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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 6 of 2019

BETWEEN:

PAULA TAUFAHEMA Plaintiff

-and-

[1] **NEIL** (aka Nila) **TAUFAHEMA**
[2] **MINISTER OF LANDS** Defendants

JUDGMENT

Before:	President Whitten QC LCJ
Assessor:	Mr Faiva Tu'ifua
Counsel:	Mr V. Moale for the Plaintiff
	Mr D. Corbett for the First Defendant
	Ms Akauola for the Minister of Lands
Date of trial:	30 November 2020 to 1 December 2020
Date of submissions:	14-17 December 2020
Date of judgment:	31 December 2020

Introduction

1. This proceeding concerns a dispute between two brothers over a town allotment in the estate of Prince Tungi of Navutoka, once known as "'Onevai" ("***the allotment***").

2. On 12 December 2017, the front half of the allotment, which has a dwelling house on it, known as Lot 40, was registered by the second defendant ("***the Minister***") in favour of the first defendant ("***Neil***") under Deed of Grant number 447/36.

3. The plaintiff ("***Paula***") originally sought orders herein that:

   (a) the registration of Lot 40 in Neil's name be cancelled;

   (b) the matter be referred back to the Minister after due consultation with the estate holder; and

   (c) Lot 40 be granted to Paula.

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4. Neil denies the claim and counterclaims for orders that the dwelling house on Lot 40 be removed and that Paula be ordered to pay Neil rent of $1,000 per month for use of the allotment from 12 December 2017 until the dwelling house is removed.

5. For reasons which will be explored later in this judgment, the real issues in the case were whether the Minister complied with s.54 of the *Land Act*, and if not, whether as a consequence, Neil's grant and registration were unlawful.

6. For ease of reference, s. 54 provides:

> **Surrender of allotments**
>
> (1) Whenever the holder of a tax or town allotment desires to surrender such allotment or any part thereof, it shall be lawful for such holder with the consent of the Cabinet to surrender the said allotment or any part thereof as aforesaid, and any allotment or any part thereof so surrendered shall, subject to the provisions of this Act, immediately devolve upon the person who would be the heir of the holder if such holder had died; and if there be no person on whom the allotment or any part thereof can so devolve the allotment or any part thereof if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder thereof.
>
> (2) Notice of the Cabinet's consent to the surrender shall be published by the Minister in one issue of the Tonga Government Gazette and in 3 issues of a Tongan weekly newspaper within 2 months of the date of the notice.
>
> (3) The notice shall be in the form specified in Schedule IVA and will require any person claiming to be the legal successor to the surrendered land to lodge his claim in writing to the allotment or part thereof by the date specified in the notice which date shall not be less than 12 months from the date that the notice is first published in accordance with subsection (2), failing which the said allotment or part thereof will revert to the estate holder.

7. In that light, the case may be viewed as a sequel to the recent Court of Appeal decision in *Luani v the Minister of Lands & Kava* [2020] TOCA 1 ("***Luani v Kava***").

Evidence

8. The Court heard evidence from Paula, his older brother, Sitalini, and their sister, Sela Pomana. Neil gave evidence. A brief of evidence from Neil's wife, Alison McBlane, was filed but she was not required to give oral evidence during the trial. Evidence on behalf of the Minister was given by Mr Fataua Halatanu, a Senior Lands Registration Officer.

9. Save for part of Mr Halatanu's evidence, which turned out to be critical to the real issue in the case, the relevant evidence of the main protagonists and other witnesses was largely uncontroversial.

Background

10. The relevant history begins on 3 December 1974 with the allotment being registered to Tevita Taufahema. Tevita built a substantial dwelling house on the front part of the allotment. Tevita's children included four sons, in order of age: Sitalini, Asaeli, Paula and Neil. Tevita passed away on 28 April 1992. The allotment was then registered to Sitalini.

11. On 27 September 2006, Sitalini, who was married but had no children, surrendered both his town and tax allotments in the estate of Noble Tungi at Navutoka.

12. Neil alleged that in 1986, he, Sitalini and Paula agreed that Neil would take the front part of the allotment with the dwelling house on it and that Sitalini would take the rear half. By contrast, Paula alleged that in 2007, Sitalini agreed with him and Neil that Sitalini would surrender the allotment so that it could be halved into two parcels of 31 perches for each of Paul and Neil and that Paula would have the front half where the dwelling house is situated. Neil denied the 2007 agreement.

13. In his brief of evidence [8], Sitalini stated that he did not clearly indicate in his letter to the Minister who was going to own the front area where the family house is located but he always held the idea that, in Tongan tradition, the heir normally has the family land including personal property on the land when the father passes away, and if the heir is ruled out, the next brother in male order normally would be given the chance to own the family land including the family house.

Sitalini stated that, as far as he could recall, this norm survived in Tongan tradition for many generations. That, he said, was what he had in mind when he surrendered his land, namely, that Paula would own the front half where the family house is situated because he is older than Neil. No mention was made of Asaeli. Further in his evidence [11], Sitalini stated that when Neil returned from Australia in about 2008, he begged Sitalini to give him the front area. Sitalini refused. He also stated [17] that in about May 2016, he went to the Ministry and spoke with one of the officers, Mr Halatanu, and told him that he wanted the front area with the family house to be granted to Paula.[1] He said that Mr Halatanu told him he would convey his request to the estate holder.

14. In his brief of evidence, Mr Halatanu confirmed the Ministry's receipt of the letter from Sitilani dated 27 September 2006 for the surrender of his tax and town allotments for the purpose of them being subdivided, and each half being given to his two younger brothers, Paula and Neil. The town allotment was then subdivided into Lot 40 and Lot 40A. He confirmed that Sitilani did not specify which brother was to receive which parcel of land.

15. On 7 March 2007, Cabinet approved the surrender by Sitalini. During cross-examination, Paula agreed that he knew about Cabinet's approval at the time because Sitalini told him.

16. In 2008, Paula and Sela went with Neil and his wife to the Ministry office and collected two application forms. They were informed by the Ministry officer to take the forms to the estate holder's then representative, Mr Afu Taumoepeau ("***Afu***"), for him to present to the estate holder. They did so. Sela stated that Afu looked at the application forms and said that he could not take the applications for undivided town allotments to the estate holder without having a map from Lands and Surveys indicating that the original registered town allotment had been divided. Afu told them to return to the Ministry and to tell the staff at the map section to divide the town allotment so that the brothers could apply for their respective halves. Paula also alleged that Afu advised them that because of their

[1] Such nominations of course do not bind the Minister: *Luani v Kava* [2020] TOCA 1 at [23]; *Kioa v Kioa* [2017] TOLC 13 at [62] citing *Sakalia v Vailea & Ors* [1995] Tonga LR 130, 135.

conflicting applications, they would have to agree on who was going to own the dwelling house, and if they could not do so, the Court would have to decide.

17. On their way back to the Ministry, Sela said she asked her brothers who was going to get the front area where the family house is situated. Paula told them that he was going to have the front area. She recalled that Neil did not say anything but turned and left with his wife. In his evidence, Neil said he became upset and told Paula and Sela that they had cheated him. Sela and Paula went to the Ministry office and told one of the officers there that Afu required lot 40 to be divided before the application form could be sent to the estate holder for his signature. The officer scolded them and told them that Afu should not have interfered. She then returned with Paula to Afu. Paula signed his application form and told Afu that the front area was for him. Paula believed that in accordance with 'normal practice', Afu would pass his application to the noble for signing and would then return the signed application form to the Ministry for processing. During cross-examination, Paula said that he understood from what Afu had told him that whomever was adjudged to be the owner of the dwelling house would receive the lot on which the house stood.

18. Neil alleged that Sela had "colluded" with Paula to have him registered on the front part of the allotment for the purpose of acquiring the dwelling house. He testified that he had sent more than TOP$10,000 to Sela to fix the dwelling house but she did not to do so. Sela said the money was used for an extension to the house. Neil pleaded that one day after the claim period expired, he lodged his application in accordance with what he contended was the 1986 agreement. In his brief of evidence, Neil stated [18-19] that after realising what he considered to be his brother's and sister's deceit, he went to Afu's office with his application for the front half of the allotment. He said that he explained to Afu about the money he had sent for the house and appliances. He said that Afu assured him that he would submit Neil's application to the estate holder. From that, Neil said that he was "given the impression that the application would be approved and that I should go back to Australia and it was okay to move to Tonga with all my belongings". He did so, and eventually, at the direction of Afu, Neil and his wife moved into the house on the front of the allotment. He said that when they moved in, Sitalini was there and told them to "Come in, don't worry, it's Sela doing all

this". They lived in the house for a number of years. One day, Neil said [22], that Sitalini offered him $8,000 to move out of the house. He did not accept the offer. That was when Neil considered that his brothers, Sitalini and Paula, and their sister, Sela, "started this ongoing battle for the house and land". He believed that the dispute was all being driven by Sela as she wanted the house for herself for when she retires, and that by having the house and land in Paula's name, he would not interfere with her plans, because he lives in Australia. He also believed that Sela did not want him to have the land because he is married to a palangi and that "she would not get along with a palangi".

19. On 5 November 2008, the Ministry prepared a notice in the form of Schedule IVA to the Act confirming Cabinet's consent to the surrender and giving notice to any person claiming to be an heir to the allotment (or part thereof) to lodge his claim by 4 November 2009, failing which, the allotment would revert to the estate holder ("***surrender notice***"). In his brief of evidence [8], Mr Halatanu stated that the surrender notice was "issued".

20. All three parties pleaded that, pursuant to s.54 of the *Land Act,* upon the expiry of the 12 month claim period stated on the surrender notice, the allotment reverted to the estate holder.

21. In 2013, in proceedings PA 14 of 2013, Sitalini applied for letters of administration over the dwelling house. Neil claimed ownership of the house.

22. Neil also pleaded that Afu was 'unreliable' as he went to Afu at least eight times for completion of his application but was "given the run-around and (was) stalled". Neil pleaded that, as a result, on 30 January 2014, he completed a fresh application form for the front half of the allotment and approached the estate holder directly for his consent.

23. On 4 August 2015, Paulsen LCJ ruled in the Probate proceedings that the dwelling house belonged to Tevita's children and not only Neil.

24. On 20 August 2015, the estate holder consented to Neil's application. By that time, Afu had passed away.

25. In 2016, after he had learned that Afu had passed away, Paula went to the new estate holder's representative, Seli, who gave Paula another application form which he signed. Paula said that he told Seli that he was applying for the front half and he was assured by Seli that he would follow up the application with Noble Tungi.

26. On 12 May 2016, Paula submitted an application for the allotment to the Ministry, without the estate holder's consent.

27. On 26 May 2016, Mr Niu (as His Honour then was), who was then acting for Paula, informed the Minister about the Probate decision in relation to ownership of the dwelling house and requested that the Ministry defer registration of the allotment pending determination of the owner of the dwelling house.

28. On 26 May 2017, Paulsen LCJ made declaratory orders, by consent, that the dwelling house was the property of Paula and ordered Neil to vacate the dwelling house by 26 June 2017. In this proceeding, Neil denied ever consenting to or instructing his former counsel (Mr Tu'utafaiva) to consent to the orders made by the court that day. However, he has not taken any action about that matter since. Paula alleged that Neil did not obey, and was therefore in contempt of, the court order. Neil denied that allegation and pleaded that he obeyed the order by building and living in a small house at the rear of "his land" being the front half of the allotment, and not the family house that had been declared to be the property of Paula. I note that in his brief of evidence [26], Paula stated that Neil and his family moved out of the dwelling house and lived on the other half at the rear of the allotment. In about June 2017, Paula took possession of the front area where the dwelling house is situated.

29. On 1 August 2017, the Ministry conducted a site inspection which confirmed the presence of the dwelling house on lot 40, the subject of Neil's application for registration.

30. On 8 August 2017, by letter on behalf of the Minister to Mr Niu, the Minister confirmed that the estate holder had consented to and endorsed Neil's application for Lot 40 and that therefore a complete application had been received by the Ministry for further processing. The Minister set out two options to be explored,

namely, that Paula ask the estate holder to amend the location on Neil's application from Lot 40 to Lot 40A at the rear; or, for Paula to remove the dwelling house from Lot 40. The Minister gave Paula two months within which to implement his preferred option.

31. On 29 September 2017, Mr Niu wrote to the estate holder (copied to the Minister) as to the outcome of the Probate proceedings and submitted another application by Paula for registration of the front half of the allotment (Lot 40) and requested that Neil's registration be in respect of the rear half of the allotment (Lot 40A) which he described as being consistent with the earlier direction by the late Afu. It was around then that Paula discovered that Neil had already applied for the front half of the allotment with the dwelling house on it.

32. Mr Niu approached the Minister about the situation and, as a result, on 29 September 2017, the Minister wrote to the estate holder seeking his consent for Lot 40A to be registered to Neil instead of Lot 40. The estate holder did not respond.

33. On 25 October 2017, the CEO of the Ministry emailed the estate holder seeking to resolve the matter before taking further action. Again, the estate holder did not respond.

34. On 26 October 2017, the Minister directed that the Deed of Grant for Lot 40 be issued and registered in favour of Neil.

35. On 12 December 2017, Deed of Grant number 447/36 for Lot 40 was registered in Neil's name.

36. Neil gave evidence [37] that he was waiting for Paula to remove his house so that he, Neil, could build another family home on the front lot. The dispute therefore is not so much about the dwelling house, but who has the benefit of the front facing portion of the allotment.

37. On 5 January 2018, Mr Niu wrote to the estate holder's new representative, and stated, in summary, that:

(a) a meeting had been held between Neil, Sitalini (who represented Paula), the town officer and the estate holder's representative during which it was agreed that the front allotment with the dwelling house on it would be granted to Paula;

(b) Paula alleged that the estate holder's representative was not aware of any endorsement by the estate holder of any application for registration by either Paula or Neil; and

(c) Mr Niu had only found out that on 12 December 2017 that the Minister had proceeded to register Neil as the holder of Lot 40.

38. On 8 March 2019, these proceedings were commenced.

Pleaded claims and defences

39. Paula alleged that the Minister registered the land without affording him an opportunity to be heard because he is the owner of the dwelling house and that he had applied for registration of Lot 40. He therefore claimed that the registration in favour of Neil should be declared null and void because the land was not available for a new grant to be made as there was a substantial dwelling house on it. That claim was not pressed and it is inconsistent with the decision of Paulsen LCJ in *Finau v Finau* [2017] TOLC 5 at [44].

40. Neil alleged that Paula is not eligible to hold the allotment because:

(a) he had his own town allotment at Manuka which he 'halved' with Asaeli; and

(b) in 2006, Paula surrendered or "gave up" his town allotment to 'Aisea Tukipili Moala[2] "for the purpose of circumventing s.44 of the *Land Act* so he could apply for part (sic) the town allotment in dispute which contained the dwelling house once the surrender by Sitalini Taufahema had taken place".

41. The Minister pleaded that the registration of Lot 40 to Neil was lawful because:

[2] On 14 August 2020, counsel for the Minister confirmed that that allotment was originally registered to Paula in 1987 and that his surrender of it was approved by Cabinet in 1992.

(a) the surrender by the previous holder, Sitalini, did not expressly specify how the two lots were to be allocated to Paula and Neil;

(b) the estate holder had consented to Neil's application for lot 40 and had not consented to Paula's application for that lot;

(c) the Minister had done his best to consult and liaise with Paula's lawyer, Mr Niu, and the estate holder, but neither had responded; and

(d) the Minister had regularly consulted and corresponded with Mr Niu, thereby giving Paula an opportunity to be heard such that there was no breach of the principles of natural justice.

42. On 11 October 2019, an injunction was granted restraining Neil from accessing the dwelling house or allowing others to do so, and to allow Paula to enter and change the locks.

43. On 31 July 2020, orders were made requiring the Minister to discover any publications of the surrender notice required by s.54 and any documents relevant to any previous allotment held by Paula which might be relevant to the s.44 issue.

44. On 18 September 2020, counsel for the Minister filed a memorandum advising that the Ministry did not possess any records of any publications of the surrender notice in any of the Tonga Government Gazette or any Tongan weekly newspaper.

Mr Halatanu's evidence

45. As foreshadowed in paragraph 9 above, it transpired that Mr Halatanu's evidence during the trial eclipsed in significance most of the uncontroversial evidence outlined in the Background.

46. It will be recalled that in his brief of evidence, Mr Halatanu stated that the surrender notice was 'issued' on 5 November 2008, the date it bore. The term 'issued' became all the more cryptic when, as noted immediately above, the Ministry admitted not having any records of the surrender notice having been published in any of the forms required by s.54(2). The suspense peaked when,

in opening, Ms Akauola informed the Court that she would leave it for Mr Halatanu to explain what he meant by the surrender notice having been 'issued'.

47. Mr Halatanu explained that in the early 1990s, shortly after ss (2) and (3) were inserted in s.54,[3] the then CEO of the Ministry orally directed heads of division to instruct registration officers, including Mr Halatanu at that time, that the procedure for publication of surrender notices pursuant to s.54(2) was that the person seeking to surrender or the person to whom the holder wished the allotment to be granted, were directed by the Ministry officers to arrange and pay for the publications of the surrender notice. That person then had to bring the receipt for the costs of the publications back to the Ministry which would then prepare and 'issue' the surrender notice to that person, who was then required to take the notice back to, say, the relevant newspapers for publishing.

48. In 2019, the procedure was changed (again, not in writing) in that after Cabinet approval, the Ministry was to arrange for publication in the Government Gazette but the person surrendering or seeking to take the allotment was still responsible for arranging and paying for the newspaper publications. He said that before 2019, publication in the Gazette was "not usually done", but he did not know why.

49. Similarly, Mr Halatanu did not know of any basis, statutory or otherwise, for the Ministry's internal requirements for the persons described above being required to arrange and pay for the publications. It was simply what he and the other officers were directed to do. He ventured to guess that the Ministry "did not have the funds to pay for the publications".

50. The timely and continual observance of discovery obligations is one of the fundamental planks to procedural fairness and forensic investigation in any civil litigation. In the present case, the parties completed discovery in April 2020. The further specific discovery by the Minister referred to above merely confirmed the Minister's physical discovery which did not include any documents relevant to s.54(2). Despite all that, Mr Halatanu, who had the Ministry file with him in the witness box, produced a receipt which initially appeared to be relevant to fees for

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[3] Act 18 of 1991, following the decision in *Vakameilalo v Vakameilalo & Minister of Lands* [1989] Tonga LR 98 where the Privy Council recommended a requirement for public notice so that the fact of a surrender would be brought to the notice of an heir.

publication of the surrender notice. It had not been discovered. Ms Akauola said she knew nothing of it. As a result, the trial was adjourned briefly to enable all counsel to consider the matter and take instructions.

51. When Mr Halatanu's evidence resumed, he described the receipt as:

    (a) being on Ministry letterhead;

    (b) for the sum of $41.40;

    (c) received from Sela Pomana;

    (d) dated 5 November 2008; and

    (e) being in regard to a "land notice".

52. Despite all counsel examining Mr Halatanu on the receipt, it was never tendered into evidence.

53. Mr Halatanu could not explain what the receipt was for. It did not contain any description of being for publication fees. In any event, the money was paid to the Ministry; it was not a receipt from a newspaper. He did not know what that fee could have been for as he said the Ministry did not charge for the preparation of surrender notices.

54. There was no evidence in the Ministry file to indicate that Sela or anyone else in the case was told by any Ministry officer that they had to pay for advertising the notice. Mr Halatanu explained that the procedure was to wait for the person applying to follow up on their application to surrender. Once Cabinet had approved the surrender, the Ministry would advise the person when they followed up that they could then go and arrange for the publication of the surrender notice.

55. The surrender notice stated the claim period to be 12 months from the date of the notice which was 5 November 2008. Subsection 54(3) requires the claim period to be not less than 12 months from the date of first publication. In answer to a question from the Bench about how the Ministry could insert the expiry date for the claim period in the surrender notice when issuing it without knowing when the notice would be first published, Mr Halatanu explained that when the Ministry

received the receipt for the publications, the date of the receipt would become the date of the notice and the start date for the (at least) 12 month claim period, all on the assumption that the date on the receipt was the anticipated date of first publication.

56. That led to further questioning by which Mr Halatanu, through deductive reasoning rather than historical fact, suggested that the surrender notice could only have had a date inserted because the Ministry must have received a receipt for the publication and that it had most likely lost the receipt or even a photocopy of it which was usually attached to the file.

57. Mr Halatanu said that the day before he gave evidence, he attended the office of the Taimi Tonga newspaper and asked for all papers published in November 2008. The paper was only able to provide copies of the editions published on 19 and 26 November. Neither contained any evidence of publication of the surrender notice in this case. When asked whether he searched the Gazette, Mr Halatanu said that he had not because, as explained above, at that time, surrender notices were not published in the Gazette.

58. During cross-examination, Mr Moale asked generally about how the Minister was informed at the end of a claim period whether any claims had been made or, if not, that the allotment in question had thereby reverted to the estate holder or the Crown as the case may be. Mr Halatanu explained that when a surrender application was submitted, it was forwarded to the Minister so that he was aware of the application and the 'process going on'. The officer assigned to each case was then responsible for updating the Minister on its status. Usually, a ministerial briefing note would be issued at the end of the notice or claim period. In this case, Mr Halatanu said that took the form of the Minister's savingram dated 26 October 2017. He agreed that apart from the surrender notice itself (which he also agreed was not evidence that it had been published), the file did not contain any evidence of publication whether in the form of a receipt (or more accurately, receipts) or other advice to the Minister that the notice/claim period had elapsed or whether any claims had been submitted within that period or whether the allotment had reverted. Mr Halatanu further agreed to the suggestion that, in those circumstances, the officer handling the case either failed to advise, failed to

completely advise or misinformed the Minister in relation to the requirements of s.54.

59. In response to questioning about how the matter should have been handled were he advising the Minister now, Mr Halatanu said that although he often appears in court on cases such as the present, he did not have 'jurisdiction' to advise the Minister on the procedure which ought to be followed. He suggested that the CEO and the Minister should consult with the Solicitor General to "work out" directions on procedures for surrender cases for the Ministry to follow. He said that his advice would be that once Cabinet approves an application for surrender, the Ministry should publish the surrender notice in the Gazette and then advertise it in three newspapers. Then, if an application is submitted within the notice period, copies of the publications should be attached to the application when presented to the Minister.

60. In answer to another question from the Bench, Mr Halatanu estimated that during his more than 20 years as a lands registration officer, there had been, on average, approximately 200 surrender cases per year, all of which involved the practice he described of the Ministry requiring the person surrendering, or hoping to claim, to be responsible for publication of the surrender notice described in s.54.

61. Mr Halatanu's frank evidence concluded with concessions to the effect that it was now clear to him that the said 'procedure' did "not completely comply with the law" and that "there are amendments which need to be done".

62. That evidence led to Sela and Sitalini being recalled. Paula, who gave evidence earlier by video link, could not be contacted. Sela could not remember ever paying $41.40 to the Ministry in relation to the surrender notice, or at all. Both were adamant that they were never told by any officer in the Ministry that they were required to arrange or pay for the publication of the surrender notice.

Issues

63. On or about 22 May 2020, the parties agreed on the formulation of two issues, namely, whether:

(a) the Minister followed the surrender procedure under s.54 ("***the s.54 issue***"); and

(b) s.44 barred Paula from claiming the allotment ("***the s.44 issue***").

64. Even though those issues had not been explicitly pleaded, the parties proceeded, without objection, on the basis that they were the issues for determination of the proceeding.

65. By the commencement of the trial, the parties appeared to have agreed that only the s.54 issue, together with what consequences ought follow if the Minister is found not to have complied with the provision, remained for determination. Notwithstanding, Mr Corbett approbated and reprobated on whether the s.44 issue remained to be considered. Early in the trial, he agreed it was not. However, towards the end of the trial, he sought to resuscitate the issue, more out of a combination of his client appearing to instruct Mr Corbett on the proper legal interpretation of s.44 and seeming forgetfulness of what had been discussed earlier, than any fresh basis borne of the evidence or new legal analysis.

66. For completeness, s.44(1) provides:

> **44 Applicants refusing grant not to make second application**
>
> (1) Any person who has applied for and has been granted by the Minister an allotment and without reasonable cause refuses to accept the land granted to him shall not be entitled to make a further application and the Minister shall keep a record of all cases where an applicant has so refused and shall not entertain any second application if made.

67. It should be immediately apparent, by its terms, that s.44(1) is of no application to the present case. Firstly, s.44 applies at the time of grant. Here, there was no evidence that in 1987, when it was granted to him, Paula refused to accept the allotment he later surrendered in or about 1992. Secondly, an act of surrender is patently different from refusing to accept a grant. Surrender is provided for in s.54. Even though ss 72 and 73 (Division V of Part IV) are entitled "Surrender of Allotments", those provisions are concerned with persons who wish to move (or 'remove') away from the district in which their allotment is situated, the

cancellation of that deed of grant and the applying for and granting of an allotment in the district to which the person wishes to move. Thirdly, neither s.54 or ss 72 and 73 contain any terms akin to the last limb of s.44, namely, that in the event of surrender, the Minister shall not entertain any subsequent application. Section 54 is silent on the point and s.73 expressly permits an application for a replacement allotment.

68. Further, as the parties' submissions, both written and oral, eventually revealed, even if s.44 was capable of an interpretation and application to the effect that Paula was precluded from applying for Lot 40 (which for the reasons stated above, it is not), that contention had nothing to do with the real issues for determination.

Submissions

69. The parties filed written submissions approximately two weeks after the close of evidence at trial. Counsel then spoke to those submissions and made submissions in reply at the final hearing on 17 December 2020.

Plaintiff

70. Mr Moale opened his client's case by posing three questions:

    (a) whether the Minister followed and completed the surrender procedure mandated by s.54(2);

    (b) if not, whether the requirements of s.54(2) are mandatory; and

    (c) if so, whether a direction to the Minister to complete the surrender procedure is the appropriate remedy.

71. With that, he refined the relief sought by Paula to orders cancelling Neil's registration and directing the Minister to complete the surrender procedure prescribed by s.54(2).

72. In closing submissions, Mr Moale applied to amend the Statement of Claim. He had not given notice to counsel for the defendants. However, neither objected. Mr Moale sought to insert at the end of paragraph 2 of the Statement of Claim

reference to Tevita's four sons. He then sought to insert a new paragraph 2A to the effect that Paula is the legal successor to the allotment because Asaeli has a registered town allotment at Manuka. Insofar as late amendments to pleadings may be considered in order to bring the pleading into alignment with the evidence that has fallen during trial, there was no evidence about Asaeli holding a town allotment at Manuka. Moreover, as he had already abandoned the original plea for an order that the allotment be registered to Paula, Mr Moale also abandoned the proposed paragraph 2A. Finally, and closer to the mark, Mr Moale applied to delete that part of paragraph 6 which alleged that the allotment had reverted by law to the estate holder.

73. Beyond that, Mr Moale submitted, in summary:

(a) section 54(2) requires the Minister to publish the surrender notice in the requisite Gazette and three Tongan newspapers;

(b) in *Tu'akoi v Tu'akoi* [2016] Tonga LR 248, Paulsen LCJ expressed the view that:

> *"[27] ... the only rights which the surrender procedure is designed to protect are those which might be lost of the land actually reverted at the end of the notice period. Rights to apply for the land whether by way of grant or lease, do not arise until the reversion has actually taken place. They are not imperilled by the reversion itself."*

(c) Paula had claimed to be the legal successor to the allotment;

(d) there was insufficient evidence to be satisfied that the surrender notice had been published at all, in which case, "time never began to run against the heir": *Luani v Kava*, ibid, [32];

(e) the Minister had no power to determine who was the legal successor to the allotment until the process provided by ss 54(2) and (3) had been completed;

(f) that process is mandatory;

(g) a grant may be set aside if the registration was made by mistake, fraud or without jurisdiction: *Sete v Palu* [2015] Tonga LR 304 at [34];

(h) Neil's registration was the result of mistake by the Minister in failing to comply with the surrender procedure required by ss 54(2) and (3);

(i) there is no guarantee that the person intended by the previous surrendering holder, and named in the letter of surrender, will obtain a grant: *Luani v Kava*, ibid, [23]; and

(j) in those circumstances, the proper course was to cancel Neil's registration and direct the Minister to complete the surrender notice procedure as required by s.54.

First defendant

74. Mr Corbett's written submissions identified the s.54 issue in terms of the Act being silent as to the consequences of the Minister not abiding by s.54(2). He was otherwise adopted the submissions on behalf of the Minister.

Minister of Lands

75. Ms Akauola submitted, in summary:

(a) there was partial compliance with the s.54 surrender procedure because Sitilani applied to surrender the allotment, Cabinet approved the surrender and a surrender notice was prepared by the Ministry;

(b) the Minister accepted that the surrender notice was not published in the Government Gazette;

(c) the Minister accepted that there was no direct evidence that the surrender notice was published in any of three Tongan weekly newspapers within two months of the date of the notice. However, as I understood her submissions, Ms Akauola suggested that an inference may be open that the advertising did occur by reason of Mr Halatanu's evidence about the receipt on the Ministry file, the practice of not dating the surrender notice until the Ministry had received a receipt for the newspaper publications and the letter from Mr Niu to the estate holder dated 29 September 2017 in which he wrote that

the surrender by Sitilani was 'notified' on 5 November 2008 and the one year for any claim expired on 4 November 2009;

(d) alternatively, if the Court found that the Minister did not follow the statutory surrender procedure, Paula was not prejudiced by it because:

(i) where there is partial compliance with the publication requirements of s.54(2), an heir does not lose his right to claim the allotment upon expiry of the date specified in the notice and he is protected by a 'rebuttable presumption of prejudice': *Luani v Kava*, ibid, at [32];

(ii) Paula knew of the surrender and "most likely the expiration date in which an heir must bring a claim, and that the allotment had lawfully reverted to the estate holder";

(iii) Asaeli is older than Paula;

(iv) if the Court accepts that the rightful heir is Asaeli, then Paula's right to apply for the allotment is not protected by the surrender procedure: *Tu'akoi v Tu'akoi*, infra; and

(v) Paula failed to exercise one of the two options the Minister presented on 9 August 2017;

(e) if the Court finds that the Minister failed to comply with s.54(2) and accepts that Paula is the legal successor to the allotment, the Court may determine what appropriate remedy (if any) is available against the Minister. In *Koloamatangi v Koloamatangi* [2003] Tonga LR 131, where the Minister failed to give public notice of a surrender, Ford J declined to cancel the Second Defendant's grant because the Plaintiff failed to establish any claim against the Minister. However, His Honour noted that such failure by the Minister gave rise to a civil liability to the Plaintiff for breach of statutory duty and that there may be circumstances where the Minister's failure results in cancellation of a grant. Ms Akauola accepted that *Koloamatangi* is distinguishable from the instant case.

Consideration

76. Paula's task in seeking to challenge the validity of Neil's registration and have it cancelled has been described as 'formidable': *Koloamatangi v Koloamatangi* [2003] Tonga LR 131 at [23]. As Ford J observed:[4]

> *"Until it is established to the contrary, the court will presume that the register is correct. Registration is final unless it has come about as a result of an error of law (i.e. contrary to the Act), or as a result of fraud, mistake, breach of the principles of natural justice or of a promise made by the Minister".*

77. To succeed, therefore, Paula must demonstrate that Neil's grant and registration were the result of one or other of those vitiating factors. Even though Mr Moale couched his client's claim in terms of mistake by the Minister, it will be seen that the correct characterisation of the claim is one of error of law.

78. The operation of s.54 was described by the Court of Appeal in *Luani v Kava* thus:

> *"[27] Section 54(1) makes it lawful for the holder of an allotment, with Cabinet consent, to surrender his allotment. If the holder has an heir, subsection (1) states that, subject to the provisions of the Act, which include of course the balance of s54, the allotment "immediately devolve[s] upon the person who would be the heir of the holder if such holder had died". If subsection (1) still stood alone in s54 the consequence of the surrender would therefore be that the allotment would immediately become the property of the heir.*
>
> *[28] But subsection (1) has since amending legislation in 1991 been qualified, and indeed contradicted, by subsection (2) and, particularly, subsection (3) which provides for the giving of a notice by the Minister of Lands requiring any person claiming to be the heir ("the legal successor to the surrendered land") to lodge a written claim to the allotment by a date specified in the notice. That date cannot be less than 12 months from the date the notice is "first published" in accordance with subsection (2). (It is convenient to call this the "12 month period" although the Minister may by his notice specify a longer period).*
>
> *[29] Subsection (2) requires the Minister to publish the notice of the Cabinet's consent to the surrender in one issue of the Tonga Government Gazette and in three issues of a Tongan weekly newspaper within two months of the date of the notice. Neither of the additional subsections requires that the first publication must be in the Gazette. Therefore, time begins to run for*

[4] See also *Sete v Palu* [2015] Tonga LR 304 at [34].

> *the heir to make his claim once there has been one publication in either the Gazette or a weekly newspaper. We must determine what consequences flow from the failure of the Minister to complete three further publications as required by subsection (2) within two months of the date of the notice. The section is silent about this important matter.*
>
> *[30] Although subsection (1) continues to say that there is an immediate devolution, the effect of subsection (3) is to make that devolution conditional upon the making of a timely claim by the heir. Absent a timely claim, subsection (3) states that the allotment "will revert to the estate holder". ... "*

79. The Court of Appeal also acknowledged[5] the statements by Lord President Scott in *Fatafehi v Kuea* [2011] TOLC 1 and approved by Lord President Paulsen in *Kioa v Kioa* [2017] TOLC 13 at [60] that the precise terms of s.54 must be strictly complied with and that 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. However, the Court of Appeal noted that neither case involved any 'real examination of the requirements of the section' nor did their Honours accept that the issue was as straightforward as Scott P seemed to have thought.

80. For present purposes, it is sufficient to identify that the terms of s.54(2) which require that a surrender notice "shall be published by the Minister" are plainly mandatory and not permissive. The requirement is twofold. Firstly, the notice must be published (in the Gazette and three Tongan weekly newspapers within two months of the date of the notice). Secondly, it must be so published by the Minister. No issue has arisen in this case as to whether the terms of the surrender notice complied with the requirements of s.54(3). Such an issue could only arise of course if there has been publication.

81. Therefore, the first issue for consideration in this case is whether the Minister complied with the publication requirements of s.54(2).

Did the Minister comply with s.54(2)?

82. The procedure described by Mr Halatanu, whereby the Ministry requires a person surrendering or a person hoping to claim the surrendered land to arrange and pay for advertising or publication of a surrender notice, was, and is, inconsistent

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[5] [37]

with the requirement of s.54(2) that the surrender notice be published by the Minister. Nowhere in s.54 or elsewhere in the Act for that matter, is there any provision which permits the Minister to effectively delegate his statutory obligation of publication to any person other than, arguably, certain 'deputies' described in s.21.

83. To the extent that such arrangements may have been capable of being the subject of Regulations by the Minister pursuant to s.21 of the Act, of all the Regulations which have been promulgated under the Act to date, none provide for such delegation of the publishing obligation under s.54(2).

84. Any question of whether the publication of a surrender notice in accordance with the procedure described by Mr Halatanu is invalid does not arise in this case. That is because the more critical issue in this case is not so much by whom the surrender notice was to be published, but whether it was published at all. Notwithstanding, the Minister is exhorted to only develop, implement and maintain policies and procedures within the Ministry which accord with the requirements of the *Land Act* and any Regulations made thereunder.

85. In the absence of any direct evidence of publication of the surrender notice in this case, in the Gazette or any newspaper, the Minister asks the Court to find, by inference, that the surrender notice was likely published in at least one newspaper.

86. I preface my findings on this point with the following views on the legal and evidentiary burdens applicable to this issue:

    (a) Paula carried the legal onus of demonstrating non-compliance with s.54 as an integer of his claim that the grant to Neil was unlawful.

    (b) In that regard, the successful extraction of the concession on behalf of the Minister that the Ministry did not have any physical evidence of publication on its file established a prima facie case.

    (c) From there, the evidentiary burden shifted to the Minister to rebut that case by demonstrating through admissible, circumstantial evidence that publication likely did occur.

87. For the reasons which follow I am not satisfied on the balance of probabilities that the available evidence, viewed objectively, is sufficient to safely support an inference that publication (in any form) occurred.

88. Firstly, the (undiscovered and untendered) receipt on the Ministry file raised more questions than it answered:

    (a) neither Mr Halatanu nor Sela knew the purpose of the payment;

    (b) the only detail on the receipt, that it was in regards to a 'land notice', could have suggested that it was a fee for processing Sitalini's surrender application or for the preparation of the surrender notice following Cabinet's approval. That latter hypothesis is consistent with the receipt being dated the same date as the surrender notice. However, no other evidence supported either possible explanation and it is also inconsistent with Mr Halatanu's evidence that the Ministry did not charge fees for such services. Therefore, striving to explain the receipt by reference to such possible purposes risks straying into impermissible speculation;

    (c) none of the fees payable in Schedule IV to the Act[6] relate to applications to surrender allotments or for the preparation of any surrender notices nor does the amount of $41.40 appear anywhere within the Schedule;

    (d) the fact that the receipt is on Ministry letterhead, meaning that the Ministry received the payment from Sela, also leads to the opposite inference, that is, that the payment was not for advertising fees paid to any newspaper. That, of course, assumes that at that time (2008), the Ministry's practice was as Mr Halatanu explained it, and not one in which the Ministry received monies from applicants for surrender for the costs of publication following which the Ministry arranged and paid for the actual publications. As noted, any attraction in that latter explanation, which would be more consistent with the requirements of the Act, flies in the face of Mr Halatanu's evidence. There is no other evidence before the Court to explain the Ministry's practices and procedures in this regard. With one exception (discussed in

[6] Substituted by Act 18 of 1991.

the next paragraph), I have no basis for disbelieving or doubting Mr Halanatanu's accuracy and reliability as a witness. His regular appearance before the Land Court on behalf of the Minister reinforces that assessment.

89. Secondly, Mr Halatanu's initial deduction and subsequent evidence to the effect that it was the Ministry's practice only to insert the expiry date for the claim and the date on the surrender notice upon receipt of a receipt for the advertising costs for such notice, suffered from inherent logical and evidentiary weaknesses. Subsection 54(3) requires that the expiry date for the claim period in the notice shall not be less than 12 months from the date that the notice is first published, *not* from the date of the notice. Notwithstanding my above-stated general acceptance of Mr Halatanu's evidence about the Ministry practices, I found his evidence that the said dates inserted in a notice were based on an assumption that the date of the receipt would be the date of first publication, somewhat implausible. It is very difficult to see how a person can approach a newspaper to arrange publication of a surrender notice and pay for it, obtain a receipt for the payment, then return to the Ministry with the receipt, for the Ministry to then complete preparation of the surrender notice, provide the notice to the person, then for the person to return to the newspaper with the notice, and for the newspaper to then print the notice all on the same day. The only other explanation is that the receipt is postdated. But, again, there was no evidence about what actually occurred in this case at that time. There was no evidence on the Ministry file that any officer informed either Sela or Sitilani of the Ministry's requirement for them to arrange and pay for the publications. Their evidence was that they were never told to do so. There is no other evidence to explain why the surrender notice was dated 5 November 2008 whether by reference to any attendance by any of Sitilani, Sela or Paula at the Ministry requesting the notice, or otherwise. There was no evidence that any of them were ever provided with the surrender notice.[7] There was also no evidence from any newspaper in operation in 2008 that all these things could be attended to and the notice published all on the same day.

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[7] The notice was not discovered by Paula. Curiously, Neil's discovery included a copy of the notice although it was marked as an exhibit to an affidavit by Sitilani sworn 9 August 2013 which I assume was for the probate proceedings.

90. The further speculation inherent in trying to fathom this particular aspect of the evidence only serves to reinforce the concerns expressed above about the Minister's apparent abrogation of responsibility for the publications required by s.54(2). Had the Ministry arranged and paid for the required publications (even if that meant passing on the cost thereof to an applicant, if that were permissible), with the likely result that documentary evidence of the payments to the Gazette and the newspapers as well as copies of the actual publications would be kept on the Ministry file, then the perplexities experienced in this case concerning whether the surrender notice was duly published may well have been avoided.

91. Thirdly, in my view, the letter from Mr Niu to the estate holder dated 29 September 2017 in which he wrote, relevantly:

> *"Sitalini accordingly surrendered the allotment with the consent of Covered on 7/3/2007. It was notified on 5/11/2008 and the one year for any claim expired on 4/11/2009 without any claim by the next eldest brother of Sitalini, 'Aseli, as per their agreement."*

does not advance the matter one way or the other. It is apparent that Mr Niu either assumed that publication had occurred (without identifying any evidence to demonstrate that it had) or he did not consider the issue and simply recited the dates on the surrender notice. Neither Paula or any of his witnesses were asked about the letter during the trial and Mr Niu was not called to give evidence.

92. Accordingly, I find on the balance of probabilities that the surrender notice was not published, as required by s.54(2), or at all.

Consequences of non-compliance

93. The next question then is what are the consequences of non-compliance with s.54(2)?

94. The finding of no publication at all dispatches Ms Akauola's submission that there was partial compliance with the provision. While there was partial compliance with the relevant requirements of s.54(1) and, to a lesser extent, ss (3), there was no compliance with the publication requirements of ss (2). That, in turn, distinguishes this case from the partial publication case in *Luani v Kava*.

Therefore, the principle elucidated in that case that, where there is at least one publication, an heir does not lose his right to claim upon expiry of the date specified in the notice, and that he is protected by a 'rebuttable presumption of prejudice', does not apply in the present case.

95. Further, as Ms Akauola accepted during closing oral submissions, the earlier written submissions on behalf of the Minister that Paula was not prejudiced by the lack of publication because:

(a) Paula knew of the surrender and "most likely the expiration date in which an heir must bring a claim, and that the allotment had lawfully reverted to the estate holder";

(b) Asaeli is older than Paula;

(c) if the Court accepts that the rightful heir is Asaeli, then Paula's right to apply for the allotment is not protected by the surrender procedure; and

(d) Paula failed to exercise one of the two options the Minister presented on 9 August 2017,

were not to the point.

96. The point is whether the grant and registration in favour of Neil was lawful.

97. Section 19(1) of the Act makes the Minister the representative of the Crown in all matters concerning land in the Kingdom. It is fundamental that in purporting to exercise a statutory power, the Minister must act within the limits of the power conferred upon him: *Palu v Sete* [2016] Tonga LR 158 at [13].

98. In this case, the Minister's grant and registration in favour of Neil resulted from Neil submitting his application in or about August 2015, with the estate holder's consent, and the Minister approving Neil's application on or about 26 October 2017. The Minister did so on the assumed basis that the allotment had reverted to the estate holder and was therefore available for application and re-grant by the Minister. That assumption was incorrect.

(d) Paula failed to exercise one of the two options the Minister presented on 9 August 2017, were not to the point.

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99. Pursuant to s.54, the only means by which the allotment could revert to the estate holder was if there was no person on whom the allotment or any part thereof could devolve. That circumstance, and the otherwise immediate devolution on such an heir, as prescribed by ss (1), is qualified as being 'subject to the provisions of (the) Act'. Those provisions include, relevantly, ss (2) and (3). They provide the procedure for identification of the heir or legal successor, including notification through publication of Cabinet's consent to the surrender and a period of not less than 12 months from first publication within which an heir or person claiming to be the legal successor is to claim the surrendered allotment. Notice of the pending reversion of a surrendered allotment thereby gives an opportunity to claimants to the legal succession to claim the land which, if upheld, prevents reversion occurring: *Kioa v Kioa* [2017] TOLC 13 at [62].[8]

100. Even if a claim is made shortly after first publication, by a person who appears to be the true heir, it would appear that the Legislature has seen fit to require that the whole period must be left to run before any such claim can be

[8] Citing *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.

accepted, to allow for the possibility of any other person claiming to be the legal successor to make a claim. Where no claim is made within that period, the allotment reverts to the estate holder. The combined effect of ss (2) and (3), therefore, is to defer what is otherwise provided by ss (1) to be an immediate devolution, for the period prescribed by ss (3).

101. Within the context of s.54, they are the only circumstances in which a surrendered allotment can revert to an estate holder thereby making the allotment available for the Minister to entertain applications for re-grant.

102. Critical to that procedure is the commencement of the (not less than) 12 month claim period. However, as the Court of Appeal observed in *Luani v Kava*:[9]

> *"If there is no publication at all, time never begins to run against the heir, because there is no (first) publication creating a starting point for the 12-month period."*

103. In my view, it must follow that if the claim period never begins, it naturally does not come to an end. If it does not come to an end, it can never be said that there was no claim within that notional period. If the period has therefore not begun and therefore cannot expire, the circumstances for reversion provided by s.54 can never occur.

104. In the present case, the failure to publish the surrender notice at all meant that the claim period never began. As it never began, it could never expire. The circumstances for reversion therefore could never occur. As a result, the allotment did not revert to the estate holder on 5 November 2009, or at all. As the allotment did not revert, it was not available for the Minister to re-grant. The Minister therefore had no power to entertain or grant any application for the allotment. Accordingly, the grant and registration in favour of Neil was beyond power, or ultra vires the Act, and was therefore unlawful.

105. It therefore did not matter whether Paula and Neil knew of Sitilani's surrender or of Cabinet's approval of it. Neither submitted claims to the Minister within the claim period specified on the surrender notice. But because it was never published, the time for which such claims were required to be made, and failing

[9] [32]

which, the allotment would revert, never began. Unless and until the allotment reverted, it ought to have remained 'in the name' of Sitilani.

106. In terms of appropriate relief, as Ms Akauola acknowledged, *Koloamatangi* is clearly distinguishable from the instant case. Notwithstanding the Minister's failure in that case to publish the surrender notice, Ford J declined to cancel the grant because, as the Court of Appeal in *Luani v Kava* noted,[10] the new grantee was innocent of any fraud, was unaware the previous holder had any child, and had expended a considerable sum in building and other works before the heir came forward and brought his proceedings. Here, there is no allegation of fraud, both Paula and Neil knew of Sitilani's surrender, they both applied for Lot 40 in 2008, albeit only to the estate holder's then representative, and Neil's evidence of having sent money to Sela for the maintenance of the dwelling house was countered by her evidence that she had repaid those monies or most of them, and more recently, Paula has been adjudged to be the owner of the dwelling house.

107. In relation to a possible civil claim by the plaintiff in that case against the Minister for breach of statutory duty, Ford J concluded:

> *"Whilst conceivably, there may be circumstances where a failure by the Minister to give public notice pursuant to section 54 of the* Land Act *may result in the cancellation of a grant, I have not been persuaded that such draconian relief is appropriate or just in the circumstances of the present case."*

108. With respect to his Honour, the circumstances in which cancellation of a grant may be warranted include, first and foremost, where a grant and subsequent registration result from an error law, i.e., contrary to the Act. It does not appear from his Honour's reasons that the above analysis was presented in the submissions before him, or considered, other than for the finding of fraud upon which his Honour's decision was based.

109. In my view, a more fundamental analysis presents where the Minister has failed entirely to comply with the publication requirements of s.54. If the s.54 procedure is not conducted according to its terms, particularly by the Minister,

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[10] [24].

the fundamental objective of the provision of ensuring that surrendered allotments devolve to the surrendering holder's heir or other legal successor, may be undermined. The primary question then becomes whether any subsequent grant and registration to another party was contrary to the Act and therefore unlawful. If so, cancellation of the grant cannot be regarded as draconian, if on a proper application of s.54, the allotment did not revert and therefore did not become available to the Minister to grant in the first place. In that event, a subsequent grantee, such as Neil, if aggrieved by the necessary cancellation of his grant, may pursue any rights he may have in respect of the Minister's breach of statutory duty. Different considerations may apply, where, as in *Koloamatangi*, fraud is involved. That is not the case here.

110. Had the publication process been conducted according to s.54, then questions as to whether any of 'Aaeli, Paula or Neil, if they submitted claims, were the true heir or legal successor to Sitilani, or whether there was any other impediment to that person being eligible to take the allotment, could all have been considered by the Minister before deciding to whom the allotment is to devolve. If no claims were made in that period, so that the allotment reverted, and subsequently, as here, any of them submitted a claim, the Minister could consider such claims and decide whom to grant the allotment in accordance with his statutory mandate. I consider that it is appropriate and just, and I agree with Mr Moale's submission, that that is what should occur now.

Result

111. For the reasons stated, I find that:

(a) the Minister failed to comply at all with the publication requirements of s.54(2);

(b) the failure to publish the surrender notice at all meant that the 12 month (minimum) period for an heir or legal successor to claim the allotment never began;

(c) as the claim period never began, the period could never end;

(d) as the claim period never began nor therefore ended (without any claim by an heir or legal successor being submitted to the Minister within that notional period), the allotment never reverted to the estate holder;

(e) as the allotment never reverted to the estate holder, it was not available for the Minister, and he therefore had no power, to grant it to Neil; and

(f) therefore, the grant to Neil was a result of an error of law (i.e. contrary to the Act).

112. As a consequence, I order that:

(a) the grant and registration of Lot 40 to Neil be cancelled; and

(b) the Minister duly undertake and complete, in full, the publication requirements of s.54 in respect of Sitalini's surrender of the allotment.

113. Paula has been successful in his amended claim. As the root cause for this litigation has been the Minister's failure to comply with the requirements of s.54 of the *Land Act*, pursuant to s.152 thereof, I order that the Minister pay Paula's costs of the proceeding, to be taxed in default of agreement.

114. While Neil has been unsuccessful on the s.54 issue, he is the unwitting victim of the Minister's failure to comply with s.54(2). The s.44 issue was misconceived. Neil's counterclaim is dismissed. In the circumstances, Neil is to bear his own costs.

NUKU'ALOFA
31 December 2020

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE