

**IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY**

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BETWEEN: KOMITI VAI HA'ASINI & HAMULA

Plaintiff

AND: FREE WESLEYAN CHURCH OF TONGA

First Defendant

AND: MINISTER OF LANDS

Second Defendant

Hearing : 11-13 August 2015 and 4 September 2015

Decision: 23 September 2015

Appearances: Mr. L. Niu SC for the plaintiff
Mrs. M. Palelei for the first defendant
Mr. 'A. Kefu SC for the second defendant

RULING

The issues

- [1] The Water Committee seeks to challenge the grant and registration of a lease No 8378 dated 18 June 2013 over land in the Crown estate at Ha'asini in favour of the Free Wesleyan Church (FWC). It applies for an order cancelling the lease and for the removal of a residence built by FWC from the land.
- [2] The Water Committee says that the leased land has been reserved for public health purposes under section 138 of the Land Act as a water catchment. For that reason, the Water Committee says, the land was not available for lease. In the alternative, the Water Committee argues that if the land has not been so reserved then the grant of the lease was unlawful as the second defendant, the Minister of Lands (the Minister), was required to, but did not, consult with it before granting the lease.
- [3] The issues that arise are:

- [3.1] Was the land reserved for public health purposes as a water catchment under section 138 of the Land Act so that it was unavailable to be granted for lease?
- [3.2] Alternatively, did the Minister have an obligation to consult with the Water Committee before granting the lease and, if so, was there adequate consultation?
- [3.3] If I find that there was not adequate consultation, what is the effect of that on the lease?

The facts

- [4] A Water Committee is an elected body established under the Water Supply Regulations of 9 October 1963, whose membership changes from time to time. Water Committees are established with the purpose of assisting village water schemes and to carry out necessary work to provide water to the village. The present Chairman and members of the Water Committee were elected in 2013 local elections.

- [5] Ha'asini is a village on the south-eastern end of Tongatapu. In the 1960's a decision was made by the then Minister of Lands to relocate six registered landholders from land around the village underground water source and well. These landholders surrendered their land (the surrendered allotments). This was approved by Cabinet decision No 134 dated 18 February 1963. That Cabinet decision was not produced into evidence and cannot be found.
- [6] The six landholders were relocated to another area in the village that became available by the surrender and subdivision of land owned by one Sione Liongiloto. There was some disputed evidence that all of this was necessary because of an outbreak of typhoid in the village. Whether this was so or not, there is no dispute that the six landholders were relocated to protect the village underground water source from contamination and, in particular, from contamination caused by leakage from septic tanks and pit latrines.
- [7] Beginning in 1976 some of the surrendered allotments were progressively subdivided and again allocated as town

allotments. In 1976, the Minister of Lands, Baron Tuita, directed that one of the surrendered allotments previously owned by 'Uaisele Puamau was to be subdivided into two 30 perches town allotments and allocated to 'Ofa Puamau and his son, Suliasi Puamau. This left a balance of land from 'Uaisele Puamau's allotment unallocated. It is from that balance of 'Uaisele Puamau's allotment that FWC was granted its lease.

[8] Six further allocations of land from the surrendered allotments were made but I was not told when the allocations were made nor were the Minister's files produced into evidence. There was a helpful plan which identifies each allocation. (Document 72 of the bundle) An area remained unallocated and vacant which I understand had formerly been the allotments of Siaosi Manu, Sione Manu and Sione Telefoni along with the balance of the allotment of 'Uaisele Puamau. There were no complaints received by the Minister about any of the allocations made from the surrendered allotments until 2000.

[9] The evidence was that the Water Committee and a local co-operative society mowed and maintained this land and that

it has been used at times by the village for a range of community activities including meetings, sports events and village functions. On a visit to the site by the Court the land appeared largely unmaintained and there was evidence that someone had grown vegetables on it recently and there were animals roaming and grazing on the land.

[10] The two witnesses called for FWC, Semisi Fanua 'Ila Kata and Sione Foueti, gave evidence that in the 1980's the King granted the land to a local Noble Servant, Hu'akavameiliku. Semisi Fanua 'Ila Kata said that in the 1980s at the Agricultural Show the King, in front of all who attended, had made an oral grant of the land to Hu'akavameiliku and that later Hu'akavameiliku had intended to grant the land to FWC but this not been implemented before his death. This evidence is too vague for the Court to make any determinations about what land the King intended to confer upon Hu'akavameiliku, whether he intended to grant title to that land or some lesser interest (such as a right of occupation only) and the basis upon which he did so.¹

¹ See for instance *Tuita v Minister of Lands* (1926) II Tonga LR 18 and *Langa Fonua 'A Fefine Tonga anors v Manuofetoa anor* [2008] Tonga LR 215.

[11] At around the same time, in 1985, the Minister of Lands, Baron Tuita, directed that an area of 10.9 perches, from one of the surrendered allotments that had been previously owned by one Sione Seteleki, would be allocated to the Water Committee. In a Savingram of 3 October 1985 he directed:

Please survey and allocate a portion of the town allotment for the Komiti Vai [of Ha'asini].

This allocation is 0a.0r.10.9p in size.

[12] There is evidence that at least the then Chairman of the Water Committee was aware of the Minister's decision. In a letter of 15 August 2001 to the Minister of Lands, Mr. Tonga Tekiteki, of the Mateaki'i Fonua of Ha'asini and Hamula Group, stated that he had spoken to the then Chairman of the Water Committee, Suli Lolohea, who

...said yes, he was the one who went to the Minister of Lands in 1985 in the time of Baron Tuita to subdivide 10 perches for the Water Committee of Ha'asini and Hamula..

[13] In his submissions, Mr. Nui said that for fear that Hu'akavameiliku might take over the area of the well from the Water Committee the Town Officer of the time asked the Minister of Lands to survey and demarcate the area of the well as belonging to the Water Committee. That submission seems to me to run counter to the Water Committee's case that the land was understood to be a reserve. In any event I do not accept the submission as there was no direct evidence as to why the Minister decided at this time to allocate 10.9 perches of land to the Water Committee. It is reasonable to assume the Minister considered this was the area of land required for the purposes of the Water Committee and Mr. Semisi Moala, who gave evidence for the Minister, said that there was a policy direction at the time that the watershed area was to be subject to subdivision, reallocation and registration of allotments. I note also that in his letter of 15 August 2001, Mr. Tekiteki asserted that it was only the Chairperson of the Water Committee who wanted to subdivide the land without the knowledge of the other members of the Committee. Mr. Tekiteki clearly had no personal knowledge of that and it cannot be assumed that other members of the Water Committee were not aware of the Minister's decision.

[14] In July 1993, 'Oliveti Puamau applied for the grant of a town allotment from the balance of the surrendered allotment previously owned by 'Uaisele Puamau, who was his grandfather. On 23 July 1993, the Minister of Lands, Dr Ma'afu Tupou, directed that the land be registered to 'Oliveti Puamau but this decision was later revoked. There is a handwritten note of the Minister dated 3 August 1993 which records that he was informed by the Ha'asini Town Officer that the land upon which the village water tanks were situated had been granted by the King to Hu'akavameiliku. The note recorded "...no applications for an allotment will be accepted" and that "There is a tax allotment that is proposed to be subdivided in town of Ha'asini". This would appear to confirm that the King had purported to confer some rights over the land to Hu'akavameiliku. For present purposes, the practical consequence of that was that 'Oliveti Puamau's application for the grant of the land did not proceed. There was produced into evidence another handwritten note of 5 November 1993 signed by the then Minister reminding 'Paula' of the Ministry of Lands to cancel 'Oliveti Puamau's application.

[15] On 27 June 2000, Tonga Tekiteki wrote to the Minister of Lands with a complaint on behalf of residents of Ha'asini and Hamula to the allocation of land around the water source. The Minister was asked to stop the further subdivision of the land and to cancel allocations already carried out for reasons that included that it would cause contamination to the water resource and that in the 1960's there was an agreement between the Government and the people of the village to reallocate the six landholders "so that the land would be available and be cleaned so the underground water source can be established".

[16] On 5 July 2001 the Minister of Lands wrote to Tonga Tekiteki and in that letter the Minister confirmed that originally six allotments had been surrendered and exchanged for other land so that the land vacated could become the underground water source of Ha'asini, but then noted:

The Minister of Lands, Baron Tuita directed on 3 October 1985, that only (10P) be allocated for the Water Committee..... it is believed there was an understanding and agreement between the Ministry of Lands and the Water Committee of Ha'asini and Hamula on that particular day. I have directed that this matter

be investigated to be referred back to the Ministry of Health to assess the current state of the underground water source and to check whether it falls within the watershed area of Ha'asini and Hamula.

[17] On 15 August 2001, Sione Tekiteki wrote again to the Minister of Lands, copying the Prime Minister and the Ministry of Health. He asserted, on the basis of enquires that he had made, that there had been no mutual agreement (presumably he meant between the Ministry and the Water Committee) to allocate only 10 perches of the land to the Water Committee. On 21 May 2002, Mr. Tekiteki again wrote to the Minister of Lands advising that 10 months had passed and he was still waiting for a response and a final decision regarding the Ha'asini water catchment. There does not appear to have been any response to that letter and no further developments until around mid 2012. Needless to say, no steps were taken to cancel the allocations already made from the surrendered allotments. There was no evidence of any contamination of the water source.

[18] In mid 2012, the present Minister of Lands visited Ha'asini in connection with a dispute that had arisen in the village regarding the use of cemetery land. The details of the dispute are of no direct relevance to this case. In his evidence, Sione Foueti, who was called as a witness for FWC and was then the Town Officer and Chairman of the Water Committee, said that he had announced the meeting to everyone in the village and a lot of people attended including people who were then members of the Water Committee and people who have since become members of the Water Committee following the 2013 elections. At the conclusion of this meeting, the Secretary of FWC, Saipalesi Unu, asked the Minister whether FWC could have the land which is now in dispute and, after checking with his clerk that the land was available, the Minister said that FWC could apply for the land. No objections were raised to this by those at the meeting.

[19] On 8 October 2012, FWC applied for its lease. On 19 October 2012 Cabinet approved the FWC lease by Cabinet Decision No 887. Although there was some dispute about it, it is clear to me that FWC began construction of its residence very soon after learning that its application had been

granted but well before any lease was registered. I understand from Mr. Niu that the relevance of this goes only to the issue of the further relief that should be granted in the event the Court cancels the lease.

[20] The evidence of Mr. Semisi Moala was that on 30 October 2012 a letter was sent by the Ministry of Lands to the Land Officer of FWC recording that an error had been made as to the location of the land that was to be subject to the lease. The application, as filed, related to land that had last belonged to one Sione Taungapeau, before it reverted back to the Crown upon his death in May 2005. Mr. Niu cross-examined Mr. Moala about this evidence. He challenged Mr. Moala's evidence that there had been an error in the first lease application. He put to Mr. Moala that FWC may have simply changed its mind as to the land that it wanted to lease. Mr. Moala accepted that was possible but also said that he was in no position to know what had been in the mind of FWC.

[21] I am satisfied that FWC made an error in its first lease application. FWC already had the use of the land previously owned by Sione Taungapeau. It wanted to build a

residence. It is unlikely it would choose to build a residence on the land that presently serves as the entrance to the Church when other land was available. There is also the fact that upon learning its application for lease was granted FWC immediately began building the residence on the land that had formerly belonged to 'Uaisele Puamau. That is a strong indication of its intention to lease that land. I consider that FWC always intended to apply for what remained of 'Uaisele Puamau's surrendered allotment and it made an error in its first application.

[22] FWC then made a second application for lease. I was not told the date that application was made. The second application for lease was produced but it is not dated. Clearly it was filed after 30 October 2012. No decision was made upon it until 19 April 2013.

[23] In the course of construction of the FWC residence the water pipe from the well to the main road was damaged. The water supply to the village was interrupted for a time while repairs were done. On 11 January 2013, Mr. O Pouono, a local lawyer, wrote to FWC. He stated in his letter that he was acting for the Water Committee and residents of

Ha'asini and Hamula. He asked that FWC stop construction of the residence and enter into discussions with the people of the village. Mr. Pouono's letter was referred by the FWC Reverend for Ha'asini and Hamula, Mr. Musika Vailea, to the Ministry of Lands. He asked that the correspondence be "checked" by the Ministry.

[24] A letter was also sent by Mr. Loumaile Hakaumotu to the Director of Health on 16 January 2013. In that letter, Mr. Hakaumotu expressed concern about construction of the residence on "an area that has been over 40 years kept by the Water Committee for the entire village". He requested that the Director of Health "stop and cancel the construction of the residential house". His reasons were set out in a detailed fashion. They were, first, that the habitation of the area would cause contamination of the water table. Secondly, that the construction of the residence was sudden without any consultation with the village or Water Committee. Thirdly, that construction work had caused damage to the water pipe and interrupted the village water supply and that FWC had ordered that the water pipe be dug up and relocated which might not only cause problems to the distribution of water but would result in costs. He said

that the Water Committee would need time to raise the money "and while that continues water will be disrupted". He also noted that no meeting of the Water Committee had been called about the matter with the implication being that this was because the then Chairperson of the Committee, Mr. Foueti, was supporting the construction of the residence by FWC while ignoring the wishes of the Water Committee.

[25] At the direction of the Minister of Lands the Ministry of Health was asked to assist to review the complaint and assess the health and sanitation issues that arose from it. On 17 January 2013, representatives of the Ministry of Health undertook an inspection of the site including the FWC residence and the well. In a Savingram of 18 January 2013 Niu Fakakovikaetau reported to Dr Malakai 'Ake, the Chief Medical Officer at the Ministry of Health. In that Savingram Mr. Fakakovikaetau noted that for 20-30 years there had been a number of houses closer to the well than the FWC residence under construction "without any health risk concerning the location of residential houses and the water well". He also noted that testing of the water source by the Ministry of Health had not found any contamination caused by septic tanks or toilets used by the residences. He

concluded that it was not proved that the well would be affected by the construction of the new residence by FWC.

[26] Another letter of complaint was received by the Ministry of Health from Mr. Hakaumotu on 21 January 2013. This was reviewed by Mr. Niu Fakakovikaetau, who prepared an internal memo for Dr Malakai 'Ake on 23 January 2013. This responded to the three main points that were the basis for Mr. Hakaumotu's dissatisfaction with the construction of the FWC residence. The new piece of information contained in this report was that, in so far as there were concerns about the cost of re-routing the water pipes, FWC was prepared to assist with those expenses.

[27] On 30 January 2013 Dr Siale 'Akauola, the Director of Health, wrote to Mr. Hakaumotu stating:

As Niu had explained, although there are dwelling houses closer to the water catchment than the new buildings constructed by the Wesleyans, it is mandatory for the Ministry of Health to always follow up and examine to confirm that the water catchment of your township is not contaminated, by anything including the dwelling houses close to it, in the future. It is believed that there will be a continuance of cooperation between

the Ministry and the Water Committee of the township of Ha'asini and Hamula to always confirm there is clean and sufficient water for the people of these towns.

[28] The evidence of Mr. Semisi Moala was that having satisfied himself with the reports submitted by the Ministry of Health that the water had been and remained safe, the Minister of Lands proceeded with processing FWC's application for the lease. It was the submission of the Water Committee that Mr. Moala's evidence was that the Minister was aware of the letters of the people of the village but he chose not to see them or invite them to be heard and that the Minister just proceeded to direct that the lease be granted. I do not accept that submission. It does not reflect Mr. Moala's evidence or what occurred. Mr. Moala was asked if the Minister had looked at the complaints that had been made to him and the Ministry of Health. Mr. Moala's evidence was that he believed the Minister did consider the complaints and they were all forwarded to him. As will be clear from the events I have described, the Minister did not ignore the complaints made by Mr. Pouono, purporting to act for the Water Committee and the villagers of Ha'asini, or the complaints of Mr. Hakaumotu. To the contrary, the

complaints were investigated before FWC was granted its lease. In so far as it is alleged the Minister chose not to see the villagers, there was no evidence of a request that he do so.

[29] On 19 April 2013 Cabinet rescinded Cabinet Decision No 887 and by Cabinet Decision No 355 consented to the grant of a lease to FWC of an area of 1r 24p for term of 50 years. The area was the balance of the surrendered allotment formerly owned by 'Uaisele Puamau. On 18 June 2013 the lease was registered in the name of FWC under lease No 8378.

[30] Before leaving the facts I should mention that at the request of Counsel a site visit was undertaken. It was a helpful exercise. As I noted earlier, the land that remains vacant has clearly been used as a vegetable garden in recent times and animals are able and do graze upon the land. The well itself is very close to a number of residences that use septic tanks. The closest residence is within 30 metres of the well but it seemed much closer than that. As was reported by the Ministry of Health, there are a number of residences much closer to the well than the FWC residence and some of these are inland of the well. These would be the most likely

to cause contamination if, as was suggested in the evidence, surface and underground water flows from elevated inland areas to the sea. The incomplete septic tank of the FWC residence is 96 meters from the well. The FWC residence is fenced and largely built but it is not yet completed. It remains unoccupied.

Other evidence

[31] The Water Committee called as witnesses Mr. Taniela Kula, from the Ministry of Lands, Environment, Climate Change and Natural Resources, and also Mr. Quddus Fielea of the Tonga Water Board. Mr. Kula had qualifications in Earth Science, Geology and Spatial Information Science and in 2013 had prepared a report headed "Brief Assessment of Ha'asini Groundwater Lens". The aim of his report was to "provide awareness of potential impacts of developments consisting of septic tanks within a close proximity of the existing village water production well field". Similarly Mr. Fielea, who trained as a Water Engineer, prepared a report in February 2013, the aim of which was "to provide awareness

on potential risks and impacts of development within the vicinity of the production wells at Ha'asini".

[32] Mr. Kula and Mr. Fiela were called to produce their reports. No objection was taken to this but I consider that it will seldom be a satisfactory approach. Expert opinion evidence must be carefully prepared having regard to the role of an expert and their obligations to the Court. It appeared that neither expert had prepared their report on the basis that it would be their evidence in Court proceedings. Neither witness confirmed that he understood the role and duties of an expert witness. Furthermore, it was not clear upon what relevant point in issue arising in this case, requiring special skill and knowledge, they were being called to give evidence. Both witnesses noted significant information gaps about matters that they considered had a direct bearing on the risk of contamination to the water source which meant that, had I been required to do so, I would not have been prepared to draw any significant conclusions from their evidence. Mr. Kula noted a lack of information about present levels of water quality at the well, the level of the water table, the direction and rate of flow of water within the production field and data to determine the impact of pumping rates on

contamination and salinity. Mr. Fiela noted that the geology of the area was not known and under cross-examination acknowledged that he had not considered the design of the septic tank originally intended for use by FWC. Without intending any disrespect to either witness, I can take very little from their evidence that is of relevance in this action.

[33] That said, I do accept that it should be recognised that further developments involving construction of new septic tank systems within close proximity to the production well has the potential to cause contamination.

Was the land reserved for public health purposes as a water catchment under section 138 Land Act?

[34] Section 138 of the Land Act relevantly provides:

The Minister shall with the consent of the Cabinet reserve such portions of Crown Land as may from time to time be required for ...commons...playgrounds, public health purposes... or for other public purposes...

[35] For land to be reserved there must be both a Minister's decision as well as Cabinet's consent. These are invariably recorded in writing. Whether the Minister made such a decision and obtained Cabinet's consent are questions of fact. Mr. Niu recognised that the Water Committee cannot produce relevant decisions of the Minister or of Cabinet creating a reserve of the land. He asks the Court to infer that a reserve was validly created. As a matter of principle, in the absence of clear evidence I think the Court should be slow to draw such an inference. That would have the potential to create mischief by introducing unnecessary uncertainty into the operation of the Land Act.

[36] In support of the Water Committee's submission Mr. Niu notes the circumstances under which the six landholders were relocated which he says was so that their land could be surrendered to the Crown "to be reserved for water catchment". Mr. Niu relied upon the evidence in the written brief of evidence of Mr. Moala, who said at paragraph 4 that, "These surrendered allotments were reserved for the water catchment". The Water Committee takes too much from that evidence in my view. It does not follow from the fact that steps were taken to protect the water catchment that

the land was also reserved for public purposes under section 138 of the Land Act. Mr. Moala said that there was no Cabinet decision to keep this land clear for the use or benefit of the village. He noted also that over time there was a change in policy so that the area became subject to subdivision and reallocation and registration as allotments.

[37] Under skillful cross-examination by Mr. Niu, Mr. Moala accepted that, being later in time, it was possible that the wording of Cabinet Decision No 134 might reflect the words of the Acting Minister of Land's Savingram of 18 January 1963 (Documents 1-2 of the Minister's bundle) and record that the land of the men of Ha'asini was to become the public well site. That Savingram related to the surrender of Sione Liongiloto's land and relevantly read:

Cabinet has approved the above named person's request to the surrender of his tax allotment, so it can be divided into town allotments and to replace the town allotments of men of Ha'asini so that their allotments become the public well site...

[38] Resourceful though this approach is, it cannot be inferred that Cabinet Decision No 134 would follow the wording of an

earlier Cabinet decision relating to different land. Furthermore, it does not follow from the existence of an intention to use the surrendered allotments as the public well site that the Minister also decide to declare the land a reserve or that Cabinet would give consent to that course. In any event, the Savingram does not say that the surrendered allotments were made reserved land under section 138 for public health or any other purposes.

[39] A further point advanced by the Water Committee relates to the wording of section 54 of the Land Act. In its present iteration section 54 provides that, "Whenever the holder of a town or tax allotment desires to surrender such allotment or any part thereof .." he may do so with the consent of Cabinet. In 1963 the ability to surrender land was more restricted and the section read, "Whenever the holder of a town or a tax allotment by reason of old age, illness or infirmity desires to surrender such allotment...". Mr. Niu's submission was that Cabinet would not have allowed land to be surrendered in apparent breach of the Land Act other than for an important purpose, such as the preservation of public health. Even if there is some validity in this submission, the surrender of the land does not imply the

reservation of the land under section 138. Furthermore, whilst it is certainly not determinative, it appears to me that had the intention been that the land in question would be reserved for public purposes it would simply have been acquired under section 141 of the Act rather than in the manner that occurred in this case.

[40] I agree with Mr. Kefu that it is implausible that the land was made reserve land under section 138. The Minister of Lands in 1963, when the six allotments were surrendered, was Baron Tuita. He was the same Minister who in 1976 directed that the former town allotment of 'Uaisele Puamau be subdivided into two town allotments for 'Ofa Puamau and Suliasi Puamau. It was the same Minister also who made other grants from the surrendered allotments from 1976 to 1985. I consider it must be accepted that it is highly unlikely that Baron Tuita would have acted in this manner had he arranged for the land to be reserved in 1963. There is also the fact that despite the grants made from the surrendered allotments, no objections were made to them until 2000. There was no complaint either to the Minister's decision in 1985 to grant an area of 10.9 perches to the Water Committee.

[41] I have not overlooked the fact that the Water Committee did contribute to the upkeep of this land but it certainly did not do so exclusively. It also did not occupy the land and it did not use the land exclusively as it was used for a range of village events unrelated to the Water Committee's activities.

[42] For these reasons I find that the surrendered allotments were never made reserved land under section 138 of the Land Act.

Was the land available to be leased?

[43] The Water Committee argues that the land leased to FWC was not available because it was reserved under section 138 of the Land Act. In his submissions Mr. Niu said, "If a reserve is shown to have been made by the Minister of Lands with the consent of Cabinet...it is land that is not available to be granted as an allotment or as a lease." In this sense the word 'available' can only be being used in its ordinary meaning and does not have any particular legal meaning. *Finau v Minister of Lands anor* [2012] Tonga LR

127, 133. As the Court of Appeal said in *Finau*, at paragraph [14] “..almost self evidently, something cannot be granted (or otherwise dealt with) unless it is available”. The land that was leased to FWC was part of the Crown estate and it was not reserved land. There being no other grounds advanced, I can see no basis for the argument that the land was not available to lease.

Did the Minister have an obligation to consult with the Water before granting the lease?

[44] The Water Committee argues that even if the land was not a reserve the Minister could not grant a lease to FWC without first consulting with the Water Committee and that in this case the grant of the lease was in breach of natural justice because he did not offer the Water Committee the opportunity to be heard. The Water Committee relies upon *To'a v Taumoepeau* (Unreported LA 10/15, 13 March 2015, Scott J) and *Manu v 'Aholelei & Minister of Lands* (Unreported LA 13/14, 17 April 2015, Paulsen P).

[45] In *To'a* Scott J observed, at paragraph [61], that it is beyond doubt that in making grants of land the Minister must make proper enquires, comply with the rules of natural justice and avoid making obvious mistake before a decision is reached. *Hausia v Vaka'uta & Anor* [1974-1980] Tonga L.R 58, *Hakeai v Minister of Land & Ors* [1996] Tonga LR 142, *Cocker v Palavi & Minister of Lands* [1997] Tonga LR 203 and *Tafa v Viau* [2006] Tonga LR 287, 293. Similarly in *Manu* I recognised that the repository of administrative power, such as the Minister of Lands when granting interests in land, is to comply with the rules of natural justice before exercising that power, to make reasonable enquires and to consult with persons whose rights, interests or reasonable expectations are imperiled by some aspect of another's application. At paragraph [56] of the judgment in *Manu*, I noted that the requirements of natural justice will vary from case to case depending upon the circumstances of the case and the power being exercised.

[46] It must be said that despite the Water Committee's reliance upon it, *Manu* was a very different case from the present one. In *Manu* the grant of a lease by the Minister was invalid because of the failure by the Minister to inspect the

land in question and to consult with a long term occupant who had built a substantial dwelling on the land. There was evidence given on behalf of the Minister that the land should have been inspected before the lease was granted and that the Minister had been misled that such inspection had in fact occurred. In those circumstances it could not be said that had the inspection been undertaken the lease would still have been granted. For that reason the grant was set aside for further consideration of the competing claims to the land.

[47] Mr. Niu argued that the Water Committee was "a person who would be adversely affected by the decision of the Minister to grant part of this land by way of lease to the first defendant". He advanced this argument on two bases. First, that the Minister was aware that the land had been cleared as a catchment area for the village water supply. Secondly, that the Water Committee "lawfully had charge of the catchment area".

[48] It makes more sense to deal first with the argument that the Water Committee was lawfully in charge of the catchment area. The Water Committee presented submissions to the effect that under by-laws to the Water Supply Regulations

the Water Committee had custody and control of the "waterworks" of the village which included "catchment areas". It argued that the catchment area of the village of Ha'asini included all the land between the well and the main road (as well as some land over the road) which includes the land subject to the FWC lease. This, it was said, gave rise to an obligation on the part of the Minister to consult with the Water Committee. I consider this argument is untenable. By regulation 7 the by-laws bind persons living in the village. They do not bind the Minister in the exercise of his powers under the Land Act. It would be quite unreasonable to expect the Minister to consult with local Water Committees when considering any grant of land which was possibly part of a water catchment area, the extent of which may be difficult or impossible to define. Furthermore, the meaning of the term "catchment areas" as used in the definition of "waterworks" in the by-laws is informed by the words that follow it and clearly refer to parts of the water supply system of the village that are "structures or appliances" only. Such an interpretation is consistent with the rest of the by-laws.

[49] As to the first argument advanced, it is the case that the land was cleared in 1963 to protect the water supply. It does not follow that the village Water Committee is adversely affected by the grant of a lease in a manner requiring the Minister to consult. The requirement that the Minister comply with the requirements of natural justice was stated in the following passage from the judgment of the Court of Appeal in *Hakeai v Minister of Lands & ors* [1996] TLR 142:

It is clear law that a person whose rights, interests or legitimate expectations are imperilled by an official's consideration of some other person's application will generally be entitled to a fair opportunity to be heard before a decision adverse to him is made. This is what is known as natural justice.

[50] I can see no justification to impose on the Minister an obligation to consult when there is no competing claim to either the right to possess/occupy the land nor title to land. What the Water Committee is concerned with in this case is the risk of contamination of the village water source through the development of the land for residential purposes. Put simply it objects to an intended land use. To require the

Minister to consult with it in those circumstances would be a major and quite unwarranted extension of the Minister's obligations for which no authority has been provided. The duty to ensure the supply and wholesomeness of water rests with the Ministry of Health under section 78 Public Health Act and not Water Committees. If an obligation to consult existed for the reasons advanced by the Water Committee then it must be an obligation to consult with the Ministry of Health. The Ministry of Health was consulted and had responded to the complaints about further allocations of the land.

[51] It must also be remembered that the surrendered allotments had already been, to a large degree, reallocated without objection and that in 1985 a decision was taken by the Minister to allocate just 10.9 perches of the land to the Water Committee. In those circumstances the Water Committee could not have had any reasonable expectation that it would be consulted about any further allocations from the surrendered allotments.

[52] For those reasons, I do not accept that the Minister was obliged to consult with the Water Committee but, if such an

obligation did arise, then I agree with Mr. Kefu that sufficient consultation was undertaken. It is not the case that the Minister "chose not to see or invite [the Water Committee] to be heard" as the Water Committee submits. As I have set out in the chronology above, the Minister was aware from 2000 of the complaints that land should not be allocated from the surrendered allotments. In 2013, before the lease was granted, the Minister received further complaints on behalf of the village, including I understand persons who are now members of the Water Committee, and he did not ignore those complaints. They were referred to the Ministry of Health who undertook enquires, inspected the land and provided formal responses to every issue raised. It was considered that the complaints were unfounded whilst at the same time the Ministry of Health acknowledged the obligation to monitor the situation closely. Whilst the Water Committee will argue that the Minister should have come to a different conclusion upon the complaints and not granted the lease, it has not been shown that the Minister acted unlawfully. In those circumstances it is not the function of this Court to substitute an alternative view for that of the Minister.

A final consideration


[53] It follows from what I have said that the Water Committee's claim must be dismissed. There may be some concern that the result of this decision pays insufficient regard to public health considerations and to the rights of the people of Ha'asini to have a safe water supply. The following points should be noted about this concern. First, the Ministry of Health has recognised that it is obligated by law to ensure that the water catchment is not contaminated. It must, and has, monitored the water catchment of the village. There was evidence from Mr. Kula that tests in 2013 and 2014 had shown that the water was safe. Secondly, in so far as the major concern is the possibility of contamination from septic tank leakage, in other proceedings the Supreme Court has issued a permanent injunction preventing the FWC from using its septic tank on the leased land. The decision of the Supreme Court was appealed to the Court of Appeal and that appeal was dismissed and so it must be regarded as beyond challenge.

RESULT

[54] I find that the lease was lawfully granted to FWC and the Water Committee's claim is dismissed.

[55] All parties sought costs in the event that they were successful. Costs should follow the event. The first and second defendants are entitled to their costs to be taxed if not agreed.

NUKU'ALOFA: 23 September 2015.



O.G. Paulsen
PRESIDENT