

IN THE SUPREME COURT

HELD AT MULINUU

IN THE MATTER OF of an application for
Judicial Review and remedies
under Article 4 of the
Constitution

BETWEEN **LEMALU FAALAFUA,**
LEMALU AILIMA
AUALA LEMALU
MATAGI, APE VAVEGA,
AUALA ENELE, and
AUALA TALAIFO, all
matais of Lefaga
First Applicants

AND **SUA PALE LIMITED** a
duly registered company
trading as 'Return to Paradise
Beach Club
Second Applicant

AND **LAND AND TITLES**
COURT a Court of record
continued under the Land and
Titles Act 1981
*First Respondent (formerly
Second Respondent and
referred herein as 'Second
Respondent')*

AND **LAND AND TITLES**
APPELLATE COURT, a
court of record with powers

under Part IX of the Land and
Titles Act 1981

*Second Respondent (formerly
Third Respondent and
referred herein as 'Third
Respondent')*

AND

LEMALU SAENI, matai of
Lotofaga and New Zealand,
LEMALU LAUTI, matai of
Lefaga and Australia, Rev
SIALOGA LEMALU,
Methodist Minister of Samoa,
and TUPE LEMALU,
Businesswoman of Lefaga

*Third Respondents (formerly
Fourth Respondents and
referred herein as 'Fourth
Respondents')*

Counsel

B. Heather-Latu for the First and Second Applicants

S. Ainuu and D. Fong for the Second and Third Respondents

T. Malifa for the Fourth Respondents

Hearing date: 2 October 2018

Date of Reserved decision: 4 December 2018

RESERVED DECISION OF TUALA-WARREN J

Brief Background

1. These proceedings concern customary land at Matautu Lefaga called 'Faga' upon which the resort Return to Paradise is situated. This Resort was built on this land as a result of a lease of customary land granted by the Minister of Lands on 1 December 2012 (Now known as the Minister of the Ministry of Natural Resources and Environment). Both the First Applicants and Fourth Respondents claim to be beneficial customary owners of Faga.
2. The First Applicants applied to the Minister of Lands for the lease of Faga to the Second Applicants in June 2009. The second applicant is Sua Pale Limited trading as Return to Paradise Beach Club. The Ministry of Lands as it was known then published the intention to lease in the Savali newspaper on 28 August 2009. The objection period is not less than 3 months as specified in the publication (per section 8(2) of the Alienation of Customary Lands Act 1965). The Fourth Respondents filed an objection within the objection period. The objection was heard in Land and Titles Court ("LTC") on 7 December 2011 during which the Fourth Respondents withdrew their objection. The LTC accepted the withdrawal and noted that the reason was for the parties to mediate. The lease was then granted by the Minister on 1 December 2012 on the basis of advice from the Ministry of Justice and Courts Administration in a letter dated 16 November 2012 that the Fourth Respondents petition had been withdrawn (*tatala talosaga*).
3. Mediation was attempted between the Applicants and the Fourth Respondent but was unsuccessful. The Fourth Respondents then filed a fresh petition on 27 February 2013 objecting to the lease. The LTC heard the fresh petition on 21 June 2013 and made a decision to revoke and cancel (*soloia ma faaleaogaina*) the lease. On 25 July 2014, the Land and Titles Court of Appeal ("LTCA") dismissed the appeal from the First applicant, upholding and affirming the decision of the LTC.

The Proceedings

4. These proceedings are brought by the First and Second Applicants to review both decisions of the LTC and LTCA.

Notice of Motion for Judicial Review

5. The Notice of Motion (“the Motion”) for Judicial Review dated 7 October 2016 pleads for the decisions of the LTC dated 21 June 2013, and LTCA dated 28 July 2014 be quashed.
6. The Applicants seek declarations;
 - a. that the lease granted by the Minister to the Second Applicant is valid and remains in force subject to its terms and conditions and the provisions of the Alienation of Customary Land Act 1965 (“ACLA”);
 - b. The Fourth Respondents objection to the lease in 2009 was withdrawn by order and authority of LTC on 7 November 2011 and therefore disposed of;
 - c. The Fourth Respondents petition to object to the lease on 27 February 2013 was out of time, unlawful and invalid;
 - d. The LTC and LTCA decisions were a breach of the First and Second Applicants Article 9 constitutional right to a fair trial and rights to property (Article 14) and therefore unlawful;
 - e. The LTC and LTCA decisions are unreasonable and/or breach of statutory duty and/or made without jurisdiction and/or made in error of law and therefore unlawful, invalid and void ab initio;
 - f. An interim and permanent stay of proceedings in relation to the implantation of both decisions;
 - g. Interim and final stay of proceedings; and
 - h. Costs.
7. These declarations are sought upon the grounds;
 - a. The LTC decision breached the Applicants’ fundamental freedoms under Article 9 of the Constitution, namely the right to a fair trial insofar as;

- i. By accepting the petition of the Fourth Respondents on 27 February 2013 challenging the validity of the lease and the period of objection had expired on 28 November 2009, thereby in breach of s8(2) of ACLA;
 - ii. The LTC and LTCA failed to exercise their jurisdiction by not rejecting the Fourth Respondents petition was in breach of their statutory powers under Land and Titles Act 1981;
 - iii. The failure of the LTC and LTCA to have regard to and enforce the earlier decision of LTC dated 7 December 2011, dismissing the Fourth Respondent's petition;
- b. The decisions by LTC and LTCA were ultra vires and made without jurisdiction insofar as:
 - i. They were not made in accordance with section 8(2) of ACLA as to time limit for all petitions relating to the grant of leases; and
 - ii. Land and Titles Act 1981 where the jurisdiction of the LTC and LTCA are subject to the provisions of the ACLA.
- c. The decisions purported to cancel and set aside a lease which was granted under the statutory authority of the Minister under Part II of ACLA which was not subject to the authority of the LTC and LTCA after the public notice period had expired, and the objection withdrawn and the lease formally granted and registered.
- d. The LTC and LTCA decisions were undertaken without and contrary to their jurisdiction and were ultra vires insofar as;
 - i. The LTC had already disposed of the Fourth Respondents original petition in a decision dated 7 December 2011;
 - ii. The LTC was effectively 'functus officio' i.e. had exhausted the jurisdiction under the ACLA and had no further jurisdiction in respect of a lease granted under the authority of the Minister and the ACLA;
 - iii. The power to grant, cancel or otherwise deal with leases granted under the ACLA is a statutory power exercisable by the Minister and not within the jurisdiction of the LTC and LTCA;
 - iv. The determination of the lease and the financial impact on the second applicant was not considered by the LTC and LTCA and breached the

Second Applicant's right to a fair trial and its rights to property under Articles 9 and 14 of the Constitution, and were therefore invalid and unlawful.

- e. The decisions of the LTC and LTCA were unfair and unreasonable insofar;
 - i. Did not consider or acknowledge the interests of the Second Applicant in coming to their decisions;
 - ii. Did not consider the grant of the lease to the Second Applicant in 2012 and the fact that the Second Applicant had acted upon it by surveying and clearing the land, and building structures and services;
 - iii. Did not consider the value of improvements on the land secured by the registration of mortgages over the leasehold interest over the land; and
 - iv. Did not invite or require input from the Ministry of MNRE or Second Applicant prior to making their decisions concerning the validity of the lease.

Statement of Claim

8. The Motion is accompanied by a Statement of Claim which pleads the land in issue is 6 acres and 23 perches.
9. The causes of action pleaded are;
 - a. Cause of Action 1-Breach of Constitutional right to a fair trial by determining the First Applicants Civil rights in a manner which was unfair, unreasonable and illegal;
 - b. Cause of Action 2- Breach of Constitutional right to a fair trial by determining the Second Applicants Civil rights in a manner which was unfair, unreasonable and illegal;
 - c. Cause of Action 3- Breach of Constitutional right to a fair trial by determining the Second Applicant's Civil rights in a manner which was unfair, unreasonable and illegal by failing to provide a hearing for the Second Applicant prior to removing its rights as a valid lessee;

- d. Cause of Action 4-Breach of Constitutional Right to a fair trial by purporting to cancel a lease granted under ACLA and in doing so, acting in breach of its statutory authority under the Land and Titles Act;
- e. Cause of action 5- Breach of Constitutional rights regarding property under the Applicants by determining the Article 14 by its unlawful decisions.

Submissions of the Applicants

10. The submissions of the Applicants can be summarized as follows;
 - a. The decisions were in breach of the Second Applicant's rights to a fair hearing as they were not heard before the cancellation of the lease;
 - b. The Fourth Respondent's objection had already been determined by the Court and therefore they were functus officio, estopped and res judicata;
 - c. The lease is a creature of statute namely the ACLA and the role of the LTC in this matter is very specific-to determine whether the objector is a 'beneficial owner' of the customary land and come to that conclusion for the benefit of determining who is entitled to receive a benefit from the lease payments;
 - d. Under the ACLA, the Minister has the overriding authority as to whether or not to grant a lease and may exercise his/her discretion in doing so. By extension the grant of a lease must also include the power to cancel, suspend or terminate a lease where the terms of the lease are breached by the lessee; and
 - e. The LTC is not empowered to cancel a statutory lease under the ACLA or the LTA.

Opposition by the Second and Third Respondents

11. The Second and Third Respondents oppose the Motion for Judicial Review and seek a dismissal of the Motion and costs.
12. They oppose the Motion and Claim upon the grounds that;
 - a. The Fourth Respondents objection was not disposed of;
 - b. The petition by the Fourth Respondents was not filed out of time;
 - c. The decisions by the LTC and LTCA did not supersede the statutory authority of the LTC;
 - d. There is no breach of a constitutional right by the LTC and LTCA;

- e. The decisions by the LTC and LTCA are fair, reasonable, intra vires, lawful and valid; and
- f. The Motion is an abuse of process.

Submissions of the Second and Third Respondents

13. The submissions of the Second and Third Respondents can be summarized as follows;

- f. The decisions were not ultra vires as the Respondents had authority under the ACLA and LTCA to make determinations on the matter;
- g. The LTC is able to determine by virtue of s8(3) ACLA whether a Samoan is a beneficial owner of customary land or not, and whether such person(s) are entitled in equity to the benefits arising from the same;
- h. LTC has jurisdiction to deal with this matter as a claim and dispute between Samoans relating to customary land (per ss34(2)(c) and 38 LTA);
- i. The Respondents' decisions are only illegal if it pursues an objective other than that for which the power to make the decision was conferred (per Sapolu CJ in *Penaia*);
- j. The primary issue pertains to a dispute concerning the customary usage of the land;
- k. The Fourth Respondents have a bona fide interest in the land as Sa'o of Aiga Sa Lemalu;
- l. The proper procedure in applying for a lease had not been followed by the Applicants as the Fourth Respondents never consented to the lease;
- m. Issues of substance should be left primarily to the LTC and LTCA for determination unless there has been a breach of fundamental human rights (per *Penaia II* and *Malifa* cases);
- n. The principle of *res judicata* is not applicable as the merits of the objection were never dealt with;
- o. There was no breach of Article 9 of the Constitution as the Applicants were dissatisfied with the outcome of their case before LTCA and now institute proceedings to judicially review, and the Applicants have been given ample and reasonable opportunity to be heard before LTC and LTCA;

- p. For the Supreme Court to determine what is relevant and what is irrelevant to a decision of a specialized Court such as LTC and LTCA would draw this Court into an assessment similar to assessing the merits of the decisions which is contrary to ss38, 42 and 43 LTA; and
- q. There is a considerable delay by the Applicants in advancing their application for judicial review which is fatal to their motion.

14. The Second and Third Respondents submit that the application be dismissed and an order of costs made against the Applicants in favour of the Second and Third Respondents.

Opposition by the Fourth Respondents

15. The Statement of Defence filed 22 December 2016 opposes the Motion and Statement of Claim upon the grounds;

- a. that the Applicants do not plead the fact of the authority that permits judicial review of LTC and LTCA decisions, and therefore lack legitimacy and are without legal authority;
- b. No constitutional remedies are pleaded;
- c. The lease pleaded was granted without approval and consent of all Sa'o to customary land Faga and therefore the lease cannot have been validly entered into;
- d. The objections of the Fourth Respondents were in accordance with the law; and
- e. The Fourth Respondents as beneficial owners have been excluded in the decision making process to lease Faga.

Submissions of the Fourth Respondents

16. The Fourth Respondents made the following submissions;

- r. Objecting to the use of the affidavits of Lemalu Fa'alafua and other Applicants who have passed away;
- s. The discontinuance against MNRE was granted without the Fourth Respondents being present to voice and argue their objection;

- t. The validity of the lease is the critical issue in this case;
- u. The decisions sought to be reviewed are not administrative law decisions receptive of judicial review unless there is proof of real and actual violation of constitutional rights;
- v. There is no evidence to support the Applicant's claim since Lemalu Fa'alafua has passed and the right of the Fourth Respondents to cross-examine cannot be effected;
- w. Other Applicants have no standing;
- x. Issues of mortgages of customary land, investors and unit trust ownership were not revealed or made known to the Fourth Respondents;
- y. Object to the new affidavits and Applicants;
- z. The Applicants were heard in the LTC and in the LTCA;
- aa. The cultural rights of the Fourth Respondents are being abused and violated by the Applicants;
- bb. The issue is not the lease but the customary land being leased;
- cc. All beneficial customary land owners did not agree to the lease; and
- dd. The objection by the Fourth Respondents has not been disposed with in accordance with sections 9 and 10 ACLA.

The issues

17. These proceedings raise a number of important issues, one of which is whether the LTC has jurisdiction to terminate a lease granted by the then Minister of Lands, now known as the Minister of MNRE ("Minister"), on behalf of the beneficial owners, made pursuant to the ACLA.
18. The first issue I will then address is whether the LTC has jurisdiction to revoke and cancel a lease over customary land which has been granted by the Minister.
19. In the event that the LTC does not have jurisdiction to revoke and cancel a lease, the second issue that follows is whether the Supreme Court has jurisdiction to set aside a decision of the LTC for lack of jurisdiction.

20. After considering these questions, I will address other issues raised by the parties in this dispute.

Issue 1: Whether the LTC has jurisdiction to revoke and cancel a lease over customary land which has been granted by the Minister.

Law

21. Article 103 of the Constitution provides for the establishment of the Land and Titles Court;

103. Land and Titles Court- There shall be a Land and Titles Court with such composition and with such jurisdiction in relation to Matai titles and customary land as may be provided by Act.

22. Sections 34 and 71 of the Land and Titles Act 1981("LTA") provide;

34. Jurisdiction of the Court – (1) The Court shall continue to have all the jurisdiction it exercised prior to this Act coming into force.

(2) In particular the Court shall have exclusive jurisdiction:

(a) in all matters relating to Samoan names and titles;

(b) to make orders or declarations in respect of Samoan names and titles as may be necessary to preserve or define the same, or the rights or obligations attaching to those names and titles in accordance with the customs and usages of the Samoan race and all laws in force in Samoa with reference to customs and usages;

(c) in all claims and disputes between Samoans relating to customary land, and the right of succession to property held in accordance with the customs and usages of the Samoan race.

(3) The Court also has the jurisdiction conferred by this Act.

71. Decisions and orders not reviewable by other Courts – Subject to this Act, no decision or order of the Court shall be reviewed or questioned in any other Court by way of appeal, prerogative writ or otherwise howsoever.

23. Article 102 of the Constitution places restrictions on the alienation of customary land. Article 102 relevantly provides:

102. No alienation of customary land - It shall not be lawful or competent for any person to make any alienation or disposition of customary land or of any interest in customary land, whether by way of sale, mortgage or otherwise howsoever, nor shall customary land or any interest therein be capable of being taken in execution or be assets for the payment of the debts of any person on his or her decease or insolvency:

PROVIDED THAT an Act of Parliament may authorise:

(a) the granting of a lease or licence of any customary land or of any interest therein;

(b) the taking of any customary land or any interest therein for public purposes.

24. Leases of customary land are authorized in the Alienation of Customary Land Act 1965("ACLA") as follows;

4. Power to grant lease or licence – (1) *Subject to section 3, the Minister, if in his or her opinion the grant of a lease or licence of any customary land or any interest therein is in accordance with Samoan custom and usage, the desires and interests of the beneficial owners of the land or interest therein and the public interest, may grant a lease or licence of that customary land or interest therein as trustee for such owners:*

(a) for an authorised purpose approved by the Minister;

(b) if the authorised purpose so approved is a hotel or industrial purpose, for a term not exceeding 30 years, with or without a right or rights of renewal for a term or terms not exceeding an additional 30 years in the aggregate, as may be approved by the Minister;

(4) *Nothing in this Act may be construed or implied:*

(a) to permit the alienation or disposition of customary land in a manner prohibited by Article 102 of the Constitution; or

(b) to permit or deem ownership in any customary land to vest in a person otherwise than as determined under any law dealing with the title to customary land.

5. Application to grant lease or licence – *Wherever any Samoan claiming to be a beneficial owner of any customary land or of any interest therein desires that the Minister shall grant a lease or licence of such land or of any interest therein under the powers conferred by section 4, the Samoan shall make written application in that behalf to the Chief Executive Officer.*

6. Form of application – **(1)** *An application under section 5 shall propose a beneficial owner or beneficial owners of the customary land or interest therein desired to be leased or licensed as the agent or agents of all beneficial owners, to whom the Chief Executive Officer or the Chief Executive Officer of the Ministry of Finance may account for the rent or consideration to be derived from the lease or licence of that land or interest.*

(1A) *An application under section 5 shall also state the full names, occupation and address of the proposed lessee or licensee, and what the applicant and the proposed lessee or licensee propose as to:*

(a) whether a lease or a licence is to be entered into;

(b) the authorised purpose of the lease or licence;

(c) the term of the lease or licence, and of any right of renewal thereof;

(d) the rent or other consideration, when it is to be paid, and any rights of review thereof; and

(e) any other covenants, conditions and stipulations.

(2) *An application under section 5 shall otherwise be in such form and give such information as the Chief Executive Officer may prescribe.*

8. Publishing of application–**(1)** *Except as provided in subsection (3), the Chief Executive Officer shall publish in the Savali the main particulars of each application received by him or her under section 5, including the names of the proposed agent or agents.*

(2) *With each such publication of particulars of an application, the Chief Executive Officer shall publish in the Savali a notice fixing a date or period, not being less than 3 months from the date of the publication, not later than or within which, and a place at which, written objections to the proposed leasing or licensing or to the proposed agent or agents may be lodged with the Registrar by any Samoan who claims that he or she would be affected thereby.*

(3) Subsections (1) and (2) do not apply:

(a) if the Samoan who makes the application under section 5 and the proposed agent or agents are held by the Land and Titles Court to be beneficial owners of the customary land or interest therein in respect of which the application is made; or

(b) if—

(i) the application under section 5 is a second or subsequent application; and

(ii) particulars of the first application have been duly published in the Savali; and

(iii) the beneficial owner making such second or subsequent application is the same person as the beneficial owner who made such first application; and

(iv) each application proposes the same agent or agents.

9. Disposal of objections – *The Registrar shall, as soon as convenient after receiving any objection, prepare, sign and file a petition to the Land and Titles Court for the purpose of having that objection heard and disposed of, and send a copy of the objection to the Chief Executive Officer, and another copy to the applicant.*

11. Payment of rent or other consideration – *(1) Every such lease or licence shall operate as if it was a lease or licence as the case may be of public land, but the rent or other consideration derived therefrom shall be received by the Chief Executive Officer in trust for the beneficial owners of the land or interest therein as the case may be.*

Discussion

25. The first issue is the jurisdiction of the LTC to deal with and terminate leases over customary land granted in accordance with the ACLA. This jurisdictional question is important as customary land becomes leased out for commercial and other purposes and parties to those leases need certainty as to which Court has jurisdiction over those leases and any disputes concerning the leases.

26. The LTC has exclusive jurisdiction in relation to Matai titles and customary land provided by section 34 of the LTA. The ACLA provides a process by which leases over customary land

are made. The ACLA allows any Samoan claiming to be a beneficial owner of any customary land to make a written application in that behalf to the Chief Executive Officer of MNRE (“CEO”) for a lease over that customary land. So although not all beneficial owners of the land applied for the granting of the lease in this case, the First Applicants were entitled to apply for the lease as beneficial owners. There is no dispute they are beneficial owners of the land.

27. Once an application is lodged, the CEO publishes the particulars of the application in the *Savali*. Written objections to the proposed lease must then be submitted within the objection period as specified in the publication. There is no dispute that the process thus far was complied with in this case, that is, the particulars of the application were published and the Fourth Respondent’s objection in November 2009 was filed within the objection period.
28. The ALCA then sets out that the LTC deals with objections as petitions. The LTC has jurisdiction to determine objections to a proposed lease over customary land, by hearing the objection and disposing of it.
29. Section 9 of ACLA does not provide how the LTC should ‘dispose’ of an objection and in the absence of any guidance I revert to the jurisdiction of the LTC. The way that the LTC deals with an objection is defined by section 34 of the LTA which is to “*make orders or declarations in respect of Samoan names and titles as may be necessary to preserve or define the same, or the rights or obligations attaching to those names and titles in accordance with the customs and usages of the Samoan race and all laws in force in Samoa with reference to customs and usages; and in all claims and disputes between Samoans relating to customary land, and the right of succession to property held in accordance with the customs and usages of the Samoan race*”.
30. This essentially means that in the context of proposed leases, the LTC has jurisdiction to make orders and declarations in relation to the rights or obligations of the parties in relation to Samoan names and titles, and customary land, in accordance with Samoan customs and usages. Essentially this involves the LTC to inquire into the status of the parties (applicant for the grant of the lease

and the objector) as to whether they are or are not beneficial owners in the land which is the subject of the proposed lease.

30. Any LTC decision therefore in relation to objections to proposed leases assists the Minister in determining whether the proposed lease is in accordance with Samoan customs and usages, and the desires and interests of beneficial owners. The public interest consideration which the Minister is also required to take into account, is perhaps not an area in which the LTC can assist the Minister.

31. Ultimately it is the Minister's decision whether or not to grant the lease.

32. In this case, the Minister granted the lease over Faga in 2012 after having been advised by the Ministry of Justice and Courts Administration that the objection by the Fourth Respondents had been withdrawn. The Fourth Respondents however filed a fresh petition objecting to the lease in 2013, more than a year after withdrawing its original petition of objection in 2011. This 2013 fresh petition was filed after the lease had been granted in 2012 and the objection period had long expired in 2009.

Fresh Petition

33. I find the LTC erred when it heard the fresh petition in 2013. It was a petition which was filed out of time. The statutory scheme provided in the ACLA provides an objection period of not less than 3 months as specified in the publication. Only those objections filed within this period can be heard. This is the same process provided by the LTA for intention to appoint a person to be the holder of a matai name or title (Part 4 LTA), and particulars of the new appointee (section 23 LTA). Accepting and hearing objections outside the objection period is not within the jurisdiction of the LTC.

Disposal of objection

34. The Respondents argue the objection by the Fourth Respondents had not been disposed of in accordance with sections 9 and 10 of the ACLA in 2011. They argue that it was a withdrawal

conditional on mediation which resulted in peace for the family, essentially a successful mediation. The Applicants argue that the objection by the Fourth Respondents had been dealt with when they withdrew their objection in 2011, and this was accepted by the LTC.

35. The withdrawal of the Fourth Respondent's objection in the 2011 was granted by the LTC at the request of the Fourth Respondents. On my reading of the LTC 2011 decision, I find that the withdrawal was conditional on mediation being attempted, not mediation being successful. In this case, mediation was then attempted and was unsuccessful. In my view, this completes the condition in the 2011 decision.

36. I therefore find that the objection by the Fourth Respondent had been disposed of in 2011, and the petition in 2013 was a fresh petition objecting to the lease, which was out of time, and filed at a time when the lease had already been granted by the Minister. Withdrawal is considered a discontinuance of proceedings, and although a discontinuance is not a bar to any subsequent action on the cause of action discontinued, a statutory period for objections is provided under the ACLA and one of the reasons for the objection period is for certainty and finality.

Competent Court

37. According to the Court of Appeal in *Penaia II*, "*The first principle of justice is that a Court be competent to decide the case. The raison d'etre of the Land and Titles Court is to provide that competence, bringing to disputes concerning Samoan custom and usage the expertise of Judges versed in such matters so they can evaluate what answer is most in keeping with the justice of the case according to Samoan values*".

38. With respect, the LTC is not a Court which is competent to terminate duly granted leases of customary land. Once this lease was granted, it became a lease of public land according to section 11 ACLA. As a lease of public land by operation of law, the Minister becomes trustee for the beneficial owners. It is a lease which in accordance with section 25 of the Land Titles Registration Act 2006 ("LTRA") must be endorsed with a certificate of correctness and registered in accordance with section 26 of the LTRA. This removes such leases from the jurisdiction of the LTC and places them within the jurisdiction of the Supreme Court.

Result

39. In terms of the 2013 decision, the LTC at first instance cannot then make a decision to revoke, cancel or otherwise deal with the lease. Its decisions are limited to making declarations about the parties' rights or otherwise to any title, name or customary land. The LTCA also with respect, fell into error in dismissing the appeal and affirming the LTC decision which revoked and cancelled the lease. The LTC does not have jurisdiction to terminate leases over customary land that are by operation of law, leases of public land.
40. Therefore the decision of the LTC which was affirmed by the LTCA, with respect, was ultra vires and made in excess of jurisdiction.
41. The next issue is whether the Supreme Court can set aside this decision for lack of jurisdiction.

Issue 2: Whether the Supreme Court has jurisdiction to set aside a decision of LTC for lack of jurisdiction.

Law

42. The law on judicial review of LTC decisions by the Supreme Court has been canvassed in many cases and is settled law. Perhaps the preferred exponent of the law is found in the Court of Appeal judgment of *Penaia II v Land and Titles Court* [2012] WSCA 6. The threshold issue considered by the Court of Appeal is 'whether the Supreme Court had authority to entertain the application for review, and as a result, whether the Supreme Court can consider the merits of the appeal'.
43. In *Penaia II*, the Court of Appeal was faced with a complaint from the appellant that the decisions of the LTC, having departed from the 1931 decision infringed ss58 and 61 of the Native Land and Titles Protection Ordinance 1934 and ss34, 70 and 71 of the 1981 Act.
44. The Court of Appeal stated;

16. Both the language and provenance of ss34(2), 70 and 71 point to stringent exclusion of judicial review save to the extent permitted by the Constitution. So too does the importance of the role of the Land and Titles Court that it is recognized in the significance

accorded to by the Constitution to the subject-matter of its exclusive jurisdiction, namely Matai title and customary land, each held in accordance with Samoan custom and usage and with the law relating to custom and Articles 100 and 101(2). Moreover "law" is defined as custom and usage which has acquired the force of law in Samoa (Article 111).

17. Even without ss 34(2), 70 and 71 there would be powerful reasons for the courts of general jurisdiction to be reluctant to intervene in disputes arising from decisions of the Land and Titles Court. The first principle of justice is that a Court be competent to decide the case. The raison d'être of the Land and Titles Court is to provide that competence, bringing to disputes concerning Samoan custom and usage the expertise of Judges versed in such matters so they can evaluate what answer is most in keeping with the justice of the case according to Samoan values. Such expertise can be gained only from a life-time's exposure to Samoan culture, which in the Courts of general jurisdiction may be, and in this Court, as constituted for this appeal, is wholly absent.

45. The Court of Appeal went onto state;

19. It is unnecessary for us to consider whether there might be some exceptional cases for which recourse might be sought in the common law. The present case could not be characterized as entailing such breach of fundamental decencies as to raise an issue.

25. But for us to investigate that question would take the courts of general jurisdiction into the very examination of the Land and Titles Court which Parliament has prohibited. The only forum in which such questions may be debated is the Land and Titles Court itself, whether at first instance and on appeal... The consequence of such ouster provisions as ss34, 70 and 71 is that the Land and Titles Court may reach decisions with which the Courts of general jurisdiction may disagree. But that is the price to be paid for the benefits of the regime.

46. In proceedings involving *An application for a declaratory judgment by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints* (Unreported 22 November 2000, per Sapolu CJ) the Court dealt with a similar question to the Court here. In that proceeding, the Corporation applied for a declaratory judgment in respect of the validity of a decision by the LTC at first instance which purported to invalidate a lease of customary land

called “Saala” at Uafato, Fagaloa, which was granted to the applicant by the Minister of Lands pursuant to the provisions of the ACLA.

47. His Honour Sapolu CJ stated that the judgment should also provide guidance as to how the proceedings which are pending before the LTC in respect of leases should be dealt with.

48. His Honour said in that case;

The real question is whether at common law the Supreme Court has jurisdiction to review the decision made by the Land and Titles Court in this case on the grounds of breach of procedural fairness by not adhering to the rules of natural justice and illegality or acting without jurisdiction. In my judgment the Supreme Court has that jurisdiction.(emphasis added)

49. His Honour determined that the Supreme Court has jurisdiction at common law to review the decision of the Land and Titles Court in that case on the grounds of procedural fairness and illegality.

50. In relation to illegality or acting without jurisdiction, His Honour said;

Article 103 of the Constitution clearly provides that the Land and Titles Court shall have such jurisdiction over matai titles and customary land as may be provided by Act. Clearly to go beyond the jurisdiction given by such Act is to exceed not only the mandate given by the Constitution but the jurisdiction given by the Act itself. It is the constitutional role of the Supreme Court to interpret the written law which includes the Constitution and any Act of Parliament. If any person or body exceeds the parameters of the powers given to him by the Constitution or Act of Parliament, the Supreme Court should be able to say so. In this way, the Supreme Court will only be fulfilling its constitutional role of ensuring that a person or body is acting within the powers given to him by law, whether that law be the Constitution or an Act of Parliament.

51. The Chief Justice’s conclusion is further supported by section 31 of the Judicature Ordinance 1961 which states;

31. Jurisdiction of the Supreme Court – The Supreme Court shall possess and exercise all the jurisdiction, power, and authority, which may be necessary to administer the laws of Samoa.

52. The Supreme Court as a superior Court of record is found in Article 65 of the Constitution and section 21 of the Judicature Ordinance 1961 as follows:

Article 65. Constitution of the Supreme Court - (1) There shall be a Supreme Court of Samoa, which shall be a superior Court of record and shall consist of a Chief Justice and such number of other Judges as may be determined by Act.

21. Constitution of the Supreme Court – There is hereby constituted a superior Court of Record for the administration of justice throughout Samoa to be called the Supreme Court of Samoa.

53. Article 4 of the Constitution provides the jurisdiction of the Supreme Court to make all such orders as may be necessary and appropriate to secure to an individual the enjoyment of the rights given under Part II of the Constitution.

4. Remedies for enforcement of rights - (1) Any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred under the provisions of this Part.

(2) The Supreme Court shall have power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of the rights conferred under the provisions of this Part.

Discussion

54. Previous cases for judicial review of LTC decisions have focused on the merits of the decisions made in the LTC. In the vast majority of those cases, both the Supreme Court and Court of

Appeal have endorsed Parliament's intention in relation to LTC decisions not being subject to review, except where there has been a breach of a fundamental right.

55. His Honour Sapolu CJ in 2009 case of *CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS* referred to the Supreme Court's jurisdiction to monitor jurisdictional limits. He said;

The real question is whether at common law the Supreme Court has jurisdiction to review the decision made by the Land and Titles Court in this case on the grounds of a breach of procedural fairness by not adhering to the rules of natural justice and illegality or acting without jurisdiction. In my judgment the Supreme Court has that jurisdiction.

Similarly, illegality or acting without jurisdiction is not strictly a matter of Samoan custom and usage. It is a matter of constitutional and customary law. Article 103 of the Constitution clearly provides that that Land and Titles shall have such jurisdiction over matai titles and customary land as may be provided by Act. Clearly to go beyond the jurisdiction given by such Act is to exceed not only the mandate given by the Constitution but the jurisdiction given by the Act itself. It is the constitutional role of the Supreme Court to interpret the written law which includes the Constitution and any Act of Parliament. If any person or body exceeds the parameters of the power given to him by the Constitution or Act of Parliament, the Supreme Court should be able to say so. In this way the Supreme Court will only be fulfilling its constitutional role of ensuring that a person or body is acting within the powers given to him by law, whether that law be the Constitution or an Act of Parliament.

56. Therefore, although the Court of Appeal has stated that the Supreme Court can only interfere with decisions of the Land and Titles Court if there has been a breach of a fundamental right as contained in the Constitution, with respect, this specific jurisdictional issue in relation to leases over customary land, has not previously been an issue before the Court of Appeal. This case is predominantly concerned with the jurisdiction of the LTC to deal with duly granted leases over customary land.

57. According to Sapolu CJ, *“If any person or body exceeds the parameters of the power given to him by the Constitution or Act of Parliament, the Supreme Court should be able to say so. In this way the Supreme Court will only be fulfilling its constitutional role of ensuring that a person or body is acting within the powers given to him by law, whether that law be the Constitution or an Act of Parliament”*. I fully support this view.

58. The jurisdiction, power and authority of the Supreme Court therefore necessarily includes authority and jurisdiction to determine whether or not a person or body purportedly exercising statutory authority had jurisdiction to exercise such authority. This is part of this Court’s function in ensuring the proper administration of the laws of Samoa.

59. The Supreme Court has the jurisdiction as a superior court of record to determine if the LTC has made a decision outside its jurisdiction. The Supreme Court’s jurisdiction to monitor jurisdictional limits, stems in my respectful view from the Constitution, statute and common law. It necessarily follows that the Supreme Court has jurisdiction to set aside decisions of the LTC for lack of jurisdiction.

Constitutional Breach

60. If I am wrong in relation to the jurisdictional issue of the LTC and the Supreme Court, Part II of the Constitution nevertheless gives to this Court the jurisdiction to set aside the orders of the LTC if there has been a breach of a fundamental right.

61. According to Nelson J in *Esekia v Land and Titles Court [2017] WSSC 145 (9 November 2017)* if the LTC is found to be in constitutional breach, the decision of the LTCA is fatally tainted by that breach if that decision is upheld.

62. A key issue in this case is the fact that the Second Applicant who is the lessee had no right of audience in the LTC proceedings, and therefore was not heard. Those who apply for leases to be granted and those who can object are ‘Samoans’ under the ACLA. A “Samoan” is defined in section 3 of the Samoan Status Act 1963 as a person who is a citizen of Samoa and has any

Samoan blood. The lessee is a corporation. They were not granted an audience in the LTC, nor should they have been.

63. This is further reinforced by the fact that the LTC has exclusive jurisdiction to in all claims and disputes between Samoans relating to customary land. According to the LTA, a “Samoan” has the same meaning given to that term under the Samoan Status Act 1963.
64. Not only did the lessee not have a right of audience but it was also not heard. Its lease was cancelled without being heard by the LTC, both at first instance and on appeal, which in any event could not hear from the Second Applicant, but has made a decision directly affecting the civil rights and obligations of the Second Applicant. The effects of the LTC decisions have been major. In the affidavit of Ramona Gilchrist nee Sua Pale dated 13 February 2017, who is a director and General Manager of lessee, she says at paras 3.3.8 and 3.4 respectively;

3.3.8. The lack of any consideration or reference whatsoever to the interests of our company the Second Applicant as the Lessee and the potential prejudice arising to our interests by any decisions on the validity of the lease already granted to us in 2012, the strength of which we build villas and put in services costing over \$6 million tala on that piece of leased land alone.

3.4 In my respectful view, these are significant and important issues which directly affect our economic and financial interests but also the entire viability of leasing customary land for development projects which has led us to spend and borrow over 30 million tala over the past 10 years and to be now subject to the actions of two Courts who acted without legal authority and without any regard to the interest of all interested parties.

65. The Second Applicant’s civil rights and obligations were determined without a fair and public hearing at all which is guaranteed in Article 9 of the Constitution.

Result

66. The Supreme Court possesses and exercises all the jurisdiction, power, and authority, which may be necessary to administer the laws of Samoa. In this case, the Supreme Court has the jurisdiction to declare these decisions firstly, ultra vires and then to revoke them in order to clearly set out the boundaries and jurisdiction of our most important Court in Samoa, the Land and Titles Court.
67. Secondly the decision of the LTC 2013 and affirmed by the LTCA 2014 was made in breach of the rights of the Second Applicant guaranteed in Article 9 of the Constitution. It has been established that the Supreme Court has jurisdiction to set aside decisions of the LTC which are in breach of a Constitutional right.
68. Accordingly the decisions of the LTC 2013 and LTCA 2014 which declare the lease to be '*soloia ma faaleaogaina*' are hereby revoked as being ultra vires or beyond the powers and jurisdiction of these Courts, and in breach of a fundamental right.
69. The lease granted by the Minister in 2012 remains valid and binding.

Addressing Second and Third Respondents ('ST Respondents') Submissions

70. For the sake of completeness, I will also address the submissions by all Respondents which I have not already addressed.
71. The ST Respondents submit that the Fourth Respondents have a bona fide interest in the land as Sa'o of Aiga Sa Lemalu.
72. If this is a finding of the LTC, I hold no view in relation to this submission. Whether the Fourth Respondents do or do not have a bona fide interest in the land is not a determination within the

jurisdiction of the Supreme Court. The point is they withdrew their objection and filed a fresh objection out of time.

73. It is also submitted that the proper procedure in applying for a lease had not been followed by the Applicants as the Fourth Respondents never consented to the lease.
74. There is nothing in the ACLA that provides all beneficial owners of a land must consent to the lease. The opportunity to object is provided in the Act, and the Fourth Respondents withdrew their objection.
75. It is submitted that issues of substance should be left primarily to the LTC and LTCA for determination unless there has been a breach of fundamental human rights (per *Penaia II* and *Malifa* cases).
76. I agree. However issues of substance are limited by jurisdiction. The Supreme Court will interfere with decisions and findings of the LTC and LTCA if those decisions are outside the jurisdiction of those Courts.
77. The ST Respondents submit that there is a considerable delay by the Applicants in advancing their application for judicial review which is fatal to their motion. They say that some parties and family members have moved on and acted on the decision since it was issued, and these proceedings are a considerable inconvenience.
78. With respect, the authorities on the issue of delay provide principles to guide a Judge in the exercise of this discretionary remedy of judicial review. It remains a matter within the discretion of the Judge and depends on the circumstances of each case. The jurisdictional issue which has arisen in this case must be considered by the Supreme Court, and I do not find that delay in this case is fatal to these proceedings. This is an issue of immense jurisdictional significance for the LTC which deals with matters of considerable importance to every Samoan. Therefore a technical argument of delay cannot take away from my discretion to look

into the issue. I do not agree with the Respondents that the delay on the part of the Applicants is a reflection of the lack of urgency by the Applicants in regards to the present matter. The Second Applicants in particular, having built a multimillion dollar investment in the form of the Resort cannot be said to be complacent. They were facing an unprecedented issue. If anything, the issues faced by the Second Applicants far outweigh the inconvenience to the Respondents.

Addressing Fourth Respondents Submissions

79. I will address the Fourth Respondents submissions which have not been addressed in my earlier discussion.
80. The Fourth Respondents argue that the decisions sought to be reviewed are not administrative law decisions open to judicial review unless there is proof of real and actual violation of constitutional rights.
81. I agree that these Court decisions are not administrative decisions. However where the LTC has no jurisdiction, the Supreme Court will set aside its decisions, whether that lack of jurisdiction falls neatly within real and actual violation of constitutional rights will not matter. A decision clearly made without jurisdiction cannot be sustained or maintained.
82. The Respondents object to the use of the affidavits of Lemalu Fa'alafua and other Applicants who have passed away and say there is no evidence to support the Applicant's claim since Lemalu Fa'alafua has passed and the right of the Fourth Respondent to cross-examine cannot be effected. They also submit that the other Applicants have no standing.
83. With all due respect to the Fourth Respondent's submission, the issue here is about a decision of the LTC, affirmed by the LTCA to revoke and cancel a lease. That these decisions were made is not disputed. This Court need not go into the evidence which was adduced in those Courts. This is a legal issue which the Supreme Court must decide upon. In any event, in

respect of an application for review, the requirement that has been adopted in English law for determining whether a person has standing is that of 'sufficient interest'. (See *Silipa v President of Land and Titles Court*[2017] WSSC 32 (28 April 2017); *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*[1981] 2 All ER 93).

84. The Fourth Respondents also submitted that the discontinuance against MNRE was granted without the Fourth Respondents being present to voice and argue their objection. The Fourth Respondents were given four (4) opportunities to be heard. There was no appearance from Counsel for the Fourth Respondents, or the Fourth Respondents on all four occasions. In any event, there is no dispute that the Minister of MNRE granted a lease to the Second Applicant.
85. The Fourth Respondents submit that issues of mortgages of customary land, investors and unit trust ownership were not revealed or made known to the Fourth Respondents, and that the cultural rights of the Fourth Respondents are being abused and violated by the Applicants. I am unable to understand this submission. Whether it is a matter of the legal advice they received or advice from MNRE, it is not clear. The primary issue is jurisdiction which I have determined.

Final Comments

86. Before I set out a Summary of my Results, there are a few comments to make in relation to these proceedings.
87. The scheme for leases over customary land has long formed part of the law of Samoa. The ACLA is an Act to provide for the leasing and licensing of customary land for certain purposes.
88. Pursuant to the ACLA, the Second Applicant was granted a lease by the Minister in 2012 for the purposes of developing a hotel. It is not in dispute that relying on that lease, the Second Applicant commenced construction of the hotel. It is also not in dispute that the cost for constructing and completing the hotel was ST\$30,000,000.00. That constitutes a significant commercial investment by the hotel investors in Samoa's tourism industry.

89. It is also however blatantly clear that despite the Minister entering into the lease with the Second Applicant and the Second Applicant relying on that lease to invest in a significant commercial operation, that lease was then purportedly cancelled by the LTC in 2013 and that cancellation was affirmed in 2014 by the LTCA. In those proceedings, the Second Applicant was not a party nor represented or heard on its significant interests invested in the lease granted by the Minister and then purportedly cancelled by the LTC.
90. This, as I have said earlier, was a flagrant breach of the Second Applicant's right to a fair trial protected by the Constitution, even if the LTC had the jurisdiction to cancel the lease (which it does not). It also breaches the basic rules of natural justice. The effect of the lease cancellation is to deprive the Second Applicant of its \$30,000,000.00 investment without being heard.
91. In these circumstances, I am respectfully at a loss as to the Attorney General's office misguided position acknowledging that the Second Applicant was not heard and its lease cancelled nevertheless defending that lease cancellation. It was clearly a breach of the Second Applicant's rights protected by the Constitution. More broadly however, the natural effect of such a position is entirely untenable it would seem as a matter of public policy. It robs leases over customary land made under the ACLA of any commercial or other value whatsoever.
92. Where a lessee under a lease over customary land can be deprived of their lease without being heard, without being a party or being represented, that lease to an investor like the Second Applicant or any other lessee is of no value whatsoever as it provides no certainty and security as to tenure over the land. Such a position in my respectful view undermines the whole intent of leases over customary land, the certainty that they are intended to provide to parties and more generally, the benefits that customary landowners can obtain through lease rentals, employment and other benefits that flow from such investments.
93. This decision is written with the greatest respect to the LTC, which in my view, is the most important Court in Samoa as it deals with matters which go to the core of every Samoan, their lands and titles. That it made decisions outside of its jurisdiction and in breach of Article 9 on this occasion, is not a reflection on the LTC which on a daily basis deals with issues of immense

significance to our people. Its decisions are deemed to be judgments in rem and bind all Samoans who are affected by those decisions, whether parties to the proceedings or not. Therefore, the importance of its decisions is immeasurable. Perhaps this decision can assist in affirming and defining the LTC jurisdiction in a most respectful way.

Summary of Results

94. I find that the Land and Titles Court does not have jurisdiction to '*soloia ma faaleaogaina*' (revoke and cancel) a lease granted by the Minister. The Land and Titles Court of Appeal also does not have that jurisdiction. Leases granted over customary land fall within the jurisdiction of the Supreme Court as they operate as leases of public land.
95. The revocation of the lease by the Land and Titles Court and affirmed by the Land and Titles Court of Appeal was also done in breach of the Second Applicant's fundamental right to a fair trial and right to be heard.
96. The Supreme Court has the jurisdiction to declare the decisions of the Land and Titles Court dated 21 June 2013 and the Land and Titles Court of Appeal dated 28 July 2014, ultra vires (beyond the powers and jurisdiction) and in breach of a fundamental right, and thereby revoke them. Accordingly, LTC decisions which declare the lease to be '*soloia ma faaleaogaina*' are hereby revoked and set aside.
97. The lease is therefore valid and binding.
98. Finally, the Applicants being wholly successful in this Motion for Judicial Review, are invited to submit a Memorandum as to Costs within 21 days of the delivery of this decision. The Respondents are invited to file a Memorandum in response within a further 14 days.



TUALA-WARREN J