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Solicitor General  
21/03/23

IN THE SUPREME COURT OF TONGA  
PROBATE JURISDICTION  
NUKU'ALOFA REGISTRY

PA 65 of 2022

IN THE MATTER OF:     The Probate Act  
                              The Court Fees Act

AND:                     An application by Mahe'uli'uli Sandhurst Tupouniua  
                              ("Applicant") for letters of administration in respect of the  
                              estate of the late Mahe'uli'uli Tupouniua.

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Statutory validity of items 22 and 23 of the Court Fees Act

## RULING

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BEFORE:                LORD CHIEF JUSTICE WHITTEN KC  
Appearances:         Mrs 'A. Tavo-Mailangi for the Applicant  
                              The Solicitor General, Mr S. Sisifa, as Contradictor  
Submissions:         21 February 2023  
Hearing:               23 February 2023  
Ruling:                23 February 2023  
Reasons:              15 March 2023

### Introduction

1. This ruling concerns the statutory validity of items 22 (Grant of Probate or Letters of Administration) and 23 (issuing a Summons in Probate proceedings) of the *Court Fees Act* ("**the Act**").
2. On 23 February 2023, after considering the written submissions filed by counsel for the Applicant and the Solicitor General as Contradictor on behalf of the Government, and after hearing further from both counsel, I found that to the extent the fees payable under those items are calculated on a sliding scale according to the value of the deceased's estate or the amount in dispute, they are ultra vires the Constitution and the Act and are therefore invalid.
3. These are the reasons for that decision.

### Background

4. On 19 October 2007, Mahe'uli'uli Tupouniua ("**the deceased**") passed away, without leaving a will. He was survived by his wife, 'Elenoa, his only son, who is

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the Applicant herein, and six daughters.

5. Section 11 of the *Probate Act* provides that the personal property of an intestate shall be vested in the Court from his death until administration is granted.
6. Section 12 then provides:

**Crown to take unclaimed estate**

If within 3 years of the date of any estate having become vested in the Court as provided by section 11 of this Act no claimant or other person has been found to be the next of kin to the deceased or to have established a right to the property, the proceeds of such estate shall become the property of the Crown and shall be paid into general revenue:

Provided that in such cases as above the Minister may instruct that instead of the proceeds of the estate being paid into general revenue, the Court grant letters of administration to any person entitled to such grant or to any person illegitimately descended from the deceased.

7. No application for letters of administration or other claim on the estate was made within three years of the deceased's passing.
8. Notwithstanding, on 18 March 2020, the Applicant (by his then lawyer, Mrs Petunia Tupou, as her Honour then was) caused a notice to be published in the Taimi 'O Tonga newspaper of his intention to apply for probate of his late father's estate and calling for any claims against the estate to be made by 10 May 2020. No claims were received.
9. On 14 July 2022, the Minister of Justice, Honourable Samiu Vaipulu, consented to the Applicant making an application for letters of administration out of time. There was no issue raised in this proceeding as to whether the proceeds of the deceased's estate were already payable into general revenue.
10. On 2 December 2022, the Applicant filed an application for a grant of letters of administration. The application was supported by an affidavit from him in which he deposed to the above history and exhibited the written consent of the Minister, his mother and siblings.<sup>1</sup>
11. The Applicant further deposed that the estate comprised three properties leased by the deceased from the Government.<sup>2</sup> He annexed valuation reports prepared

<sup>1</sup> The applicant also filed a supplementary affidavit on 19 January 2023 in which, relevantly, he corrected the year of the public notice stated in his first affidavit from 2019 to 2020.

<sup>2</sup> Lease numbers 422 (Neiafu, Vava'u), 6408 (Fatai, Tongatapu) and 3689 (Kolofo'ou, Tongatapu).

by Mr Viliula Mafi in March 2021. Mr Mafi valued the leases (including substantial improvements on the Kolofo'ou property) at a total of \$1,785,000.

***Court Fees Act***

12. The Act provides, relevantly, that the following fees are payable in Probate matters:

**PROBATE AND ADMINISTRATION**

22 Grant of Probate or Letters of Administration of Estate -	
Not exceeding \$2,000	\$43.00
For each additional \$1000 or part thereof	\$20.00
23 Summons –	
Amount in dispute not exceeding \$100	\$20.00
Amount in dispute exceeding \$100 for every additional \$200 and for any remainder	\$20.00

13. On the commonly held assumption that the tiers in item 22 are intended to refer to the value of the estate in question, the fees payable for the issuing of letters of administration, based on the value of the deceased's estate in this case, were calculated at \$35,723.
14. In respect of that sum, the Applicant deposed to being unable to pay the fees all at once and therefore requested time to pay the "duty payable on the deceased's estate, from the estate".

**Issues**

15. This application is representative of a number of cases in recent years in which hardship has been occasioned to applicants for letters of administration and their families in respect of high value estates by reason of the calculation of the relevant fee said to be payable under the Act and the manner in which leases have been valued. This has become a matter of growing concern for the Court.
16. As such, on 27 January 2023, I directed that notice be given to the Solicitor General and counsel for the Applicant that the application gave rise to a number of issues, including:
- (a) Whether the fees for item 22 (and 23) of the Act are lawful, to wit:
    - (i) Whether the fees (which are the only items in the Act to be calculated on a sliding scale of value) are, in truth, a form of death or inheritance

tax?

- (ii) If so, whether any of the revenue legislation of the Kingdom, which expressly provides for the imposition of taxes and other duties, provides for or even contemplates the imposition of death or inheritance taxes?
  - (iii) If not, whether on its proper construction, those fees are ultra vires the Act; alternatively, clauses 18 and 78 of the Constitution, and therefore unlawful?
- (b) If the fees are lawful, then whether, on the proper construction of the Act, they must be paid in advance of the issuing of orders for probate or letters of administration or whether they may be paid after the issuing of those court orders, and if so, on what terms?
  - (c) Following the decision in *International Metropole Corporation v Minister of Lands & ors* (CV 38 of 2022, Supreme Court, 18 November 2022), and having regard to s.3 of the *Probate Act*, what is the proper method for valuation of land leases in the Kingdom?
17. As those issues have potentially far-reaching implications, the Solicitor General was requested to participate on behalf of the Government as a proper and necessary party; alternatively, in the capacity of Contradictor.

### **Submissions**

18. Counsel for the Applicant filed written submissions which may be summarised as follows:
- (a) The quantum of the fees in the Act have been amended on three occasions since 1927.
  - (b) There is no inheritance or death tax Act in Tonga. In the UK, inheritance tax is a levy or tax imposed on the estate of someone who has died. The standard rate of inheritance tax is 40% and only charged on part of the estate that is above a threshold. That is similar to how Tongan income tax is structured.
  - (c) The fees for item 22 (and item 23) are arguably a form of death or inheritance tax as it appears to have a threshold of how fees apply

(calculated on a sliding scale of value).

- (d) All other fees in the Act have a fixed amount.
- (e) Tonga's existing revenue legislation that expressly provides for the imposition of taxes and other duties does not provide or even contemplate the imposition of a death or inheritance tax.
- (f) Section 20 of the *Income Tax Act* exempts retirement funds from tax upon death. Section 49(1)(b) provides that capital gains tax is not payable on the transmission of an asset on the death of a person to an executor or beneficiary.
- (g) Clause 18 of the Constitution - "Taxation – Compensation to be paid for property taken" – provides, relevantly, that "all the people have the right to expect that the Government will protect their life, liberty and property" and, in return, it is therefore "right for all the people to support and contribute to the Government according to law".
- (h) Section 14 of the *Probate Act* provides that where it appears to the court that the value of the property of the deceased person does not exceed \$5,000 the Court may without any probate or letters of administration or other formal proceedings pay from the estate any debts or charges due by the deceased and pay the surplus (if any) to such person as may be entitled. In that circumstance, fees under the Act would not be payable because there would be no formal grant of probate or letters of administration. However, in the present case, where the estate is valued at over \$5,000, the fees are payable if letters of administration are to be issued.
- (i) The fees in item 22 would appear to be ultra vires the Constitutional obligation of the Government to protect people's life, liberty and property without any differentiation in value.
- (j) Clause 78 of the Constitution provides that the "Legislative Assembly shall assess the amount of taxes to be paid by the people and the customs duties and fees for trading licences ...".
- (k) The Form J-58 which is required to be submitted with an application for probate or letters of administration, together with Form J-43, contains a

reference to the fees payable under item 22 as the "Duties payable".

- (l) Having regard to the nature of the fees (calculated on a sliding scale of value) and the purpose of the Act which is to regulate fees that are payable into court (which should be administrative in nature), the fees are in truth an inheritance or death tax which have not been authorised pursuant to clauses 18 and 78 of the Constitution and are therefore ultra vires and unlawful.
- (m) If the fees are lawful, then on a plain reading of the Act, they are to be paid upon the grant of the probate or letters of administration. There is no known statutory provision which might permit the fees to be paid after the issuing of the court orders or on terms. However, s. 9 of the *Probate Act* provides that "[t]he Court in granting letters of administration shall proceed as far as may be as in cases of probate". It is submitted that it could possibly be read into this section that the Court may decide upon an application being made on whether payment can be made and on what terms for a probate matter including intestacy.
- (n) As noted in the decision in *International Metropole Corporation v Minister of Lands and Ors* and having regard to s. 3 of the *Probate Act*, there is no statutory legal framework in place for the proper method of valuing leases in Tonga whether it be for the purpose of probate or for other purposes.
- (o) Section 3 of the *Probate Act* gives the Court discretion to ascertain the value of the property of the deceased as correctly as the circumstances allow. Therefore, the Court should set any guidelines, instructions or regulations for ascertaining the value of a deceased estate.
- (p) In Practice Direction No. 1 of 2012, and in the context of ss 14 and 3 of the (then) *Probate and Administration Act*, Chief Justice Scott stated:

*"[6] The proper approach to the valuation of leases which are included in a Section 14 application is not clear. I will be asking Crown Law Office to provide a written opinion on the matter. Pending the provision of the opinion applicants including a lease or other similar interest in land should be asked to provide details of the manner in which their valuation of the interest was calculated."*

It is not known whether that opinion was ever provided.

19. The Solicitor General, as Contradictor, submitted, relevantly and in summary:
- (a) The opening sentence of clause 18 of the Constitution gives the people of Tonga "the right to expect" that the Government will protect their life, liberty and property.<sup>3</sup> It is in the nature of a recital (a "whereas" clause) which explains why the people should support and contribute to the Government according to law by paying taxes with the expectation that Government will protect their life, liberty and property.<sup>4</sup>
  - (b) Tax laws specify the taxes people pay to support and contribute to Government. Statutory fees legislation is also enacted to regulate the support and contributions that people are expected to pay Government. The *Court Fees Act* could either be a tax law or a statutory obligation for the people to pay administrative fees to support Government in its role.
  - (c) The prescribed items of fees are required to be paid in advance, except for item 22 whereby fees are to be calculated on a sliding scale of value and paid *after* the grant of probate or letters of administration. Alternatively, if the Court finds that for the purpose of the Act, the fees are fixed and to be paid in advance, then those fees should be paid in advance.
  - (d) The Kingdom's revenue legislation does not expressly provide for or contemplate the imposition of death or inheritance tax. Section 20 of the *Income Tax Act* is not relevant to the present issue.
  - (e) The sub-title to clause 18 of the Constitution - "Taxation - Compensation to be paid for property taken" - contemplates that laws will be enacted to provide and regulate support and contribution to Government by way of death or inheritance tax.
  - (f) Whilst the fees prescribed under the Act may be construed as having been enacted by virtue of clause 18, clause 78 of the Constitution requires the Legislative Assembly to assess the amount of taxes, customs duties and fees to be passed, including the expenditure and revenue during the year succeeding the last meeting of the Assembly. The Government's Budget

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<sup>3</sup> *Dandin Group Ltd v Ministry of Police* [2012] TOCA 6 at [14].

<sup>4</sup> *R v Ikahihifo* CR 304 of 2022, paragraph [23].

Statement for the year ending 20 June 2023<sup>5</sup> that was passed by the Legislative Assembly, refers to “fees and licences” as non-tax revenue.<sup>6</sup>

- (g) The appropriate fees could only be calculated once the Court ascertains the value of the deceased property and in accordance with the observations in the decision in *International Metropole Corporation v Minister of Lands & ors*, CV 38 of 2022.
  - (h) Therefore, the fees prescribed under item 22 are lawful.
  - (i) Alternatively, if the Court finds that the imposition of the fees is unreasonable, and that the fees prescribed by item 22 to be calculated on a sliding scale is contrary to the purpose of the Act and clause 18 of the Constitution, then the Court may declare item 22 void and unlawful.
  - (j) Section 3 of the *Probate Act* provides sufficient express authority for the Court to ascertain the value of the property of a deceased as correctly as the circumstances allow, which is distinguishable from Cabinet’s and the Ministry of Lands’ lack of authority to value the property of a deceased person as discussed in the *International Metropole* case.
  - (k) Therefore, the Court is at liberty to either engage an independent land valuer or instruct the land valuer that the Applicant engaged and direct the proper method and relevant considerations to be pursued and followed by the land valuer to ascertain the value of the deceased’s property.
20. During her oral submissions, Mrs Tavo-Mailangi:
- (a) was unable to offer any suggestions in relation to the methodology for valuing leases; and
  - (b) did not have instructions as to whether the deceased owned the buildings on the Kolofo’ou leasehold (valued by Mr Mafi at \$274,700) or whether the deceased’s family had continued to pay the annual rents on any of the leases since his passing.

21. During his oral submissions, Mr Sisifa:

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<sup>5</sup> 2022/23 Appropriation Act 2022, Act No. 2 of 2022.

<sup>6</sup> Government of Tonga Budget Statement for the year ending 20 June 2023, paragraph heading “6.2.3 Recurrent Revenue by Category”, pages 54 and 55.



- (i) agreed that the sliding scale nature of items 22 and 23, that is, not being referable to any direct transaction like the other fees, was consistent with the items being taxes;
  - (ii) agreed that by the current revenue legislation framework, Parliament to date has intended that there be no death or inheritance taxes in Tonga;
  - (iii) agreed that items 22 and 23 are in truth “disguised” death or inheritance taxes;
  - (iv) agreed that unlike s 3 of the *Probate Act*, items 22 and 23 of the Act does not contain any similar provision mandating the Court to ascertain the value of the estate for the purposes of calculating those fees, and that the practical result, is that the Applicant is required to provide that evidence;
  - (v) agreed that pursuant to ss 57(3) of the *Land Act*, the Government already effectively taxes the annual rental payments for leases by the Minister issuing a voucher in favour of the holder of the tax or town allotment for the amount of the rent less 10%;<sup>7</sup> and
  - (vi) it is difficult to find any clear basis for Mr Mafi’s valuations.
22. Mr Sisifa also referred to Hansard in 2010, when the last amendments to the Act were debated. He stated (without producing a copy of the record) that while there was no specific deliberation by the Legislative Assembly in relation to items 22 or 23, there was a record of opposition members at the time claiming that the increases to those fees were a tax.
23. In the end, Mr Sisifa concurred with Mrs Tavo-Mailangi that the purported fees in items 22 and 23 are, in truth, indirect taxes, which are ultra vires the Act and should therefore be struck down.

### Consideration

24. Upon that agreement, it remains for the Court to determine whether that agreed position is correct, as a matter of law; and if so, why.

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<sup>7</sup> See also s 78 of the *Income Tax Act* which requires the Minister of Lands to withhold tax of 3% from gross annual lease rentals.

*Constitutional power*

25. Both counsel referred to clauses 18 (Part I, Declaration of Rights) and 78 (Part II, Form of Government) as the Constitutional foundations for the imposition of tax in the Kingdom.

26. Clause 18 provides:

**18 Taxation - Compensation to be paid for property taken**

All the people have the right to expect that the Government will protect their life liberty and property and therefore it is right for all the people to support and contribute to the Government according to law. And if at any time there should be a war in the land and the Government should take the property of anyone the Government shall pay the fair value of such property to the owner. And if the Legislature shall resolve to take from any person or persons their premises or a part of their premises or their houses for the purpose of making Government roads or other work of benefit to the Government the Government shall pay the fair value.

27. Clause 78 provides:

**78 Assembly to assess taxation**

The Legislative Assembly shall assess the amount of taxes to be paid by the people and the customs duties and fees for trading licences and shall pass the estimates of expenditure for the Public Service in accordance with the nineteenth clause. And upon the report of the Minister of Finance upon the expenditure and revenue received during the year succeeding the last meeting of the Assembly the Legislative Assembly shall determine the estimates for the expenditure of the Government until the next meeting of the Legislative Assembly. And the ministers shall be guided by the estimates of public expenditure so authorized by the Legislative Assembly.

28. However, there is another provision which specifically provides for the imposition of court fees. Clause 96 (within the Judiciary section of Part II), provides:

**96 Court fees**

The Legislature shall determine the fees payable to the various courts. The Registrar of the Supreme Court shall keep the court records.

29. That clause 96 discretely provides for court fees suggests that they were not intended to fall within the genus of taxes, duties or fees referred to in clause 78. Further, on a plain reading of that latter provision, it is clear that the fees there are specified as being for trading licences.

*Interpreting the Act*

30. The Act has been in operation since 1927. The preamble describes it as an Act

to regulate the fees payable in the Courts of the Kingdom.

31. In interpreting the Act, one begins with general, axiomatic principles such as:
- (a) the natural and ordinary meaning of the words of the Act must be read in their context and in the light of the purpose of the Act;<sup>8</sup>
  - (b) if the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament, and there is no need to look elsewhere to discover their intention or their meaning;<sup>9</sup>
  - (c) the Court must also give effect to the ascertained purpose of the legislature when it enacted the contested law - strict grammatical meaning must yield to sufficiently obvious purpose;<sup>10</sup>
  - (d) statutes should be interpreted so as to avoid manifest injustice or unreasonableness in a way which is consistent with the purpose of the statute;<sup>11</sup>
  - (e) the Court will strive for an interpretation which will make the Act work in the manner that the Court presumes Parliament must have intended, and to avoid one which will lead to a result which is absurd in the sense that the result may be unworkable, impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial or productive of a disproportionate counter-mischief;<sup>12</sup>
  - (f) the Court has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute;<sup>13</sup> and
  - (g) where the wording is ambiguous, reference to Parliamentary debates is

<sup>8</sup> *Crown v Schaumkel* [2012] TOCA 10.

<sup>9</sup> *Gough Finance Ltd v Westpac Bank of Tonga* [2005] TOSC 40 citing Halsbury, vol 44 para 857.

<sup>10</sup> *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56 at [96]; *Crown v Schaumkel*, *ibid*.

<sup>11</sup> *Ongosia v Tongia* [2006] Tonga LR 239 citing *Fifita v Minister of Lands & Fakafanua* [1974-80] Tonga LR 1 (PC).

<sup>12</sup> *Attorney General v Ikamanu* [2021] TOCA 3 at [20]; *Atenisi Institute Inc v Tonga National Qualifications and Accreditation Board* [2019] TOSC 45 at [157] citing *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389.

<sup>13</sup> *Atenisi Institute Inc v Tonga National Qualifications and Accreditation Board*, *supra*, at [154] citing an article published in 2003 by the Hon. Justice Susan Glazebrook of the New Zealand Court of Appeal entitled "Filling the Gaps" referring to Sir Rupert Cross on Statutory Interpretation (3 ed, 1995) 49.

permitted.<sup>14</sup>

32. However, it has long been a principle of statutory interpretation that statutes which encroach on the rights of the subject are to be interpreted strictly so as to respect those rights.<sup>15</sup> In doing so, special considerations apply, including:
- (a) where there is any ambiguity, the construction which favours freedom of the individual should be adopted, so that in respect of statutes which impose financial burdens and, where a subject is to be taxed, the language of the statute must clearly impose the obligation;<sup>16</sup>
  - (b) taxing Acts are strictly construed in the sense that one looks at what is said;<sup>17</sup> there is no room for intendment,<sup>18</sup> although a fair and reasonable construction must be given to the language used without leaning to the one side or to the other;<sup>19</sup>
  - (c) the intention of the legislature must be ascertained from the words of the statute, given where possible their ordinary common sense meaning,<sup>20</sup> and assisted only by such external or historical facts as are necessary to enable the court to understand the subject matter of the statute and the meaning of the words employed;<sup>21</sup>
  - (d) to this extent, the mischief at which an Act is directed may be used as a guide to enable the court to put the words in context;<sup>22</sup>
  - (e) however, the courts will not apply words literally where to do so would defeat the obvious intention of the legislation and produce a wholly unreasonable result;<sup>23</sup> and
  - (f) it is possible that the obscurity of an enactment or the uncontrollable width of its language may compel a court to find that no reasonable construction

<sup>14</sup> *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, HL.

<sup>15</sup> Referred to as the "recognised rule" by Bowen LJ in *Hough v Windus* (1884) 12 QBD 224 (CA) at 237.

<sup>16</sup> *Commissioner of Inland Revenue v National Pacific Insurance* [2000] Tonga LR 392.

<sup>17</sup> Halsbury's Laws of England, Taxation Law (Volume 99 (2022), paras 1–769; Volume 99A (2022), paras 770–1246), 2. Income and Corporation Tax, 17. General rules for interpretation of taxing Acts.

<sup>18</sup> *Customs and Excise Comrs v Thorn Electrical Industries Ltd* [1975] 3 All ER 881.

<sup>19</sup> *Pearlberg v Varty (Inspector of Taxes)* [1972] 2 All ER 6.

<sup>20</sup> *Kidson (Inspector of Taxes) v Macdonald* [1974] Ch 339.

<sup>21</sup> *Assam Railways and Trading Co Ltd v IRC* [1935] AC 445–459, HL.

<sup>22</sup> *Escoigne Properties Ltd v IRC* [1958] AC 549, HL; *Howard v Borneman (No 2)* [1975] Ch 201, CA.

<sup>23</sup> *IRC v Hinchy* [1960] AC 748, HL.

is available, and that the taxpayer is therefore not to be charged.<sup>24</sup>

33. The central issue in this case also requires consideration of the interpretative rule against doubtful penalisation.<sup>25</sup> In the seminal text “Statutory Interpretation” by Francis Bennion,<sup>26</sup> the learned author expounds the principal of legal policy that a person should not be penalised except under clear law. The court, when considering, in relation to the facts of a case, which of opposing constructions of an enactment would give effect to the legislative intention, should presume that the Legislature intended to observe this principle. The Courts therefore strive to avoid adopting a construction which penalises a person where the Legislature’s intention to do so is doubtful or penalises him in a way which was not made clear. Whenever it can be argued that an enactment has a meaning requiring infliction of a detriment of any kind, the principle against doubtful penalisation comes into play. If the detriment is minor, the principle will carry little weight. If the detriment is severe, the principle will be correspondingly powerful. It is a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.<sup>27</sup> One aspect of the principle against doubtful penalisation is that by the exercise of State power, the property or other economic interests of a person should not be taken away, impaired or endangered, except on the clear authority of law. It follows that whenever an enactment is alleged to authorise interference with property, the Court will apply the principle against doubtful penalisation. The interference may take many forms. All kinds of taxation involve detriment to property rights.
34. Notwithstanding the modern attitude of the courts that the revenue from taxation is essential to the running of the State, that the duty of the judiciary is to aid in its collection while remaining fair to the subject, and the rule requiring the courts to observe the principle *ut res magis valeat quam pereat*,<sup>28</sup> there are many cases where the court has refused to adopt the construction of a taxing Act which would

<sup>24</sup> *Customs and Excise Comrs v Top Ten Promotions Ltd* [1969] 3 All ER 39 HL.

<sup>25</sup> Discussed in *Bin Huang v Police* [2020] TOSC 28 at [53] and *International Metropole Corporation v Minister of Lands & ors* (CV 38 of 2022, Supreme Court, Whitten LCJ, 18 November 2022).

<sup>26</sup> Second edition by Butterworths, pages 571 to 574, 584 to 589 and 735 to 736.

<sup>27</sup> *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 at 724.

<sup>28</sup> It is better for a thing to have an effect than for it to become void.

impose liability where doubt exists.<sup>29</sup>

*Operation of items 22 and 23*

35. Section 2 of the Act provides:

**2. Collection**

(1) The fees specified in the Schedule hereto shall be paid as therein prescribed in respect of the several matters to which they are applicable:

Provided that no fee shall be charged or payable in any case in which such fee charged would have to be paid by any Government Department.

**Allocation**

(2) All moneys received as fees shall be paid by the officer receiving the same into the Treasury for the benefit of the general revenue.<sup>30</sup>

36. The Schedule to the Act contains the fees payable for the filing of specified documents and provision of court services across the three courts and their respective jurisdictions. The amounts prescribed in items 22 and 23 have been increased by amendment on a number of occasions without apparent alteration to the formulae therein.
37. Notably, all 71 items within the Schedule, other than items 22 and 23, are for fixed amounts regardless of the value of the subject matter or amount in dispute. The Supreme Court fees range from \$4 for the registration of a will (item 27) to \$116 for the issuing of originating process in the form of a Summons and Statement of Claim (item 9), regardless of the nature of the dispute or the quantum of the claim.
38. In contradistinction, items 22 and 23, contain formulae, or sliding scales, for the calculation of fees in respect of a grant of probate or letters of administration, (apparently in the case of 22) according to the value of the estate; and for the issue of a summons, according to the amount in dispute.
39. The text of the formula in item 22 is unclear. After the primary description of the service ("Grant of Probate or Letters of Administration of Estate"), the following lines ("Not exceeding \$2,000" and "For each additional \$1000 or part thereof") are, on a plain reading, nonsensical. That is because the text does not specify

<sup>29</sup> See e.g. *Tomkins v Ashby* (1827) 6 B&C 541 at 542; *IRC v R Woolf (Rubber) Ltd* [1962] Ch 35 at 44-5; *IRC v Berrill* [1981] 1 WLR 1449 at 1460; *South West Water Authority v Rumble's* [1985] AC 609.

<sup>30</sup> Compare clause 96 of the Constitution which refers to fees being payable to the various courts.

any subject matter for those additional fee calculations. A practice has developed over the years within the Supreme Court registry for those lines to be read as applying to the value of the deceased's estate to which the grant is to apply. A generous interpretation of the words "of Estate" at the end of the chapeau leading into the two tiers below it, by effectively inserting the words "of a value", supports that approach. That has certainly been the basis upon which the putative fees payable in the present case, and many before it, have been calculated.

*The sliding scale components of items 22 and 23 are, in truth, a form of tax*

40. The above comparison of clauses 18 and 78, in relation to taxation, and clause 93, in relation to court fees, makes plain that the Constitution treats court fees as separate from and different to taxes.
41. A number of issues arise from that distinction as articulated in the Directions issued on 27 January 2023.
42. A fee is defined variously as:
  - (a) a payment made to a professional person or to a professional or public body in exchange for advice or services, or money paid as part of a special transaction;<sup>31</sup>
  - (b) a charge fixed by law for services of public officers or for use of a privilege under control of government.<sup>32</sup>
43. A fee for service assumes a direct relationship between the payment of the fee and the receipt of the service.<sup>33</sup>
44. The term 'tax' has a profoundly legal history. The components of a tax have been defined as (a) enforceable by law, (b) imposed by authority of a legislature, (c) imposed by a public body, and (d) for a public purpose.<sup>34</sup> Most simply, a tax is a tribute or impost imposed by Parliament.<sup>35</sup> Blacks Law Dictionary, *ibid*, further defines a tax as:<sup>36</sup>

<sup>31</sup> Words and Phrases Legally Defined, 4<sup>th</sup> ed., Vol 1, LexisNexis, p. 926; Butterworths New Zealand Law Dictionary, 6<sup>th</sup> edition, by Spiller at p. 113.

<sup>32</sup> Blacks Law Dictionary, 4<sup>th</sup> edition, West Publishing Co., p. 740-741.

<sup>33</sup> LexisNexis Concise Australian Law Dictionary, 4<sup>th</sup> edition, at p. 236 citing *Harper v Victoria* (1966) 114 CLR 361.

<sup>34</sup> *Lawson v Interior Tree Fruit & Vegetable Committee* [1931] SCR 357 at 363.

<sup>35</sup> Butterworths New Zealand Law Dictionary, *ibid*, at p. 304.

<sup>36</sup> At p. 1628.

- (a) a pecuniary burden or contribution laid upon individuals or property to support the government and is a payment exacted by legislative authority;
  - (b) annual compensation paid to government for annual protection and for current support of government;
  - (c) a rateable portion of the produce of the property and labour of the individual citizens, taken by the nation, in the exercise of its sovereign rights, for the support of the government, for the administration of the laws and as a means for continuing in operation the various legitimate functions of the state;
  - (d) an enforced contribution of money or other property, assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses; and
  - (e) a public burden imposed generally upon the inhabitants of the whole state, or upon some civil divisions thereof, for governmental purposes, without reference to peculiar benefits to particular individuals or property.
45. All items in the Schedule, other than 22 and 23, represent a specific payment for a specific Court service. There is a direct relationship between the payment of each fee and the receipt of the service to which it relates. The quantum of those fees may also be regarded as proportional to the cost of the Court providing each specific service. For instance, the time, energy and other Court resources required to receive for filing and then issue a sealed Statement of Claim does not differ according to the quantum of the claim. In that regard, it is notable that the Act does not impose any fee for the issuing of a judgment, which generally does require differing amounts of time, judicial expertise and energy and other Court resources depending on the subject matter of the proceeding to which it relates.
46. By that test, the purported fee for a grant of probate or letters or administration, or issue of a summons in Probate matters, should not change according to the value of the estate or amount in dispute. In uncontested probate matters, the work of the Court in issuing a grant of probate or letters or administration does not change depending on the value of the estate. Even on the rare occasions when such matters are contested, the additional work of the court in managing,



hearing and determining such cases (or in any other jurisdiction for that matter) is not something for which the Act imposes a fee. The administrative task in finally issuing a grant remains the same.

47. It has been held that that while charges may be made for the issue of licences, or for any other services provided under statute, the revenue from them must not exceed the cost of administering the service: *Congreve v Home Office* [1976] QB 629.
48. Depending on the value of the estate or amount in dispute (and they will often be related), the amounts payable under items 22 and 23 have the potential to be grossly disproportionate to the relative cost of the service being provided.
49. The instant case is a prime example. The cost to, or requirements of, the Court in issuing letters of administration for an estate valued at \$10,000 will rarely, if ever, be materially different to the same task for an estate worth \$10 million. Yet, according to item 22, the fee payable for an estate worth \$10,000 would be over \$200 (bearing in mind that the maximum fixed fees in the Schedule, for filing notices of appeal, are \$207<sup>37</sup>) and the fee payable for an estate worth \$10 million would be over \$200,000.
50. By those extrapolations, including the present case attracting a fee of over \$32,000, the amounts payable under item 22 cannot be regarded as a reasonable charge for a court service.
51. Further, the amounts chargeable have the potential to so far exceed the reasonable cost of the service in an individual case, that to characterise them, by comparison to all the other fixed amounts, as a court fee, becomes absurd.
52. That potential for absurdity is exacerbated in the case of item 23. Firstly, it will be noted that apart from the combined fee for a Summons and Statement of Claim in item 9 (\$116), and item 23, there is no fee chargeable for the issuing of a separate summons in the Supreme Court. For a similar document – a subpoena – the fee is only \$8 (item 13). In the Magistrates Court, the fees for issuing summonses are \$69 in the civil jurisdiction (item 37) and \$8 in the criminal jurisdiction (item 42) and revenue cases (item 49). Secondly, the instances in

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<sup>37</sup> Items 1 and 64.

which a summons is required in a probate case are extremely limited. The only place they are mentioned in the *Probate Act* is in s 15, to require executors or administrators to attend and show cause why an order for the administration of the property of the deceased shall not be made. Thirdly, the first line of item 23 suggests that the fee for a summons where there is no amount in dispute is only \$13. However, fourthly, and for the purpose of illustration, let it be assumed that a probate matter is contested, say by an actual or potential beneficiary challenging the standing of the proposed applicant for a grant or even disputing the distribution of the estate. Let it also be assumed that the value of the subject estate is as the present case. The sliding scale in item 23 is based on the "amount in dispute". In the scenarios posited above, the amount in dispute would arguably be the entire value of the estate said to be \$1,785,000. Therefore, the 'fee' payable for the issuing of a summons, which is nothing more than a simple one-page court order requiring the named respondent to attend court on a specified day, would be \$178,510.<sup>38</sup>

53. The problem becomes even more acute when one considers item 25, filing an application for probate or letters of administration, for which the fee is only \$10, regardless of the value of the estate.
54. And then there is item 29 where the fee for 'Resealing Probate or Letters of Administration'<sup>39</sup> is stated as the same as a grant. Resealing involves little more than an assessment of a grant of probate or letters of administration or its equivalent, issued by the Superior Court of a foreign or Commonwealth country, for compliance with the requirements of s 39 of the Probate Act. Once approved and the grant is resealed by the Tonga Supreme Court, the grantee is able to administer the assets of the deceased's estate in Tonga. For that almost entirely administrative task, on an estate value as per the present case, the fee would be over \$32,000.
55. A comparative analysis of some other Tongan statutes which impose fees is instructive. For example, it will be recalled that clause 78 of the Constitution provided for fees for trading licences. Schedule 1 to the *Business Licences*

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<sup>38</sup> \$20 for the first \$100, plus \$20 for every additional \$200 thereafter. It is not clear what the words "and for any remainder" mean.

<sup>39</sup> Pursuant to ss 39 to 44 of the *Probate Act*.

*Regulations* prescribes all fixed fees (except for copying fees which are per page). All fees prescribed in the *Customs and Excise Management Regulations* are also all for fixed amounts. Even Schedule IV to the *Land Act* provides for all fixed fees in respect of registration, transfer and other charges, regardless of the value of the land involved. The only exception is survey fees which are calculated according to the size of the site to be surveyed and thereby represent greater cost where there is greater work required. Schedule XII provides for Land Court fees which again are all fixed (including for summonses).<sup>40</sup>

56. A comparative survey of court fees in some other Commonwealth jurisdictions may also be instructive:
- (a) In the United Kingdom, which retains the imposition of inheritance tax (discussed further below), there are no court fees for an application for a grant of probate if the estate is £5,000 or less; and, where the value of the estate is over £5,000, the application fee is fixed at £273.
  - (b) In Australia, where death duties<sup>41</sup> were abolished in 1978, the different States and the Commonwealth courts prescribe their own court fees. For instance, in the Federal Court, which does not have a probate jurisdiction, and no sliding scales, the only distinction in court fees lies as between a corporation and any other case.<sup>42</sup> However, in Victoria, where the Supreme Court does have a probate jurisdiction, court fees for such matters are structured according to corporate, standard and concession fees.<sup>43</sup> However, the fees for probate matters are the same regardless of those categories. There are no fees payable for a grant of probate or letters of administration (i.e. effectively the judgment or product of the application), rather the fees are payable on the filing of an application for same. Those fees are calculated according to bands of gross value of the subject estate. The bands start at estates less than \$500,000 and are gradated to the maximum band of \$3 million or more. However, each of those bands

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<sup>40</sup> Note that the Land Court fees in Schedule XII to the *Land Act* appear to conflict with the fees prescribed in Part IV of the *Court Fees Act* for "All Courts, All Jurisdictions".

<sup>41</sup> Including no inheritance or estate taxes being taxes upon the estates of decedents, or the inheritance of beneficiaries.

<sup>42</sup> Schedule 1 – Part 1 *Federal Court and Federal Circuit and Family Court Regulations* 2012.

<sup>43</sup> *Supreme Court (Fees) Regulations* 2018, Schedule 1, Part 4 - Fees payable in the Office of the Registrar of Probates.

attracts a fixed fee. That is, the fee is not calculated on a sliding scale of value within the applicable band. At present, those fixed fees range from AUD\$24.64 to \$2,171. For the value of the estate in the present case (even if the figure was in AUD), the fee would be \$642.18, or about 3% of the fee payable for a grant in Tonga.

- (c) In New Zealand, where death duties were effectively abolished in 1992,<sup>44</sup> the High Court fee for filing an application for probate or letters of administration is NZ\$200<sup>45</sup> (or 0.6% of the fee payable for a grant in Tonga). There is no fee for a grant of administration obtained by way of an application without notice or in solemn form. The fees for all other probate matters range from NZ\$20 to \$50.
57. In the UK, inheritance tax is imposed<sup>46</sup> on the estate (property, money and possessions) of someone who has died. The tax is calculated as a percentage of the value of the estate<sup>47</sup> above a specified threshold<sup>48</sup> and subject to certain exceptions.<sup>49</sup>
58. The sliding scale in item 22 of the Act has the same effect. The purported fee for a grant of probate for estates is calculated effectively as a percentage of the value of the estate above a specified threshold.<sup>50</sup> In that regard, it is no different to the method by which taxes such as consumption tax<sup>51</sup> and income tax<sup>52</sup> are calculated and imposed.
59. Further, to the extent that the fees calculated by items 22 and 23 may be far in excess of any reasonable cost of providing the services to which they relate, the surplus, like all other general taxes, is paid into consolidated revenue for the general support of Government and its operations.
60. For those reasons, I find that the sliding scale components of items 22 and 23

<sup>44</sup> The legislation has not been repealed. The rate of tax was simply reduced from 40% to zero.

<sup>45</sup> *High Court Fees Regulations* 2013, items 35 to 45.

<sup>46</sup> *Inheritance Tax Act* (UK) 1984.

<sup>47</sup> Currently 40%.

<sup>48</sup> £325,000, or the deceased's home is given to his/her children, the threshold can increase to £500,000.

<sup>49</sup> Inheritance tax is normally not payable on an estate above the £325,000 threshold if left to a spouse, civil partner, charity or a community amateur sports club.

<sup>50</sup> TOP\$2,000 or \$5,000 where section 14 applies.

<sup>51</sup> *Consumption Tax Act*, ss 5(3)(a): 15% of the value of the taxable supply.

<sup>52</sup> *Income Tax Act*, s 5 and *Income Tax (Amendment) Order* 2017, s 2.

do not constitute a fee for a court service and are, in truth, a form of taxation.

*Ultra vires the Constitution and the Act*

61. The taxing Acts of Tonga,<sup>53</sup> which have been passed into law by virtue of clauses 18 and 78 of the Constitution, do not include any form of death duty or inheritance tax on deceased estates. It is clear therefore that, to date, successive Governments have been content not to impose such taxes. That the legislation does not even contemplate them is illustrated by s 20 of the *Income Tax Act* which expressly exempts from taxation any amount received from an approved retirement fund where it is paid on, inter alia, the death of the approved fund member. Also, ss 49(1)(b) provides that capital gains tax is not payable on the transmission of an asset on the death of a person to an executor or beneficiary. Therefore, to effectively impose a tax on an estate, disguised as a court fee, conflicts with the *Income Tax Act*.
62. Moreover, it is clear that clause 96 of the Constitution confers on Parliament the power to raise court fees and for the court to charge and collect them. It is equally clear that the Constitution does not confer on the courts the power or responsibility for imposing or collecting taxes, nor does it empower Parliament to do so.
63. Accordingly, to the extent that items 22 and 23 of the Act have the effect of requiring court users to pay, and the Courts to impose and collect, what are in truth taxes, they are ultra vires the Constitution and the Act, and therefore void: *A-G v Wilts United Dairies Ltd* (1921) 37 TLR 884 at 886.

*Appropriate fee to be paid*

64. The effect of that finding is to disregard the sliding scale elements of items 22 and 23. Therefore, as both counsel agreed during oral submissions, by application of the remaining valid provisions, the appropriate fees payable are \$43 for a Grant of Probate or Letters of Administration of Estate (regardless of the value of the estate) and \$13 for a Summons (regardless of the amount in dispute).

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<sup>53</sup> Income Tax Act, Revenue Services Administration Act 2021, Consumption Tax Act, Customs and Excise Management Act and Excise Tax Act.

*Court fees may be paid after the service is supplied*

65. Section 2 of the Act is silent as to when a court fee is to be paid. The words “in respect of the several matters to which they are applicable” do not specify or connote that the fee must be paid at the time the service is provided such as when a document is filed in the Court or issued by it.
66. That lacuna or ambiguity ought be resolved beneficially in favour of the court user provided that the appropriate Government revenue is secured. Therefore, in my view, it is open to the Registrar (or Chief Justice, if the Registrar’s decision is challenged) to consider providing the relevant court service on terms that require payment of the applicable fee by a specified date after the provision of the service. In the vast majority of cases, where the fixed fees are relatively modest, there is rarely an issue in the fee being paid at the time of the transaction. That should remain the case. Subject to any future legislative amendment, the problem which arose in the instant case, and which required the Applicant to seek time to pay, is unlikely to arise again.
67. In this regard, it is lamentable that unlike other jurisdictions such as those considered above, the Act does not contain any provision which allows the Registrars, Chief Magistrate or Chief Justice, as the case may be, to waive or reduce court fees in cases of genuine hardship. Court fees should not be a barrier to accessing justice.

*Valuation of leases*

68. In light of the above findings, it is unnecessary, in this case, to consider or determine any issue in relation to the valuation of leases in Tonga.
69. The Court’s statutory role in ascertaining the value of a deceased estate, in accordance with s 3 of the *Probate Act*,<sup>54</sup> will now likely be confined to s 14 and whether the value exceeds \$5,000, or in disputes between beneficiaries in relation to distributions, although they too are rare given the clear terms of s.16 (distribution of certain assets to widows whether the deceased left a will or not) and the Schedule to that Act for division of property on an intestacy.
70. However, for completeness, and in the event that a future case might provide a

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<sup>54</sup> The Court shall ascertain the value of the property of the deceased as correctly as the circumstances allow.

more suitable vehicle for considering any issue in relation to the valuation of leases, I will record some of the events and observations that gave rise to it in this case.

71. In each of his three valuation reports, Mr Mafi described his approach to the task as:

*"To determine the Market Value of the abovementioned property on the basis 'as is' for information.*

*I have undertaken my Valuation based on 'Open Market Value' as defined by the Australian Securities Commission.*

*The price at which the property might reasonably be expected to be sold at the date of the valuation assuming:*

- i. A willing, but not anxious buyer and seller and*
- ii. A reasonable period within to negotiate the sale, having regard to the nature and situation of the land and the state of the market for land of the same kind, and*
- iii. That property will be reasonably exposed to the market, and*
- iv. That no account is taken of the value or other advantage or benefit additional to market value, to the buyer incidental to ownership of the property being valued."*

72. Mr Mafi also observed that:

*"GENERAL COMMENTS*

*Land dealings in Tonga lack of consistency in approach and value. The leasehold nature of ownership, birthright entitlement to land and the non-existence of town planning zoning make identify a true market value basis difficult in the extreme. ..."*

73. For the Kolofo'ou lease, Mr Mafi based his valuation on "various sales in the past years". He then set out details of four transfers of Government leases. Three of those were the subject of Cabinet decisions in 2007 and 2008 with the fourth being in 2021. The "sale prices" ranged from \$1,275,000 to \$3.1 million. The areas ranged from 1610 m<sup>2</sup> to 2112 m<sup>2</sup>. The original terms ranged from 50 to 99 years. The remaining durations were specified for two, from 16 to 33 years.
74. From that, Mr Mafi opined that the rates for commercial property in the Nuku'alofa CBD ranged from \$300 to \$1,200 per square metre. The basis for his rate per square metre for each of the four comparable "sales" is unclear. If it was intended to divide each "sale price" by the respective land area, then the results were inconsistent. For example, in relation to lease no. 2501, with a sale price of

\$1,275,000 and an area of 1,610 m<sup>2</sup>, Mr Mafi's stated rate was \$430 per square metre whereas the presumed calculation produces a rate of \$791.

75. Within the square metre range, Mr Mafi adopted a rate of \$1,100 for the subject property. Apart from stating that he "had regard to the location, site features, aspect and accessibility", the basis for the adopted rate was not explained. He then arrived at a land value of \$1,265,000. However, that was followed by:

*"The above valuation is considered as if lease is renewing whereby the current remaining period of 7 years, land value be set at \$180,000."*

76. How the higher value based on an assumption that the lease would (or could) be renewed could be considered relevant in circumstances where the lessee has been dead for (then) approximately 14 years was not explained.
77. A similar approach was examined recently in *International Metropole Corporation v Minister of Lands & ors.*<sup>55</sup> There, the primary issue was the validity of a Cabinet decision to increase the annual rental payable on a lease purportedly pursuant to the additional covenant for all leases in Form No. 10 of Schedule IX to the *Land Act*. The decision was based on a recommendation from the then Minister of Lands and Natural Resources which was in turn based on a valuation of the subject lease conducted within the Ministry. Evidence was received from the Ministry's then Deputy Chief Executive Officer (Land Administration Division) and from the same Mr Mafi, who provided the valuation reports in the present case, and who served as a valuer in the Ministry for 30 years before retiring in 2006 and commencing private practice.
78. In determining that Cabinet's decision in that case was unlawful, the following observations were made in relation to the approach and methodology for the valuation of leases adopted by the Ministry, with which, to a large extent, Mr Mafi agreed:

91. *"As Ms Pale and Mr Mafi explained, the decision to 'value the lease' and the approach taken to the valuation exercise had developed and, until this case, continued to develop as a practice within the Ministry. The term 'practice' is necessary because of the lack of any statutory foundation for such valuations. As noted above, a statutory power will be construed as impliedly authorising everything which can fairly be regarded as incidental or consequential to the power itself. Therefore,*

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<sup>55</sup> CV 38 of 2022, Supreme Court, Whitten LCJ, 18 November 2022.



*a statutory decision-maker may develop a policy or practice to guide the exercise of a discretionary power. However, a policy or practice does not enjoy the status of legislation or regulation made under an Act. The Ministry's policy or practice therefore cannot create or confer on itself any power which is not provided for by the Act or Regulations: Jones Business Services Ltd v Kingdom of Tonga [2020] TOSC 101.<sup>56</sup> As the Minister here had no power under the relevant legislation to value leaseholds for the purpose of Cabinet's revision of their rents, the Ministry's practice of conducting valuations for that purpose was invalid.*

92. *While it was never explained, the original decision by the relevant Minister commencing the practice of valuations for lease rent revisions and every decision to continue the practice since was infected by the same error of law.*
93. *...*
94. *The approach taken by the Ministry to the valuation exercise was infected by numerous errors of law. In light of the frank evidence of Ms Pale and Ms Sikalu's concessions as outlined above, those errors may be succinctly stated.*
95. *The sales comparison approach was derived from overseas jurisdictions which have systems of land law marked by the arch-principle of freehold title which may be bought and sold. Tonga's land system does not.*
96. *By definition, the sales comparison approach conflicts with Tonga's statutory prohibitions against the sale of land.*
97. *The term 'lease' is not defined anywhere in the legislation examined above. Even the standard deed of lease only refers to the lessee 'holding' the land for a specified period. A lease is an agreement whereby a holder of land (lessor) vests in a lessee an estate or interest in land based on a legal entitlement to exclusive possession of specified land (or other property such as buildings) for a specified period of time in return for the payment of specified rent.<sup>57</sup> In Tonga, the purpose or use to which the demised land may be put is also a requisite term of the parties' agreement. Also, in Tonga, before a lease may be granted and take legal effect, the consent of Cabinet is required and the lease must be registered.*
98. *The concept of 'land value' in the context of leaseholds being equivalent to the amount of a 'gift' or upfront payment a lessor is prepared to receive and a lessee is prepared to pay, in addition to whatever annual rents are agreed (or revised by Cabinet in the event of disagreement) for the balance of the term of the lease, does not have any basis in Tonga's written law nor is it consistent with the sales comparison approach.*

<sup>56</sup> Referring to *'Atenisi Institute Inc v Tonga National Qualifications and Accreditation Board [2019] TOSC 45*, citing *Re Minister for Resources; ex parte Cazaly Iron Pty Ltd [2007] WASCA 175* and *Vai v 'Uliafu [1989] Tonga LR 56*.

<sup>57</sup> E.g. *Cocker Enterprises Ltd v McCarthy (trading as Le-Ata Fashion Boutique & Gift Shop) [2021] TOSC 1 at [75]*.

99. *Upfront payments for leases are not 'gifts' as described by Ms Pale. A gift is property voluntarily and gratuitously transferred by a donor to a donee without receiving consideration and with no intention that the property will be returned to him: Hausia v 'Otukolo [2022] TOSC 71 at [103].<sup>58</sup> Upfront payments for leases are very rare in other common law jurisdictions. Even the standard deed of lease in Form 3 to Schedule IX of the Land Act only provides for the payment of annual rents. At common law, where there is an additional consideration, such as a fine or premium, it is proper to state it in the premises to the lease, to ensure the due operation of the deed and to ascertain the proper stamp duty or other tax.<sup>59</sup> Accordingly, in my view, upfront payments for leases in Tonga ought be regarded as forming part of the total consideration paid by a lessee and received by a lessor in exchange for the granting of the lease.*
100. *The lack of any Government controlled or independently curated database or record system for upfront payments rendered the approach taken by the Ministry – of asking anyone who might be prepared to disclose what they paid for a lease of similar property – inherently unreliable, subjective and arbitrary. There was no sound evidential basis for the assumed value of the subject land.*
101. *The value of any lease will depend on, among other things, the use to which the parties agree the land may be put. For instance, land which may be used for commercial or industrial purposes is likely to fetch a higher 'price' than land which can only be used for residential purposes. So too, will any improvements by the lessor on the land be likely to affect the terms upon which the parties agree. The situation may be different where it is the lessee who subsequently constructs improvements on the land<sup>60</sup> during the term of the lease. While the general principle in Tonga on improvements being personalty and separate to the land remains,<sup>61</sup> and subject to any relevant terms of their agreement, the lessee will be entitled to remove those improvements at the end of the lease.<sup>62</sup>*
102. *However, even if it be assumed (in the absence of any clear expression of intention in the legislation) that the so-called 'value' of a lease is relevant for the purposes of considering whether the annual rent should be altered on a five yearly revision, then the total consideration (i.e. financial or other benefit) the lessor agrees to receive, and the lessee agrees to pay over the life of the lease, must be taken into account. As noted, the total consideration must include both any upfront payment and the annual rent. In the instant case, the agreement by Westpac to forgive Samisoni's debt constituted a financial benefit to Samisoni of over \$1 million in exchange for the lease. That benefit should have been taken into consideration.*

<sup>58</sup> Citing *Tauelangi v Hemaloto* [2016] TOSC 22. See also *Kalaisi v Maile* [2016] TOLC 8 at [66], [67].

<sup>59</sup> Halsbury's Laws of England, fourth edition, volume 27, paragraph 106.

<sup>60</sup> For town allotments, with the consent of the Minister as required by the additional covenant in Form 7.

<sup>61</sup> See the discussion in *Lopeti v Lopeti* [2022] TOLC 7 at [62] to [64].

<sup>62</sup> As provided in the Form 3 standard Deed of Lease.

103. *The Ministry's approach of basing lease land value on upfront payments but at the same time disregarding what was 'paid' in this case by Westpac to Samisoni was legally irrational. It also constituted a failure to take into account a relevant consideration. The Ministry's other practice of not requiring (or at least requesting) parties to disclose the amount of their upfront payments constituted a failure to take into account a relevant consideration."*

## Result

79. For those reasons, it is hereby declared that:

- (a) The provisions within item 22 of the *Court Fees Act* by which the fee for a grant of probate or letters of administration is calculated by reference to the value of the deceased's estate are ultra vires clause 93 of the Constitution and the Act and are therefore invalid.
- (b) The fee payable in item 22 for a grant of probate or letters of administration is \$43, regardless of the value of the estate.
- (c) The provisions within item 23 of the *Court Fees Act* by which the fee for a summons is calculated by reference to the amount in dispute, are ultra vires clause 93 of the Constitution and the Act and are therefore invalid.
- (d) The fee payable in item 23 for the issuing of a summons is \$20, regardless of the amount in dispute.
- (e) Fees payable under the *Court Fees Act* may be paid after the service or transaction to which they apply, subject to the discretion of the relevant Court Registrar, Chief Magistrate or Chief Justice, as the case may be.

80. The fee payable by the Applicant in the instant case for the grant of letters of administration is \$43.

81. Therefore, the original application for time to pay the previously calculated fee, which no longer applies, is no longer required.

NUKU'ALOFA  
15 March 2023



M. H. Whitten KC  
LORD CHIEF JUSTICE