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IN THE COURT OF APPEAL OF TONGA
LAND JURISDICTION
NUKU'ALOFA REGISTRY

AC 3 of 2020
[LA 16 of 2018]

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BETWEEN:

**1. NAITINGIKEILI KAUFUSI**

**2. HUANG HUA** Appellants

AND:

**1. SIONE PANUVE VEATUPU**

**2. LUPE VEATUPU**

**3. MINISTER OF LANDS** Respondents

Coram: Whitten P
Moore J
Blanchard J

Counsel: Mr. W. C. Edwards SC for Appellants
Mrs. P. Tupou KC for First and Second Respondents
Mr. S. Sisifa SC, Solicitor General, for Third Respondent

Hearing: 19 October 2020
Date of Judgment: 6 November 2020

## JUDGMENT OF THE COURT

### Introduction

[1] This is a case about the lawfulness of the cancellation by Cabinet of a valuable long-term registered lease of part of a town allotment at Kolofo'ou called Konga 'o Ha'atavake. The issue is whether Cabinet's decision was vitiated because it was seriously misinformed by the Ministry of Lands about whether there were existing breaches of the lessee's covenants

under the form of lease prescribed by s.124 and Schedule IX of the Land Act.

[2] The second respondents, Sione and Lupe Veatupu, sought from the Land Court a declaration that the cancellation of the lease was unlawful and an order reinstating the lease. They claimed as occupiers of the land whose possession of it is dependent on the continued existence of the lease. They also claimed to have the authority of the lessee, and after her death the authority of her widower and heir, to occupy the land and also to bring this proceeding.

[3] The case is complicated by the fact that the lessee, Mele Me'afo'ou, who was Lupe's sister, died in 2001 intestate and no grant of letters of administration of her deceased estate has ever been made. The lease was the personal property of Mele (see *Wight v Wight* [2018] TOCA 17; AC 3 of 2018 (7 Sept 2018) at [41]). It is therefore necessary to consider the effect of s.11 of the Probate Act which vests personal property of an intestate deceased in the Supreme Court until a grant of administration and of s.12 which makes the proceeds thereof the property of the Crown after three years from death subject to the possibility, under the proviso to that section, of the making by His Majesty in Council of an instruction for the grant of letters of administration.

[4] The case was tried in the Land Court before Niu J and an assessor. Niu J gave judgment on 24 March 2020 declaring the cancellation unlawful and directing the Minister of Lands to forthwith remove any note or record in his office that the lease is cancelled or terminated. He also directed cancellation of a new lease granted after the cancellation of Mele's lease to the second appellant, Huang Hua, at the request of the current holder of the allotment, the first appellant, Naitingikeili Kaufusi. (It is accepted that if, as Niu J held, the decision cancelling Mele's lease was unlawful, it must follow that Huang Hua's lease was not lawfully granted.)

[5] In the Land Court the third respondent, the Minister of Lands, opposed the claim by Lupe and Sione Veatupu, but in this court Mr. Sisifa advised that the Minister now takes a neutral position.

**The Factual Narrative**

[6] Until 1999 the tax allotment was registered in the name of Tevita Uluilakepa Kaufusi, the father of Mele and Lupe and of their brothers, Viliami and Mo'ale. Viliami was the eldest son of Tevita. Viliami died in 1998 and his eldest son, Naitingikeili, became the heir to the allotment. Naitingikeili Kaufusi made his claim to the allotment within 12 months of Tevita's death as required by s.87 of the Land Act and became the new registered holder. None of this is in dispute.

[7] But at the time Naitingikeili became the holder of the allotment there were already two leases registered over it, each of approximately half the allotment. Each had been granted at the request of Tevita and with the consent of Cabinet under s.56 of the Land Act. The first of these was the lease to Mele which is the subject of this litigation. Mele's lease was for a term of 90 years from 18 November 1993 at a rental of $5 per year. It was registered on that date under No.5452. The second registered lease was to Lupe, granted in 1994 for the rest of the allotment for a term of 99 years, also at $5 per year. The stipulated purpose for which each of the leases was requested and granted was "residential".

[8] When the leases were granted Tevita paid into the Ministry in advance the whole of the rent for each term. So, in respect in Mele's lease, he paid $450. The Ministry deducted its 10% commission and paid the balance out to Tevita.

[9] Mele's lease contained the prescribed covenants by the lessee to pay the rent and not to:

> *"(a) abandon, neglect or fail to use [the leased land] for any period or periods of altogether 3 years: or*

> *(b) use or permit any person or persons to use it for any purpose other than that upon which application and approval have hitherto been made."*

[10] The lease form states that if any of the covenants are not complied with "by the lessee, his heir or representative", then Cabinet may at its discretion terminate the lease. We should mention at this point, that the case came before this Court on an earlier occasion on an appeal against the Land Court's refusal to strike out Sione and Lupe's claim. In dismissing that appeal we held that, on a provisional view of the facts, Lupe and Sione had the necessary standing to challenge Cabinet's decision to cancel the lease: *Kaufusi v Veatapu* [2019] TOCA 10; AC 18 of 2018 (17 April 2019). We noted Cabinet's discretionary power to terminate for non-compliance with any of the covenants and that the lease was required by s124 to include this power. The Court said at [17]:

> *"Under the general law a landlord is not obliged to observe the requirements of natural justice before taking steps to forfeit a lease for breach of covenant but this power is conferred on the Cabinet by law and not by contract.* ***In our judgment this attracts the duty of the decision-maker to observe the requirements of natural justice before exercising the power.***" [Emphasis added]

[11] To return to the narrative, when the leases were granted there was a house on Mele's half of the allotment which she and her husband had built when they were living in Tonga before, in 1986, moving permanently to the United States. The house, which we will call "Mele's house", was occupied by Tevita and by Lupe, Sione and their children. There was no house at that time on Lupe's half of the allotment.

[12] That remained the position until Tevita's death in 1999 after which Lupe and Sione continued to live in Mele's house with their family. They gave evidence that they had Mele's permission to do so. However, Naitingikeili disputed this, tendering an affidavit from his uncle, Mo'ale, to the effect that before Mele died she had in a telephone conversation authorised him to look after her house and to tell Lupe and her family to move out, which he

says he did. Lupe denies being told to move out. Mo'ale died before the trial but his affidavit was admitted in evidence.

[13] Then in 2001 Mele died in the United States. Her heir is her husband, Sione Me'afo'ou, whom we will called "Mele's heir". Lupe gave evidence that Mele's heir gave authority for her family's occupation of Mele's house to continue but, as we have seen, Mele's heir has not obtained letters of administration.

[14] In 2009 Lupe and Sione completed building a new house on Lupe's half of the allotment and moved into it. But, she says, they continued to look after Mele's house which was used from time to time by visitors from overseas, including relatives. There was also evidence that their daughter, Milika, and her husband, 'Inoke Vaka, have lived in Mele's house since their marriage in 2015. 'Inoke confirmed this in his evidence and said that the house is in good condition. Lupe and her husband say they spent $80,000 renovating Mele's house and building a carport in front of it. The continued use of Mele's house after 2009 and its good condition are disputed by Naitingikeili.

[15] Naitingikeili and a witness on his behalf say that they inspected the area of Mele's lease three times in July-October 2017 and that the house was not being occupied, with the interior being very dusty and the toilet not working properly. On the third occasion they were told to get off the property by 'Inoke.

[16] From 2014 Lupe, in an arrangement that still continued to the time of the trial, allowed the Free Wesleyan Church (FWC) to store hire equipment (chairs, tables and tents) on the veranda of Mele's house and under the new carport. The evidence was that this was intended to be a temporary arrangement until the FWC could erect its own storage facility elsewhere; that Lupe and Sione received no rental from the church; and that they had no involvement in the church's rental business, which is not conducted on the land.

[17] On 11 September 2017 Naitingikeili wrote to the Minister of Lands requesting that Mele's lease be cancelled because, he said, for the past 28 years there had been a failure to comply with the lease agreement. After setting out the lease covenants which we have quoted in [9] above, Naitingikeili alleged that the lessee was in breach of them. He informed the Minister that Mele had died in 2001 and that the house on the land had belonged to Tevita. It was, he said, being used by Lupe for business. He attached an affidavit in which he stated that the land had never been occupied by Mele or her descendants and that he wanted it to revert back to him as the registered owner.

[18] On 17 October 2017, officials of the Ministry presented a briefing paper to the Minister recommending the termination of Mele's lease on the basis of non-payment of annual rental (something never alleged by Naitingikeili) as well as abandonment and neglect. The paper mistakenly said that rent had been in default since 17 November 1983, which was in fact 10 years before the lease was granted. The paper went on:

> *"the non-payment of rental since 1983 is an indication of neglect by the lessee ..."*

[19] The only evidence of inspection of the property by officials is a statement in the briefing paper that an inspection had shown that "no one resides in the house and the open garage is utilized by the FWC for storage".

[20] The same errors about the rental were repeated in the Minister's submission to Cabinet which on 18 October 2017 approved termination of the lease "on the basis of non-payment of annual rental and neglect".

[21] Naitingikeili was advised by letter of 7 November 2017 that the lease had been terminated on this basis. He went to see Semisi Moala of the Ministry and pointed out that non-payment of rent was not the ground of his application, but he said he was told that it was too late to correct the ground of termination. He proceeded to have his legal advisor tell Lupe that she must remove all her personal effects and the equipment of the FWC from

the property so that he could commence operating his own business on the land. In November 2017 he offered to lease the land to Huang Hua for 45 years at a rental of $200 per year. Cabinet approval was sought for that lease, for the purpose of a commercial and residential site. Approval was given by decision made on 11 December 2017 and the new lease was registered on 9 February 2018. Huang Hua paid Naitingikeili $120,000 when the new lease issued. Whether that arrangement was known to Cabinet does not appear from the evidence.

[22] This proceeding was commenced on 21 July 2018.

**The Land Court's Judgment**

[23] After helpfully setting out the facts of the case in some detail, Niu J recorded his finding that Lupe and Sione had been in possession of the land, of Mele's house and of a 1,500 gallon cement water tank beside the house and had built a substantial carport on the land. They were in possession when Naitingikeili applied to have Mele's lease cancelled.

[24] The Judge considered that he had no authority to decide whether or not the purpose of the lease had been breached by Lupe and Sione. That was for Cabinet to decide. It was relevant that the annual rental of $5 had been set so low because the lease was for residential purposes. But no rent was received from the Church by Lupe and Sione. Although Cabinet was "the proper forum" to decide whether or not there was a breach of the purpose of the lease from the use of the carport by the Church for storage of its rental equipment, Cabinet, in exercising its discretion to terminate the lease, must act fairly. The Judge said that this Court had, in *Tafa v Viau* [2006] Tonga LR 287 at 293, confirmed that any person or body who had authority to decide anything which may affect another person or persons had a duty to take reasonable steps to ascertain the facts relevant to the matter and to accord natural justice before proceeding to make the decision. He considered that Cabinet was the repository of the power to make the decision to cancel Mele's lease and that it had a duty to take reasonable

steps to ascertain the facts relevant to the application of Naitingikeili and to accord natural justice before it proceeded to make its decision. It should have seen in the paper submitted by the Minister that the ground of the application was that the annual rent had not been paid since 17 November 1983 but that the lease had not commenced until 18 November 1993. The Judge then said at [56] that Cabinet:

> *"... ought to have taken steps to ascertain the exact date from which the rent had not been paid. Had it done that, it would have discovered that the rent had in fact been paid up to 17 November 2083 instead."*

[25] In the letter written by Naitingikeili, he had said that the house belonged to Tevita and had been converted to a business by Lupe. Niu J considered that Cabinet ought to have taken steps to ascertain who owned the house and what sort of house it was and whether it would be removable if the lease was terminated or would have to be dismantled or destroyed. Cabinet also needed to find out the type and extent of the business operated by Lupe on the land. Had it done that, it would have found that it was the church who in fact operated the rental business by storing its rental equipment there.

[26] The Judge said that what was more serious was Cabinet's failure to appreciate that there had not been a grant of letters of administration in respect of Mele's estate, which included the lease, and the application of ss.11 and 12 of the *Probate Act*. Cabinet ought to have taken steps to ascertain whether or not there had been a will and whether Cabinet could deal with a lease without any court order in view of s.37 of that Act which provides:

> **Property of a deceased person**
>
> Any person taking or dealing with the property of a deceased person before the Court has adjudicated thereon shall be liable to a fine not exceeding $500 recoverable by distress and the conviction of a person under this section is no bar to the prosecution of the person for any other criminal offence.

When it cancelled the lease, Cabinet destroyed a very valuable property. The Judge referred to the fact that the lease had 66 years to run at a very low rent. He noted that the house, carport and water tank had been valued in March 2018 at $95,100. The lease had vested in the Supreme Court under s.11. He concluded that Cabinet, with the Minister sitting in it, had acted unlawfully. He made a declaration to that effect and, having earlier found that the cancellation had not actually been registered, he directed the Minister to forthwith remove any note or record in his office that the lease had been cancelled or terminated. He also directed cancellation of the lease to Huang Hua.

**Submissions on Appeal**

[27] Mr Edwards, for the appellants, said that Lupe and Sione were not the lessees, but merely "strangers to the lease". They had no right to occupy the land and no standing to bring this proceeding in relation to it. He submitted that when Mele's lease was registered she had already migrated permanently to the United States. Counsel went so far as to describe the lease arrangements made by Tevita and Mele as a sham. He said that Naitingikeili had never relied upon any non-payment of the rent. But Mele had never occupied the land. Tevita had never given her possession after the lease was registered. Mele was thus guilty of abandoning the lease. She had also neglected it by not doing any work on it, and there was the further breach that she had not used it.

[28] Mr Edwards said that any permission to occupy given by Mele to Lupe and Sione had been withdrawn before her death and would in any event have ceased with her death. Lupe had been told by Mo'ale on behalf of Mele not to occupy the property. The trial Judge had failed to take account of Moale's affidavit which had been admitted in evidence. Nor did he have regard to the evidence of the appellants given about the condition of the property in 2017. Lupe and Sione said they had spent money on the property but did not produce any proof in the form of receipts. Counsel submitted that they were not in possession when the lease was cancelled. There had from 2014

onwards been the further breach by reason of the property being permitted to be used for a commercial purpose by the FWC.

[29] It was also submitted that Lupe and Sione could not rely upon any authority from Mele's heir to use the property or bring this proceeding. Citing *Wight v Wight*, counsel said that as an heir who had not obtained letters of administration Mele's widower could have no legal or equitable interest in the lease and could not confer any right of possession or give any authority to Lupe and Sione in respect of it.

[30] In response, Mrs Tupou relied upon the reasoning of Niu J. She said that he was entitled to prefer the evidence of Lupe and Sione concerning their possession and use of the property and to find that the Cabinet's decision was flawed. Counsel submitted that the lessee was entitled to allow relatives and others to occupy the land and did not have to personally occupy it. Nor did a lawful occupation automatically come to an end on the death of the lessee.

**Discussion**

[31] At issue in this appeal is whether the Judge was justified in finding that Cabinet's decision to cancel the lease was fatally flawed because of the Ministry's inadequacies in its investigations concerning the property and its own records about the lease. We must begin, however, with two preliminary questions because an answer to either of them which accepts the appellants' argument will determine the appeal in their favour. These questions are:

(a) whether the lease arrangements were in fact a sham; and

(b) whether Lupe and Sione were entitled to bring this proceeding or were, in Mr Edwards' phrase, simply "strangers to the lease".

### *(a) A sham lease?*

[32] It has to be said that Mr Edwards, for good reason in our view, did not press the "sham" argument very strongly. It was not an argument that should have been raised at all as the proceeding was concerned solely with the validity of the cancellation, not with the validity of the lease. Furthermore, there was really nothing in the evidence to support it. A lease or other contract will be found to be a sham, and therefore will be treated as of no legal effect, if it is a counterfeit, the parties to it having no intention that it should actually govern the relationship between them. A sham is a façade, disguising the reality.

[33] In this case there is nothing of substance to suggest that Tevita did not intend his daughters to have the full benefit of their leases, which by their length were obviously designed to operate long after his death. The fact that he chose to benefit them in a manner that gave each of his daughters a valuable asset which they could not hope to receive under the statutory rules governing the inheritance of allotments does not in the least mean that what he and each daughter did was a counterfeit or façade. Tevita, as holder of the allotment, was entitled to create long-term leases to persons other than his heir provided he gained Cabinet consent to them in terms of s.56(i). If what he was doing was considered to be inappropriate Cabinet would presumably withhold that consent. Its decision to allow the grant of the leases has never been challenged. It is true that Mele never personally occupied the land leased to her but, as Mrs Tupou submits, the law does not require that; the prescribed form of lease prohibits subleasing without Cabinet consent but not the permitting of occupation by another person or persons. Mele was entitled to allow Tevita and other family members to live in the house she and her husband had already built on the land (and of which she may have had a claim of ownership) and where Tevita had been residing for some years before the lease was created. There was nothing unusual about that attracting the suspicion that the lease was not intended to have legal effect, especially after Tevita should die. The arrangement for

advance payment of the rental by Tevita to the Ministry and then back (less commission) to Tevita himself was something unlikely to be found outside a family situation, but Tevita must have been content to fund the rental in this way so as to provide long-term security for his daughter in respect of a property on which she and Sione had built a house. In economic effect it was if Tevita had gifted the money to her so she could pay in advance the indebtedness which would otherwise arise under the lease over its full term. The annual rental was set very low but that was as approved by Cabinet.

***(b) Standing***

[34] Lupe and Sione say that as occupiers of the land, who had done expensive works on it, they were prejudiced by Cabinet's decision to cancel the lease, even though they were not parties to it. There can be no doubt that they were permitted by Mele to occupy the land along with Tevita during his lifetime. But the appellants complain that Niu J did not accept their evidence that Mele, through Mo'ale, asked Lupe to leave the property after Tevita's death. However, having heard from Lupe and Sione, the Judge preferred their evidence to the contrary and found that Mele had impliedly authorised them to occupy and looked after her house and land up to when she died. That was a finding open to the Judge on the evidence before him, including Mo'ale's affidavit to which he made specific reference. He of course had the benefit that we do not enjoy of having seen and heard the witnesses who gave oral evidence and were cross-examined.

[35] We are prepared to assume, without deciding, that Lupe and Sione's licence to occupy the property came to an end with the death of the licensor, Mele, but their continuing occupation would not thereby have become a trespass and thus unlawful. It would not have done so until someone with the necessary authority as lessee required them to leave the land or otherwise took steps to bring the occupation to an end: see *Hampton v BHP Billiton Minerals Pty Ltd (No 2)* [2012] WASC 285 at [300] – [303] and the other authorities referred to by Lord President Paulsen in *Manu* v *'Aholelei* [2015] Tonga LR 135 at [43] – [46]. The vested owner of the lease after

Mele's death was the Supreme Court under s.11 of the *Probate Act*. While the lease existed it bound the holder of the allotment, Naitingikeili, who had no right of possession of the land. Only the Court could take steps to bring the occupation by Lupe and Sione to an end. They were therefore lawfully in possession and dependent upon the continuance of the lease when Cabinet made its decision on cancellation. That gave them the necessary standing to bring this proceeding.

[36] There is, however, another way in which they have claimed such standing, namely through the authorization they say they were given by Mele's heir to take steps to protect the property and to have the lease reinstated. However, we do not base our decision on standing on this alternative claim because the authorization, said to be in the form of a power of attorney, was apparently not adduced in evidence – it is not in the material before us. However, assuming that Mele's heir did request and authorise Lupe and Sione to take steps on his behalf to protect the lease, he would not have been barred from doing so by the fact that he had not first obtained letters of administration. As this Court remarked in *Wight* at [42], if before administration is granted any action is necessary to protect the position of the heir, application can be made to the Court. All the more so, in our view, when the affected asset is actually vested in the Court and when s.12 in its proviso recognises that the heir may belatedly receive the estate.

[37] Mr Edwards attempted to find some support in *Wight* for his client's case but *Wight* is readily distinguishable. There the legal owner of the lease had taken steps to terminate the occupation of the land by the appellant heir and there was no question of destruction or damage to any asset of the deceased estate pending the grant of administration.

***(c) Cabinet's obligation of proper inquiry***

[38] In *Tafa v Viau*, this Court held that before the grant of an allotment is made, reasonable steps must be taken by or on behalf of the Minister to acquaint the Minister with relevant information concerning the availability of the land.

A most material factor, the occupation on the land together with the erection of the house on it, had not been taken into account, and so the Minister's decision was invalid. The same obligation on the Minister has been held to exist, as a matter of natural justice to a lawful occupier, when the Minister is considering the granting of a lease: *Manu v 'Aholelei*.

[39] This court in *Tafa* cited Brennan J's dictum in *Kioa* v *West* [1985] HCA 81;(1985) 159 CLR 550 at 627 that the repository of a power has to adopt a reasonable and fair procedure before he exercises the power. As Lord President Paulsen said in *Manu v 'Aholelei* at [53], this includes the duty to take reasonable steps to ascertain the facts relevant to the exercise of the power and the decision-maker can be held to account if he fails to have regard to circumstances that he would have known had he acted reasonably and fairly. When the Minister (or Cabinet) has not made reasonable inquiries about material matters, he (or it) may have overlooked a relevant consideration or acted in breach of natural justice to an affected person like an occupier, and the decision may therefore be unlawful. In *Tafa* at [12], the Court said that, of course, the Minister did not have to make enquiries personally. He may rely on his officers, but if he does so, and they fail to perform the task properly, a person affected may have a remedy for that failure as if it were failure of the Minister.

[40] We can see no good reason why these general principles should not apply when the decision to be made is to cancel a lease and the decision-maker is the Cabinet, acting upon a submission from the Minister, who in turn has been advised by his officials. The necessary inquiries whenever leases are granted or cancelled will be into both the Ministry's own records about the land and also the state of affairs on the property, including the existence and ownership and types of construction of any building or other substantial structures thereon, and the occupation or use of the land and any structures. When cancellation of a lease is under consideration obviously proper inquiry must be made about whether any breach of covenant which would justify cancellation has occurred and is unremedied. And if the

Ministry becomes aware that the lessee has died an attempt should be made to locate the heir.

***(d) Deficiency in the inquiries***

[41] We have concluded that in this case the Ministry's inquiries, and hence its briefing paper to the Minister and the Minister's submission to Cabinet recommending termination, were very seriously inadequate. Because Cabinet relied upon the inquiries in accepting the Minister's recommendation, its decision was unlawful, as Niu J correctly found.

[42] The Ministry misread its own records and carelessly failed to notice the discrepancies in its own briefing paper about when the lease had commenced. It also overlooked the advance payment of the rent. The consequence of telling its Minister and the Cabinet that rent had not been paid since 1983 is that Naitingikeili's allegations of abandonment and neglect must have appeared more plausible. But proper inquiry would have quickly revealed that Mele and her heir may not have abandoned the lease. There was no obligation on the lessee to occupy the land personally. In accordance with Tongan custom land is commonly occupied by relatives: see for example, *Manu v 'Aholelei* at [38] and the cases cited therein. Cabinet needed to know that there was a claim that Lupe, the sister of the deceased lessee, was using the house from 2015 onwards as a residence for her daughter and spouse.

[43] There must on the evidence also be doubt about whether a proper, and not cursory, inspection by an independent person would have revealed any neglect of the property. Indeed, Lupe says that $80,000 had been spent by her on the house and carport. Such neglect as there may have been could apparently have been quickly remedied if officials had sought comment from neighbours and drawn it to the attention of Lupe who would have been found living next door.

[44] Cabinet was also misinformed about the use of the land for a non-residential purpose because the officials failed to identify that the carport and the veranda of the house were being used only for storage of hire equipment which belongs to the FWC, not Lupe; that the hire business was that of the church and was being conducted elsewhere; and that neither Lupe nor her family was receiving any financial reward in respect of the storage. There may have possibly been a breach of the lease discovered in this respect but the Ministry's briefing paper made it appear more serious than it really seems to have been.

[45] The decision on cancellation was a matter for Cabinet but if the true material circumstances had been accurately put before Cabinet it may well have taken a different view of Naitingikeili's application. It was also not advised that the consequence of the death of the lessee in 2001 and the absence of any application for grant of letters of administration – a common situation in Tonga – was that the lease was vested in the Supreme Court. That in itself might have suggested to Cabinet the need for further inquiries to identify and consult with Mele's heir.

[46] For these reasons, the appeal cannot succeed. We agree with the orders made by Niu J.

**Final Comments**

[47] We make these final comments. The lease expressly gives to Cabinet a discretion to terminate for non-compliance with any of the lease covenants. A court will intervene to ensure that Cabinet follows a proper process in making its decision. Therefore the setting aside of the decision does not preclude Cabinet from looking at the matter afresh if, after proper inquiries have been made by the Minister through his officials, existing breaches of the lease are revealed.

[48] We leave open the question, not raised before us, of whether the existence or non-existence of a breach of covenant, is entirely a matter for

assessment by Cabinet once proper inquiries have been made and a proper process followed by its advisers, or whether that matter additionally falls within the Land Court's jurisdiction under s.149(1)(b) or (e) of the *Land Act*.

[49] Further, although the form of lease could be read as strictly limiting the exercise of Cabinet's discretion in respect of a breach of covenant to either terminating the lease or, despite the breach, declining to do so, that may be an unsatisfactorily stark choice. We according think it possible, without deciding the point, that Cabinet has an implicit power, and perhaps in at least some circumstances, an obligation, to give the defaulting lessee notice of the breach and a reasonable period within which to remedy the breach, rather than proceeding immediately with termination.

**Orders**

[49] The appeal is dismissed.

[50] The appellants are to pay the costs of the first and second respondents, such costs to be fixed by the Registrar if not agreed upon.

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**Whitten P**

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**Moore J**

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**Blanchard J**

COURT OF APPEAL TONGA