IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 7 of 2019

BETWEEN:

SILIVESITILI FUSIPUNGA LOPETI Plaintiff

-and-

[1] TAVITE KAVAFOLAU LOPETI
[2] PRINCE KALANIUVALU
[3] MINISTER OF LANDS Defendants

JUDGMENT

BEFORE:	PRESIDENT WHITTEN KC LCJ
Counsel:	Mr S. Fili for the Plaintiff
	Ms L. Tonga for the First Defendant
	Mrs A. Taumoepeau KC for the Second Defendant
	Ms 'A. 'Akau'ola for the Third Defendant
Trial:	9 to 11 May 2022, 25 July 2022, 15 September 2022
Submissions:	14, 18 and 24 October 2022
Judgment:	27 October 2022

The claims

1. In this proceeding, the Plaintiff ("*Silivesiteli*") sought orders:

   (a) declaring that he is the owner of a dwelling house constructed on part of a town allotment registered to his older brother, the First Defendant ("*Tavite*");

   (b) requiring Tavite to vacate the house forthwith;

   (c) requiring Tavite to return all furniture that Silivesiteli placed in the house, or to pay him the value thereof; and

   (d) requiring the Second Defendant ("*the Estate Holder*") to 'give' him a town allotment.

2. In the alternative, Silivesiteli claimed that if the Court finds that the allotment in question was not available when the Estate Holder 'gave' it to him and the Third Defendant ("*the Minister*") 'approved' a grant of it in his favour, all three Defendants should be ordered to pay him damages by reason of their 'negligence' in the sum of TOP$300,000 for the house and AUD$30,157.32 for the furniture.

3. The Defendants denied Silivesiteli's claims.

4. By his original counterclaim, Tavite sought an order that if the Court finds that Silivesiteli is the owner of the house, he is to pay Tavite TOP$90,000 in damages for the unlawful demolition and removal of a previous house on the allotment.

5. Silivesiteli denied Tavite's counterclaim.

Procedural history

6. During the course of the fragmented trial:

   (a) Tavite discontinued his counterclaim;[1]

   (b) after an leave to amend was granted, Silivesiteli's claims against the Estate Holder and the Minister were struck out for failing to disclose a reasonable cause of action: *Lopeti v Lopeti* [2022] TOLC 9;[2] and

   (c) Tavite declared that he did not want the house and wanted it removed from his land.

Evidence

7. Silivesiteli gave evidence and called evidence from a number of his family members, including Maka Lopeti, Houpili Lopeti Tuiono, Siaosi Lopeti, Vaifo'ou Latu. Upon the withdrawal of the counterclaim, their evidence lost much of its relevance. Silivesiteli also called evidence from his younger sister, Luse Toki (nee Lopeti) as well as from Mateni Puloka as to the value of the subject house.

8. Tavite gave evidence.

9. An affidavit from Semisi Moala, a senior officer at the Ministry, was also filed prior to the claim against the Minister being struck out. I have had regard to it only for historical purposes.

10. Most of the evidence, insofar as it was relevant to the ultimate issues for determination as they unfolded, was uncontroversial. Generally, I found Silivesiteli's evidence to be self-serving as he repeatedly depicted himself as the victim in the case who had done nothing wrong and, at other times, he was

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[1] 25 July 2022

[2] 6 September 2022

evasive. Throughout her cross-examination, Luse appeared vague and unsure, even in the face of contrary statements in her affidavit. When asked if she understood her affidavit when it was read to her, Luse said that she didn't really listen or pay attention because she didn't want anything to do with the case between her two brothers, and that she only attended Court because she was 'summoned'. Those displays and her repeated and distressed remonstrations about not wanting to give evidence in the dispute between her brothers, in which, as will be seen, she played a significant part, rendered her evidence largely unreliable.

11. Where there were material differences between the accounts of the main protagonists, I preferred the evidence of Tavite whom I found to be an honest and forthright witness.

Facts

12. The dispute concerns a town allotment in Lapaha known as "Felemei".

13. The following historical record of the land in question is from the decision of Paulsen LCJ in the related proceeding LA 12 of 2016.[3]

14. Before 1920, the estate holder of Lapaha granted Filise 'Auaea a tax allotment called Toafa and the town allotment, Felemei, which measured 3 roods 26 perches. The allotments were registered on 8 January 1929.

15. Filise's eldest son was 'Alekisio. 'Alekisio had a town allotment called Pule where he raised his large family. Tavite is 'Alekisio's eldest son and heir and Luse is 'Alekisio's youngest daughter. Yohanny is Tavite's eldest son and heir.

16. In 1967, Tavite was granted a tax allotment called 'Fo'i Hefa'.

17. Tavite went to New Zealand in around 1973 and earned money. He returned and built a house for his parents and eight sisters on Felemei (which was then Filise's land) thinking that he would one day inherit the allotment. Filise and his wife were also living on Felemei at this time.

18. In 1984, Filise died and 'Alekisio succeeded to Felemei and Tavite succeeded to Pule. 'Alekisio was never registered as the holder of Felemei. Pule was registered

[3] *Lopeti v Lopeti* [2017] TOLC 11 (7 November 2017)

in Tavite's name on 27 February 2009.

19. In around 1996, 'Alekisio agreed to lease part of Felemei to his youngest daughter Luse. On 16 October 1996, Cabinet consented to a 50-year lease of 810m² of Felemei. However, the lease was not then prepared or registered.

20. 'Alekisio died in November 2007 and in January 2008, Tavite lodged his heir's affidavit claiming Felemei (and Toafa). However, because of 'some muddlement in the registry office, which misunderstood the legal position,'[4] on 6 August 2010, Tavite's son, Yohanny Lopeti was registered as the holder and lessor of Felemai.

21. In around 2010, when he became aware that Felemei was being surveyed for Luse's lease, Tavite lodged an objection to the granting of the lease with the Ministry. He was (erroneously) told by a Ministry officer that there was nothing that could be done about it. As a result, Tavite changed his election and retained his own allotments. Later in 2010, the Minister granted Felemai and Toafa to Tavite's eldest son, Yohanny.

22. On 6 August 2010, the then Minister directed that Felemai be surveyed and for an area of 1 rood 24 perches to be deducted. The Ministry undertook that the remaining area was to revert to the estate holder.

23. On 23 August 2010, Yohanny wrote to the Minister of Lands objecting to Luse's lease over Felemei but he received no reply.

24. We return now to the subsequent events relevant to the present case.

25. Tavite gave evidence that in 2015, Silivesiteli met him in New Zealand and told him that he was going to build on Felemei. Tavite did not agree. He told Silivesiteli that he had no right to the land and that Silivesiteli was not to do anything to the old house there. During his cross-examination, Silivesiteli denied those conversations. Tavite also gave evidence of a similar occasion in January/February 2016 when the two were at the police station for fighting. Again, Silivesiteli denied that Tavite ever told him not to build on Felemei.

26. On 22 July 2015, Silivesiteli presented an application to the Estate Holder for a grant of part of Felemai.[5] The estate holder gave his consent to the application

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[4] *Lopeti v Lopeti* [2018] TOCA 8 at [2].

[5] 33.4 perches or 845 m².

the same day. The application was then submitted to the Ministry. According to Silivesiteli, his application went 'missing' within the Ministry. According to Semisi Moala of the Ministry, the application was incomplete.

27. Luse's lease of a parcel of 810m² was registered on 13 January 2016. Later that day, Tavite and Yohanny met with the Minister to complain about Luse's lease only to be told that they were too late as the lease was registered that morning. The Minister said he would reconsider the matter. Tavite returned a week later to see the Minister only to be told that the Minister was overseas. He returned two days later and was told to speak to a Registry Officer, Sione Uele. Tavite spoke to Sione Uele but was told that there was nothing that could be done about the lease.

28. In the same month, Tavite was 'surprised and disappointed' to see that the trees at Felemai had been cleared by Silivesiteli. He then instructed his lawyer to write to Silivesiteli demanding that he not touch anything further on the land as he had no right to do so.[6]

29. On 24 February 2016, a second application was submitted to the Estate Holder for part of Felemai on behalf of Silivesiteli and signed by Luse. The Estate Holder provided his consent the next day. The relevant part of the application form[7] to which the Estate Holder affixed his signature stated:

> *"I hereby agree to the grant of the allotment as described above and declare that there is no impediment to prejudice this grant.*

30. The same day, the survey fee of $46 was paid and, in response to a request from Luse on behalf of Silivesiteli, Semisi Moala from the Ministry issued a letter in which he stated, relevantly:

> *"TO WHOM IT MAY CONCERN*
>
> *This is to certify that the above named has lodged an application to register and own a town allotment property at Lapaha...*
>
> *The estate holder... signed and granted the above said land registration application today, 25/2/2016.*
>
> *The Ministry is executing all relevant survey & land registration requirements before register [sic] the said town allotment.*

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[6] Tavite no longer had a copy of that letter.

[7] Form 11 in Schedule IX to the *Land Act*.

Enclosed herewith is a copy of the land registration application form and scheme map of the subject land.

Should you need further clarification on this matter, please do not hesitate to contact the Ministry."

31. During his evidence, Silivesiteli described that letter as "confirming the approval" of his application. He said he was happy with it and "trusted" it. He said that in reliance upon the Estate Holder's 'approval' of his application for the land and the Minister's 'confirmation' of it, he proceeded to procure and ship building materials from Australia to Tonga with which to build a new house on the site. During cross-examination, Silivesiteli said that he did not understand the Ministry's letter because he was illiterate and that one of the people who worked for him explained it to him.

32. The Ministry letter also had attached a map of the allotment with one parcel within the subdivision marked "area required". It was a different parcel to Luse's leasehold. During cross-examination, Silivesiteli said he did not know that and repeatedly stated that he "did what the Government and the Estate Holder told him to do".

33. Silivesiteli also claimed that the Estate Holder:

    (a) was responsible for checking the availability of land in his estate;

    (b) in or about August 2016, "convinced" Silivesiteli to construct the new house on Felemai 'to decorate and upgrade the village'; and

    (c) directed the selection of the site.

    The Estate Holder denied those allegations.

34. Luse gave evidence that she told Silivesiteli to construct his new house on her leased land, to which he agreed.

35. The Minister denied ever confirming to Silivesiteli that the land in dispute was available. Moreover, in his defence, the Minister pleaded that:

    (a) the letter only informed Silivesiteli that his application had been consented to by the Estate Holder and that the Ministry would process his application by conducting the relevant survey and registration requirements before the land was registered;

(b) he had no knowledge that Silivesiteli brought building materials from Australia with the intention to build a new house on part of the land;

(c) Silivesiteli should have waited until the land was formally granted and registered in his name before commencing construction of the new house; and

(d) he had no knowledge that the Estate Holder had encouraged Silivesiteli to construct the new house on the land.

36. As noted, the purported claims in negligence against the Estate Holder and the Minister were struck out. The allegations against them and their pleaded responses have been included here to provide the factual context within which Silivesiteli said he decided to construct the house.

37. In June 2016, Tavite and Yohanny commenced proceedings LA 12 of 2016 ("*the related proceedings*") against Luse and the Minister. Relevantly, Tavite claimed that he was the lawful holder of Felemai and sought an order for the cancellation of Luse's lease. Luse disputed Tavite's entitlement to Felemai.

38. Mr Moala deposed that while the Ministry was in a position to further process Silivesiteli's application in accordance with the Minister's direction to survey the allotment, once the related proceedings were commenced, the Ministry 'put on hold' all further action in relation to Silivesiteli's application until the outcome of that proceeding. He described that as 'normal procedure'.

39. Silivesiteli claimed to have had no knowledge of the related proceedings while his works were being undertaken. He said that he honestly believed that Tavite had already registered "Pule" and had constructed a house there, where he was living with his family right up to the date of the ruling in the related proceedings. However, he confirmed that he was in Tonga during those proceedings. He then sought to attribute his lack of knowledge about them as due to having engaged three separate different lawyers in relation to these disputes.

40. The two containers of Silivesiteli's materials were transported to Lapaha and placed on the land until, he said, Siaosi Mafi and Silia Kalaniuvlu from the Ministry attended the site and confirmed the boundaries. Silivesiteli also brought out an Australian builder and employed other local labour.

41. In or about 20 September 2016, Tavite was informed by his youngest son that Luse had posted photos on Facebook of the old house being dismantled. He then instructed his lawyer to take steps to stop the works. By the time Tavite arrived in Tonga, the old house had already been dismantled and new construction had commenced. A photo of the state of the construction as at 28 September 2016 showed the external perimeter walls for the foundation as being only four courses above ground with some plumbing rough in works and soil and fill in situ for the subsequent pouring of a concrete slab.[8]

42. On 25 October 2016, Tavite's then lawyer filed an urgent application in the related proceedings for an interim injunction to restrain Luse and any other person authorised or instructed by her from continuing to build on the land. In his affidavit in support, Tavite appeared to believe that it was Luse who was carrying on the work. In his evidence in this case, he confirmed that belief. Further in his affidavit, Tavite said he could not understand why Luse insisted on carrying on with the construction while the claims in relation to the land were outstanding and that she was running "the risk that she may have to remove the house from the land".

43. In a minute dated 11 October 2016, Paulsen LCJ also described Luse as having "apparently started new building work on the disputed land". Further, in her notice and affidavit in opposition,[9] Luse gave a very clear impression that the construction was hers. Her only reference to Silivesiteli was that he had come to Tonga about four or five months prior to build the house and that he was funding the construction. More importantly, however, Luse deposed:

> *"[3] I am prepared to take the risk that I may be ordered by the Court, if the Plaintiffs' claims are successful, to remove the house from the land. However, it is my intention at this stage of the proceedings not to remove the house if I am not successful in my defence of the Plaintiffs' claim.*
>
> ...
>
> *[5] The First and Second Plaintiffs are my brother and nephew respectively; they are my own blood relatives. Therefore, if I am not successful in my defence I do not intend to remove the house but to leave it on the land for the Plaintiffs to use if they would want. Furthermore, my said brother Silivesiteli has expended a lot of money and his time to build a house, and I would not wish to see all that effort wasted by removing the house."*

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[8] Court book p.81

[9] 17 November 2016

44. On 18 November 2016, when the application was to be heard, Luse's lawyer (Mr Tu'utafaiva) proposed that if Tavite and Yohanny were successful in their claim for the cancellation of her lease, Luse would leave the house on the land for their benefit. They agreed. That resolution was recorded by Paulsen LCJ in a minute issued that day. On that basis, Tavite considered that there was then no need to pursue any claim for the loss of the old house.

45. During her cross-examination in this case, Luse denied ever opposing the injunction application and then suggested that the signature on her affidavit was not hers. She said she only did what Mr Tu'utafaiva told her. When asked about her undertaking, Luse said that it was "kind of like the idea at the time" but that she did not expect the matter would end up in court in this proceeding. She added that "as Tongans, they should have just talked about it and settled it".

46. During his evidence in this proceeding, Silivesiteli disavowed any knowledge of the injunction application. When asked about a statement in the brief of evidence of Sione Ma'afu,[10] who was one of his workers during the construction of the house, to effect that when the works were at foundation stage, Silivesiteli told them that Tavite and Yohanny were trying to stop the construction but that "it would not stop", Silivesiteli initially spoke of how he "took the workers out of love". When pressed to actually answer the question, he denied Sione's statement. Later in her cross-examination, Luse conceded that Silivesiteli knew about the application.

47. Silivesiteli also denied any knowledge of Luse's undertaking and was adamant that she was not authorised by him to give it. As he claims ownership of the new house, he considered that he is not bound by Luse's undertaking and that she gave it on the basis of a cultural custom that female siblings have a status over male siblings by which she expected that her brothers would respect her opinions and wishes. Silivesiteli said that any commitment Luse gave in respect of his house 'is to be declared null as he did not consent to it'.

48. During her evidence, Luse said that she and Silivesiteli intended that once the new house was built, she would reside in and take care of it and that Silivesiteli and his family would stay with her whenever they were in Tonga. She confirmed

[10] 1 April 2022 at [19], [20].

that the new house was not hers but was owned by Silivesiteli. She also asserted that Tavite was aware of that at the time of construction. Luse also confirmed that her undertaking in relation to the new house in the related proceeding was the product of 'her opinion and feelings' and a Tongan custom that 'sometimes the brothers give special respect to what their sisters want or say'. She added that as she was the one who took care of their parents until they passed, then in Tongan custom, she expected to have a portion of the parents' land for looking after them.

49. Between November 2016 and January 2017, Silivesiteli proceeded with construction and completion of the new house. He also purchased and installed furniture and fittings for the new house. He produced an inventory of the furniture and other items he said constituted the contents of the new house upon its completion and individual values totalling AUD$30,157.32.[11] He did not produce any receipts for those items.

50. The trial of the related proceeding was conducted on 7 and 8 September and 11 October 2017. On 7 November 2017, then President Paulsen declared Tavite as the lawful holder of the whole of Felemei and ordered the Minister to register Tavite as such and to cancel Luse's lease.[12] On 26 March 2018, the Court of Appeal dismissed Luse's appeal.[13]

51. Luse gave evidence that she lived in the furnished house between when it was completed and November 2020.[14] There was also evidence of Saiti Lopeti (Silivesiteli 's nephew) and others including Silivesiteli's de facto partner and her children living in the house during that period with his permission. Luse testified that she left all the furniture and furnishings in the house when Tavite took possession. She asserted that Tavite's daughter, Talenisita Mataele, sold the furniture and most of Silivesiteli's materials that were left in the house.

52. Tavite gave evidence that when he first went to the house in December 2018, the only items of furniture there were four second-hand queen size beds without headboards, two bedside drawers, a broken microwave oven, a dining table with

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[11] Court book 45, 46.
[12] *Lopeti v Lopeti* [2017] TOLC 11.
[13] *Lopeti v Lopeti* [2018] TOCA 8 (AC 15 of 2017).
[14] Brief of evidence [15].

six chairs, one brown sofa set comprising one three seater and two single chairs and a broken television. During his cross-examination, Tavite said that since then, only about half of the furniture is still in the house, namely, one queen size bed, the two side bedside drawers and the dining table with six chairs. Since he took possession of the house, he has had various family members occupy and look after it.

53. Tavite said that when he took possession of the house, he cleaned it up and disposed of many of the broken items of furniture. He put a lot of the old furniture outside. He said he gave Luse and the other occupants authorised by Silivesiteli an opportunity to collect those items. At one stage, they came and took certain items and materials away, only to return them a couple of weeks later. Since then, his daughter sold the sofa set and the three other beds. He did not know how much she received for them. He said that he did these things because he was advised by Mr Niu (as his Honour then was) that "their time had expired" and that therefore the contents of the house belonged to Tavite. He concluded that he was content for Silivesiteli to have any of the remaining items of furniture and materials that belong to him but that he was not happy to pay Silivesiteli for any of the items that had since been disposed of.

54. Tavite also confirmed that he did not want the house or for it to remain on his land.

55. Mr Puloka, a builder with training in quantity surveying, estimated the cost of construction at TOP$245,957. However, when preparing his report, he had assumed the house was 15 years old. When its actual age was revealed, he adjusted the level of depreciation he had applied (based on an assumed 80 year design life) to arrive at an estimate of just under TOP$250,000. He also identified a number of defects in the original construction work, including in particular, that the in-slab plumbing to the septic tank did not appear to contain traps to prevent odour throughout the house. He also found water leaks, that had caused some damage to a number of internal walls, and which most likely emanated from within the plumbing in the slab around the laundry. He also opined that the house had not been well maintained. All up, Mr Puloka estimated the costs of rectifying the plumbing issues to be at least TOP$50,000.

Submissions

56. Both remaining counsel filed written submissions after the conclusion of the trial. They were also subsequently invited to file supplementary submissions on any application of the principles of unjust enrichment to the case.

Silivesiteli

57. In his primary submissions, Mr Fili submitted, relevantly and in summary, that:

    (a) Silivesiteli built on the land at Felemei belonging to Tavite by mistake due to the "advice" of the Estate Holder and the Ministry;

    (b) Tavite[15] has been in "wrongful possession" of the house for four years from 2018;

    (c) Tavite's daughter sold some of Silivesiteli's furniture;

    (d) if the house was ordered to be removed, Silivesiteli asked for a "reasonable time" to do so in order to "collect money" and "find new land to rebuild the house on";

    (e) Tavite should be required to vacate the house until it is removed;

    (f) Tavite should be required to return all of Silivesiteli's furniture or pay the full value of it claimed at AUD$30,157; and

    (g) Tavite "is liable to pay the value of the plaintiff's dwelling house as compensation in the sum of TOP$249,281...".

58. In his supplementary submissions, Mr Fili confirmed that Silivesiteli had consented to removing the house and asked for 18 months for him to do so. He then submitted that:

    (a) Tavite is to pay all current utilities bills for the house;

    (b) the damage to the house occurred during Tavite's possession of it; and

    (c) that Silivesiteli is entitled to "compensation for his furniture, unjust enrichment, general damages and cost for moving of the house for a total value of $150,000".

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[15] The reference in [8] of Mr Fili's submissions to the "plaintiff" being in wrongful possession is assumed to be typographical error.

Tavite

59. In her primary submissions, Ms Tonga submitted, in summary, that:

(a) Silivesiteli had failed to prove any basis for a claim for compensation against Tavite;

(b) Silivesiteli was "foretold" not to build at Felemei;

(c) Tavite was originally led to believe that the house belonged to Luse with the materials being provided by Silivesiteli;

(d) Tavite owed no duty, and "did nothing wrong", to Silivesiteli or in respect of his decision to build the house;

(e) Silivesiteli did not tender any receipts or other proof of value and has otherwise failed to prove his claim for the furniture;

(f) Tavite's evidence of other people living in the house before he took possession of it was not disputed by Silivesiteli;

(g) there was no evidence of any inventory of furniture and furnishings in the house as at the time the former occupants vacated it;

(h) while Silivesiteli is entitled to any remaining furniture of his in the house, Tavite should not be required to compensate him for any of the items sold because Luse (and therefore indirectly, Silivesiteli) was given a reasonable opportunity to take the furniture when she left, but had failed to do so; and

(i) Silivesiteli's request for an order that Tavite vacate the house is "inappropriate".

60. In her supplementary submissions, Ms Tonga submitted, in summary, that:

(a) a reasonable time for Silivesiteli to remove the house is three months;

(b) even though issues of unjust enrichment were raised during the trial, Silivesiteli did not make any such claim, nor did he give any evidence to support one;

(c) Tavite has not been enriched because he wants Silivesiteli's house (which has "problems" that will be costly to rectify) removed, Silivesiteli dismantled the previous house on the site and Tavite will have to bear the costs of building a new house on the land;

(d) Tavite's use of the new house is justified because Silivesiteli dismantled the old house;

(e) any loss suffered by Silivesiteli in having to remove the house has been caused by his own careless actions in failing to heed Tavite's warning not to build on the site, not having any title of ownership over the land, being aware of Tavite's claim to the land in LA 12 of 2016, continuing to build in the face of the injunction application in the proceeding, and "he should therefore face the risks of his actions".

Consideration

61. There is no issue in this proceeding, nor was there any overt challenge to the fact, that Tavite is the lawful holder of the land in question at Felemei or that Luse's former lease over it was invalid. By reason of the decisions in LA 12 of 2016 as confirmed by the Court of Appeal, those matters are now *res judicata*.

62. Similarly, there was no real issue as to ownership of the new house notwithstanding that it was unlawfully built on Tavite's land. Since at least the Court of Appeal's decision in *Kolo v Bank of Tonga* [1997] Tonga LR 181, buildings in Tonga are generally to be regarded as items of personal property rather than accreting to the land and thus forming part of the realty. In that regard, the Court observed that:

> *"... Because of the Constitution of Tonga, and because of Tonga's traditions, the intricate law of fixtures and of accretions to land which applies elsewhere is not wholly appropriate to Tonga. Although all the implications have not yet been worked out, and their working out should be left to the process of development of the law of Tonga case by case, we think that the broad proposition stated by Ward CJ[16] should be accepted.*

63. That principle has continued to be recognised and applied in numerous land (and other) cases in Tonga since.[17]

64. One of the implications, perhaps presciently alluded to by the Court of Appeal in *Kolo*, 'yet to be fully worked out', is that with more modern building techniques

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[16] In the decision appealed from.

[17] E.g. *Kinetisys Inc v Mafi* [2007] TOLC 1, *Mangisi v Koloamatangi* [1999] TOCA 9, *Cowley v Tourist Services Ha'pai Ltd and Fund Management Ltd* [2001] Tonga LR 183, *Niu v Takealava* [2013] Tonga LR 55, *Westpac Bank of Tonga v Fonua* [2014] Tonga LR 94, *Yang v Manoa* [2016] TOCA 3, *Talia'uli v Simpson* [2019] TOLC 10 and *Gill v Rosic* [2021] TOSC 72.

and materials being employed, there is a growing incidence in Tonga of buildings, both residential and commercial, being constructed with concrete foundations or raft slabs and concrete post and beam frames and block walls. The practical reality therefore is that if the general principle was originally based on the ability to fairly easily dismantle the generally smaller, older style traditional Fales and re-assemble them elsewhere, that will rarely be the case with more modern concrete structures. At most, fittings such as roof sheeting, trusses, windows, doors and any internal timber framed walls may, to varying extents, be salvaged and reused. However, the remaining bulk (and cost) of the concrete construction will more often than not have to be demolished, with little if any salvage value, or left behind as a virtual shell.

65. As this issue was not agitated (or perhaps even realised) in this proceeding, it is not an appropriate case for further consideration of it. As the Court of Appeal indicated, any change in the law in this regard should be developed on a case-by-case basis (where the issue is raised in such cases). Otherwise, it may be a matter for Parliament.

66. In the meantime, and as the general principle discussed above remains the law in Tonga, Silivesiteli remains the owner of the new house he built and financed.

67. It follows, as the parties eventually agreed during the course of the trial, that Silivesiteli is entitled to dismantle the house (so far as that is possible given it has a concrete slab) and remove it from Tavite's land.

68. However, Silivesiteli's claim against Tavite for damages or compensation in relation to the house is entirely misconceived.

69. Firstly, the only pleaded reference to Tavite in relation to the claim in negligence,[18] was in the alternative claim that if the court found that the land in dispute was not available for grant then the first, second and third defendants were jointly and severally liable to pay Silivesiteli the value of his house as compensation "for their negligence to enquire and they have breached their legal duty to take care, resulting in damages to the plaintiff". The pleading did not contain any allegations whatsoever either prior to or after that bald claim which could form the basis for a viable claim in negligence against Tavite. By

[18] Amended Statement of Claim [16(iv)].

comparison to the claims against the Estate Holder and the Minister, which were purportedly embellished in the Amended Statement of Claim, but were still struck out for failing to disclose a reasonable course of action, the pleaded claim here against Tavite (which was not improved in the amended pleading) is even more bereft. Had an application been made on behalf of Tavite earlier in the proceeding, the claim would most likely have also been struck out.

70. On that basis alone, and now that all the evidence has been presented before the Court, the position has not improved, and the claim is, and always was, hopeless. During the trial, and in an endeavour to move away from the thicket of pleadings and to identify in the simplest terms possible the real complaint by Silivesiteli against Tavite, Mr Fili was asked on a number of occasions to identify the basis for any duty of care said to have been owed by Tavite to Silivesiteli and the legal basis for it, and even more fundamentally, what it was that Tavite was said to have done wrong. On each occasion, no answer was forthcoming.

71. Secondly, the alternative claim was premised on a finding that the land was not available for grant "which was given by the second defendant to the plaintiff and approved by the third defendant...". The premise misconstrues the real issue. As the claims against the Estate Holder and the Minister had been struck out, it is unnecessary to consider the second limb of the premise. However, for the purposes of this judgment, there was no evidence that at any time either the Estate Holder or the Minister "gave" the land to Silivesiteli. The propositions are also legally erroneous. An Estate Holder cannot give land to a person under the *Land Act*. He can give his consent to an application for land within his estate but that is all. Regardless of whether the Estate Holder gives or withholds his consent, or even objects to an application, the grant of an allotment is still wholly within the province of the Minister.[19] In that regard, the letter from the Ministry dated 25 February 2016 could not, on any interpretation, be regarded as an approval by the Minister of Silivesiteli's application. Accordingly, the real issue is not whether the land was available for grant, but whether it was ever "given" to Silivesiteli. For the reasons stated, it was not.

72. Thirdly, and perhaps most importantly, Silivesiteli's decision to build on the

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[19] Section 34.

subject land was infected by the following mistakes of fact and law as well as his own imprudence and impudence:

(a) He ignored Tavite's warnings not to build on Felemei.

(b) He did not build on the land by mistake due to any "advice" of the Estate Holder or the Ministry.

(c) He wrongly assumed that the Estate Holder's consent to his application amounted to the land being given to him.

(d) He wrongly interpreted the Ministry's letter (issued the same day his application was lodged) as being an approval of his application and misunderstood the true nature of its content which was nothing more than an acknowledgement of receipt of his application and advice as to the next steps to be taken in considering it.

(e) He conceded in cross-examination that knew he had to wait for the land to be registered before he could consider it as his.

(f) He did not take care to observe the parcel of land marked on the Ministry's attached map as being the "area required".

(g) He did not build on the "area required", being the parcel to which his application related, but instead built on the parcel Luse had (invalidly) leased.

(h) He did not understand that, under s 84 of the *Land Act*, Tavite, as the heir, was entitled to make an election to claim Felemei (and Toafa) for himself while Tavite's allotments would go to Yohanny.

(i) He commenced shipping materials and later, the construction, after the commencement of LA 12 of 2016, to which Luse was a party and, in which, the title to the land and her lease were in dispute. In this regard, I do not accept Silivesiteli's denial of knowledge of that proceeding. His close connection with Luse during that time, while she was staying at Felemei, and Silivesiteli's presence in Tonga for the construction, compel the view that it was more likely than not that Silivesiteli was aware of the proceeding. To suggest otherwise, in all the circumstances, is, in my view, inherently implausible.

(j) Similarly, I am satisfied on the evidence referred to in paragraph 46 above, that Silivesiteli was aware of the injunction application and that he nevertheless continued with the construction. In light of the last finding, to suggest that during the course of that application, in which Luse and her legal representative filed important affidavit material about the nature of the construction and Silivesiteli's apparent part in it, Silivesiteli nevertheless had no knowledge of it, borders on the absurd. In any event, and in one of the rare moments of lucidity during her evidence, Luse unhesitatingly confirmed that her brother knew of the application.

(k) That last finding then tends to also cast doubt on Silivesiteli's denial of knowledge and disavowal of Luse's undertaking to leave the house for Tavite if she lost the case (which she did). However, Tavite has not sought to enforce that undertaking as against Silivesiteli as a basis for claiming ownership of the house. I therefore saying further about it.

73. Fourthly, Mr Fili's final attempt in submissions at advancing a claim for compensation departed markedly from what had been pleaded and run at trial. He instead asserted an entitlement on the part of Silivesiteli to "compensation for his furniture, unjust enrichment, general damages and cost for moving of the house for a total value of $150,000". Putting the furniture claim to one side, and which will be dealt with separately below, none of those was ever pleaded. Moreover, and apart from the belated complaint that Tavite had the use of the house since 2018, Mr Fili did not adumbrate any legal basis for the claims or even attempt to explain how the amount had been calculated. For example, there was no evidence of the estimated costs of removing the house or any other consequential losses and there was no evidence to support any claim for 'general damages', whatever they might be. However those claims may be interpreted, the fundamental fact remains that neither Silivesiteli nor Mr Fili have pointed to any legal or factual basis or any form of breach by Tavite of any form of legally recognised duty sufficient to found any claim for damages against him in relation to the house. In other words, through all this, Tavite did nothing wrong. Conversely, and for the reasons stated above, Silivesiteli has been the sole author of his current predicament and any resulting losses.

74. The issue of the possible application of restitutionary principles of unjust

enrichment arose during the course of the trial but before Tavite declared that he did not want the house. Until then, there was a question as to whether he should be required to pay Silivesiteli for the house, if it were to remain on his land, and if so, how much. Even though Ms Tonga submitted that the principles are no longer applicable to the case as it has unfolded, Mr Fili appears to have deployed them albeit fleetingly and in an unspecified manner. I will therefore say something briefly about the law on the subject.

75. Restitution is concerned with the restoration to the Plaintiff of a benefit conferred on the Defendant at the expense of the Plaintiff in circumstances which make it unjust that the Defendant should retain that benefit. The availability of relief under the modern law of restitution and unjust enrichment was recognized in Tonga by the Court of Appeal (albeit in the context of a contractual dispute) in *Fumera v Pozzati* [1998] Tonga LR 109. In *Filimoehala v Filimoehala* [2016] TOLC 6, Paulsen LCJ referred to the historical limitations on the court's jurisdiction to order restitution on the ground of unjust enrichment as being subject "to binding authority of previous decisions" and that the courts do not have "discretionary power to order repayment whenever it seems ... just and equitable to do so".[20]

76. As noted above, Silivesiteli built the house, at least in part, by mistake. One of the recognized categories of unjust enrichment involves benefits conferred by mistake. A claimant who carries out improvements to a chattel or to land which belongs to the defendant in the mistaken belief that he is or will become the owner of the chattel or the land may be entitled to bring a claim in unjust enrichment against the defendant to recover the value of the enrichment which the defendant has obtained as a result of the work carried out by the claimant.[21] This may be so at least where the defendant knew that the claimant was mistaken and failed to disabuse him of his mistake.[22] Here, it will be recalled that Tavite warned Silivesiteli not to build on Felemei.

77. The claimant may be entitled to recover either the increase in value of the defendant's chattel or land which is attributable to the improvement carried out

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[20] Citing Goff and Jones, The Law of Unjust Enrichment, Eighth Edition at 1-23 page [13].

[21] E.g. *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA; *Thomas v Robinson* [1977] 1 NZLR 385; *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303.

[22] E.g. *Inwards v Baker* [1965] 1 All ER 446, CA; *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, CA; *A-G of Hong Kong v Humphreys Estate (Queen's Garden)* [1987] 2 All ER 387, PC; *JS Bloor Ltd v Pavilion Developments Ltd* [2008] EWHC 724 (TCC).

by the claimant or the reasonable value of the services or work carried out by the claimant. A mistake as to an existing fact is to be distinguished from a misprediction which does not generally give rise to a claim in mistake.[23] The long-established common law rule to the effect that a mistake of law did not give rise to a claim in unjust enrichment[24] has been abrogated by the judiciary[25] with the effect that the law relating to mistakes of fact and mistakes of law has been substantially assimilated.[26] A mistake of law which caused the benefit to be conferred will, in principle, generate an unjust enrichment claim.[27]

78. The three principal elements to a claim for unjust enrichment are that the defendant was enriched by the receipt of a benefit, that the benefit was gained at the plaintiff's expense and that it would be unjust to allow the defendant to retain that benefit: *Filimoehala v Filimoehala* [2016] TOLC 6. Recognised defences including change of position,[28] estoppel[29] or where counter restitution (or *restitutio in integrum*) is impossible.[30]

79. In the present case, where Tavite does not want the house on his land, it cannot be said that he has been or will be enriched by it, or that he has freely or voluntarily accepted any benefit.[31] Similarly, any question as to whether it would be unjust to allow him to retain the house does not arise because he does not want it. That analysis has greater significance in Tonga where, as explained above, the house is regarded as personalty and not a fixture that accretes to the

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[23] E.g. *Ramsden v Dyson* (1866) LR 1 HL 129.

[24] E.g. *Bilbie v Lumley* (1802) 2 East 469; *Brisbane v Dacres* (1813) 5 Taunt 143; *Dixon v Monkland Canal Co* (1831) 5 Wils & S 445; *Henderson v Folkestone Waterworks Co* (1885) 1 TLR 329, DC.

[25] *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, HL; D*eutsche Morgan Grenfell Group plc v IRC* [2007] 1 All ER 449; *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] All ER (D) 30 (Nov) per Flaux J. The mistake of law bar had earlier been abrogated by the judiciary in other jurisdictions: e.g. Canada (*Air Canada v British Columbia* (1989) 59 DLR (4th) 161), Australia (*David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, Aust HC), South Africa (*Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* (1992) (4) SA 202) and Scotland (*Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SLT 299, Ct of Sess).

[26] *Brennan v Bolt Burden* [2004] EWCA Civ 1017.

[27] *Kleinwort Benson Ltd v Lincoln City Council*, ibid; *Deutsche Morgan Grenfell Group plc v IRC*, ibid.

[28] E.g. *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512, HL; *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14.

[29] E.g. *United Overseas Bank v Jiwani* [1976] 1 WLR 964; *Legione v Hateley* (1983) 152 CLR 406.

[30] Goff and Jones *The Law of Unjust Enrichment* (9th Edn, 2016) Ch 31.

[31] *Forman & Co Pty Ltd v The Ship 'Liddesdale'* [1900] AC 190 at 202, 204; *City Bank of Sydney v McLaughlin* (1909) 9 CLR 615 at 632-3. See also *R v Vale of White Horse District Council* [2003] EWHC 388, [14] (Lightman J). In Australia, the position is less clear in the light of *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, but still arguable: *Liebe v Molloy* (1906) 4 CLR 347, 353–4; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]* [2014] WASC 162 [90] (Edelman J); Barker, Kit --- "Unjust Enrichment in Australia- What Is(n't) It? Implications for Legal Reasoning and Practice" (2020) 43(3) Melbourne University Law Review 903.

land. In those circumstances, and where neither party has addressed this issue further, it is not necessary to consider any potential defences.

80. Ultimately, as the parties are in tacit agreement that the house is to be removed, the only issue is how long Silivesiteli should be given to do so. Having considered both side's suggested timeframes, but without any evidence as to how long the work is likely to take (and I am not concerned with how long it might take Silivesiteli to find and secure another allotment or rebuild on it), I consider that six months is reasonable for two reasons. Firstly, according to Silivesiteli, it only took about three months to build the house. Secondly, had he been properly advised, Silivesiteli has now had over four years since the Court of Appeal's decision to remove the house.

81. The residue of Silivesiteli's claims (as belatedly submitted by Mr Fili, but never pleaded) are for Tavite's alleged "wrongful possession" of the house and the furniture.

82. I consider the wrongful possession claim to be extraordinary for the simple reason that Silivesiteli now seeks compensation for Tavite's use of the house which Silivesiteli unlawfully constructed on Tavite's land. Were the claim to be countenanced (as say a type of unpaid rent or mesne profits claim), Tavite could equally be expected to claim compensation for the trespass created by Silivesiteli's house on Tavite's land. There is also the matter of Silivesiteli having unlawfully dismantled and removed the family house that was on the site. Even though Tavite abandoned his counterclaim, I consider it appropriate to take that fact into account when approaching this claim. There is also the discrepancy in the timeframe. Mr Fili claims that Tavite has been in possession of the house since 2018 whereas Luse testified that she was living in it until November 2020. All up, I am not satisfied that Silivesiteli has demonstrated an entitlement to any compensation for this claim.

83. However, now that Tavite has renounced any interest in retaining the house, I will order that he and any others authorised by him vacate the house until it is removed.

84. That leaves the furniture claim. Silivesiteli's evidence in this regard was less than satisfactory. I agree with Mr Tonga's observations that there was no objective

evidence as to value or any inventory at the time the last of those Silivesiteli authorised to live in the house had left it. I accept Tavite's evidence, which was clear and precise, on this issue. I also accept the argument advanced on his behalf to the effect that Luse and the others were given ample opportunity to take the furniture away but failed to do so. In those circumstances, and where they were occupying a house which had been unlawfully built on Tavite's land, I consider that Silivesiteli (through his authorised agents such as Luse) abandoned or waived his right to claim the furniture that was disposed of by Tavite. Any detriment suffered by Silivesiteli as a result must also be balanced against the fact that Silivesiteli was effectively using Tavite's land for storage of those items and without permission or payment.

85. Silivesiteli is entitled (which Tavite does not dispute) to recover the remaining items of his furniture that are in the house.

86. Otherwise, I am not satisfied that Silivesiteli has proven a claim for any damages or compensation under this head.

Result

87. For those reasons, I make the following orders.

88. It is declared that the house constructed by Silivesiteli on Tavite's land belongs to Silivesiteli.

89. Within six months of the date of issue of this judgment, Silivesiteli is to:

    (a) remove from the house any remaining items of furniture that belong to him; and

    (b) dismantle and remove the house and make good any damage to the allotment that may be caused during those works or indemnify Tavite for the reasonable costs of any such remediation.

90. Tavite is to permit Silivesiteli and those authorised by him reasonable access to the allotment to undertake those works.

91. Tavite and any other persons authorised by him to occupy the house are to vacate it forthwith.

92. Should Silivesiteli fail to remove his furniture and/or the house within the six

month period stated, Tavite shall be at liberty to dispose of the furniture and the house and, in that event, Silivesiteli shall be required to indemnify Tavite for the reasonable costs of disposal less any salvage value obtained.

93. Otherwise, all other claims by Silivesiteli for damages or compensation are dismissed.

94. Silivesiteli is to pay Tavite's costs of the proceeding, to be taxed in default of agreement.

NUKU'ALOFA
27 October 2022

M. H. Whitten KC LCJ
PRESIDENT