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(04) Therefore, it is clear to me that counsel for the interested party, Mr. Nawaikula is apprised of information obtained from the plaintiff on a solicitor-client basis. It can be safely inferred that Mr. Nawaikula has confidential information which would be of benefit to the interested party. As noted in paragraph one and two above, the plaintiff's interests conflicts with the interests of the interested party. It is a well-established principle that solicitors should not act for clients where there is a conflict of interest between them. Where facts are disclosed to a solicitor on behalf of one client which may be prejudicial if disclosed to another client without the authority of the client, there is almost certainly a conflict of interest. As stated in paragraph one and two above, there is a significant risk of conflict, between the interests of the plaintiff and the interested party. In my opinion, Mr. Nawaikula must refrain from acting for the new client, the interested party because; (1) there is a risk of breach of a confidence entrusted with Mr. Nawaikula by the former client, the plaintiff (2) the knowledge which Mr. Nawaikula possess of the affairs of the former client, the plaintiff, would give an undue advantage to the new client, the interested party. Therefore, it will prejudice the plaintiff, if Mr Nawaikula proceeds with the application for Joinder on behalf of the interested party.

(05) I note the Schedule to the Legal Practitioners Act which is titled "The Rules of Professional Conduct and Practice" and I more specifically refer to Chapter 1.

Clause 1.01 says:

*"A practitioner shall not abuse the relationship of confidence and trust with the client" and*


Clause 1.05 says:

*"Where a practitioner has received information from or on behalf of a client a practitioner shall not thereafter act for another client in circumstances where the practitioners' receipt of such information may result in detriment to the first mentioned client".*

## ORDERS

- (1) I uphold the preliminary objection raised on behalf of the plaintiff.
- (2) I declare that counsel for the interested party Mr. Nawaikula is disqualified from acting in the proceedings.
- (3) Accordingly, the application for joinder is dismissed.



  
..... 21/02/2020.  
**Jude Nanayakkara**  
**[Judge]**

**At Lautoka,**  
**Friday, 21<sup>st</sup> February, 2020.**