

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 5 of 2016

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#1
17/11/17

BETWEEN : 'AMANAKI KIOA

Plaintiff

AND :

- 1. SOLOMONE KIOA**
- 2. JOSHAIAH AFUITANGIMANA S.F.K.M
SIPU**
- 3. TANIELA VAKA**
- 4. SINAMONI VAKA**
- 5. HEIMULI LIKIAFU**
- 6. HON. MINISTER OF LANDS**

Defendants

BEFORE PRESIDENT PAULSEN

Counsel **Mrs. P Tupou for the plaintiff**
 Mr. S Tu'utafaiva for the first to fifth defendants
 Mr. 'A Kefu SC for the sixth defendant

Hearing: 11-13 September and 10 October 2017
Date of Ruling: 17 November 2017

RULING

THE CLAIM

- [1] The plaintiff 'Amanaki Kioa ('Amanaki') is the eldest son and heir of Viliami Kioa ('Viliami') and inherited his tax and town allotments

rec'd 17/11/17
HLC

upon Viliami's death. His claims in this action relate to dealings with those allotments during Viliami's lifetime and fall into two parts.

- [2] First, 'Amanaki asks the Court to cancel a registered lease of Viliami's town allotment that Viliami granted the first defendant, Solomone Kioa ('Solomone') and a sublease Solomone has agreed to grant to his nephew, the second defendant Joshaiah Sipu ('Joshaiah'). 'Amanaki argues that Viliami expressed a clear intention to cancel the lease and the Court should give effect to his wishes. Alternatively, he contends that the Minister breached duties to alert him to the application for the lease and to ensure that the granting of the lease was 'appropriate, reasonable and fair'. Finally he submits that Solomone is in breach of a covenant to use the land only for residential purposes.
- [3] Secondly, 'Amanaki seeks the cancellation of grants of lots made to the third defendant Taniela Vaka ('Taniela') and the fifth defendant Heimuli Likiafu ('Heimuli') following the subdivision of Viliami's tax allotment. He also seeks the eviction of Taniela and Heimuli from the land. 'Amanaki argues that the Minister failed to publish notice of the surrender of the lots by Viliami as required by section 54 of the Land Act thereby depriving him of his right to assert his claim to the land as heir. He also claims that the grants are invalid having been made after the Minister had assured him that he would put further dealings with the land on hold.

THE FACTS

- [4] 'Amanaki does not now rely on all of the matters raised in his pleading and the primary arguments advanced are those I have

identified above. I will set out the facts in so far as they are relevant to these issues. First, I will set out the facts as they relate to the disputed lease and sublease. I will then deal with the surrender of lots.

The disputed lease and sublease

- [5] Viliami was the registered holder of a town allotment at Kolofo'ou called Leangiangi. It was 39.4p and contained in Deed of Grant 122/66. There were four houses built on Viliami's town allotment. It is not entirely clear when the houses were built and at whose cost but it does not appear to be disputed that the houses belonged to Viliami and when they were let out the rent was paid to Viliami during his lifetime.
- [6] Viliami and his wife Pisila, who predeceased Viliami, had nine children; three boys and six girls. 'Amanaki was Viliami's eldest legitimate son and heir. Solomone was the second son. At various times all of the children moved to live overseas. Viliami lived overseas at times but when in Tonga he lived on his town allotment.
- [7] Viliami granted Solomone a lease of his town allotment. The application for the lease was made on 1 May 2009. Viliami signed the application at the offices of the Ministry of Lands and certified that there was no impediment to prejudice the lease. Viliami also wrote to the Minister giving as his reason for the lease that he was aging and that Solomone was his only child living in Tonga and 'carrying out the responsibilities'. Cabinet gave its approval to the lease on 11 November 2009 and it was registered on 4 February 2011 under no. 7952. The lease is for 50 years at a rental of \$100

per annum and for residential purposes. Notwithstanding the lease Viliami continued to live on the land when in Tonga and he received the rents.

- [8] Despite what is stated in Viliami's letter of 1 May 2009 Solomone was not living in Tonga but he said that he returned to Tonga from time to time to check on the allotment and the houses. Solomone's evidence was that Viliami's intention was that he would look after the houses for the family and for the use of his siblings when they visited Tonga. To a degree this is supported by the terms of a will that Viliami made in July 2015 in which he bequeathed each of his four houses to specific children and grandchildren including 'Amanaki and Solomone. However, Solomone also gave evidence that Viliami said that he felt guilty that he had not given Solomone an allotment of his own and that Viliami was afraid that 'Amanaki would chase his brothers and sisters off the land.
- [9] Vila Pau'uvale lived with Viliami in 2015 and said that he told her that he had granted the lease at the insistence of Pisila and his eldest daughter Siu. 'Ana Ma'ufualu, who is the Minister's secretary, said that Viliami had told the Minister in around September 2015 that he was 'stressed' (or burdened) by Solomone to grant the lease. These statements are not in my view reliable evidence of Viliami's state of mind at the time the lease was granted. They are contradictory, made almost six years after the lease was granted and, as I shall shortly note, after Viliami and Solomone had argued. More relevant to Viliami's state of mind when the lease was granted are Viliami's letter of 1 May 2009 and that on 14 August 2009 Mr. Sione Uele, a Registry Officer, spoke to Viliami and he confirmed his

wish to grant the lease. On the evidence before me I am satisfied that in granting the lease Viliami was not subject to any inappropriate influence or pressure from Solomone or anyone else.

- [10] In around November 2013 Solomone agreed to sublease 14p of the allotment to Joshaiah intending that Joshaiah would build a house on the land. Cabinet gave its consent to the sublease on 31 January 2014. The sublease is to be for a term of 47 years from 4 February 2014 and also for residential purposes but has not yet been registered.
- [11] According to 'Amanaki in 2015 he learned of the lease and spoke with Viliami about it. Solomone said that 'Amanaki was aware of the lease earlier. Regardless, I am satisfied that 'Amanaki was not consulted about Viliami's intention to grant the lease by Viliami or the Ministry.
- [12] 'Amanaki said that when he raised the issue of the lease Viliami claimed not to know about it and said he would cancel the lease. Viliami returned to Tonga and shortly thereafter he had an argument with Solomone. There was conflicting evidence as to what caused the argument. Vila Pau'uvale said Solomone objected to Viliami hiring security guards to protect him following a robbery. Solomone said he objected to Viliami inviting a man and his son to live on the land. During the argument Solomone asserted that he had rights over the land under the lease. This may have been a further cause of upset for Viliami although Solomone believed that the argument was cleared up the next day.

- [13] Viliami then met with the Minister wanting to cancel the lease. Following that meeting 'Ana Ma'ufualu wrote a letter to the Minister for Viliami dated 27 July 2015 requesting the cancellation of the lease so that 'I am able to freely live in peace on my allotment until I die then the Heir to my land can do whatever he pleases'. Surprisingly Vila Pau'uvale also claimed to have written that letter for Viliami. She also said that Viliami later showed her a letter from the Ministry cancelling the lease. I do not accept her evidence on either matter. 'Ana Ma'ufualu was quite certain that she wrote the letter of 27 July 2015 and she confirmed that the letter was in her handwriting. It seems much more likely that Viliami would seek assistance in writing such a letter from someone at the Ministry than from someone who, at least on the evidence before me, had no experience in such matters. It is also clear, and I find, that the Minister did not cancel the lease.
- [14] On 15 September 2015 'Amanaki met with the Minister. 'Ana Ma'ufualu attended the meeting and took the minutes but they are very brief and clearly are not a complete record of what was discussed. I am satisfied that at this meeting 'Amanaki expressed concern both about the lease and the surrender of lots in Viliami's tax allotment.
- [15] In November or early December 2015 Viliami returned to New Zealand. He died there on 27 December 2015. 'Amanaki claimed Viliami's town and tax allotments which were granted to him on 3 March 2016. 'Amanaki has forced Solomone off the town allotment and he has been living there and collecting the rents.

- [16] On 18 February 2016 the Ministry wrote to 'Amanaki advising him that the Minister had decided that there was no good reason to cancel the lease.

The tax allotment

- [17] Viliami had a tax allotment called Honolulu at Nualei, Kolofo'ou. It fronted Taufa'ahau Road and was 8a 0r 1.9p in Deed of Grant 8/1. In 2000 Viliami subdivided his tax allotment into 36 lots and he progressively made requests to the Minister to surrender lots in favour of nominated persons.

The letters of surrender

- [18] Many letters of surrender have been produced into evidence but this action is concerned only with the surrenders of Lot 12 in favor of Sinamoni (but later granted to Taniela), Lot 13 in favour of Taniela, and Lots 23 and 24 in favour of Heimuli. I will not set out the full text of each surrender letter that is in issue. They all share common features in that they:

- (a) Were written by 'Amanaki;
- (b) Are dated;
- (c) Are addressed to the Minister of Lands;
- (d) Contain a request to surrender a stated lot which is a reference to Viliami's survey plan of the subdivision;
- (e) State the name of a person for whom the lot is being surrendered;

- (f) State expressly that 'Amanaki consents to the surrender as heir or that he has joined in the application by signing the letter;
- (g) Have been signed by Viliami; and
- (h) Except in the case of the surrender letter for Lot 23 have been signed by 'Amanaki.

[19] As an example I set out the text of the letter given to Taniela in respect of Lot 13 which was in the Tongan language but was translated as follows:

Minister of Lands
Nuku'alofa
Tonga

4.4.2012

I make this letter to you with a humble heart.

The purpose of this plea is in regards to my tax allotment Honolulu that is located in the District of Nualei where a scheme plan is in place.

And I wish to surrender no. 13 so that it can become the lawful town allotment of Taniela Vaka.

I place my signature here together with my heir 'Amanaki Kioa who also agrees to this.

And I hope this concern being made falls well with you.

Respectfully

(signed)

Viliami Kioa

(signed)

'Amanaki Kioa (Heir).

Taniela and Sinamoni

[20] Taniela was approached by Viliami in New Zealand in 2012 and asked if he wanted to buy land for NZD\$15,000. Viliami needed money for medical treatment. In the first week of April 2012 Taniela and his wife met Viliami, Pisila and 'Amanaki and gave Viliami NZD\$10,000. Taniela was subsequently given a letter of surrender addressed to the Minister and signed by Viliami and 'Amanaki in respect of Lot 13. This was submitted to the Minister. A balance of NZD\$5,000 was paid to Viliami on about 30 July 2012. Taniela began to build his house on the land in 2012.

[21] Sinamoni is Taniela's son. On 20 December 2012 Viliami provided him with a surrender letter in respect of Lot 12. Taniela paid NZD\$15,000 to Viliami for the surrender letter.

Heimuli

[22] Heimuli learned that Viliami was subdividing his land and met with him on 31 July 2012. He gave Viliami \$10,000 in return for a letter of surrender in relation to Lot 24. On 16 August 2012 Heimuli gave Viliami a further \$10,000 for a letter of surrender in relation to Lot 24 also.

'Amanaki's consent

[23] 'Amanaki says he did not consent to the surrenders in issue. He said that he only consented to surrender Lots 31 and 34 and no others. The starting point must be that all of the letters of surrender that are presently in issue were written by 'Amanaki, indicate his agreement to the surrenders and, except in one case, have been

signed by him. One can *prima facie* infer that 'Amanaki did indeed consent to the surrenders in those circumstances.

- [24] However, whilst 'Amanaki acknowledged that he did write letters of surrender for Viliami he said that the number of the lots and the names of the person in whose favour the lots were to be surrendered were left blank. He claims that he was to agree to each surrender before the letters were completed and signed. 'Amanaki also says that Viliami was to leave the allotments on Taufa'ahau Road free for him and his children. In re-examination 'Amanaki alleged that Viliami had forged his signatures and that he did not have a plan of the subdivision to know the position of the lots.
- [25] 'Amanaki's evidence was not only implausible but plainly incorrect. As an example of many contradictions his evidence contained, 'Amanaki alleged that Viliami forged his signature on a surrender letter in respect of Lot 34, yet Lot 34 was one of only two lots that he acknowledged he had agreed to surrender. I will give just two other examples which relate directly to the surrenders in issue in this action to further illustrate why I do not accept 'Amanaki's evidence.
- [26] The first concerns the surrender letter of 4 April 2012 given to Taniela in respect of Lot 13. 'Amanaki wrote the letter and said that he entered Taniela's name and signed the letter but that he did not insert the lot number and was surprised that the letter was for Lot 13 because it was intended for Lot 10. In response to a question from Mr. Tu'utafaiva 'Amanaki said he had thought the surrender was for Lot 10 because there was a building on that lot. A number of important points emerge. First, contrary to his evidence 'Amanaki

inserted the lot number in his own handwriting and it appears to me that he also inserted Taniela's name. His evidence that he recognised Viliami's handwriting and that Viliami had written the lot number when he was not present was untrue. 'Amanaki admitted that he had inserted the lot number in response to questions from me and by way of explanation said there were 'a lot of letters that were given to me to write and also some numbers were left blank' suggesting that his recall could not be relied upon. Secondly, the surrender letter was dated and prepared in respect of a specific transaction and the details of the transaction were known to 'Amanaki. Thirdly, the process followed was not the one that 'Amanaki said he had agreed with Viliami. It was not a case of 'Amanaki completing a surrender letter 'in blank' so that it might be used, subject to his later agreement, as and when Viliami found someone who wanted a lot. Fourthly, there was clearly communication between the two men in relation to Viliami's intentions and dealings with his land.

- [27] The second example concerns the surrender letter in respect of Lot 12 in favour of Sinamoni. 'Amanaki said that he did not insert the lot number or Sinamoni's name and that he signed the letter before those details were entered (although he also said he could not recall when he signed the letter). In this case also 'Amanaki's evidence that he did not insert the lot number is incorrect. The word/numeral 'fika 12' are plainly in his handwriting. It also appears to me that Sinamoni's name is inserted in 'Amanaki's handwriting. Once again the process followed was not the one 'Amanaki said that Viliami had agreed to.

- [28] I found 'Amanaki's assertion that he did not know what lots were being surrendered because he had no plan of the subdivision to be obtuse. If he was concerned to know exactly where any lot was in the subdivision he only had to ask for the plan and if it was not provided he could then choose not to prepare or sign the surrender letters.
- [29] There was no evidence that 'Amanaki ever refused his consent to any surrender and it was established that regardless of what reservations he may have privately harbored 'Amanaki agreed to the surrenders when Viliami asked him to. He said 'I told [*Viliami*] that I would agree to him giving out the land as it was his in any event' and 'I felt obligated to do as [*Viliami*] wished' and 'I felt sorry for my father that's why I signed' and 'I did not want to upset him because of his age nor did I want him to feel as if I was obstructing his wishes for land that was currently his'. When asked by Mr. Tu'utafaiva whether he had lied when he told the Minister in a meeting in September 2015 that he had signed only two surrender letters 'Amanaki said 'I only did that because of what my father had wanted me to do'. In answer to a proposition put to him by Mr. Kefu that he wrote and signed the surrender letters intending to surrender the lots 'Amanaki replied 'Yes because I wanted to obey my father'.
- [30] The evidence satisfied me that 'Amanaki knowingly consented to the surrender of Lots 12, 13, 23 and 24. Except in the case of Lot 23 all of the letters of surrender were signed by 'Amanaki. As 'Amanaki wrote that letter including his name at the bottom of the page as heir and, in my judgment, completed all the details contained in the

letter his failure to add his signature does not change the fact of his consent.

June 2013 correspondence

- [31] In June 2013 there was correspondence from Viliami and 'Amanaki with the Minister and others expressing concern that Taniela was building on the land. There was little evidence about the background to the correspondence and its content was confusing. In a letter to the Minister of 14 June 2013 Viliami wrote that he had changed his agreement with Taniela (of which there was no evidence) and requested that there be no more building by Taniela or anyone else on any of the Lots 1-36. This was notwithstanding that he had given letters of surrender of many of those lots. Nothing came of this correspondence and Viliami shortly resumed issuing surrender letters until April 2015.

Cabinet approval and advertising the surrenders

- [32] Cabinet's approval to the surrender of Lots 12, 13, 23 and 24 along with Lots 1 and 25 and an area of 1a 0r 27.3p for a public road was given by decision no. 903 on 7 November 2014.
- [33] Notice of the surrender of the land was published only in the Taimi o Tonga newspaper and then only once on 17 March 2015. In this regard there was substantial non-compliance with section 54 of the Land Act which requires the notice to be published in three issues of a weekly newspaper and in the Tonga Government Gazette. The notice also contained errors. It was dated 9 March 2014 (pre-dating Cabinet's approval) and the 12 month period in respect of which

claims were to be made was stated to end on 11 March 2015, which was six days before publication of the notice.

Events in September 2015

[34] 'Amanaki met with the Minister on 15 September 2015. 'Ana Ma'ufualu took the minutes of the meeting. The minutes record that 'Amanaki told the Minister that he had written in 2012 to express his disagreement with the surrender of land by Viliami and that he had signed only two letters of surrender. There was no evidence of such correspondence in 2012 and, as noted above, 'Amanaki consented to the surrender of many lots. During this meeting 'Amanaki also told the Minister that 'there is forgery and unlawful work being done here'. It is sufficient for present purposes if I say that this allegation is entirely unsubstantiated in any respect which might have a bearing on this action. The minutes record that the Minister advised 'Amanaki that all works would be put on hold.

[35] Following the meeting 'Amanaki wrote to the Minister on 21 September 2015 with a list of lots that he claimed were surrendered without his knowledge which included Lots 12, 13, 23 and 24. As I have noted 'Amanaki did consent to the surrender of each of those lots contrary to his advice to the Minister at the meeting and in his letter.

Applications for grants

[36] On 6 January 2016 Sinamoni agreed that Taniela could apply for both Lot 12 and 13 as his town allotment. On 21 March 2016 Taniela applied to be granted both lots and they were granted to him. The date that the grant was made is not clear but there is a

Savingram signed by the Minister dated 2 March 2016 which confirms the grant. Taniela has not been issued with a Deed of Grant.

[37] On 18 February 2016 Heimuli applied for the grant of Lots 23 and 24 as his town allotment. They were granted to him on 23 February 2016 but he too has yet to receive a Deed of Grant. Heimuli has built a house on the land but intends to build another house when he has received his Deed of Grant.

[38] As noted earlier, Viliami died in New Zealand on 27 December 2015. On 25 February 2016 'Amanaki applied for Viliami's town and tax allotments as heir. On the same day he wrote to the Minister again denying that he had signed letters of surrender and referring to his letter of 18 September 2015 which he described as a 'letter of cancellation of all allotments allocated but not yet registered'. Viliami's town and tax allotment were granted to 'Amanaki on 3 March 2016 but he inherited only 2a 2r 36p of the original 8a 1r 1.9p of Viliami's tax allotment.

THE SUBMISSIONS

The lease and the town allotment

[39] Mrs. Tupou argued that Viliami expressed a clear intention to cancel the lease and advances the bold proposition 'Surely, if a landholder is free to lease his land without limitation, he should also be free to cancel should he choose'.

[40] Mrs. Tupou then argued that the Minister had a duty to alert 'Amanaki to the application for the lease and to make reasonable

enquires as to the facts of the case so as to ensure that the grant of the lease was appropriate, fair and reasonable. Mrs. Tupou submitted that the grant of the lease (and sublease) was not appropriate, fair or reasonable due to Viliami's age, the prejudice to 'Amanaki's interests as heir and because Solomone (and also Joshaiah in the case of the sublease) were living overseas. Mrs. Tupou contends that if leases can be granted without an heir's consent the laws of succession are undermined. She said:

It is incomprehensible to envisage a norm for heirs to be deprived of their hereditary rights and be subjected to having to apply to lease an allotment on which to reside until a lease expired (which in this case would probably not be in his lifetime) because his hereditary rights have been leased on a long-term basis to another.

- [41] Finally, Mrs. Tupou argues that the lease and sublease should be cancelled because of the breach of a covenant in the lease that the land would be used only for residential purposes. She submitted that the evidence established that neither Solomone nor Joshaiah had lived on the land and that it is being rented out commercially.
- [42] In his submissions Mr. Tu'utafaiva argued that the Minister owed no duty to 'Amanaki as it is incompatible with the provisions of the Land Act. He submits that an heir cannot by refusing his consent deprive a landholder from exercising his right to grant a lease. He made the point that if the heir has a right to be consulted before a lease is granted then so would all others in the line of succession and that this cannot ever have been the Legislative Assembly's intention. He also argued that the submission that 'Amanaki has been deprived of his hereditary rights is not correct. He has inherited the land upon

Viliami's death in accordance with the Land Act and with the benefit of the lease. Mr. Tu'utafaiva submits that there has not been any breach of the lease as the land is being used only for residential purposes. Furthermore, Joshuaiah cannot be in breach of his sublease when it has not yet been registered and no interest under the sublease has passed to him.

- [43] Mr. Kefu argued that the grant of the lease was lawful because the requirements of the Land Act were complied with and the Minister had no obligation to inform or consider the interests of 'Amanaki before granting the lease. He also submits that 'Amanaki has not been deprived of the land, rather he has inherited the land and is entitled to the benefit of the lease.

The surrenders and the tax allotment

- [44] Mrs. Tupou submitted that the Minister was required to advertise the surrenders in accordance with section 54 of the Land Act and failed to do so. She argued that the effect of the Minister's failure is that the grants to Taniela and Heimuli are null and void and ineffective against 'Amanaki. She also argues that the fact that 'Amanaki signed three of the four surrender letters does not change anything as a landholder has no right to place conditions upon a surrender of land and so even if 'Amanaki had claimed the land and then chosen to allocate it to persons other than Taniela and Heimuli they would have no rights against him.
- [45] Mrs. Tupou's second argument is that the grants to Taniela and Heimuli should be set aside as 'Amanaki had a reasonable

expectation following his meeting with the Minister that dealings with Viliami's land would be put on hold.

[46] Mr. Tu'utafaiva argued that 'Amanaki is bound by the letters of surrender that he prepared and that he cannot rely on non-compliance with section 54 nor could he have any reasonable expectation that dealings were on hold.

[47] Likewise, Mr. Kefu argued that 'Amanaki cannot rely on non-compliance with section 54 when he was fully aware of the surrenders and wrote the letters of surrender himself. 'Amanaki had waived his rights both in relation to section 54 and to claim the land. Mr. Kefu also submitted that 'Amanaki cannot complain that the Minister made grants to Taniela and Heimuli after putting dealings with Viliami's land on hold as the allotments had already been surrendered and had reverted to the Crown and they were available for grant.

DISCUSSION

The lease

Viliami's cancellation

[48] The submission that if Viliami was free to lease his land he must also have been free to cancel the lease is unorthodox and I do not accept it. A registered holder's right to grant a lease of his town or tax allotment is conferred by statute (section 56 of the Land Act). He cannot unilaterally cancel a registered lease. A registered lease can only be cancelled in a manner contemplated by the Land Act or by Order of the Court.

The Minister's duty

- [49] There is nothing in the Land Act which expressly required the Minister to seek 'Amanaki's consent to the lease. There is no basis for argument that such an obligation can be implied as a matter of statutory construction either and Mrs. Tupou did not attempt to advance one. To the contrary Mrs. Tupou acknowledged in her submissions 'It is accepted that Viliami Kioa was free to lease his town allotment and did not require the consent of ['Amanaki']'.
- [50] Mrs. Tupou contends however that the Minister was required to both alert 'Amanaki to the fact of the lease application and to ensure that the lease was appropriate, reasonable and fair. She did not refer me to any authority in support of her submission but I understand her to be relying on the case law that has held that the Minister must take reasonable steps to acquaint himself with relevant information before making grants. The leading case on the Ministerial obligations is *Tafa v Viau* [2006] Tonga LR 287 (CA) which was recently discussed and followed in *Naulu v Tupou* (Unreported, Court of Appeal, 8 April 2016, AC 21 of 2015).
- [51] In *Tafa* the Court noted that the Land Act repeatedly made reference to whether a piece of land was 'available' to be granted as an allotment and the scheme of the Act as a whole was to make availability an essential requirement before a grant could be made. The Court went on to hold that the Minister had a duty to take reasonable steps to ascertain whether land that was subject to an application for grant was subject to some other claim that might be an impediment to the grant or make it unavailable. This

requirement arose because of two specific aspects of the Minister's function when making grants namely (at [12]):

In the first place, he cannot properly sign a declaration on behalf of the Crown that there is no impediment if the truth is that he simply does not know because he has made no sufficient inquiry. In the second place, the administrative decision to make the particular grant cannot properly be made in the absence of the same enquiry in a case where the Minister does not actually know whether the land is available, or whether any competing claim has been appropriately resolved.

- [52] In *Tafa* it was found that the Minister did not take reasonable steps to acquaint himself with the relevant information about the land as a most material factor, the occupation of the land and the building of a house on the land, was not taken into account in determining whether the land was available. In *Naulu* it was held the Minister failed to take into account when making a grant the relevant factor that crops were being grown on the land.
- [53] *Tafa* and the cases that have followed and applied it have been concerned with the exercise by the Minister of his administrative power to make grants. It is because the Minister is the repository of a discretionary administrative power to make grants that he is obliged to adopt a reasonable and fair procedure (*Kioa v West* (1985) 159 CLR 550, 627 referred to in *Tafa* at 294).
- [54] The purpose of the Minister's enquires before making a grant is to determine if there is some claim which might be an impediment to the grant or make the land unavailable. In the usual case the 'claim' might be a competing application for the land or occupation/use of

the land. The interest of an heir is not such a claim. Until the landholder dies or surrenders his land the heir has no right to apply for the land or occupy/use the land without the holder's consent nor is he able to impose conditions on the holder's dealings with the land. It is significant that just as the Land Act does not require an heir's consent to the grant a lease there is no requirement for his consent should the registered holder wish to grant a mortgage over his allotments.

- [55] Furthermore, *Tafa* is distinguishable as the two specific aspects of the Minister's function which combined to require the Minister to make reasonable enquires when making a grant of a tax or town allotment are not present in this case. In the first place it is not the Minister but the registered holder that is required to provide a declaration that there is no impediment to a lease granted under section 56. Section 56 provides that the 'registered holder of a town or tax allotment may grant a lease over the whole or part of his town allotment'. Under section 24 the form of application for a lease is as prescribed in Schedule IX of the Act. The prescribed form requires the grantor to declare that there is no impediment to prejudice the lease. In the second place, it is not the Minister who exercises the administrative decision to grant the lease. It is the registered holder that grants a lease under section 56. Broadly in such a case the Minister's duties are to receive and process the application, to obtain Cabinet's consent and ensure compliance with the other conditions in section 56, to survey the land that is to be subject to the lease and to prepare and register the lease.

[56] The short response to Mrs. Tupou's primary submission, that it is 'incomprehensible' that an heir can be deprived of his hereditary rights because the deceased holder has granted a long term lease, is that the heir is not deprived of his rights at all. First, the Land Act protects the interests of successors by limiting the term for which both tax and town allotments can be leased (see section 56(iv) and 60 of the Land Act). This reflects a balance between the future interest of heirs and a registered holder's right to make economic use of the land. Secondly, the heir's rights are defined by the Land Act. The heir has no absolute right to succeed to a tax or town allotment free of any encumbrance. Section 58 provides that should a registered holder who has granted a lease die before the expiry of the lease the heir shall be bound by the lease. There is nothing incomprehensible about this.

[57] It follows that there was no requirement for the Minister to alert 'Amanaki to the application for the lease or consider his interests as heir as he now contends.

Breach of covenant

[58] Mrs. Tupou argues that the lease should be cancelled because neither Solomone nor Joshaiah have lived on the land and it has been rented out commercially. She relies upon the term of the lease which provides:

And furthermore, the Lessee covenants...that in respect of the land hereunder leased, he will not(b) use or permit any persons to use it for any purpose other than that upon which application and approval have hitherto been made.

If any of the above covenants is not complied with by the lessee, his heir or representative, then Cabinet may at its discretion terminate this lease.

- [59] I do not accept the argument. First, the power to cancel the lease is discretionary and is vested in Cabinet not the Court. No application has been made to Cabinet to cancel the lease. Secondly, Amanaki has failed to prove any breach of covenant. It does not follow that Solomone or Joshuaiah must live on the land for it to be used for residential purposes. The land is and has always been used for residential purposes. The houses on the land are domestic dwellings and used as such. That residential use does not become commercial use simply because rent is charged. Thirdly, Amanaki cannot seek to cancel the lease for breach when he has chased Solomone from the land in fundamental breach of his obligations as lessor.

The surrenders

- [60] It is the case that the Minister failed to comply with the requirements of section 54 when advertising the surrender of the lots. Mrs. Tupou argues that as a consequence the surrenders are null and void. She referred me to *Fatafehi anor v Kuea* (Unreported Land Court, LA 30 of 2008, 10 January 2011, Scott CJ) and quoted the following from paragraph [35] of the judgment:

In the Court's view the precise terms of Section 54 must be strictly complied with. Defective compliance will not be effective against a person having a right to assert a claim to be the legal successor to the surrendered land.

- [61] That statement of principle is undoubtedly correct but the important words are 'a person having a right to assert a claim to be the legal

successor'. Relevantly in the present context the Chief Justice went on to find that the plaintiff (who was the heir) was not such a person as he had renounced in writing his claim to the land in favour of his brother. The words immediately following those quoted to me by Mrs Tupou were:

In this case, however, the court has determined that the First Plaintiff by surrendering his right to the land in 1995 surrendered his right subsequently to claim the land. Accordingly the defects in the Section 54 procedure cannot avail him.

[62] It is not uncommon for landholders to surrender land with the intention that it be granted by the Minister to a person they nominate. Often they will, as in this case, require substantial payments to be made to them in return for providing a letter of surrender and nomination. Such nominations of course do not bind the Minister (*Sakalia v Vailea & Ors* [1995] Tonga LR 130, 135) who is required to give notice of the pending reversion of a surrendered allotment thereby giving an opportunity to claimants to the legal succession to claim the land which, if upheld, prevents reversion occurring (*Tu'akoi v Tu'akoi* [2016] TOLC 5 at [26] and [27] referred to in *Nuku v Luani & ors* (Unreported, Court of Appeal, 6 September 2017 AC 6 & 7 of 2017). It is for that reason that surrender letters are often accompanied by the heir's written consent to the surrender. As *Fatafehi* demonstrates a claimant to the legal succession may renounce their rights to claim the land.

[63] By the letters of surrender 'Amanaki unconditionally renounced his rights to claim the lots in issue following their surrender. Taniela

and Heimuli made substantial payments in return for the surrender letters. 'Amanaki was aware that payments were being made and that the letters of surrender were to be submitted to the Minister. Both Taniela and Heimuli relied upon the surrender letters by submitting them to the Minister, applying for grants and building houses on the land. Whether one considers 'Amanaki has waived his right to claim the land or is estopped from doing so does not matter. He was not a person having a right to assert a claim to those lots once they had been surrendered and, as was the case of the plaintiff in *Fatafehi*, the defects in the section 54 procedure do not avail him.

The Minister's assurance

- [64] 'Amanaki cannot rely either on the Minister's statement in September 2015 that everything would be put on hold at least in so far as the lots in issue are concerned. The surrender of the four lots in issue had already occurred. 'Amanaki had renounced his claim to those lots and has no basis to complain about the grants to Taniela and Heimuli.

Joshaiah and Sinamoni

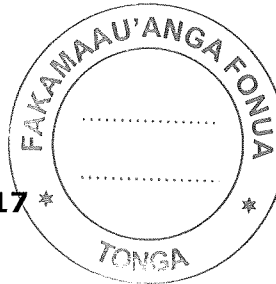
- [65] For completeness I should record the position in respect of Joshaiah and Sinamoni. 'Amanaki has failed in his challenge to Solomone's lease and he has no independent basis to challenge Joshaiah's sublease. In the case of Sinamoni, he gave up his claim to Lot 12 in favour of Taniela and has no interest in this action and 'Amanaki has no claim against him either.

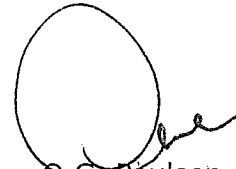
RESULT

[66] For the reasons set out above Amanaki's claims are dismissed in their entirety.

[67] The defendants are entitled to their costs to be fixed by the Registrar if not agreed.

NUKU'ALOFA: 17 November 2017 *




O.G. Paulsen
PRESIDENT