CP103/22

IN THE SUPREME COURT OF SAMOA

HELD AT MULINUU

IN THE MATTER OF: Article 70(1)(b), Part IX and Article 104 of the *Constitution of the Independent State of Samoa*
Declaratory Judgments Act 1988
Government Proceedings Act 1964

BETWEEN: **LETUFUGA ATTILA MANUTOIPULE ROPATI** in his capacity as the removed President of the Land and Titles Court

Plaintiff

A N D: **THE ATTORNEY GENERAL,** on behalf of the Prime Minister, the **HONOURABLE FIAME NAOMI MATAAFA**

First Defendant

A N D: **JUSTICE LESATELE RAPI VAAI**, in his capacity as the incumbent President of the Land and Titles Court

Second Defendant

A N D: **THE ATTORNEY GENERAL,** on behalf of the **GOVERNMENT OF THE INDEPENDENT STATE OF SAMOA**

Third Defendant

Coram: Honourable Justice Whitten KC

Counsel: Mr S. Ainu'u and Mr M. Lemisio for the Plaintiff
The Attorney General, Ms S. H. Wallwork, and Mr D. Fong for the Defendants

Hearing: 27, 28 May 2024

Judgment: 17 June 2024

JUDGMENT OF THE COURT

Introduction

1. In July 2016, the Plaintiff was appointed President of the Land and Titles Court ("***LTC***") pursuant to what was then s 26A(1) of the *Land and Titles Act* 1981 ("***LTA 1981***").

2. In 2020, the then Government passed a triumvirate of Bills[1] designed, relevantly, to restructure the LTC. In March 2021, a month before the general election that year, two of those enactments - the *Constitutional Amendment Act* 2020 ("***CAA 2020***") and the *Land and Titles Act* 2020 ("***LTA 2020***") - came into force.

3. The CAA 2020, inter alia, restructured the LTC and instituted a new basis and process for the appointment of its President.

4. The LTA 2020 repealed[2] and replaced[3] the LTA 1981. At the heart of the present case is ss 67(6) of the LTA 2020 which provides that an appointment under the repealed Act that is not provided for in the new Act is revoked at the commencement date of the new Act.

5. When it was first assented to, the LTA 2020 did not contain any provisions for the appointment of any judges to the new LTC.

6. In October 2022, and in purported consequence of ss 67(6), the new Prime Minister informed the Plaintiff that his position as President of the LTC had been revoked and he was required to vacate his office. A few days later, the Second Respondent was sworn in as the new President of the new LTC.

7. In this proceeding, the Plaintiff initially claimed that his removal, and the appointment of the Second Defendant (who was over the statutory retirement age of 68 when appointed), were in contravention of the Constitution and therefore unlawful. He also sought an order reinstating him as the President of the LTC. Alternatively, he claimed damages of more than WST$3 million.

8. The Attorney General, on behalf of the First and Third Respondents, has denied the claims on the basis that the Plaintiff's removal as President was authorised by operation of ss 67(6) and was therefore lawful.

9. The Second Respondent is content to abide the decision of this Court.

---

[1] *Constitutional Amendment Act* 2020, *Land and Titles Act* 2020 and the *Judicature Act* 2020 (which did not concern the LTC).
[2] Section 66.
[3] Long title.

10. The LTC legislative reforms of 2020 have given rise to a number of related proceedings instituted by the Plaintiff for interim or interlocutory relief. They were decided by this Court in April 2022[4] and October 2022[5] with the latter decision being reviewed by the Court of Appeal in July 2023.[6] On that occasion, the Court of Appeal identified, but could not then determine, the key legal issues[7] and potential arguments for and against the Plaintiff's claims,[8] and noted that they would have to await determination by this Court in the substantive proceedings.[9]

11. The only evidence adduced for the trial of this, the substantive proceedings, was from the Plaintiff. During the trial, the Attorney General tendered an affidavit of a Deputy Registrar of the LTC on a discrete issue which arose during oral submissions. No other evidence was filed by or on behalf of any of the Defendants. The Attorney General raised objections as to admissibility of parts of the Plaintiff's affidavit evidence. The objections were resolved, largely by consent, without any significant impact on the ultimate issues for determination.[10] The Attorney General did not require the Plaintiff for cross-examination. As such, the trial was conducted almost entirely by way of legal argument.

12. Shortly prior to the commencement of the trial, at the direction of the Court, the parties filed an agreed list of issues for determination.

13. During the trial, the Plaintiff abandoned his challenge to the validity of President Vaai's appointment and his consequential claim to be reinstated as the President of the LTC.

14. The remaining issues therefore concerned principally the lawfulness of the Plaintiff's removal from office and his claim for damages.

15. Those issues bear heavily on the doctrine of the separation of powers and one of its concomitants: judicial independence. As will be seen, the importance and relative complexity of those issues are a reflection of the fact that, certainly in Samoa, (and it

[4] *The President of the Land and Titles Court v Attorney General* [2022] WSSC 8.
[5] *Ropati v Attorney General* [2022] WSSC 76.
[6] *Ropati v Attorney General* [2023] WSCA 2.
[7] [66]
[8] [53] to [59]
[9] [52], [61] to [64].
[10] Most of the objections concerned statements by the Plaintiff that were said to constitute opinions or argument on the legal issues for determination. They were treated as submissions. The Attorney General also objected to the Plaintiff's exhibiting certain letters of advice from her office to the Head of State and the Minister in December 2021 and a letter from the Samoan Law Reform Commission to the Attorney General. That objection was resolved on the basis that I had regard to the contents of the letters but that they would otherwise be treated as confidential and sealed on the court file. The final objection, to paragraph 19 of the Plaintiff's principal affidavit, in relation to his claims for untaken sick and annual leave, on the ground of hearsay, was upheld with leave granted to the Plaintiff to adduce further evidence, if so advised. He did not do so.

would appear, the vast majority of Pacific island nations), the relevant events within Parliament, the legal conundrums which have sprung from them, and their impact on the judicial career of a senior judge, are unprecedented.

Summary of findings

16. For the reasons which follow, I have concluded that:

    (a) the revocation of the Plaintiff's appointment as President of the LTC and his removal from judicial office pursuant to ss 67(6) of the LTA 2020 was inconsistent with the Constitution and offended the principles of judicial independence, and was therefore unlawful; and

    (b) as a result, he is entitled to compensation in the sum of WST$750,000.

Background

17. Like the passage of the legislation from which it has arisen, this dispute has had a checkered history and taken different forms.

18. The following uncontroversial background facts have been distilled from the pleadings, the relevant legislation, the affidavit material,[11] the related decisions of this Court and the Court of Appeal and the parties' agreed facts and written submissions.[12]

History of the LTC

19. Prior to the reforms of 2020, Article 103 of the Constitution established the LTC "with such composition and such jurisdiction in relation to Matai titles and customary land as may be provided by Act". The principal Act at that time was the *Native Land and Titles Ordinance* 1934. As a Court of record, the LTC originally consisted of a President, being the Chief Judge of the High Court (as it was then constituted), and Assessors and Samoan Commissioners, having exclusive jurisdiction over Samoan names, titles, customs and native lands.[13] In 1952, the name of the governing instrument was changed to the Samoan Land and Titles Ordinance. By 1966, Samoan Judges were able to preside over sittings of the Court.[14] The Court was then comprised of the Chief Justice, Assessors and Samoan Judges, and any Supreme Court Judge authorised by the Chief Justice to preside.

[11] Sworn 14 December 2021 in proceeding MISC 381/21; 2 March 2022 in proceeding MISC 41/22; and in this proceeding 27 October 2022 and 8 May 2024.
[12] Dated 24 May 2024.
[13] Native Land and Titles Protection Ordinance 1934, ss 36 and 37.
[14] Samoan Land and Titles Protection Amendment Act 1966, s 2.

20. In March 1981, the LTA 1981 repealed the Samoan Land and Titles Ordinance[15] but declared that: [16]

> *"[t]here shall continue to be a Court of record called the Land and Titles Court, which is the same Court as that existing under the same name prior to the commencement of this Act".*

21. The composition of the Court then became a President – being the Chief Justice, or a Judge of the Supreme Court as appointed under the Constitution – Deputy Presidents, Samoan Judges appointed in accordance with the Act, and Assessors.

22. The Court comprised:

    (a) a court of first instance, the jurisdiction of which could only be exercised by the President, or a Deputy President and at least two Samoan Judges and one Assessor;[17] and

    (b) an appeal Court, consisting of the President and Samoan judges appointed by the President.[18]

23. Decisions of the LTC were amenable to judicial review by the Supreme Court and appeals to the Court of Appeal.

24. The appointment of the President of the LTC became governed by s 26A which provided, relevantly, that the Head of State, acting on the advice of Cabinet, upon the recommendation of the Judicial Service Commission, may appoint as President a person qualified to be appointed a Judge of the Supreme Court under Article 65 of the Constitution or a Samoan Judge qualified under s 28 of the LTA 1981. A Samoan Judge so appointed was required to have at least five years of relevant work experience in a senior position in the administration of justice and hold such qualifications as may be determined by the Judicial Service Commission by Notice.

25. Section 29(2) provided that each Samoan Judge held office until he or she attained the age of 65 years.

26. Otherwise, ss 26D(2) provided that a Samoan Judge appointed as President may be suspended or removed in the same manner as provided for a Judge of the Supreme Court

---

[15] s 95
[16] s 25
[17] s 35
[18] Part 9 with ss 77(3) providing that so far as practicable, the President was to be the Chief Justice or other Judge of the Supreme Court who had not been a member of the Court at the hearing of the petition on appeal.

under what was then Article 68 of the Constitution. Apart from prescribing a retirement age for Judges of the Supreme Court of 68, Article 68(5) provided that a Judge of the Supreme Court:

> … shall not be removed from office, except by the Head of State on an address of the Legislative Assembly carried by not less than two-thirds of the total number of Members of Parliament (including vacancies), praying for his or her removal from office on the ground of stated misbehaviour or of infirmity of body or mind.

2016: Plaintiff's appointment

27. The Plaintiff commenced his professional life in 1992 as a Senior Research Officer for the LTC. In 2001, he was appointed Assistant Registrar for the LTC. In 2002, he took up a position as an Associate at Petaia Law Chambers. In 2004, he was employed as Corporate Manager for the Samoa Ports Authority. From 2008 to 2016, he was employed as a Clerk of the Legislative Assembly.

28. On 12 July 2016, the Plaintiff was appointed President of the LTC.

2019: Attempted removal

29. In December 2017, the Plaintiff was involved in an altercation with a security guard at a Ministry social event. As a result, he pleaded guilty in the District Court to one count of intentionally causing actual bodily harm, for which he was discharged without conviction subject to conditions. The Prosecution appealed that result to the Supreme Court which quashed the discharge order and remitted the case back to the District Court for further consideration.[19] The Attorney General appealed that decision. The Court of Appeal allowed the appeal, entered a conviction and imposed a fine.[20] In doing so, their Honours presciently observed:

> *"[63] The respondent fears that the consequences of a conviction would include termination of his role as President of the LTC, loss of his right to practise as a lawyer and restrictions on future travel and immigration.*
>
> *[64] We accept that a conviction will reinforce the pressure to terminate the respondent's role as President of the LTC. The respondent says that he would step down voluntarily if convicted. Even if he did not, added pressure might well be brought from other directions requiring him to do so. This would undoubtedly be a huge blow. On the other hand, a conviction would merely put a legal label on a course of conduct which is already in the public domain. It might be argued that it is that course of conduct which has affected his standing and fitness to serve as much as the presence or absence of a*

[19] *Police v Ropati* [2018] WSSC 131

[20] *Attorney General v Ropati* [2019] WSCA 2

conviction. The Court should take care not to usurp the function of bodies whose responsibility it is to determine eligibility for employment by routinely providing discharges in cases of this kind.

…
[67] Overall, we are in no doubt that the consequences of a conviction would bear heavily on the respondent. However, the question remains open whether he will continue as President of the LTC regardless of the presence or absence of a formal conviction. That is for himself and others to determine. …."

30. Subsequently, the Plaintiff was suspended from duty by the Judicial Services Commission, which also recommended his removal from office. A motion to terminate his position was addressed before the Legislative Assembly. The motion failed to pass the required two-thirds majority and the Plaintiff was reinstated as President of the LTC.

2020: Legislative reform

31. On 15 December 2020, the *Constitution Amendment Act*[21] and the new *Land and Titles Act*[22] were passed. On 5 January 2021, the Head of State assented to the Acts.

CAA 2020

32. The long title to the CAA described it as an Act to amend the Constitution on matters relating to the Civil and Criminal Courts and the Land and Titles Court, and related purposes. Relevantly, Article 68 was replaced by a new Article 67 entitled "Tenure, suspension and removal of office". Sub-article (6) provides that The Chief Justice shall not be removed from office, except by the Head of State on an address of the Legislative Assembly carried by not less than two-thirds of the total number of Members of Parliament (including vacancies), praying for his or her removal from office on the grounds of stated misbehaviour or infirmity of the body or mind, or as prescribed by Act. However, the previous provisions of sub-article 68(5) for removal of a Supreme Court Judge were not included in the new Article 67. Instead, sub-article 67(7) provided that the conditions for tenure, suspension and removal of a Judge of the Supreme Court from office were to be provided for in Article 79, which is entitled "Judicial Service Commission". However, sub-article 79(4) (the only provision of possible application) merely provides that:

[21] No. 22
[22] No. 24

> The Head of State acting on the advice of the Judicial Service Commission and focusing on standards within the Act to provide for conditions of tenure, suspension and removal of office from:
>
> (a) Judge of the Supreme Court as provided for in Article 67(7); and
>
> (b) the Senior Judge of the Supreme Court as provided for in Article 68(2); and
>
> (c) a Judge of the Subordinate Court.…

33. Whatever that Article was intended to prescribe, it would appear, as the Attorney General alluded to during oral submissions, that at present there are no operative Constitutional provisions for the conditions of tenure, suspension or removal from office of Judges of the Supreme Court.

34. Of greater relevance to the instant case was the insertion in Part IX – Land and Titles - of Articles 104 to 104G. Those Articles substantially reformed and restructured the LTC. As the Attorney General helpfully explained in her written submissions:

> *"6. The Lands and Titles Court was previously a 2 tier lower Court subject to the review of the Supreme Court and was headed by the Chief Justice. It is now a 3 tier Court with increased jurisdiction and completely independent of the Supreme Court. The Lands and Titles Court is now headed by a President as appointed under the Constitution in the same manner as the Chief Justice. It has its own Judicial Service Commission (known as the Komisi o Faamasinoga o Fanua ma Suafa). The President is the Chair of the Komisi. The Chief Justice no longer has any role in the Lands and Titles Court.*
>
> *…*
> *19. By virtue of the passage of the 3 Acts, the Land and Titles Court System was completely restructured. It changed from being a 2 tier system to one of 3 tiers with the establishment of the Land and Titles Court of Appeal and Review. The jurisdiction has been extended to now include Judicial Reviews and final interpretation of provisions of the Constitution[23] (matters which were previously dealt exclusively by the Supreme Court).*
>
> *20. The composition of the LTC has also changed with the removal of the Chief Justice as the Head of the Land and Titles Courts and the exclusion of the Chief Justice from the Komisi responsible for appointments of Judges.*
>
> *21. The Constitutional amendments also prescribed that a Komisi, as established by an Act, will advise the Head of State regarding all matters to do with the appointment, removal and suspension of all Judges of the LTC (except the President).[24] Previously under the LTA 1981, Judges were appointed by the Head of State on the advice of Cabinet upon the recommendation of the Judicial Service Commission.*

[23] Article 104C
[24] Articles 104E(1), (4) and (5)

> *22. These legislative amendments also introduced significant changes to the appointment process and the criteria for the President of the Lands and Titles Court. The provisions for appointing the President are now enshrined in the Constitution. Prior to this, the President was appointed pursuant to section 26(A) of the LTA 1981.*
>
> *23. It is also of relevance to note that the legislative reform created a new hierarchy of Judges in the Lands and Titles Court. The former hierarchy under LTA 1981 was President, Deputy President, Judges and Assessors. The hierarchy is now for a President (appointed under the Constitution) then Deputy President, Vice President and Judges appointed under LTA 2020.*[25]*"*

35. More specifically, Article 104 established three courts within the new LTC: the Land and Titles First Court, the Land and Titles High Court and the Land and Titles Court of Appeal and Review. All appointments within, and the jurisdiction of, the new LTC are now provided by Part IX or an Act of Parliament. Article 104(2) described the new LTC as having:

> *"… special jurisdiction, it governs a legal system different and separate from that of the Civil and Criminal Courts in Part VI; and has special individual jurisdiction over the subject of Samoan customs and usages in relation to matai titles and customary lands."*

36. The jurisdiction and constitution of each of the three Courts in the heirarchy is set out in Articles 104A to C respectively. The LTC is still headed by a President but he or she only sits on the High Court and Court of Appeal and Review. Another key feature of the new LTC is its self-contained or unitary jurisdiction, which means that its decisions are no longer amenable to review by the Supreme Court or appeal to the Court of Appeal.[26]

37. The President's role has also been extended to include that of Chairperson of the newly established Komisi o Auaunaga a le Faamasinoga o Fanua ma Suafa ("***Komisi***"), sitting with a Supreme Court Judge nominated by the Chief Justice and the Chairperson of the Public Service. The Komisi's functions, within Part IX, include the provision of advice by which the Head of State may extend the retirement age of a President of the LTC beyond 68 (for periods of 12 months at a time),[27] or exercise the power to appoint, remove, and to determine the terms and conditions of the appointment of any Deputy President, Vice President, and Judges of the Land and Titles First Court.[28]

[25] Section 61B
[26] Article 104C(8)
[27] Article 104D(1)(c)
[28] Article 104E(4), as double entrenched by s 61A of the LTA 2020.

38. The Constitutional amendments also altered the manner and process by which the President of the LTC is appointed. Article 104D(1) now provides:

> **104D. Appointment, removal, tenure of office**
>
> (1) The Head of State, acting on the advice of the Prime Minister, may appoint a President of the Court under Part IX Land and Titles Court, referred to as the President of the Land and Titles Court:
>
> (a) a Samoan lawyer practicing, has practiced under an Act for Lawyers in Samoa for a period of not less than 10 years; and
>
> (b) who holds a matai title and has rendered matai services to his or her village for a period of not less than 7 years;
>
> (c) he or she holds office until the age of 68 years, provided that, the Head of State may, acting on the advice of the Komisi o le Faamasinoga o Fanua ma Suafa may extend for not more than 12 months or for successive period each of not more than 12 months; and
>
> (d) nothing done by the President in the performance of his or her functions is taken to be invalid by reason only that he or she has reached the retiring age under this Article.

39. While there is an infelicitous disconnect in the drafting between the end of the chapeau to Article 104D(1) and the subparagraphs which follow, it appears tolerably clear that the first two are intended to be qualifications or criteria for appointment as President, namely, that the person has been a practising Samoan lawyer for not less than 10 years, and who holds a matai title and has rendered matai services to his or her village for not less than seven years.

40. The process and bases for removal of the President of the LTC is also now provided for in Part IX, albeit in substantially the same terms as the former Article 68. Article 104D(3) provides that:

> The President shall not be removed from office, except by the Head of State on an address of the Legislative Assembly carried by not less than two-thirds of the total number of Members of Parliament (including vacancies), praying for his or her removal from office on the grounds of stated misbehaviour or of infirmity of body or mind, or as prescribed by an Act.

LTA 2020

41. In its original from,[29] the long title to the LTA 2020 described it simply as "An Act to replace the Land and Titles Act 1981".

[29] No. 24 of 2020 (but noted elsewhere in the Act as 2022).

42. Among the interpretations in s 2, President is defined as the President of the Court appointed under Part IX of the Constitution. Deputy President and Vice President are defined as persons appointed by the Head of State on the advice of the Komisi. There is no reference, either express or by necessary implication, to the position or role of Assessors in the new Act.

43. There are parallels in the early parts of the structure of the old and new Acts. Each dealt with preliminary matters, administration, customary land and matai titles. But that was where the similarities ended.

44. Part 6 of the LTA 1981 was entitled "Land and Titles Court". As noted above, that Part commenced with provisions for the appointment, salaries and allowances, suspension and removal of the President, Judges and Assessors of that Court.[30] The following Divisions provided for matters such as the jurisdiction, sittings and proceedings before the Court, practice and procedure and interim orders. Part 7 concerned preliminary hearings but had earlier been repealed. Part 8 dealt within the decisions and orders of the Court. Part 9 dealt with appeals.

45. In the LTA 2020, Part 5, entitled "Proceedings" simply dealt with the manner in which proceedings could be commenced and progressed in each of the three Courts. Part 6 provided for the making of rules of procedure and regulations. However, unlike Article 104D, in respect of the President, neither the CAA 2020 or the LTA 2020 then contained any provisions for the appointment (including qualifications or criteria for eligibility), suspension or removal of Judges, Deputy Presidents or Vice Presidents of the new LTC,[31] which had been provided for in Part 6 of the repealed LTA 1981.

46. Part 8 is entitled "Miscellaneous". It commences with s 66 which provides that the LTA 1981 is repealed. Next, s 67, which is central to the present case, provides:

> **Savings and transitional provisions:**
>
> (1) All Matai Titles entered onto and deleted by the Registrar under the repealed Act is treated as having been entered onto or deleted from the Register by the Registrar under this Act, at the commencement of this Act.
>
> (2) The provisions of the repealed Act are saved for the purpose of determination of a petition filed before the commencement of this Act, at the commencement of this Act.

[30] Sections 26 to 32.

[31] Salaries and allowances for all judicial officers of the new LTC are provided for by Article 104G of the CAA.

> (3) All records, instruments, nominations, appointments, warrants, decisions, orders and generally all documents and acts of authority originating under the repealed Act, and which are subsisting at the commencement of this Act, shall ensure [sic][32] for the purposes of this Act as fully and effectually as if they had originated under the corresponding provisions of this Act and accordingly shall, where necessary, be deemed to have so originated.
>
> (4) The repeal of the Land and Titles Act 1981 does not affect any claim, title, right or interest created or vested under that Act, nor any instrument or document in support, and every such claim, title, right, interest, instrument or document shall continue in force and have effect as if this Act had not been passed or as if made or done under the corresponding provisions of this Act.
>
> (5) Employees employed under the repealed Act are taken to be employed under this Act, at the commencement of this Act.
>
> (6) An appointment under the repealed Act that is not provided for in this Act is revoked at the commencement of this Act.
>
> (7) The Appellate Division of the Land and Titles Court is the Land and Titles High Court at the commencement of this Act.

47. On 15 March 2021, approximately a month before the general election, both the CAA 2020 and LTA 2020 came into force.

48. It is now apparent that, for a short time at least, the LTC continued its normal operations with the same judges and the Plaintiff continuing as its President. During that time, the legislative lacuna in the omission in the LTA 2020 of provisions for appointment, suspension or removal of all other judges[33] of what was supposed to be the new LTC, as well as the purported effect and operation of ss 67(6), seem to have gone unnoticed.

December 2021

49. Later in 2021, and in accordance with Article 104E(1)(a) of the amended Constitution, the Plaintiff, as President of the LTC, also served as the Chairperson of the Komisi. According to the Plaintiff,[34] by December that year, the LTC was urgently "short" a Deputy President, a Vice President and a Judge for the Court to manage its "increasing workload" and "operate more efficiently and properly in order to administer justice for" the country. As a result, the Komisi selected three suitably qualified candidates and prepared warrants for their appointment for execution by the Head of State.

50. However, on 2 December 2021, the Komisi received a letter from the Minister of Justice and Court Administration ("***the Minister***") directing that no appointments should be made

[32] Counsel agreed that "ensure" was intended to read "inure".
[33] The President now being provided for by Article 104D of the amended Constitution.
[34] Paragraphs 3 to 15 of his first affidavit.

because, at that time, in light of the reference in Article 104E of the Constitution to "as may be provided by an Act", the Minister was unable to find any appointment provisions in the LTA 2020. This "fundamental drafting error and defect in the 2020 Act", as the Minister described it, led her to believe that no appointments could be made to the new LTC, and no current judges could be suspended or removed.

51. On 13 December 2021, the Attorney General provided advice to the Government, in terms, that although Article 104E(4) conferred a general power of appointment on the Head of State to make judicial appointments to the LTC on the advice of the Komisi, the Constitution did not provide for any qualifications or processes for appointments, suspension of removals of Deputy Presidents, Vice Presidents or Judges of the LTC, and that until an Act was passed to "activate" them, the Komisi could not exercise its "powers". As a result, the Head of State refused to sign the warrants of appointment. The Plaintiff then opined that that state of affairs undermined the LTC's ability to carry out its "core functions and duties under the Constitution" and "greatly affect[ed] the independence of the Judiciary".[35] He also formed the view that he could not wait for "any necessary legislation to be passed" to address the lacuna in the Constitution and so he proceeded, purportedly pursuant to Article 104F(3), to schedule the swearing in of the successful appointees, by him, for 17 December 2021.

Proceeding MISC 381/21

52. On 14 December 2021, the Plaintiff commenced proceedings in this Court (MISC 381/21) by Notice of Motion, on a 'pickwick' basis,[36] seeking urgent declaratory orders essentially enforcing the appointment of the three proposed new members of the LTC by requiring the Head of State to execute the proposed warrants of appointment. The Respondent was named as the "*Attorney General sued for an on behalf of the Independent State of Samoa, made in relation to the refusal of the Head of State to execute warrants of appointments for judicial offices*".

53. The grounds for the application included reliance upon Article 104E(4) of the Constitution which was said to provide for the Head of State to appoint a Deputy

[35] [16] to [20] of the Plaintiff's first affidavit.

[36] Or urgent interim basis; a procedure usually provided to prevent imminent mischief and irremediable harm: *Pickwick International Inc. Ltd v Multiple Sounds Distributors Ltd* [1972] 3 All ER 384 as discussed in *FAST Party v Attorney General* [2021] WSSC 25 at [11].

President, Vice President and Judges of the LTC on the advice of the Komisi, which had been properly given.

54. In his affidavit in support, the Plaintiff deposed, inter alia, that:

> *"[19] The effect of the Head of State following the advice of the Attorney General means that the Judicial arm of Government is not able to affectively carry out its core functions and duties established under the Constitution, meaning that the Executive arm will always have the final say in determining the affairs and appointments needed to be made for the Judicial arm of government.*
>
> *[20] That state of affairs greatly affects the independence of the Judiciary and should not be overlooked or treated likely [sic] by the Honourable Courts.*
>
> *[21] This administrative action/position taken by the Honourable Minister has necessitated the making of this Application seeking clarification and possibly a Declaration of the Honourable Supreme Court with respect to the interpretation of Article 104E(4).*
>
> *[22] The act of prohibiting the Komisi from making the appointments is a clear violation of the independence of this Honourable Court to make appointments which is required for the proper and effective administration of its functions and duties under the Land and Titles Act 2020 ('the Act').*
>
> *[23] In the absence of a law that 'may provide' criteria for the appointment of Deputy Present, Vice President and Judges of the Land and Titles Court, we are able to be guided by the criteria already applied the Judicial Service Commission, a time honoured practice.*
>
> *…*
>
> *[28] Time-honoured employment standards and procedures within the Ministry as well as budgetary measures can be put in place to accommodate the new appointments until such time as a new law may provide more specifically for such matters.*
>
> *[29] I cannot afford to await the passing of any law which governs the appointment, removal or suspension of members appointed by the Komisi whilst there are vacancies at the moment which are desperately needed in order to assist the Land and Titles Court's increasing workload.*
>
> *[30] I understand that a Bill specifying the duties and functions of the Komisi has been drafted, but the consultation of the Bill has yet to be undertaken and will most likely not take place for another year or so. Meanwhile, the effective administration of justice remains wanting and is unaccommodated which will no doubt result in the miscarriage of justice due to the delay envisaged.*
>
> *[31] Should a law be passed at that stage, then removals and suspensions can take place, however, the Komisi has made the recommendation decision in accordance with the provisions of the Constitution and the Act and it has acted on this power which should now be exercised in order to accommodate a shortage of members which are required by law to assist with the administration of justice."*

55. By Notice dated 15 February 2022, the Attorney General opposed the application on the following grounds, in summary:

(a) the relief sought by the Plaintiff was not available as the issue raised by him was "not justiciable" because:

(i) the establishment and the model for the Courts is a function of Parliament;

(ii) the laws had not yet been passed by Parliament to enable the Komisi to make judicial appointments; and

(iii) the remedies sought by the Plaintiff "offended against each of the three essential elements of judicial independence, namely, security of tenure, financial security and institutional independence";

(b) further, the Plaintiff did not have standing to bring the proceedings, and the relief he sought was "untenable at law", for a number of reasons including, relevantly:

(i) the Plaintiff's tenure as President of the LTC was revoked upon the commencement of the LTA 2020 pursuant to ss 67(6) thereof;

(ii) the continuation of the Plaintiff's tenure as President of the LTC had not been preserved by any statutory savings or transitional provisions; and

(iii) the Plaintiff had not been appointed as President pursuant to Article 104D nor had he taken the Oath of the President as required by Article 104F of the Constitution.

February 2022: Minister's request to cease all LTC proceedings

56. Also on 15 February 2022, a week before the LTC intended to resume work following the end of year vacation, the Minister sent a letter to the Registrar of the LTC headed:

> *"REQUEST TO CEASE ALL COURT PROCEEDINGS OF THE LANDS AND TITLES COURT DUE TO SERIOUS ISSUES WITH LAND AND TITLES ACT 2020."*

57. In her letter, the Honourable Minister:

(a) outlined her concerns about a number of different assented versions of the CAA 2020 and LTA 2020;

(b) noted that a Parliamentary Special Committee had been established to consider the implications of the statutory uncertainty;

(c) advised that:

> *"While we await the Committee's report and findings, it has been brought to my attention that the appointment of the President, Vice Presidents and Judges of the LTC who were all appointed under the Land and Titles Act 1981 (Repealed Act) were all revoked on 15 March 2021 when the LTA 2020 was enforced (see section 67(6) of the LTA 2020)."*

(d) and requested that all hearings of the LTC scheduled to commence on 21 February 2022 be put 'on hold' until Cabinet considered these matters and provided clear directions.

58. On 18 February 2022, the Plaintiff rejected the Minister's request. He opined, inter alia, that:

(a) Cabinet was encroaching on the separation of powers and the independence of the Judiciary guaranteed under the Constitution; and

(b) the Minister's request was "asking for a direct breach of the law".

59. Notwithstanding, the Plaintiff noted that as the LTC had been left without support staff, cases scheduled for hearing in February and March 2022 had to be adjourned to await the outcome of the Parliamentary enquiry.

60. On 22 February 2022, the Minister replied that she had been advised by the Attorney General that the issues concerning the legislative process might impact the legitimacy of the three Bills which purported to provide the new framework for the LTC. She denied, however, giving any direction in relation to the operation of the LTC and stated that there was no intention on the part of the Executive to encroach on the work of the Judiciary.

61. On 24 February 2022, the Plaintiff confirmed to the Minister his rationale for adjourning the LTC cases as being due to not having any administrative support. However, he added that with the "clarification and assurance of no intervention from the Minister or the Executive", the LTC could go ahead with hearings scheduled for March 2022.

62. Despite that, on 28 February 2022, the Minister replied, inter alia:

> *"... for the avoidance of any doubt, and to be absolutely clear (lest there be any possibility of misunderstanding), I will continue to give effect to your previous advice of 18 February 2022 that all cases scheduled for February and March 2022 before the Land and Titles Court will be adjourned, and I will ensure that the acting CEO and the Ministry staff act accordingly."*

Proceeding MISC 41/22

63. As a result, on 2 March 2022, the Plaintiff commenced further proceedings in this Court (MISC 41/22) by Notice of Motion, again on a pickwick basis, against the Attorney General on behalf of the Minister. There, the Plaintiff complained that 'his Court' could not carry out its business because the Executive had prohibited Ministry staff from providing administrative support which constituted a violation of the doctrine of the separation of powers. He sought declarations that the Minister's prohibition on administrative assistance being provided to the LTC was unlawful, and an order prohibiting the Minister from issuing any further such directives.[37]

64. The Plaintiff's stated grounds for that second application included, relevantly:

> *"A. The Constitution under Part IX provides for the establishment of the Land and Titles Court and its functions which are to be carried out as a separate arm of the Judiciary in Samoa;*
>
> *B. The appointment of the existing President and the Honourable Judges of the Land and Titles Court are validly saved by virtue of Article 111(6) of the Constitution;*
>
> *…*
>
> *E. There is no legal nor reasonable justification for the administrative action taken by the Respondent in ceasing the work of the Land and Titles Court;*
>
> *F. Any legal review of any existing legislation may always be remedied by implementing a retroactive decision to validate any action that may be undertaken by the current officers of the Court;*
>
> *G. There are no serious uncertainties or lacunas in the existing law governing the operations of the Land and Titles Court which would require a delay in its operations;"*

65. In his supporting affidavit, the Plaintiff deposed that he was the President of the LTC[38] and averred, relevantly:

> *"[20] The notion of existing law needed to be ascertained and remedied need not require the delay in the carrying out of the Land and Titles Court matters, any legal defect can always be remedied by retroactive and other remedial forms of legislation.*
>
> *[21] The Land and Titles Court has been in operation despite the lack of subsidiary legislation to assist it in guiding it to carry out its duties which it has been carrying since year 1980.*

[37] The application for a mandatory order against the Minister was withdrawn during the hearing as it was expressly precluded by ss 12(1)(a) of the *Government Proceedings Act* 1974.

[38] [1]

[22] Any purported subsidiary legislation will only follow the current practices which this Honourable Court has been applying for the last 40 years or so and will continue to do so.

[23] The notion that the positions of myself and other Honourable member Judges of the Land and Titles Court have been revoked is ludicrous given that once the Constitutional Amendment Act 2020 (CAA) was passed, our positions were saved by Article 111(6) of the Constitution.

[24] There was also never any intention for our offices to be revoked, had there been that intention, then certain notices as required under the principles of natural justice would have been issued to us prior to the passage of the CAA and other laws which resulted in the reform of the Land and Titles Court.

[25] We are legally and lawfully appointed because we were at the time of the passing of the CAA then the persons lawfully performing the functions of those respective offices, I as the President and the other current members as Judges of this Honourable Court.

…

[27] … if there was any remedial work required to carry out on the existing legislation, this could always be done later in the form of amending legislation with retrospective effect."

April 2022 decision

66. On 14 March 2022, and because it concerned Constitutional issues, the application was heard by a three member Bench comprising, Chief Justice Perese, Justice Nelson and Justice Tuatagaloa.[39]

67. Counsel for the Plaintiff (then Ms L Vaa-Tamati) relied upon submissions which echoed the grounds for the application and the Plaintiff's affidavit evidence.

68. In opposition to that application, the Attorney General submitted that the Minister:

    (a) had acted:

        (i) within the scope of her Constitutional powers, duties and authority contained in Article 35;

        (ii) pursuant to her obligations under s 7 of the *Ministerial and Departmental Act* 2003;

[39] While the title to the decision in *The President of the Land and Titles Court v Attorney General* [2022] WSSC 8 (14 April 2022) names the proceeding as MISC 381/21, it is evident from the content of the decision that it pertained to MISC 41/22. On 14 May 2024, the Registrar of the Court confirmed the typographical error.

(iii) upon advice that the Plaintiff and the other Judges of the LTC had no jurisdiction to act as Judges because their appointments had been revoked when the LTA 2020 came into force; and

(iv) to protect the administrative functions, responsibilities, and liabilities of the Ministry;

(b) did not interfere with the functions of the LTC or its administrative staff, therefore there was no violation of the doctrine of separation of powers; and

(c) was concerned that, by implication, decisions of the Plaintiff and the other LTC Judges, from the time the defects in their appointments were made known, may be considered void and unlawful which could expose the Government to civil liability as well as the Plaintiff and the other Judges personally if they are not protected by judicial immunity.

69. The Attorney General also noted that "the issue with the appointment of the Judges for the LTC [was] also problematic" and that the lacuna in the LTA 2020, by which all appointments under the LTA 1981 had been revoked without provision in the new Act for the appointment of new judges, was "unsatisfactory and need[ed] to be remedied" by Parliament.

70. On 14 April 2022, their Honours delivered judgment: *The President of the Land and Titles Court v Attorney General* [2022] WSSC 8 ("**April 2022 decision**").

71. After providing a brief overview of the relevant legislative background, the Court considered the terms of the LTA 2020. There, it was observed that neither the LTA 2020 nor the CAA 2020 contained any definition for the office of "Judge". However, their Honours further opined that:

> *"[41] … It is not necessary for the purposes of this dispute to determine the meaning of 'Judge' under the LTA 2020. All we note is that the term is not specifically defined in either the LTA 2020 or in the CAA 2020. What we need to consider is whether the lack of a specific provision for the appointment of 'Judges' has any impact on the meaning of s.67(6) LTA 2020?*
>
> *[42] The legislative history suggests that perhaps by as early as 1966, when Samoan Judges had the power to sit on cases; but most certainly by 1981, Samoan Judges could properly be regarded as Judicial Officers and under the Constitution and the legal doctrine of the separation of powers, are protected by the principles of judicial independence. They were appointed in accordance with a transparent process and served pursuant to the terms of a Warrant issued by the Head of State."*

72. Their Honours then identified the issues for determination as being whether:[40]

(a) a failure on the part of the Executive to provide administrative and support services to the LTC was an unlawful breach of the principle of judicial independence; and

(b) if it was, did ss 67(6) of the LTA 2020 purportedly revoke the appointments of the Plaintiff and other Judges made under the LTA 1981.

73. In answer to the first question, the Court considered the principles of judicial independence as being "a matter of considerable public interest".[41] They identified the essential conditions for that independence as security of tenure, financial security and institutional independence.[42] Of particular note to the instant case was the Court's reference to the decision of Glazebrook J in *Claydon v Attorney-General*,[43] in which Her Honour described tenure in judicial office as one of the means of ensuring judicial independence, and that:

> *"… Tenure provides corresponding rights not to be removed from office without good cause and a right either to be offered a similar or better position if there is restructuring or a right to continue to receive the benefits of office if there is no such offer (and some would suggest even if a similar or better position is declined)."*

74. The Court also cited the work of Professor Phillip A Joseph on Constitutional and Administrative Law, [44] and his discussion on institutional independence by reference to the *Beijing Statement of Principles of Independence of the Judiciary* (referred to further below).

75. After accepting the fact of the Plaintiff's complaints, the Court concluded that the Executive had failed to provide administrative staff for the operation of the LTC, which amounted to a breach of the Plaintiff's judicial institutional independence.[45]

76. On the second issue, the Plaintiff relied on the doctrine of de facto officer and Article 111(6) of the Constitution, which provides:

> Where in this Constitution reference is made to any officer by the term designating his or her office, that reference shall, unless the context otherwise

[40] [43]
[41] [55]
[42] [50]
[43] [2004] NZAR (CA) 16, at 45 [108].
[44] Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed) Thomson Reuters, Wellington, 2021 at 21.3.5.
[45] [63]

requires, be construed as a reference to the officer for the time being lawfully performing the functions of that office.

77. Their Honours did not consider it necessary to consider either Article 111(6) or the doctrine of de facto officer. Rather, they considered that the issue of whether the President and the Judges continued to have jurisdiction were matters that could be resolved by ordinary principles of statutory interpretation.[46]

78. On the proper interpretation of ss 67(6), the Court considered the rules of statutory interpretation prescribed by ss 7 and 25 of the *Acts Interpretation Act* 2015,[47] the common law principles guiding the interpretation of savings and transitional provisions,[48] and concluded, in summary, that:[49]

(a) in the absence of express provisions dealing with the appointment of Judges to determine the LTC matters pending before it, and therefore by necessary implication, Parliament must reasonably be understood to have intended for the President and Judges/Assessors, appointed under the LTA 1981, to continue to have jurisdiction over petitions which were filed before the LTA 2020 came into force, and to deal with claims, titles, rights, interests created or vested under the LTA 1981;

(b) the judicial appointments made under the LTA 1981 continued to have jurisdiction only insofar as expressly saved and provided for under ss 67(2) of the LTA 2020, with respect to petitions filed before the commencement of the LTA 2020; and pursuant to ss 67(4), with respect to a claim, title, right, interest, instrument or document created or vested under the LTA 1981; and

(c) the [Plaintiff as President] and Judges who were appointed under the LTA 1981 did not have the authority to exercise jurisdiction with respect to the other provisions of the LTA 1981, or under any of the provisions of the LTA 2020;

(d) it would be a matter for Parliament to "consider how to take these matters forward";

(e) the Minister was commended for acting in good faith to protect the integrity of the new judicial system; and

[46] [22]
[47] [69] to [70]
[48] [71] to [80]
[49] [77] to [80]

(f) the Plaintiff was commended for his strong defence of the principles of judicial independence.

79. On that basis, the Court declared that the Plaintiff was entitled to relief from the Executive by the Ministry's immediate resumption of the provision of support services to enable the Plaintiff and Judges of the LTC to carry out their normal business in accordance with the abovementioned transitional provisions of the LTA 2020.

80. Neither party appealed that decision.

MISC 381/21 discontinued

81. Later that month, his then Counsel advised the Attorney General that the Plaintiff intended to discontinue proceeding MISC 381/21. She also requested the Attorney General to "expedite the necessary amending legislation" to enable the LTC to "fulfil its inherent expectations as a Court" and to deal with "urgent matters now restricted by" the Supreme Court's April 2022 decision.

82. In consenting to the discontinuance, the Attorney General stated:[50]

> *"… I believe this is a sensible approach as we work to find a solution to remedy the many problems created by the repeal of the Lands and Titles Act 1981 and the amendments to the Constitution.*

83. On 5 May 2022, a Notice of Discontinuance in respect of proceeding MISC 381/21 was filed by consent. The notice stated that the discontinuance was "*on the ground that the parties have settled this matter and reached mutual agreement*". In her submissions in this proceeding before me, the Attorney General denied any agreement in relation to the substantive issues which were the subject of proceeding MISC 41/22 or relating to judicial appointments. She described the Plaintiffs' Motion in proceeding 381/21 as "ill-conceived from the outset as it was an attempt to seek Declaratory Orders against the Head of State" and that the decision to discontinue it was a "sensible one".

August 2022: investigation of issues with the text of the CAA 2020 and LTA 2020

84. As noted above, the CCA 2020 and LTA 2020, as originally passed, did not contain any provisions for the appointment of Judges to the new LTC. Issues arose as to the "authenticity of some versions" of those Acts[51] and potential differences between the

[50] Exhibit E to the Plaintiff's third affidavit.

[51] *Ropati v Attorney General* [2023] WSCA 2 at [22].

version passed by Parliament compared to that assented to by the Head of State. A Special Parliamentary Committee of Enquiry was established to investigate the matter.

October 2022: re-assenting the CAA and LTA 2020

85. After the version issues of the two Acts had apparently been resolved, Parliament in turn resolved to "de-assent" and "re-assent" them. Their commencement dates of 15 March 2021 remained. So too did the lacuna in the LTA 2020.

The Plaintiff's 'removal'

86. Meanwhile, between May and October 2022, that is, following the April 2022 decision, the Plaintiff proceeded to hear 30 applications for leave to appeal and 41 appeals.[52]

87. Then, on 20 October 2022, in a letter to the Plaintiff entitled "Annulment and cessation of appointment as President of Lands and Titles Court", the Honourable Prime Minister wrote:

> *"1. I acknowledge the services that you had rendered as the President of the Lands and Titles Court.*
>
> *2. Undoubtedly, while carrying this post of President, you had encountered numerous challenges and I thank you for all the good work that was carried out for the betterment of Samoa.*
>
> *3. But I respectfully write to you that pursuant to Section 67(6) of the Lands and Titles Act 2020 and the repealing of the Lands and Titles Act 1981, you are hereby notified that your appointment as President of the Lands and Titles Court being ceased and annulled.*[53]
>
> *4. This notice is made following a recommendation by the Special Committee that investigated the different versions of the Constitutional Amendment Act 2020 and the Lands and Titles Act 2020 plus the Legislative Approval of a motion that I moved on the 23 August 2022:*
>
> > *(a) For the setting aside of Standing Order 113(5)(a) where the timeframe for the Head of State's approval of an Act can be reissued that approval outside of the said timeframe.*
> >
> > *(b) Two copies of the Act as passed by Parliament on the 15 December 2020 be given to the Clerk of the House.*
>
> *5. The version of the Act that was approved by the Head of States, at the conclusion of Parliament's sitting of 23 August 2022, Section 76(6)* [sic][54] *remains. This section states that all appointments made under the repealed*

[52] Affidavit of Leugamata Faletolu Lofipo, Deputy Registrar of the LTC, sworn 28 May 2024, at [4] and [5].

[53] This translation was provided by the Plaintiff's counsel. During submissions, the Attorney General contended that the Samoan phrase used meant "revoked by law". Both Counsel accepted that the Prime Minister intended to convey, relevantly, that the Plaintiff's tenure had come to an end.

[54] Cleary intended to be ss 67(6).

Lands and Titles Act 1981 are ceased to exist on the date the new Lands and Titles Act 2020 came into force.

6. For your information, the appointment by the Head of States of the President of the Lands and Titles Court is now govern [sic] *under Article 104D of the Constitution. This appointment will be made in the near future.*

7. Therefore, you are respectfully notified to vacate the President's Office before Tuesday 1 November 2022.

8. May God bless you in your future endeavors."

88. On 21 October 2022, the Plaintiff responded, inter alia, by reference to paragraph 74 of the April 2022 decision, in which the Court opined:

> *"It is difficult to comprehend either of these possibilities - Parliament contemplating a wholesale statutory and summary removal without due process of all LTC Judges etc; or attribute to Parliament the intention of an enacting legislations which would leave the LTC without Judges at all."*

He then asked the Prime Minister to instruct the Attorney General to seek further clarification from the Court on the status of ss 67(6) as per its April 2022 decision.

89. At a meeting on 24 October 2022, the other Judges of the LTC confirmed to the Plaintiff that they had not received any similar notices from the Prime Minister. They continued to be paid and have had access to the Court building, their offices, secretariat services and the other benefits of office.

90. On 28 October 2022, the Prime Minister replied to the Plaintiff's letter in the following terms:

> *"1. I acknowledge receipt of your letter dated 21 October 2022 pertaining to the above matter.*
>
> *2. I understand your point, but as I said in my letter of 20 October 2022, your appointment as the President of the Lands and Titles Court is no longer valid under the Section 67(6) of the Lands and Titles Act 2020. This decision was not made because of any other reason but because of the reason I mentioned above and also in accordance with the law.*
>
> *3. For your information, Lesatele Rapi Vaai has been appointment as the new President of the Lands and Titles Court in accordance with Article 104D(1) of the Constitution, and the Government is planning the swearing in ceremony next week.*
>
> *4. This letter serves as a notice to the Minister of Justice and Court Administration that you are to vacate the Office of the President by 1 November 2022.*
>
> *5. I apologise for this but I hope that you will understand and accept this decision.*

6. God Bless you in your future endavours."

This proceeding commences

91. On 29 October 2022, the Plaintiff commenced the present proceedings by Notice of Motion seeking judicial review of the Prime Minister's 'decision' to remove him as President of the LTC.

92. The original grounds for the Plaintiff's challenge may be summarised, relevantly, as:

    (a) ss 67(6) does not empower the Prime Minister to remove the President of the LTC;

    (b) in its April 2022 decision, this Court determined that ss 67(6);

        (i) is 'vague'; and

        (ii) produces an intention that cannot be attributable to Parliament, including the summary removal without process of LTC judges which the Prime Minister has done by her decision to remove the President of the LTC under ss 67(6);

    (c) the Prime Minister has misconstrued the application of ss 67(6); and

    (d) the Prime Minister's decision is ultra vires as any decision to terminate the appointment of the President is the responsibility of the Head of State acting on the advice of two thirds of Parliament.

93. The Plaintiff then sought a declaration that the Prime Minister's decision was unlawful, illegal and unconstitutional; an order quashing the decision; and a declaration that he remained the President of the new LTC unless and until he is removed from office in accordance with Article 104D of the Constitution.

94. On the same day, the Plaintiff also filed an ex parte Notice of Motion seeking urgent interim declaratory orders,[55] to effect that:

    (a) he remains the President of the new LTC pending determination by this Court of the substantive claim for judicial review regarding the interpretation of ss 67(6) of the LTA 2020 and the law relating to the appointment of the President of the LTC; and

    (b) he continue to receive his salary, benefits and allowances as President of the LTC until the Court determines otherwise.

[55] Pursuant to the *Declaratory Judgments Act* 1988.

October 2022 decision

95. Chief Justice Perese directed that the Plaintiff's ex parte application be heard on 31 October 2022 and for the Attorney General to be served on a pickwick basis. After hearing argument that afternoon, his Honour delivered his ruling: *Ropati v Attorney General* [2022] WSSC 76 ("**October 2022 decision**").

96. His Honour was satisfied as to the existence of serious issues to be tried, namely:[56]

    (a) whether s 67 of the LTA 2020 means the Plaintiff was summarily dismissed as the President of the LTC, without cause, when the Act came into force; and

    (b) if he was not, whether he could be subsequently dismissed whilst carrying out his duties under the transitional provisions of the Act.

97. As to the balance of convenience, His Honour noted that normally, where Government is involved, the conventional wisdom is that damages is an adequate remedy. However, his Honour (initially) considered it difficult to see how any award of damages could ever compensate for the harm which would be caused to the independence of a person such as the Plaintiff holding the office of President of the LTC.[57] Against that, the Attorney General submitted that it was imperative that the new President (the Second Defendant), whose warrant was to be signed by the Acting Head of State the next day, be allowed to begin leading the new judicial system brought into existence by the CAA 2020 and LTA 2020.[58] She also submitted that membership of the Judicial Services Commission was complete, and that body would be able to appoint new Judges to sit in the new jurisdiction, once the appointment criteria was added to the LTA 2020, which was hoped to be amended in the December sitting of Parliament.

98. His Honour's reasoning may then be summarised as follows:[59]

    (a) the principle of judicial independence with respect to judicial tenure is of fundamental importance;

    (b) whether the Government has acted in breach of that principle could, in this case, be adequately addressed by an award of damages and a declaration;

[56] *Ropati v Attorney General* [2022] WSSC 76 at [4].
[57] [8]
[58] [9]
[59] [11] to [16]

(c) even if the Plaintiff had been improperly dismissed, he would not automatically be entitled to continue as President of the new LTC, a role which is now specifically provided for in the Constitution;

(d) the Plaintiff was not chosen to lead the new LTC, and the Court should be slow to interfere with judgment calls made by those empowered by the Constitution to make them;

(e) the administration of justice required that proper weight be given to the interests of those affected by the uncertainties to the new LTC caused by continued delay in the appointment of Judges under the LTA 2020, and a President under the Constitution;

(f) for those reasons, the balance of convenience did not favour the granting of interim orders; and

(g) an interim declaration was not reasonably necessary to preserve the position, pending further Order of the Court.

99. Accordingly, the Plaintiff's application was dismissed.

100. The Plaintiff appealed that decision.

101. On 2 November 2022, the Second Defendant was sworn in as the President of the new LTA.

December 2022: amendments to the LTA

102. On 21 December 2022, the *Land and Titles Amendment Act* 2022 was assented to by the Head of State. The amendments included a definition in s 2 of "judge" as meaning a Judge of the LTC appointed under Part 5A.

103. The insertion of the new Part 5A was designed to fill the lacuna in the original version of the Act. Sections 61A to 61H thereof provide for the appointment of Deputy Presidents, Vice President and Judges, their respective and requisite qualifications for appointment, immunity, tenure of office, suspension and removal.[60] There was still no mention of Assessors. Further, and notably:

(a) the qualifications for a Deputy President now also included no less than 10 years experience as a practising lawyer in Samoa;[61]

[60] Division 2
[61] ss 61C(a)

(b) Deputy Presidents appointed under the old Act were expressly "taken to be appointed" as Vice Presidents under the new Act;[62]

(c) a person can be appointed a Vice President if, inter alia, they had been a judge of the LTC for at least three years, including of the old LTC, and met the qualifications for appointment as a judge under s 61E;[63]

(d) the minimum requirements for appointment as a judge of the new LTC First Court now include a certificate in the field of Law or any other relevant training as determined by the Komisi;[64]

(e) a Samoan judge under the repealed Act is also "taken to be appointed" as a Judge of the LTC First Court;[65] and

(a) a Judge appointed under Division 2 may only be removed by the Head of State, acting on the advice of the Komisi, on the grounds of stated misbehaviour which may include a criminal conviction; or infirmity of body or mind, rendering the judge incapable of discharging the functions of his or her office.[66]

104. It will be recalled that new Article 104D(3), concerning removal of a President of the new LTC, contained the additional final phrase: "or as prescribed by an Act". Section 61I of the amended LTA 2020 expanded the grounds for removal of a President for stated misbehaviour to include a criminal conviction; behaviour which brings, or is likely to bring, the office of the President or the Court into disrepute; or behaviour which may affect the confidence of the public in the LTC.

105. Section 61J provided for salaries and allowances of all judicial officers of the LTC with the added protection in ss (3) that they may not be diminished during office, unless as part of a general reduction of salaries applied proportionately to all persons whose salaries are determined "by Act".

106. Section 7 of the Amendment Act inserted a new ss 67(8) which preserved the entitlement of Deputy Presidents and Judges who transitioned from the old LTC to their new designations in the new Court, pursuant to ss 61D(3) and 61E(2) respectively, to continue to be paid the same salaries and other benefits received before the commencement of the

[62] ss 61D(3)
[63] ss 61D(1) and (2)
[64] ss 61E(e)
[65] ss 61E(2)
[66] s 61H

new Act until the Head of State fixes salaries, allowances and other benefits pursuant to s 61J.

107. Section 8, headed "Savings and transitional", provided that any decision or act done or purported to be done for the purpose of the principal Act, between 15 March 2021 and 21 December 2022 (the date of assent of the Amendment Act), is validated as if it was made under the Amendment Act.

108. The revision notes to the consolidated and corrected versions of both the amended Constitution and the LTA 2020 confirmed that, notwithstanding their de-assent, correction and re-assent, and in the case of the LTA 2020, its amendment in December 2022, their commencement dates, relevantly, remained 15 March 2021.

109. None of the 'corrections' or amendments to the LTA 2020 altered the terms of ss 67(6). Nor did they introduce any provisions for or concerning the appointment of the President of the LTC.

July 2023 appeal

110. On 11 July 2023, the Plaintiff's appeal against the October 2022 decision was heard.

111. A week later, judgment was delivered: *Ropati v Attorney General* [2023] WSCA 2 ("**July 2023 decision**"). The Court of Appeal[67] described the Plaintiff's appeal as touching on "extremely difficult and serious issues" as to the LTC,[68] and on the "tenure of a senior judge and thus the independence of the judiciary.[69] Their Honours also described the issues as "difficult" due to "a lack of clarity in the language of the CCA 2020 and LTA 2020", as well as "procedural complexities" as to whether the April 2022 decision of the Supreme Court precludes the Plaintiff's current claim (i.e. whether the doctrine of *res judicata* or issue estoppel applies).

112. As the appeal was against an interlocutory judgment, the Court of Appeal was unable to determine the substantive issues in the litigation. However, their Honours proposed to provide "something of a road map for their ultimate resolution and also deal with what should happen between now and that ultimate resolution".[70]

[67] Harrison, Asher and Young JJA.
[68] [1]
[69] [3]
[70] [4]

113. The Court considered the legislative and factual background, the allied proceedings and previous decisions of the Supreme Court, and more recent events in the litigation. In particular, their Honours noted that:[71]

(a) since 1 November 2022, the Plaintiff (Appellant) had not been permitted to carry out judicial functions, including those contemplated by ss 66(2) and (4) of the LTA 2020 and had not received any salary, allowances or benefits;

(b) a new President of the LTC was sworn in on 2 November 2022; and

(c) in December 2022, the LTA 2020 was amended to insert:

(i) a definition of 'judge";

(ii) ss 61D(1) and 61E(1) as to the qualifications of those to be appointed as Vice Presidents and as judges of the Land and Titles First Court; and

(iii) ss 61E(4) which provided that Samoan judges appointed under the LTA 1981 continue in office under the LTA 2020.

114. After determining that the Court had jurisdiction to hear appeals from interlocutory judgments of the Supreme Court,[72] their Honours turned to consider issues of res judicata; whether the Plaintiff had a serious arguable case; and what, if any, interim relief was appropriate in the circumstances.

115. The Court described the "res judicata argument", on its face, as "substantial", because, in summary:[73]

(a) in its April 2022 decision, the Supreme Court expressly concluded that the Plaintiff, along with other Judges appointed under the LTA 1981, had jurisdiction under ss 66(2) and (4) but no other jurisdiction under the LTA 2020;

(b) the tenor of that judgment strongly suggested that it should be seen as a final, and not an interlocutory judgment;

(c) there was no appeal from that decision; and

[71] [36], [37]
[72] [40] to [48]
[73] [49] to [52]

(d) steps had subsequently been taken on the basis of the law as explained in that judgment, including amending the LTA 2020 and the appointment of the Second Defendant as new President of the LTC under Part IX of the Constitution.

116. However, the Court also noted that:

(a) the proceedings that resulted in the April 2022 decision involved something of a crisis in relation to the work of the LTC which therefore required a "here and now" solution;

(b) the immediate focus of that litigation was on the provision of administrative services;

(c) in those circumstances, there may be scope for argument as to whether the Supreme Court is to be taken to have rejected the Plaintiff's claim to be President of the new LTC;

(d) similarly, there may be scope for argument as to the significance of the Plaintiff not appealing that decision;

(e) on the other hand, there may be scope for the Plaintiff to resist the application of res judicata to his claim; and

(f) conversely, he could seek special leave to appeal out of time against the April 2022 decision, although that would involve consideration of the steps that have been taken in reliance on that judgment.

117. Ultimately, in light of the limited argument available on that aspect of the case, their Honours were not in a position to determine conclusively, one way or the other, whether the Plaintiff's substantive claim to be President of the new LTC was precluded by res judicata. That, they opined, would have to be determined in the substantive proceedings in the Supreme Court.

118. As to whether the Plaintiff had a serious arguable case, the Court of Appeal held, that on its proper interpretation, legislation which removed the Plaintiff from office would not be unconstitutional. However, that still left for determination whether the combined effect of the CAA and LTA 2020 is that the Plaintiff lost his position as President of the LTC.[74]

[74] [55]

119. Their Honours went on to observe that the roles of President and Judges of the new LTC "correspond broadly" to the roles of President and Samoan judge of the old LTC. In contradistinction, however, the role of Assessor within the old LTC was not carried through to the new LTC.[75]

120. Against that background, their Honours considered that it was possible to construe s 67 so that the Plaintiff became President of the new LTC. They then outlined a non-exhaustive list of interpretative arguments for and against that proposition, namely:

> *"57. … (a) The word 'appointments' in s 67(3)[76] includes appointment to judicial office. This would mean that s 67(3) would read as if provided:*
>
> > *All … appointments [including appointments to judicial office] … originating under [the LTA 1981, and which are subsisting at the commencement of this Act, shall ensure for the purposes of this Act as fully and effectually as if they had originated under the corresponding provisions of this Act and accordingly shall, where necessary, be deemed to have so originated.*
>
> *(b) A similar argument in relation to s 67(4) and the word "title, right".*
>
> *(c) Because the roles of President and Samoan judges of the old Land and Titles Court correspond broadly to those of President and judges of the new Land and Titles Court, they were "provided for" in the LTA 2020 with the result that s 67(6) was not engaged in relation to them. On this approach, the main effect of s 67(6) would be in respect of assessors as no such role is provided for in the LTA 2020.*
>
> *(d) The failure to provide for appointment of judges to the new Land and Titles Court might suggest an assumption that the existing Samoan judges would transition to be judges of that Court. If they were not to so transition, there would be an immediate issue with the operation of the new Court once the CAA and LTA 2020 came into effect. This is because, it would be arguable there were no judges to do the work of the Court. This was an issue that was dealt with in the April 2022 judgment.*
>
> *(e) Similar considerations would apply if the President of the old Court did not become President of the new Court, albeit that unlike the position of the judges (in respect of whom there was no appointment mechanism in the CAA and LTA 2020), it would have been possible to appoint a new (or reappoint the old) President under the CAA 2020 if that were necessary. However, it would be arguable that until an appointment, there would be no President.*
>
> *(f) The CCA and LTA 2020 recognise continuities between the old Land and Titles Court and two of the three component courts of the new Land and Titles Court.*
>
> *(g) In the aftermath of the coming into effect of the CAA 2020 and LTA 2020, it does not appear to have occurred to anyone to doubt that the President and*

[75] [56]

[76] It would appear the reference in the judgment to "66(3)" was a typographical error.

Samoan judges of the old Land and Titles Court had transitioned to corresponding roles in the new Land and Titles Court.

(h) Given the importance of judicial independence and its reliance on secure judicial tenure – considerations that were reflected in s 26D of the LTA 1981 – it would be surprising if the Parliamentary purpose underpinning the CAA and the LTA 2020 was to deprive the President of the old Land and Titles Court of judicial office.

58. There are countervailing arguments. The Constitution and LTA 2020 both make it clear that the President of the new Land and Titles Court is to be appointed under Part IX of the Constitution and the appellant has not been so appointed. It is arguable that this implies that there was to be a new start for the new Land and Titles Court. If so, it is arguable that that what may be seen as implications in s 67 of the LTA 2020 should not be taken to depart from that position. In any event, it is well arguable that the word "appointments" in s 67(3) and "title" and "right" in s 67(4) do not, particularly in the context of those two subsections, naturally refer to judicial office. The point would be that 67(3) is directed solely at preserving the validity of all formal manifestations of the substantive decisions of the old Lands and Titles Act. Similar considerations apply to the corresponding argument under s 67(4). As well, some of the arguments outlined in the preceding paragraph might be thought to be a little stronger in relation to the transition of Samoan judges of the old Land and Titles Court to the new Land and Titles Court than in respect of the role of President.". On that basis, the Court concluded that the Plaintiff had a serious arguable case that he became President of the new LTC. There was also the issue as to what, if any, rights the Plaintiff accrued under the April 2022 decision, and whether he could be dismissed from the performance of his transitional functions as envisaged in that judgment.[77] *Their Honours opined that the validity of the Plaintiff's removal in October 2022 from the transitional role recognised in the April 2022 decision "may be questionable".*[78]

121. In considering what, if any, interim relief should be granted pending the final hearing and determination of the substantive proceedings, the Court of Appeal recognised that: [79]

(a) the Plaintiff was in an "awkward situation";

(b) he was no longer being paid;

(c) there were practical limitations on what he could do financially;

(d) he presumably did not wish to take any action that might be interpreted as an acceptance that he is no longer the President of the LTC;

(e) the res judicata argument may "run both ways"; and

[77] [57] to [59]
[78] [61]
[79] [60]

(f) the resolution of the proceedings may not necessarily result in a binary outcome.[80]

122. Of particular significance for present purposes was their Honours' expression of:[81]

> *"… some discomfort at the notion that a senior judge can be removed from office in the way contended for, both generally, and particularly without compensation."*

123. Given the appointment of the Second Defendant as the President of the new LTC, the Plaintiff elected not to pursue his application for an interim declaration that he remain in office.

124. That, however, left for the Court of Appeal the issue of payment of the Plaintiff's salaries and allowances. That issue had not been explicitly addressed by the Chief Justice possibly because the Attorney General had submitted before him that the Prime Minister was not responsible for payments of salary (i.e. the wrong defendant). Their Honours were not persuaded by that submission and considered it appropriate to allow the appeal albeit only to the extent of granting, in the first instance, an interim declaration that the Plaintiff should be paid a lump sum representing his judicial salary and allowances for nine months, with a reservation of leave to apply for additional payments should the substantive litigation not be resolved within three months. As a precondition of payment, the Plaintiff was required to undertake to the Supreme Court to abide by any order that the Court may think fit as to repayment following determination of the substantive proceedings.[82]

125. In their final comments, the Court of Appeal described the "*present imbroglio*" as being *"a result of ill-drafted constitutional and legislative provisions*" which had brought about a situation in which two different people have arguable claims to be the President of the new LTC and the potential for "*a messy situation*" should the Plaintiff be held to be able to exercise the rights apparently conferred on him under the April 2022 judgment.[83] Their Honours also expressed concern that "*the incoherence of the relevant provisions of the CAA and the LTA 2020 may dictate an incoherent outcome*", for instance, a conclusion that the Plaintiff can continue to work on the transitional basis along the lines of the April 2022 decision which would likely "*be awkward to implement on a long-term basis*".[84]

---

[80] [61]
[81] [62]
[82] [64]
[83] [65]
[84] [66]

126. For those reasons, and notwithstanding that the legal issues involved principles of high importance (including judicial independence and tenure), their Honours opined that the complexities of the situation and unsatisfactory nature of some of the possible outcomes meant that "*a practical negotiated solution [would be] likely to produce the best ultimate result*".[85] The existence of this judgment is testament to the fact that the parties have not as yet been able to achieve such a solution.

Since the appeal

127. In respect of the lump sum ordered by the Court of Appeal of nine months' worth of entitlements, the Plaintiff says he has received a total of $70,000. He claims that was less than his 'usual' entitlements.

128. On 31 January 2024, the Plaintiff filed a further Notice of Motion in the Court of Appeal seeking additional payments from 19 July 2023. By memorandum dated 15 March 2024, the Attorney General did not oppose the application. She also noted that as the Plaintiff may be entitled to further payments going forward and as there had been ongoing delays in having the substantive action heard and determined, including the Chief Justice necessarily recusing himself from hearing the matter, an urgent hearing was sought before an "alternative judge".

129. On 4 April 2024, the parties consented to a Court Order that the Plaintiff be paid his salary and allowances for the period from 19 July 2023 to 4 April 2024. However, he has not received any further payments nor an explanation for the delay. Before me, Mr Ainu'u explained that he had followed this issue up with the Attorney General's office. The Attorney General explained that she had followed it up with the Ministry of Finance but that, to date, no explanation had been forthcoming.

130. During the trial, Mr Ainu'u stated, on instructions, and without objection from the Attorney General, that the Plaintiff's lack of income has caused him significant financial harm. He has defaulted on obligations to his bank in respect of certain borrowings and, as a result, has incurred higher penalty interest rates. Consequently, his bank has prevented him from accessing his account until the interest is paid.

[85] [67]

Pleaded positions

131. The Plaintiff's claims evolved during the proceeding. Putting aside the claims he withdrew during the trial, by his Fifth Amended Statement of Claim,[86] the Plaintiff seeks:

    (a) a declaration that his purported removal as President in October 2022 was "unconstitutional, unlawful, illegal, and invalid"; and

    (b) damages.

132. Beyond a recitation of the uncontroversial background detailed above, the Plaintiff's pleaded contentions and the Attorney General's defence to them[87] may be summarised, relevantly, as follows.

133. Firstly, the Plaintiff pleaded that ss 67(6) of the LTA 2020 did not empower the Prime Minister to remove him as President of the LTC because:[88]

    (a) by its April 2022 decision, this Court identified "vagueness and ambiguity" with the provision and opined that it yielded a result that could not have been Parliament's intention, and therefore:

        (i) pursuant to s 7 of the *Acts Interpretation Act* 2015, the Court is required to consider the legislative history (and other extrinsic material referred to in subsection (5)) and give the provision a fair, large and liberal construction; and

        (ii) the legislative history of ss 67(6) demonstrates that it was meant to make the position of Assessors redundant but was not meant to remove the President or Judges of the old LTC;

    (b) Article 111(6) of the Constitution, which provides that *"...[w]here in this Constitution reference is made to any officer by the term designating his or her office, that reference shall, unless the context otherwise requires, be construed as a reference to the officer for the time being lawfully performing the functions of that office"*, when read with Article 104D, has the effect of "saving" the Plaintiff's appointment as President of the new LTC;

    (c) ss 67(3) of the LTA 2020 also saves his appointment; and

[86] 19 April 2024
[87] First and Third Respondents' Amended Statement of Defence, dated 26 April 2024.
[88] [14]

(d) his purported removal as President was "not done in accordance with" Article 104D of the Constitution in that he was not removed by the Head of State on an address by the Legislative Assembly carried by not less than two thirds of its Members.

134. On the basis of his posited interpretation of ss 67(6), the Plaintiff then contended that the Prime Minister's decision:[89]

(a) was based on a misconstruction of the provision;

(b) failed to give effect to any transitional arrangements to allow the Plaintiff to deal with LTC matters which were pending before him; and

(c) was therefore unconstitutional, unlawful and illegal.

135. The Attorney General denied those allegations and noted parts of the Plaintiff's claim contained legal submissions which would be addressed at trial. She added that the Prime Minister's correspondence with the Plaintiff was to inform him that his position was revoked by ss 67(6) and that, subsequent to this Court's April 2022 decision, it was necessary for a new President to be appointed pursuant to Article 104D to enable the LTC to exercise jurisdiction under the LTA 2020 including in respect of any cases filed prior to the commencement of that Act. The Attorney General also pleaded that the removal requirements under Article 104D only apply to a President who was appointed under the Constitution; not the Plaintiff, who was appointed under the LTA 1981.

136. Secondly, the Plaintiff pleaded that his unlawful removal has caused him financial loss, for which the Government is liable, totalling $3,460,338.65, calculated as follows:[90]

(a) he was 54 years of age when he was removed from office in 2022;

(b) he expected to remain in the position of President until the statutory age of 68, i.e. for another 14 years;

(c) he was not allowed to reapply for the position;

(d) he is a career public servant but is unlikely to secure another public service position "considering the stance of the present government against his appointment as the President of the LTC";

[89] [15]
[90] [17]

(e) at the time of his removal, his entitlements included salary of $135,187.47 per annum, telephone allowance of $3,000 per annum, Assessor's allowance and Judicial Retirement Fund contributions of 20% of his salary per annum;

(f) $1,892,624.58 being 14 years of salary and future earnings;

(g) $363,944.00 for sick (25 days per annum valued at $12,998.00) and annual leave (25 days per annum valued at $12,998.00) for 14 years;

(h) $283,245.15 for untaken sick leave (121 days valued at $62,910.31), untaken annual (158 days valued at $82,147.36), telephone allowance ($3,000.00) and total contract per annum for period 2022/2023 ($135,187.47);

(i) $378,524.92 for Judicial Retirement Fund contributions for the next 14 years;

(j) $42,000.00 for phone allowance for the next 14 years;

(k) $500,000.00 in exemplary damages; and

(l) costs.

137. Apart from admitting the Plaintiff's age, and the amounts of what were his annual salary and telephone allowance, the Attorney General pleaded that she had no knowledge of the balance of the Plaintiff's financial claims and otherwise denied them.

Issues for determination

138. From the pleadings, the parties agreed a list of issues. At the suggestion of the Court, Counsel also agreed to add another issue concerning the constitutionality of ss 67(6). For reasons which will become apparent, I have reworded and reordered the issues slightly, as follows:

(a) Have the Plaintiff's claims in respect of ss 67(6) not removing him from office and/or that ss 67(3) of the LTA 2020 and Article 111(6) of the Constitution saved his appointment as President already been determined by this Court in the April 2022 decision, and if so, whether the Plaintiff is precluded, by virtue of the doctrine of res judicata or issue estoppel, from bringing the present challenge against his removal as President?

(b) If not, did ss 67(6) remove the Plaintiff's appointment as President of the LTC?

(c) Do ss 67(3) of the LTA 2020 and Article 111(6) of the Constitution transition and/or save the Plaintiff's appointment as President from the LTA 1981 to the Constitution?

(d) Does the Plaintiff meet the criteria for appointment as President pursuant to Article 104D of the Constitution, and to what extent was that relevant to his removal?

(e) Is ss 67(6) inconsistent with the Constitutional provisions enshrining judicial independence, particularly security of tenure (both before and after the CAA and LTA 2020), and if so, whether pursuant to Article 2(2), ss 67(6) is void to the extent of any such inconsistency?

(f) If the Plaintiff's removal was unconstitutional, is he entitled to damages or compensation from the Third Defendant (the Government), and if so, how much?

Preliminary observations

139. Before proceeding to consider the issues for determination, it is necessary to address a number of preliminary issues, including by reference to some of the authorities cited by Counsel in their written and oral submissions.

Judicial review

140. The Plaintiff seeks judicial review of the Prime Minister's alleged decision to remove home from office.

141. As noted by the Court of Appeal in *Teo v Attorney-General*,[91] Samoa, 'does not have a judicial review statute. The prerogative writs still remain. There may also be rights under the Constitution. The Plaintiff's residual claims for declaratory relief fall within the ambit of the writ of certiorari. Like all actions by prerogative writ, relief is discretionary.

142. The Plaintiff has also called in aid the *Declaratory Judgments Act* 1988, s 11 of which provides:

> **11. Jurisdiction discretionary** – The jurisdiction conferred under this Act upon the Supreme Court to give or make a declaratory judgment or order is discretionary, and the Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.

[91] [2001] WSCA 7

143. The modern grounds for judicial review have been aggregated to include illegality, procedural fairness (or procedural unfairness), and irrationality (or unreasonableness).[92] The Plaintiff's claim is rooted in the first.

144. As will be seen below, at times during submissions, Counsel for the Plaintiff drifted into ancillary complaints about the manner in which (as distinct from the purported legal basis on which) the Plaintiff was removed from office. Those complaints took on the appearance of allegations of breaches of natural justice and procedural unfairness, and even perhaps, bad faith. They were not pleaded. Mr Ainu'u did not seek leave to amend, nor did he press them as any additional or alternative bases for relief. I have therefore not considered them as such. However, I have taken into consideration the facts pointed to by Mr Ainu'u to the extent they are relevant to the pleaded causes of action.

145. The evidence in this case did not present any significant factual disputes for resolution. As recently observed by Justice Asher in *Fesili v Attorney General*,[93] that was appropriate for proceedings taken under the *Declaratory Judgments Act*. The focus of the Act is on the interpretation, construction and validity of statutes or things done under statutes.

146. That is not to say, however, that the evidence was necessarily complete. In a number of respects, what was adduced tended to raise more questions than it answered. Nevertheless, the parties proceeded with the hearing on the basis of the evidence before the Court. In that regard, Mr Ainu'u was cognizant of the Plaintiff's onus of proof. In the absence of any explanation from the Attorney General, I have approached the absence of evidence from either the First Defendant or on behalf of the Third Defendant as a considered position. Mr Ainu'u submitted that, as a result, adverse inferences should be drawn. I deal with that matter where it arises below.

Prime Minister's 'decision'

147. The Plaintiff challenges what he regards as being the Prime Minister's decision to remove him from office on the basis of ss 67(6) of the LTA 2020.

148. Judicial review may lie in respect of decisions made by persons or public authorities in the exercise of statutory, prerogative or other power that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, and that decision must affect the private rights of some person or

[92] For example, see *Amoa v Land and Titles Court* [2011] WSSC 89 at [37].
[93] [2024] WSSC 22 at [32].

deprive another of some benefit which he had been allowed to enjoy, and expected to enjoy in the future or which he has a legitimate expectation of acquiring or enjoying.[94]

149. However, by definition, a decision, in the administrative law sense, will usually involve a choice between competing claims, rights, actions or interests, by a statutorily empowered decision-maker pursuant to specified legislative requirements, rules or other established criteria. It often also involves an exercise of discretion.

150. The Prime Minister's correspondence with the Plaintiff on 20 and 28 October 2022 involved none of that. The Prime Minister did not make a decision to remove the Plaintiff from office. By the passing of the CAA and LTA 2020, Parliament, consisting of the Head of State and the Legislative Assembly,[95] made a decision to restructure and establish a new LTC under the Constitution, as a result of which, the Plaintiff's appointment as President of what became the old LTC was purportedly revoked. The Prime Minister, like the Minister before her, merely communicated to the Plaintiff the meaning and effect of ss 67(6), in accordance with advice from the Attorney General at the time.

151. However, the Prime Minister, as the head of Cabinet and the Executive, did make a decision when she directed the Plaintiff to vacate his office by 1 November 2022. There was no evidence before the Court, that prior to doing so, the Prime Minister took into consideration this Court's April 2022 decision. The effect of the Prime Minister's direction was to dictate the duration of, and bring to an end, the Plaintiff's transitional tenure. She did so at a time when, on the available evidence, the Plaintiff had or most likely had pending appeal cases before him. The question then becomes whether the Prime Minister's decision was in breach of the April 2022 decision and thereby interfered with the Plaintiff's rights, if any, conferred by that judgment or the Constitution, and whether it offended the principles of judicial independence.

152. It is also implicit from the Prime Minister's communications with the Plaintiff, and I am prepared to infer, that a number of other decisions were necessarily made, namely:

    (a) not to offer the Plaintiff an opportunity to apply for appointment as President of the new LTC;

    (b) not to consider the Plaintiff for appointment as President of the new LTC;

[94] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408–409, [1984] 3 All ER 935 at 949, HL, per Lord Diplock.
[95] Article 42 of the Constitution.

(c) not to provide the Plaintiff with any reasons as to why he was not to be the new President;

(d) not to provide the Plaintiff with an opportunity to respond to any adverse information which may have informed the above decisions;

(e) not to offer the Plaintiff a different judicial position on the new Court; and

(f) not to offer the Plaintiff any compensation in lieu.

153. Given, as noted above, that those matters do not form the basis for the relief sought, they must be regarded as contextual only. They are also subsumed by the overarching and far more fundamental question raised in this proceeding, namely, whether the Plaintiff's removal by operation of ss 67(6) was Constitutionally valid.

Judicial independence

154. As mentioned at the outset of these reasons for judgment, and as observed and discussed by this Court in its April 2022 decision and by the Court of Appeal in its July 2023 decision, at the heart of this case lies the doctrine of the separation of powers, principles of judicial independence and whether the Plaintiff's removal from office has offended those principles. A corollary to that is the question of where those principles sit or should sit within the Samoan legal framework, including Constitutional rights, and what, if any, relief may be available in circumstances where those rights have been infringed.

155. There is no issue in this case about the legality of the Government's restructuring of the LTC. The real issue is what is to happen to judges of a Court affected by legislative restructuring. Here, Part 5A of the LTA 2020 eventually and satisfactorily answered that in respect of all the other Judges of the old LTC who were transitioned across to the new court. The Plaintiff was not.

156. The real issue therefore narrows to whether the remaining revocation of the Plaintiff's appointment as President and removal from office, without cause, due process, offer of a position on the new LTC or compensation, was in accordance with relevant legislative provisions, any Constitutional protections or rights and/or principles of judicial independence.

157. As also mentioned at the outset, and as far as Counsel's submissions and my research would indicate, these questions have not yet been the subject of any published curial decision in Samoa.

158. For that reason, I commence this section by respectfully adopting the principles of judicial independence outlined by their Honours in their April 2022 decision.[96] Those that are germane to the present case may be conveniently summarised as follows:

(a) The principle of judicial independence is essential to the rule of law and to the continuance of the judiciary's authority and legitimacy.[97]

(b) Judicial independence is one of a number of overlapping ideas, which when taken together, describe the concept of separation of powers: *Samoa Party v Attorney General*.[98]

(c) The protection of the independence of the Judiciary is a matter of considerable public interest: *Tafililupetiamalie v Attorney General*;[99] *Sirros v Moore*;[100] *Attorney General v Chapman.*[101]

(d) Judicial independence involves the impartiality, and appearance of impartiality, of Judges; and the freedom of Judges from political and other pressures in their determination of the law and adjudication of disputes.

(e) Judicial independence is not a right of any particular Judge or indeed of Judges in general. It is designed for the protection of litigants, particularly in litigation against the State. Judges should be free to give effect to their Oath of office to do right by all manner of people, and in doing so, they enjoy corresponding rights: *Claydon v Attorney-General*.[102]

(f) The three essential, but not exhaustive, conditions of judicial independence are security of tenure, financial security, and institutional independence: *Valente v The Queen.*[103]

(g) Security of tenure includes the appointment process and the provisions for termination of office or removal from office.

---

[96] [44] to [57]

[97] Halsbury's Laws of England/Constitutional and Administrative Law (Volyume 20 (2014)/3. The Judiciary/2 The Independence of the Judiciary/130. The principle of judicial independence.

[98] [2009] WSSC 23, para 98.

[99] [2015] WSSC 62

[100] [1975] QB 118, 132 per Lord Denning

[101] [2011] NZSC 110, para 97 per McGrath and William Young JJ

[102] [2004] NZAR (CA) 16, per Glazebrook J, at 45 [108]

[103] [1985] 2 SCR 673, a decision of the Canadian Supreme Court concerning a dispute about whether a Provincial Court (Criminal Division) in Ontario is an independent tribunal within the meaning of s.11(d) of the Canadian Charter of Rights and Freedoms.

(h) Tenure in office is one of the (although not the only) means of ensuring judicial independence. Tenure provides corresponding rights not to be removed from office without good cause and **a right either to be offered a similar or better position if there is restructuring or a right to continue to receive the benefits of office if there is no such offer** (and some would suggest even if a similar or better position is declined).[104] (emphasis added)

159. By way of further background, rationale and understanding as to the application of those principles, and consideration of a number of the key authorities upon which Counsel relied, the following may be added.

160. The origins of the doctrine of separation of powers within the Westminster system of government may be traced back to 1610 with the decision of Chief Justice Coke in the *Case of Proclamations*.[105] That was followed, in 1616, by the *Case of Commendams*. In 1660, King Charles II issued the Declaration of Breda by which the English Parliament resolved that "government ought to be by King, Lords and Commons", the essence of a constitutional monarchy. Judicial tenure was mentioned in Parliamentary petitions as early as 1641.[106] The Declaration of Rights of 1688 was enacted the following year by the English Parliament in the *Bill of Rights* (Eng). Perceived failures of the judicial system and the 'tyrannical' control over it contributed to the English Civil War and, following it, the imposition by the victorious Parliament of the *Act of Settlement* 1701 (Imp) upon the Crown. The operation of that Act was simple but extremely effective. It gave Judges tenure during good behaviour and security of remuneration, effectively removing them from royal and executive influence.[107] This ensured that judges could only be dismissed by a successful address as to the misconduct of a judge to both Houses of Parliament. In the United Kingdom, the Act of Settlement is the cornerstone of judicial independence and is reinforced by convention that restricts Parliament's power of address.[108]

---

[104] *Claydon*, ibid, at [109].

[105] Chief Justice Coke, *Case of Proclamations* (1611) 12 Co. Rep 74; 77 ER 1352; [1610] EWHC KB J22.

[106] Joseph Smith, 'An Independent Judiciary: The Colonial Background' (1976) 124 University of Pennsylvania Law Review 1104, from 2009 'The Independence and Impartiality of State Courts Following Kable v DPP (NSW)' UNSW Law Journal Volume 32(1) 75.

[107] Article III, clause 7.

[108] *Attorney-General v Mr Justice Edwards* (1891) 9 NZLR 321 at 375 (CA) per Williams J. Although the Act was partially in force in New Zealand from 1840 (*Imperial Laws Application Act* 1988, s 3 and First Schedule), the provisions guaranteeing judicial tenure were subsequently incorporated into domestic law initially by the *Judicature Act* 1908 (repealed), and subsequently the *Constitution Act* 1986, ss 23 and 24.

161. In *Samoa v Attorney General*, the separation of powers was described as:[109]

> *"… embodied by clear implication in the Samoan Constitution by the provisions of the Constitution which establish the Executive, the Parliament and the Judiciary, the three principal organs of our democratic system of constitutional government. It is a common law principle of democratic and constitutional government whose existence does not depend on the Constitution but is now implicit in the Constitution and forms an integral part of the Constitution."*

162. Ever since the Act of Settlement, the experience in England and in those countries which have chosen to adopt a like judicial system has been that a tenured, rather than elected judiciary, is conducive to judicial independence. In turn, that assurance of independence has been regarded as essential to public confidence that legal controversies, civil or criminal, great or small will be resolved according to law and without fear, favour, affection or ill-will be that related to a party or otherwise. In this sense, no judge in those countries is responsible to an electorate for continuance in office.[110]

163. For instance, in Australia, at the Federal level, tenure is until 70 years of age.[111] Judicial accountability is solely via a procedure for removal from office by the Governor-General in Council but only "on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity".[112] That mechanism is a direct legacy of the security of judicial tenure for which the Act of Settlement provided. That form of security of tenure has been entrenched by provision in both the Constitution and statute.[113] The learned authors of "Judicial independence from the Executive" have opined that, as a result:[114]

> *"… the federal government may not, for example, appoint acting judges to federal courts or remove judges in the course of court restructuring. The level of protection provided in s 72 appears to satisfy the international standards for judicial independence."*

---

[109] [2009] WSSC 23 at [96].

[110] "Judicial accountability – new developments and threats", paper delivered at the Commonwealth Lawyers' Conference, Goa, India, by Justice Logan, a Judge of the Federal Court of Australia and of the Supreme and National Courts of Papua New Guinea; President, Australian Defence Force Discipline Appeal Tribunal, 8 March 2023.

[111] Australian *Constitution*, s 72(2).

[112] Australian *Constitution*, s 72(ii).

[113] Federal Court of Australia Act 1976, s 6.

[114] Rebecca Ananian-Welsh and George Williams, Judicial Conference of Australia 2014, p 16 - https://www.ajoa.asn.au/wp-content/uploads/2014/07/P62_02_09-Judicial-Independence-from-the-Executive-June-2014.pdf

164. It will be noted that the grounds and procedure for removal in s 72 of the Australian Constitution bear a striking similarity to the provisions of former Article 68 and current Articles 67(6) and 104D(3) of the Samoan Constitution.

165. By contrast, the appointment, tenure and remuneration of Australian state and territory judges are usually governed by legislation and convention and are therefore subject to change by ordinary Act of Parliament.[115] With one exception. The provisions of the New South Wales Constitution concerning the removal (directly or through the abolition of a judicial office), suspension and retirement of judges were entrenched by a constitutional amendment in 1995.[116] Accordingly, in New South Wales, a judge may only be removed 'by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity', mirroring the protection afforded to federal judges in s 72(ii) of the Commonwealth Constitution. The retirement age of judges in New South Wales is set by legislation and judges are entitled to re-appointment in cases of court re-organisation or the abolition of a judicial office.[117] Those provisions may only be altered by referendum.[118]

166. In Papua New Guinea, judicial tenure is measured by a term of years, fixed at the time of appointment, with reappointment possible up to 70 years of age (subject to a limited discretion to extend an appointment to 75 years of age).[119] Papua New Guinea's Constitution also provides for removal of the senior judiciary from office on the ground of misbehaviour or incapacity, although by a different mechanism.[120]

167. As the then Chief Justice of the High Court of Australia, Sir Gerard Brennan, said:[121]

---

[115] Kirby, 'Judicial Independence in Australia Reaches a Moment of Truth', above n 68, 189-190. For discussion of the convention that 'a member of the judiciary should not be compulsorily removed from office during the term of his or her appointment otherwise than on the ground of proved misbehavior or incapacity' see: Quin (1990) 93 ALR 1, 30 (Deane J).

[116] Constitution Act 1902 (NSW) s 7B(1) introduced by the Constitution (Entrenchment) Amendment Act 1992 (1995 No 2) (NSW). This section provides that any Bill that 'expressly or impliedly repeals or amends' those provisions 'shall not be presented to the Governor for Her Majesty's assent until the Bill has been approved by the electors in accordance with this section'. Crucially, s 7B(1) also provides that s 7B can only be amended by referendum, thus meeting the requirements of double entrenchment laid down in *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

[117] s 55-56

[118] s 7B(1)

[119] PNG Organic Law on the Terms and Conditions of Employment of Judges, s 2. The maximum appointment term for a judge who is a PNG citizen is 10 years with that for a non-citizen being 3 years.

[120] The value judgment as to whether there are "good grounds for removing" the judge concerned is consigned to a tribunal consisting of three presently serving or former judges of the Supreme Court or the National Court or of a court of unlimited jurisdiction of a country with a legal system similar to that of Papua New Guinea, or of a court to which an appeal from such a court lies: PNG *Constitution*, ss 179, 180 and 181.

[121] G Brennan 'Judicial Independence' *Speech*, Australian Judicial Conference, Canberra, 2 November 1996; available at *http:www.law.monash.edu.au/JCA/brennan.html*.

"Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed."

168. Another former Chief Justice of the High Court of Australia, Sir Anthony Mason, put it this way:

"Judicial independence is a privilege of, and a protection for, the people. It is a fundamental element in our democracy, all the more so now that the citizen's rights against the state are of greater value than his or her rights against another citizen."[122]

169. In "Judicial independence from the Executive", the learned authors note:[123]

"The importance of judicial independence is bolstered by its inherent relationships with democracy, the separation of powers and the rule of law. The Australian Bar Association described an independent judiciary as 'a keystone in the democratic arch' and warned 'that keystone shows signs of stress. If it crumbles, democracy falls with it.[124]

…

'The reason why judicial independence is of such public importance is that a free society exists so long as it is governed by the rule of law – the rule which binds governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought. However vaguely it may be perceived, however unarticulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law.'"[125]

170. In 1978, the New Zealand Royal Commission on the Courts reported:[126]

"Independence is an essential quality in a judge and it is imperative that the independence of the judiciary be respected and maintained. Without that independence, the just determination of proceedings cannot be assured and public confidence in the integrity of the judicial process is destroyed. The tradition of judicial independence, freedom from favour as well as from fear, is of fundamental constitutional importance in maintaining a proper balance in the continuing relationship between the State and the citizen. ***In revising the structure of the courts this basic principle must not be eroded****.*

[emphasis added]

---

[122] A Mason 'The Independence of the Bench, the Independence of the Bar and the Bar's role in the Judicial System' (1993) 10 *Australian Bar Review* 1, at 3.

[123] Rebecca Ananian-Welsh and George Williams, Judicial Conference of Australia 2014, p 4 - https://www.ajoa.asn.au/wp-content/uploads/2014/07/P62_02_09-Judicial-Independence-from-the-Executive-June-2014.pdf

[124] Australian Bar Association, 'The Independence of the Judiciary' [1991] (Winter) Victorian Bar News 17, 18 [2.2].

[125] Former Australian High Court Chief Justice Sir Gerard Brennan, 'Judicial Independence' (Speech delivered at Annual Symposium of the Australian Judicial Conference, Canberra, 2 November 1996) 2. This speech was quoted in the Bangalore Principles.

[126] [1978] VII AJHR H2 at [248].

171. The *Minimum Standards of Judicial Independence*, adopted by the International Bar Association in October 1982, include:

> *"20(a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the term of services.*
>
> *(b) In the case of legislation reorganising courts, judges serving on those courts shall not be affected, except for their transfer to another court of the same status."*

172. To like effect is clause 2.39 of the Universal Declaration of the Independence of Justice, which was unanimously adopted at the first plenary session of the first World Conference on the Independence of the Judiciary in Montréal on 10 June 1983.

173. The Constitution of Samoa has been described as inspired by the principles embodied in the United Nations Universal Declaration of Human Rights ("**UDHR**").[127] Although not legally binding, the contents of the UDHR have been elaborated on and incorporated into subsequent international treaties, regional human rights instruments, and national constitutions and legal codes. It enshrines, in particular, the principles of equality before the law, the presumption of innocence and the right to a fair trial by a competent, independent and impartial tribunal established by law. Since its inception, a number of universal instruments have been promulgated to elaborate and provide guidance on the content of the rights expressed in the UDHR and the attainment of them. They include the adoption by the United Nations, in 1985, of the Basic Principles on the Independence of the Judiciary.[128]

174. The preamble to the Basic Principles explains that they were formulated to assist Member States in their task of securing and promoting the independence of the judiciary and should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. Relevantly, the Basic Principles provide:

> ***Independence of the judiciary***

[127] Samoa Statement by Mrs. Palanitina Toelupe, Assistant Secretary, Ministry of Women Affairs, New York, 9 June 2000, 23rd Special Session of the United Nations General Assembly Women 2000: Gender Equality, Development and Peace for the 21" Century.

[128] Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

…

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

…

Discipline, suspension and removal

…

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

…

175. In 1995, the 6th Conference of Chief Justices of Asia and the Pacific was held in Beijing, in conjunction with the 14th LAWASIA Conference. The most important event of the Conference was the adoption of a Statement of Principles of the Independence of the Judiciary. The lineage of the Beijing Statement can be traced through a number of different international instruments incorporated in the recitations to the Statement, including the Charter of the United Nations, the Universal Declaration of Human Rights, and the Basic Principles on the Independence of the Judiciary. The Chief Justices and other judges in Asia and the Pacific concluded that the Principles represents the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the Judiciary. Relevantly, Article 29 of the *Beijing Statement of Principles* provides:

"The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court ***must be reappointed*** *to its replacement or appointed to another judicial office of*

equivalent status or tenure. Members of the court for whom no alternative position can be found ***must be fully compensated****."*

[emphasis added]

176. Among the 20 initial signatories to the Statement of Principles was the late former Chief Justice Sapolu of Samoa. The Statement was revised into its current form in 1997 at the 7th Conference held in Manila. It has now been adopted by 32 countries from the Asia Pacific region, said to represent approximately two thirds of the world's population.[129] In 2007, then Chief Justice of Queensland, the Honourable Paul de Jersey AC wrote:[130]

> *"The abiding significance of the Statement must depend on the implementation and maintenance of the standards it sets. They must first be more broadly understood. It is not enough that Chief Justices and their judges appreciate and support them. That is a given. To be relevant and definitive, they must be accepted more broadly by those whose depredations, intentional or unwitting, can render the work of the courts of law peripheral or ephemeral. The Statement should be understood and accepted to the point where a government tempted to intrude upon judicial authority, and thereby diminish the rule of law, would be dissuaded from that course in recognition it would run contrary to the principle expressed by the Statement."*

177. Between 2000 and 2002, the Bangalore Principles of Judicial Conduct were drafted by an informal group of Chief Justices and superior court Judges (the Judicial Integrity Group). They were endorsed by the United Nations Human Rights Commission in 2003 and published with a commentary in 2007. The preamble to the Bangalore Principles declares their intention to establish standards for ethical conduct of judges and are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. The principles are stated as six "values". The first reiterates that judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial.[131]

178. Samoa has been a member of the Commonwealth of Nations since 1970. As such, it shares certain values with other Commonwealth nations. In *Republic v Lambourne*,[132] Chief Justice Hastings provided the following historical account of the development of, and adherence to, those values.

---

[129] Senior Judge J Clifford Wallace, United States Court of Appeals for the Ninth Circuit "An Essay on Independence of the Judiciary: Independence From What and Why" 58 *NYU Annual Survey of American Law* (2001) 241, 249.

[130] Beijing Statement of Principles of the Independence of the Judiciary, 17th Pacific Judicial Conference, Tonga, 7-9 November 2007.

[131] *Warren v Queen* [2014] PNSC 1 at [249].

[132] [2021] KIHC 8 at [49] to [52].

179. In 1991, the Harare Commonwealth Declaration was adopted by the Commonwealth Heads of Government. It affirms that the rule of law and the independence of the judiciary are among the "fundamental political values" of the Commonwealth.[133] It also recognises the rule of law as part of the "shared inheritance" of the Commonwealth that constitutes its "special strength."[134] The Harare Commonwealth Declaration led to the development of the Latimer House Guidelines in 1998 and then to the Commonwealth Latimer House Principles on the Accountability of and the Relationship between the Three Branches of Government, to which the Guidelines are annexed.[135] The Commonwealth Latimer House Principles were adopted by consensus by the Commonwealth Heads of Government in 2003[136] and were incorporated into the Charter of the Commonwealth which was adopted by the Commonwealth Heads of Government in December 2012 and signed by Queen Elizabeth II in March 2013. The Charter states the rule of law to be one of the core principles of the Commonwealth. It commits each member state to "an independent, impartial, honest and competent judiciary."[137]

180. The Latimer House Principles:

(a) highlight the importance of the separation of powers between the Legislature, the Executive and the Judiciary to ensure effective governance and democracy;

(b) provide guidance on the role of the separation of powers in the Commonwealth, its effectiveness in providing democratic governance and the role of civil society; and

(c) are intended to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, Parliaments and judiciaries of the Commonwealth's fundamental values.

181. They include, relevantly:

(a) Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and

[133] Harare Commonwealth Declaration [1991] para 9, http://thecommonwealth.org/history-of-the-commonwealth/harare-commonwealth-declaration.

[134] Ibid, para 3.

[135] The Principles were established by the Commonwealth Parliamentary Association, the Commonwealth Secretariat, the Commonwealth Magistrates and Judges Association , the Commonwealth Lawyers Association and the Commonwealth Legal Education Association: Commonwealth Parliamentary Association | www.cpahq.org

[136] And further updated with an action plan in 2008/2009.

[137] Charter of the Commonwealth, Principle VII, http://thecommonwealth.org/our-charter.

protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

(b) Relations between Parliament and the judiciary should be governed by respect for Parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.

(c) Judiciaries and Parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

(d) An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.

(e) The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

182. And, to secure those aims:

(a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process.

(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.

(c) Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

183. In 2012, the United Nations General Assembly resolved to adopt the Harare Declaration at the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels. The Declaration states in part:

> *"We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice."*[138]

[138] The resolution was adopted by the General Assembly at its 3rd plenary meeting, 24 September 2012: https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf.

184. In 2019, the United Nations Special Rapporteur on the Independence of Judges and Lawyers emphasised, inter alia:[139]

> *"… the importance of tenure and stability in [judicial] positions, it must be guaranteed by preventing abrupt removal processes or arbitrary transfer of judges and prosecutors. Therefore, it is relevant to establish the conditions for judicial personnel to perform their duties without fear of being arbitrarily substituted."*

185. In *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, Gleeson CJ of the Australian High Court observed that here is no single ideal model of judicial independence, personal or institutional.[140] Minimum standards of judicial independence are not developed in a vacuum. They take account of considerations of history and of the exigencies of government. Judicial independence and impartiality are secured by a combination of institutional arrangements and safeguards.[141]

186. In Samoa, the independence of the judiciary has been recognised, if not enshrined, in the Constitution since its inception in 1960. Among the fundamental rights in Part II, resides Article 9, which provides, relevantly, that in the determination of legal rights and obligations, every person is entitled to a fair hearing by an *independent and impartial tribunal* established under the law.

187. Observance of the principals of judicial independence has been achieved, in part, by entrenching provisions for security of tenure and financial security in the Constitution. Until the legislative reforms the subject of this proceeding, Article 68 of the Constitution, entitled "Tenure of office", provided that a Judge of the Supreme Court shall hold office until the Judge reaches the age of 68 years (subject to possible extension),[142] and shall not be removed from office, except by a two-thirds majority vote of Parliament on the grounds of stated misbehaviour or infirmity of body or mind. Although under the now repealed LTA 1981, the statutory retirement age for Samoan Judges was 65, ss 26D(2) incorporated by reference the same Constitutional protections on removal of the President as provided for Supreme Court Judges. The new Articles 67(6) and 104D(3) of the Constitution maintain those protectional limits[143] on removal in respect of the Chief Justice and the President of the LTC respectively. As noted above, some of the recent

[139] Presentation of the Report of the Special Rapporteur of the United Nations on the Independence of Magistrates and Lawyers, Diego García-Sayán, before the General Assembly of the United Nations, at the seventy-fourth session, on October 16, 2019.
[140] [36], referred to in *Warren v Queen*, ibid.
[141] [42], [43]
[142] ss (1)
[143] Subject to other grounds "as prescribed by an Act".

drafting arrangements to those and related provisions has left the position in respect of removal of Judges of the Supreme Court unclear.

188. There has not been a restructuring of a Court in Samoa in the nature of the 2020 reforms to the LTC, or at all. Nor does there appear to have ever been (as far as Counsels' submissions indicated) any previous instance of a serving Judge being (successfully) removed from office.

189. The reorganisation of the court system, including the abolition of existing courts, is undoubtedly a legitimate exercise of legislative power. If, however, a government initiates such measures not for the genuine purpose of improving the machinery of justice, but for the purpose of disposing of judges whose decisions have proved inconvenient to it, or who are otherwise out of favour with it, there is a serious threat to judicial independence.[144]

190. In *Claydon v the Attorney General*, ibid, the New Zealand Court of Appeal considered the question of judicial independence in the context of the abolition of the Employment Tribunal and its replacement with the Employment Relations Authority, effected by the Employment Relations Act 2000 (ERA). The appellants were members of the Employment Tribunal who had been appointed for a fixed term under the Employment Contracts Act 1991. Although they were entitled to apply, they were not appointed to the Employment Relations Authority when the Tribunal was abolished. They therefore sought compensation for the unexpired portion of their fixed term contracts. The appellants argued that they were entitled to the benefits of their judicial offices for the remainder of the fixed terms because these were "existing rights" under s17(1)(b) of the Interpretation Act 1999 which had not been abrogated by the ERA. It was argued that this interpretation was reinforced by the principle of judicial independence.

191. The Court of Appeal rejected the appellants' claim and upheld the decision of the High Court. The Court of Appeal held that it was clear under the ERA that office holders' rights ceased to exist when the Tribunal was abolished. Gault P and Blanchard J held that the principle of judicial independence could not assist the appellants' argument because the statute was so clear. Keith J observed that the principle of judicial independence could not assist the appellants in any event because its purpose was to protect the rights of

[144] "Removal of Judges" by the Honourable L J King AC QC, 2003 Flinders Journal of Law Reform, p 180; Mason, 'The Appointment and Removal of Judges' in Helen Cunningham (ed), Fragile Bastion (1997, Judicial Commission of New South Wales) 11, 26.

parties seeking justice in the Courts. It was also observed that the principle of judicial independence did not apply to a quasi-judicial tribunal in the same way as it applied to a court (McGrath J), nor did it operate to vest rights in any particular judicial officer (Glazebrook J). As noted in this Court's April 2022 decision, Glazebrook J described judicial tenure as providing *"corresponding rights not to be removed from office without good cause and a right either to be offered a similar or better position if there is restructuring or a right to continue to receive the benefits of office if there is no such offer (and some would suggest even if a similar or better position is declined)."* McGrath J observed that the principle of judicial independence "*calls for restraint from the legislative and executive branches of government in actions they undertake affecting the judiciary*".[145] His Honour also noted Canadian authority which suggested that protections of judicial independence should be institutionalised through appropriate legal mechanisms.[146]

192. In Australia, where a government has sought to reduce a serving judge's tenure by removing him or her from office, the courts have shown a greater willingness to constrain the exercise of governmental powers. However, this has been coupled with a reticence to second-guess the legitimacy of executive decisions in this area.[147]

193. In *Macrae v A-G for New South Wales*,[148] the Court of Petty Sessions was abolished, and thereby the positions of a hundred Stipendiary Magistrates, to make way for the introduction of Local Courts. In the course of the re-organisation, the New South Wales Attorney-General decided not to re-appoint five magistrates to judicial positions in the new Local Courts. The failure to re-appoint the magistrates was based on private allegations of unfitness in letters from the Chairman of the Bench of Stipendiary Magistrates to the Attorney-General. The magistrates were never confronted with the allegations or presented with an opportunity to defend their positions. The deposed magistrates challenged the decision that had effectively resulted in their removal from office. Kirby P, Mahoney and Priestly JJA of the New South Wales Court of Appeal upheld the magistrates' challenge, finding that they had been denied procedural fairness and were entitled to a fresh decision. Special leave to appeal to the High Court was refused

[145] [91]
[146] [92] citing *R v Mackin* [2002] SCC 13 at para [40].
[147] "Judicial independence from the Executive", ibid, p 19.
[148] (1987) 9 NSWLR 268.

and the magistrates were invited to apply for the positions in competition with other applicants. The Court of Appeal thus confirmed that a court may exercise judicial review over an executive decision to abolish a court and selectively reappoint its judicial officers.

194. In particular, Kirby P (as his Honour then was) described the approach generally taken by the legislature in Australia, and in England and elsewhere, as when a court is abolished and its functions transferred to a new court, judicial independence and tenure are preserved by appointing the judicial officers exercising the jurisdiction of the abolished court to the new court or by retaining their office in some way.[149]

195. One of the magistrates who was a party to the challenge in *Macrae* was Quin. He claimed that his application for re-appointment should be considered separately and on its own merits and not in competition with applications from other applicants. That argument was accepted by Kirby P and Hope JA in the Court of Appeal.[150] The Attorney General appealed that decision to the High Court.

196. In *Attorney-General (NSW) v Quin*,[151] no issue arose as to the validity of the statutory reforms underpinning the proceedings. As Brennan J observed:

> *"7. What, then, is the purpose of the Act? It was to ensure that, in the circumstances obtaining in New South Wales when the Act came into force, a fresh start should be made in the administration of justice in the lower courts. The Courts of Petty Sessions were abolished and the tenure of the former magistrates was destroyed by s.9; Local Courts, tenure exercising at least the same jurisdiction but constituted by magistrates to be freshly appointed, took the place of the abolished courts. No vestige of the tenure of former magistrates was left. Whether the statutory scheme for making a fresh start was unjust to former magistrates is not a question for curial determination. Axiomatically, it is no function of the court to endeavour to resurrect and, by its order, to protect the tenure of the former magistrates which Parliament, by s.9 of tenure the Act, destroyed."*

197. The only issue was the manner in which the Attorney General was required to consider Quin's application for re-appointment to the new court and whether he had any legal entitlement to, and/or enforcement of, the 'legitimate expectation' he asserted in that regard. In answer to that primary question, Mason CJ explained:

> *"[26] Generally speaking, the judicial branch of government should be extremely reluctant to intervene in the Executive process of appointing judicial officers. Apart from s.12, under the constitutional arrangements*

[149] At 278-281.
[150] Quin v Attorney-General for and in the State of New South Wales (1988) 16 ALD 550 (Mahoney JA dissenting).
[151] (1990) 170 CLR 1

which prevail in New South Wales and the doctrine of separation of powers, to the extent to which it applies in that State, the function of making appointments to the Judiciary lies within the exclusive province of the Executive. According to tradition, it is not a function over which the courts exercise supervisory control. In the present case those considerations are necessarily reinforced by the fact that here the respondent invites the courts to compel the Executive to depart from a method of selecting persons for appointment as magistrates which, in the view of the Executive, is calculated to result in the appointment of those who are best fitted for appointment.
[27] Underlying the respondent's argument and the majority judgments in the Court of Appeal are the importance of the doctrine of judicial independence and the need to protect the security of tenure of judicial tenure officers. The importance of these matters requires no emphasis. These considerations are relevant to removal from judicial office rather than to appointment to judicial office, except in so far as they bear upon the terms of appointment. For my part I am unable to equate the failure to appoint magistrates to the Local Courts with removal from their previous office. It was not suggested that the reorganization of the court structure involving the creation of the Local Courts was other than a genuine reorganization. It was not suggested that its object was to enable the removal from office by covert means of the respondent and the former magistrates who did not accede under s.12."

198. Relevantly, and to similar effect, Deane J observed:

"[3] The approach to be adopted in the appointment of magistrates to the new courts necessarily involved the reconciliation of two basic tenets of the administration of justice in this country. The first is the convention that a member of the judiciary should not be compulsorily removed from office during the term of his or her appointment otherwise than on the ground of proved misbehaviour or incapacity. The rationale of that convention is to be found in the need for a strong and independent judiciary as the primary custodian of individual rights and liberty under the law. It is unnecessary to do more than point to s.72(ii) of the Constitution to demonstrate its importance under our system of government. In New South Wales, the convention is not entrenched in a written constitutional guarantee which controls and limits legislative and executive competence. That being so, there was no constitutional barrier which precluded the State Parliament and Executive from effectively removing, otherwise than for proved misbehaviour or incapacity, one or more of the serving stipendiary magistrates in New South Wales from the exercise of the former jurisdiction of the State's Courts of Petty Sessions by not including them among those appointed to the new Local Courts. The second of those two basic tenets of the administration of justice is a vital, albeit sometimes disregarded, norm of executive conduct. It is that appointment to judicial office should be unaffected by considerations which are likely to result in the appointment of other than the best available appointee. Even in a modern society recognizing the ideal of the rule of settled, standing laws as distinct from the rule 'of men', it is unavoidable that some individuals be entrusted with legal authority to sit in judgment upon others. Obviously, the citizen whose person and property are potentially subjected to such judgment of other individuals should enjoy the safeguard

that appointment to judicial office will not be affected by ulterior considerations such as political patronage or personal reward or entitlement.

[4] In the special circumstances which exist when the jurisdiction of an existing court is transferred to a new court, the reconciliation of those two tenets of the administration of justice has ordinarily been found in seeing the second of them as qualified by the first to the extent necessary to ensure that all willing members of the existing court are, in the absence of proved misbehaviour or incapacity, appointed to the new court (see, e.g., Macrae, at pp 278-281, 287). That precise reconciliation was not, however, accepted by the New South Wales Parliament or Executive in relation to the establishment of the new Local Courts. In that regard, the State Parliament and Executive would seem to have been influenced by a view that the magistrates of the new Local Courts would 'have higher status and greater freedom from governmental direction or supervision than (was) ... enjoyed by stipendiary magistrates' ... Rightly or wrongly, the approach which was finally adopted was to substitute an adverse view of the Attorney-General for the traditional removal test of proved misbehaviour or incapacity. ..."

199. By a majority of the High Court, the appeal was allowed. Ultimately, Quin's case failed because, as Mason CJ opined, it would have required the Court to compel the Attorney-General to depart from the method of appointing judicial officers which conformed to the relevant statutory provision, is within the discretionary power of the Executive, and is calculated to advance the administration of justice."[152]

200. The decision in *Quin* has evoked commentary and controversy. Perhaps most vocal of its critics has been Justice Kirby (who went on to serve as judge of the High Court of Australia from 1996 to 2009). In 1992, writing extra-judicially, his Honour reiterated his views in *Macrae* that international principles of judicial independence require that:[153]

"...at least in the case of judges, and one might say judicial officers performing the duty of judges, ***their tenure cannot properly be undone by a reorganisation of their courts or tribunals****. Out of deference to the office (whatever view is held of the individual officeholder) such judicial officers* ***must be afforded the opportunity of appointment to a court of the same or higher rank and status, salary and benefits of office****. If the judicial officer declines, he or she* ***must continue to receive the benefits of office*** *of the court which is abolished.*

[emphasis added]

201. In 1994, Kirby J described the decision in *Quin* as:[154]

[152] Mason CJ, at p 20, [39].

[153] "Abolition of Courts and Non-reappointment of Judicial Officers" (1995) 12 Aust Bar Rev 181, 205. Referred to by McGrath J in *Claydon*, ibid, at [90].

[154] Ronald Wilson Lecture 1994, "The Abolition of Courts and non-reappointment of Judicial Officers in Australia", Francis Burt Law Education Centre.

> *"… a disappointing view both of the scope of legitimate expectation and of what really advances the administration of justice in this country. Amongst the considerations which most advances the administration of justice in Australia is surely the independence of judicial offices, including magistrates who perform more than 90% of the court work of Australia. If they are susceptible to removal by the reconstitution of their courts and an obligation to apply and be considered de novo, their independence is negatived. The signal sent by the High Court's decision in Quin is that the procedure adopted in the New South Wales reconstitution the Local court is permissible and ultimately beyond curial intervention. … Unless reversed, it will continue to assist Executive Governments throughout Australia to erode judicial independence and tenure upon the asserted basis this this is being done to uphold 'quality' in courts, tribunals and other public offices. … With respect, Quin, is a most unfortunate decision. As the judges in the minority in the High Court observed pointedly, it is difficult to reconcile it with the earlier refusal of special leave to appeal in Macrae.*[155] *It is also an unduly narrow decision when compared with recent decisions in England concerning judicial review of the crown exercise of its prerogative powers.*[156] *One may hope that, in time, Quin will be revisited.…"*

202. The High Court's decision in *Quin* demonstrates the 'reluctance of courts to intervene in the executive authority of judicial appointment and the genuineness of the plan of court reorganisation'.[157] Since *Quin*, developments in constitutional law have hinted at the possibility of stronger protections for the tenure of state and territory judges. For instance, in *Kable v Director of Public Prosecutions*,[158] it was held that the vesting of a function in the court of a State which had the capacity to undermine public confidence in the impartiality of the courts which exercise federal jurisdiction was inconsistent with Chapter III of the Australian Constitution and therefore invalid. Shortly after that decision, in *The Honourable Justice Vince Bruce v The Honourable TRH Cole, RFD and Ors*,[159] Spiegelman CJ (sitting in the NSW Court of Appeal) considered that *Kable* placed limits on any attempt to restrict judges' security of tenure. His Honour added: [160]

> *"The independence of the judiciary is, to a very substantial degree, dependent upon the maintenance of a system in which the removal of a judicial officer from office is an absolutely extraordinary occurrence."*

---

[155] Deane J, 45; Toohey J, 68.

[156] *In re M* [1994] 1 AC 377; [1993] 3 WLR 433 (HL); *Regina v Secretary of State for the Home Department; Ex parte Bentley* [1994] 2 WLR 101 (QBD); *Regina v Parliamentary Commission for Administration; Ex parte Dyer* [1994]1 WLR 621 (QBD).

[157] Kathy Mack and Sharon Roach Anleu, 'The Security of Tenure of Australian Magistrates' (2006) 30 Melbourne University Law Review 370, 392-394.

[158] (1996) 189 CLR 51.

[159] Matter No CA 40337/98 NSWSC 260 (12 June 1998).

[160] [4]

203. It may be seen, therefore, that the principle that in cases of court restructuring, previously serving judges should be reappointed, has been long held and widely recognised.[161] Kirby J has opined that:[162]

> *"If any other practice is implemented, it presents a grave threat to judicial independence. That threat hangs as a Damoclean sword over all judicial officers in a like position. If judicial officers are repeatedly removed from their offices, and not afforded equivalent or higher appointments, the inference must be drawn that their tenure is, effectively, at the will of the Executive Government, i.e. the politicians in power from time to time. This is contrary to international principal. …"*

204. Thankfully, challenges to judicial independence in the Oceania region have been historically rare although the last few decades has seen a marked increase, most often through the abolition or restructuring of inferior courts and tribunals, with governments reappointing only some former office holders to the replacement court or tribunal, or to another court or tribunal of equal standing. When such cases do arise, they have the potential to engender (usually) well-founded anxiety at any prospect of undue pressure on, or worse, cracks in, this fundamental cornerstone to modern democratic systems of government and the ramparts separating the triunal powers within them. In addition to the cases discussed above, the following selection illustrates the significance of the issue and the responses of some governments and courts to it.

205. In Australia, the appointment, tenure and remuneration of state or territory judges lacks explicit protection under the Commonwealth Constitution. Therefore, those facets of judicial independence are susceptible to interference by the executive or Parliament (with the exception of in New South Wales due to the entrenched protections in its Constitution). Courts have recognised the vulnerability of protections for the tenure of state and territory judges in a number of cases. For instance, in *McCawley v The King*,[163] Thomas McCawley's appointment to the Supreme Court of Queensland was linked to his Presidency of the Court of Industrial Arbitration, which was for a seven-year term, despite the Queensland Constitution expressly granting life tenure. The High Court found

---

[161] For example, First World Conference on the Independence of Justice, Universal Declaration on the Independence of Justice (10 June 1983) ('Montreal Declaration'), cl 2.06(g); Kirby, 'Independence of the Judiciary: Basic Principles, New Challenges' 10-11, referring to the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.1. See, also: ibid 26-35; Michael Kirby, 'Abolition of Courts and Non-Reappointment of Judicial Officers' (1995) 12 Australian Bar Review 181; S Zeitz, 'Security of Tenure and Judicial Independence' (1998) 7 Journal of Judicial Administration 159; Commonwealth, Tenure of Appointees to Commonwealth Tribunals, Parl Paper No 289 (1989) [5.26]–[5.28]; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

[162] "Abolition of Courts and Non-reappointment of Judicial Officers", ibid, p 37.

[163] [1920] AC 691. For discussion see, Nicholas Aroney, 'Politics, Law and the Constitution in McCawley's Case' (2006) 30 Melbourne University Law Review 605.

McCawley's appointment to be invalid.[164] That was reversed on appeal when the Privy Council affirmed that the life tenure granted by the Queensland Constitution was subject to both express and implied amendment by subsequent legislation.[165]

206. The cases of *Macrae* and *Quin*, discussed above, also provide salient reminders of the vulnerability of judicial security of tenure when pitched against Executive policy decisions involving restructuring or recomposition of courts and tribunals.

207. A number of examples are to be found in Victoria. In 1992, following a change of government, the Industrial Relations Commission and the Accident Compensation Tribunal were abolished and replaced. Section 175(1) of the *Employee Relations Act,* 1992 (Vic) provided that "on the appointed day the former Commission is abolished and the members of the former Commission go out of office". The Act did not make provision for the appointment of members of the old Commission to the new. The Deputy Presidents and other members of the old Commission were advised that they were to be regarded as having applied for appointment to the new Commission unless they indicated otherwise, notwithstanding that their applications would "not be treated more favourably than those of other applicants". It would appear that the letter to the former officeholders was drafted with the majority opinion of the High Court in *Quin* in mind. Of the fifteen members of the old Commission, five declined to apply for a position in the new Commission. They were offered a non-negotiable *ex gratia* termination package as determined by the State Department of Industry and Employment. The remaining members (including two Deputy Presidents and eight Commissioners) sought appointment to the new body. The two Deputy Presidents were successful but only two of the eight Commissioners succeeded. The unsuccessful Commissioners were offered *ex gratia* termination packages.

208. The case of the Accident Compensation Tribunal and the treatment of its former members has been described by Kirby J as the 'most serious of departures from the convention'.[166] By the *Accident Compensation Act* 1985, the Tribunal members enjoyed the rank, status and precedence of a judge of the County Court of Victoria. They performed judicial duties. They were each to hold office as a judge of the Tribunal during good behaviour until the age of 70. They could be removed from office only by the Governor of Victoria

[164] *McCawley v The King* (1918) 26 CLR 9.
[165] McCawley v The King [1920] AC 691.
[166] "Abolition of Courts and Non-reappointment of Judicial Officers", ibid, p 27.

on an address of both Houses of Parliament. In 1992, the *Accident Compensation (WorkCover) Act* 1992 (Vic) abolished the Tribunal. It made no provision for the continued existence of the office of the judges or for their tenure. As a result, all the judges who were not reappointed to some equivalent office in the County Court or the State Administrative Appeals Tribunal were effectively removed from office, without proof of misbehaviour, or by the exercise of the procedure promised to them by Parliament and accepted by them on their appointment. The move was met with unprecedented protests from judges throughout Australia, the International Commission of Jurists, the Centre for the Independence of Judges and Lawyers (in Geneva), the Law Council of Australia, Law Societies and Bar Associations throughout the nation, and others, all to no avail. Of the nine who were not appointed elsewhere, each was provided with monetary compensation. That compensation fell far short of the promise of office to the age of 70, pension or other rights nor could it provide redress for their dispossession of office, and loss of status, reputation, etc. Proceedings were commenced in the Supreme Court of Victoria.[167] It would appear from the lack of any reported decision that those proceedings were resolved.

209. Similar experiences have occurred in South Australia[168] and Western Australia.[169]

210. In *D'Imecourt v Manatawai*,[170] the then Chief Justice of the Republic of Vanuatu was served with two notices, signed by the Minister of Foreign Affairs and Immigration, declaring the Chief Justice an undesirable immigrant. The then President of Vanuatu issued a constitutional instrument purportedly terminating the Chief Justice's appointment. The Chief Justice brought proceedings to quash those decisions on a number of bases including lack of jurisdiction, denial of natural justice, that his termination was ultra vires the Constitution, failure to give reasons, unfair hearing and bias. In granting the relief sought, Tompkins J observed, relevantly:

> *"... To decide whether a Chief Justice should be removed from office can only be regarded as a constitutional issue of the outmost and gravest importance. It harks right back to the fundamental concept of the independence of the judiciary. If there be the slightest suggestion that a judge may be removed for other than entirely proper reasons, properly established after a fair hearing, the independence of the judiciary is imperilled. A judge may well be unable*

[167] *Bingman v Attorney-General for the State of Victoria* (No 4493/93).

[168] 1994 Bill to abolish the Industrial Court and the Industrial Commission of South Australia was abandoned following protests from the Judges of the Supreme Court and the Law Society. The government then sought to alter the composition of the court by offering attractive retirement packages.

[169] 1991 abolition of the Workers' Compensation Board.

[170] [1998] VUSC 59.

to carry out the judicial oath to perform his judicial office "without fear or favour", if his independence is likely to affected by the threat of unjustified removal. The independence of the judiciary is at the very cornerstone of a free democracy. It is an inherent and vital part of the constitutional separation of powers. Some centuries ago, Blackstone, the well-known English legal commentator, said in his Commentaries page 269-

> *'In this distinct and separate existence of the judicial power in a peculiar body of men nominated indeed but not removable at pleasure by the Crown, consists one main preservation of public liberty: which cannot subsist long in any state unless the administration of common justice be in some degrees separated both from the legislative and also from the executive power.'*

It is of particular importan[ce] in constitutional issues. The High Court of Australia in R. v. Joske; ex parte Shop Distributive and Allied Employees' Association [1976] HCA 48; (1976) 135 CLR 194, 276 the majority said that:

> *'...upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which Government power might be exercised and upon that the whole system was constructed.'"*

211. In the 2003 Canadian decision of *Alberta v Ell and Others (A-G of Canada and Others intervening)*,[171] the respondents were justices of the peace. In 1988, the Justice of the Peace Act was amended to improve the qualifications and independence of provincial justices of the peace and required all such justices who exercised judicial functions to meet qualifications decided upon by an independent judicial council. The respondents did not meet the qualifications and were removed from office but offered administrative positions as non-presiding justices of the peace. They applied for a declaration that the provision which removed them from office, inter alia, contravened their security of tenure and independence required by s 11(d) of the Canadian Charter of Rights and Freedoms 1982 ("**Charter**"). The chambers judge granted the application and declared the provision to be of no force and effect as it applied to the respondents. The Court of Appeal upheld the finding of the chambers judge. The province appealed to the Supreme Court.

212. The Supreme Court held that although it has been historically confined to the superior courts, the principle of judicial independence had evolved to apply to all courts. The principle of independence clearly extended to protect the judicial office held by non-sitting justices of the peace. However, security of tenure could not be viewed as an absolute as that would make necessary reforms almost impossible. If a removal from office was necessary in the promotion of the public interests served by judicial

[171] [2003] 5 LRC 256.

independence, then it could not be considered arbitrary, and would not undermine the perception of independence in the mind of a reasonable and informed person. The reforms introduced by the amending Acts reflected a good faith and considered decision of the legislature that was intended to promote those interests. It was uncontested that the provisions were enacted to serve the public good. Various commissions had indicated a pressing need to improve the independence and competence of justices of the peace and the amendments reflected the recommendations of those reports. Thus, the Court held that the impugned legislation did not undermine the perception of independence in the mind of a reasonable and informed person, who would perceive the amendments to strengthen, rather than diminish, the independence and qualifications of Alberta's justices of the peace. Accordingly, the amendments were respectful of the principle of judicial independence, s 11(d) of the Charter was not engaged and the appeal was allowed.

213. In 2011, the Supreme Court of Papua New Guinea gave judgment in *Re Reference to Constitution section 19(1) by East Sepik Provincial Executive*.[172] Between November 2011 and May 2012, Injia CJ was twice purportedly suspended from office and twice arrested. Justice Kirriwom was also arrested, again without any substance in the charge. Action was purportedly taken pursuant to the *Judicial Conduct Act*. It was not until 2021, in the immediate aftermath of the death in 2021 of Sir Michael Somare, that the Hon Belden Namah made a full and public apology for his behaviour in that period of tension and in relation to Sir Michael Somare, Sir Salamo Injia and the judiciary generally. The Hon Peter O'Neill also tendered a public apology for his part in the political impasse which occurred as a sequel to the Supreme Court's decision. In 2013, the PNG Parliament repealed the *Judicial Conduct Act*.

214. A recent constitutional stand-off in Kiribati provides a vivid and cautionary tale of the turmoil that can eventuate, not to mention international concerns, when the separation of powers becomes blurred and judicial independence is challenged. In February 2020, Judge Lambourne left Kiribati to attend a conference in Australia. However, he became stranded due to the COVID-19 pandemic. A dispute arose as to the terms of his judicial appointment and tenure under the Constitution or whether he was only appointed for a fixed three-year term. The Kiribati government attempted to prevent Judge Lambourne from resuming his position in Tarawa by stopping payment of his wages,

[172] [2011] PGSC 41.

refusing to issue an ongoing work permit and by not allowing him to board several repatriation flights. On 11 November 2021, then Chief Justice Hastings overturned the government's actions, declaring them unconstitutional. Before reaching that conclusion, his Honour observed:[173]

> *"[54] The independence of the judiciary is ensured when judges have security of tenure. In Valente v R,[174] the Supreme Court of Canada defined security of tenure as 'a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.'[175]*
>
> *[55] Former Chief Justice of Canada Beverley McLachlin has written about the importance of security of tenure, financial security and administrative independence in enabling an independent judiciary to perform its core functions:[176]*
>
> > *'The necessary pre-conditions for judicial independence are the conditions that remove the apparent or real possibility of inappropriate influence from the other two branches on the judiciary's exercise of its essential adjudicative functions. Security of tenure and financial security are necessary to remove the possibility that the other branches could influence the judiciary by threatening judges' careers and economic security. Administrative independence is required both as an important intrinsic feature of judicial independence, and also to remove the appearance of inappropriate influence on the courts through executive control of their budgets. The purpose of these conditions is not to create special benefits for judges as individuals, but to enable the judiciary to properly exercise its essential function in the constitutional economy of the modern democratic state.'*
>
> *[56] These principles reflect widely held norms and provide the context in which constitutional and statutory provisions affecting the separation of powers, judicial independence and the rule of law can be interpreted."*

215. Following that decision, both Judge Lambourne and Chief Justice Hastings were suspended over allegations of misconduct. In August 2022, the Court of Appeal upheld the Chief Justice's ruling and overturned a subsequent attempt by the government to deport Judge Lambourne.[177] In September 2022, the government suspended all judges of the Court of Appeal. A 'special tribunal' was established by the government to deal with

[173] *Republic v Lambourne* [2021] KIHC 8.
[174] [31]
[175] See also Richardson, "Defining judicial independence: A judicial and administrative tribunal member perspective", (2006) 15 *Journal of Judicial Administration* 206 at 206–207.
[176] B McLachlin, "Judicial Independence: A Functional Perspective" in *Tom Bingham and the Transformation of the Law* (Oxford, Oxford University Press, 2009), 269 at 281-282.
[177] *Attorney-General v Lambourne* [2022] KICA 9

the misconduct allegations. In April 2024, Parliament voted to accept the recommendation of that tribunal to remove Judge Lambourne from office.

216. Most recently, in *Sharma v The President of the Republic of Fiji*,[178] the Applicant was the Solicitor General of Fiji, appointed pursuant to s 116 of the Constitution. He represented the Superintendent of Elections ("**SOE**") and the Attorney General on an application before the Court of Disputed Returns by an elected member of Parliament. The Court found against the SOE. The SOE then filed complaints against Sharma in relation to his conduct of the case. The Judicial Services Commission then asked the President to suspend Sharma pending 'referral to and appointment of [a] Tribunal' pursuant to ss 112(4) of the Constitution. Sharma was then suspended without pay. He sought reinstatement of his salary but was refused. Seven weeks passed without any further communication. He then received 31 questions and a direction to reply to them and the SOE's complaint within two days. He sought more time, which was also refused. The Judicial Services Commission advised the President that a tribunal was not warranted and that he should proceed with determining the complaints in accordance with ss 116(9) of the Constitution. The advice also contained a draft letter of termination of Sharma's position. Termination followed and Sharma sought judicial review of the decisions which culminated in him being removed from office. A new Solicitor General was appointed whilst Sharma went on to secure employment teaching at a university.

217. Under Chapter 5 of the Fijian Constitution, entitled 'Independent Judicial and Legal Institution', the grounds and procedure for removal of the Solicitor General are essentially the same as for a judicial officer, that is, on the grounds of misbehaviour or inability to perform. The statutory retirement age is 70. The Applicant was 22 years younger.

218. Justice Amaratunga found that Sharma's suspension without salary and removal from office were "contrary to law and null and void", and that if he was wrong about that, Sharma had clearly been denied a reasonable opportunity to be heard. In arriving at that conclusion, his Honour observed, relevantly: [179]

> *"Judicial independence is secured in a number of ways, but principally by providing for security of tenure: in particular this requires that a judge may only be removed from office, or otherwise penalised, for inability or misbehaviour and not because the government does not like the decisions which he or she makes. It is also required that removal from office should be*

[178] [2024] FJHC 49

[179] At [235], citing Chief Justice of Trinidad and Tobago v Law Association of Trinidad and Tobago [2018] UKPC 23 at [18].

in accordance with a procedure which guarantees fairness and the independence of the decision-makers from government."

219. I now turn to consider the issues for determination having regard to the parties' competing submissions. As noted above, there are no factual conflicts to be resolved. The issues therefore are largely questions of law.

Issue 1: Are the Plaintiff's claims precluded by res judicata?

220. In its July 2023 decision, the Court of Appeal raised the potential issue of res judicata and whether the Plaintiff's principal claim in this proceeding may be precluded or barred by virtue of this Court's April 2022 decision. However, neither res judicata nor issue estoppel were pleaded by or on behalf of any of the Defendants either before the Court of Appeal's decision, or since.

221. However, Counsel for the Plaintiff did not take issue with that and the question was addressed in written submissions and proceeded to full argument at trial. In fact, in his first supplementary affidavit,[180] the Plaintiff pre-emptively deposed (or submitted) that the issues in the present case were not determined in the April 2022 decision because, in summary:[181]

(a) in proceeding MISC 381/21, he filed two motions for a pickwick hearing, on 14 December 2021 and 2 March 2022;[182]

(b) the April 2022 decision concerned the second of those motions;

(c) the Attorney General was sued for and on behalf of the Minister of Justice and Court Administration;

(d) while the April 2022 decision "dealt with some aspects of the pickwick application", it did not determine issues regarding the "legality, lawfulness and the constitutionality" of ss 67(6), and Articles 104D, E and F, which "continued to be negotiated between the parties";

(e) in light of the April 2022 decision, the Plaintiff decided to withdraw the substantive proceeding in MISC 381/21, and in advising the Attorney General of same, he:

[180] Sworn 8 May 2024.

[181] [3] to [15]

[182] The Court records in fact show that the 14 December 2021 motion was filed in proceeding MISC 381/21 whereas the 2 March 2022 motion was filed in proceeding MISC 41/22.

(i) requested that her office "expedite the necessary amending legislation" to enable the LTC to fulfil its inherent expectations as a Court and deal with urgent matters now restricted by [the April 2022 decision]; and

(ii) noted that the proposed appointees would be "released from their position" so that once "the law is in order" they could apply for any vacancies they wish and "their applications would be considered according to the criteria to be determined by the proposed law".

Plaintiff's submissions

222. Before me, Mr Ainu'u (further) submitted that *res judicata* does not apply to the Plaintiff's claims in this proceeding for the following reasons, in summary:

(a) Res judicata was first raised in oral submissions by the Attorney General during the hearing in proceeding MISC 41/22 before the Chief Justice on 31 October 2022 but did not feature in his Honour's decision.

(b) The conditions for issue estoppel, identified in *Silipa v President of Land and Titles Court*, [183] namely, (a) the same issue has been decided, (b) the judicial decision which is said to create the estoppel was final, and (c) the parties to the judicial decision or their privies were the same persons as parties to the proceedings in which the estoppel is raised or their privies, do not apply here.

(c) The April decision dealt with whether the Minister was justified in her decision to instruct staff not to assist the LTC Bench. In this proceeding, the Plaintiff is challenging the legality and constitutionality of his removal as the President of the LTC.

(d) The April decision was not a final decision. The Court in that matter was dealing with a *Pickwick* application by the Plaintiff as part of interim orders to allow staff to assist the LTC Bench while the substantive matter was being dealt with by the Court. Following the April 2022 decision, the parties "agreed" that the substantive application in that proceeding would be withdrawn "in lieu of the Attorney General amending the LTA 2020 to address the issues" identified in the decision, including ss 67(6).

[183] [2017] WSSC 323, citing *Reed v Mataeliga* [2005] WSSC 1; *Carl Zeiss Stifteing v Raynor & Keeler Ltd (No 2)* [1967] 1 AC 853, 935.

(e) The parties in the present proceeding are different to those the subject of the April 2022 decision. In MISC 41/22,[184] the Attorney General was sued for and on behalf of the Minister. Here, the Defendants are the Attorney General sued for and on behalf of the Prime Minister and the Government, and President Vaai.

223. Alternatively, Mr Ainu'u submitted that even if the principles of res judicata or issue estoppel apply, then pursuant to the recent Court of Appeal decision in *The Speaker of the Legislative Assembly v Malielegaoi*,[185] the Plaintiff ought be entitled to "reopen" the April 2022 decision so far as it concerned "issues of jurisdiction under the LTA 2020 which, inter alia, includes the question of whether it yields the result of summarily removing [the Plaintiff] as the President of the LTC".

224. By way of further alternative, Mr Ainu'u submitted, having regard to the Court of Appeal's remarks at paragraph 61 of its July 2023 decision (referred to above and recited for convenience in the footnote below),[186] that the natural conclusion of the April 2022 decision is that the Plaintiff "is [or was at the date of his removal] the President of the Land and Titles Court, albeit in a limited capacity", in which case, "the Constitutional and Statutory mechanism - either under the Pre or Post LTA 2020 regime - ought to have been engaged to remove him as President (which was not done)". If the Plaintiff remained as a "'transitional' President", then how was he to be removed? The repeal of the LTA 1981 repealed its provisions on removal of the President. As the April 2022 decision meant that the Plaintiff's authority was limited and did not extend to petitions filed under the LTA 2020, the question arises as to whether or not the removal provisions in that Act applied.

225. Mr Ainu'u went on to submit that it was right of their Honours in the April 2022 decision to refer the matter to Parliament to amend the legislation "to carve out a transitional road map that may include the creation of a recruitment and selection procedure to allow interested applicants (including the Plaintiff) to reapply for their posts under the new regime. And if they are not successful, then have a legislative formula to settle the issue

[184] Erroneously referred to in both side's submissions as MISC 381/21.

[185] [2024] WSCA 1, citing *Re Wakim* [1999] HCA 27, 198 CLR 511 at [80] per Gaudron J.

[186] "... Although it may turn out that res judicata principles preclude a claim by the appellant to be President of the new Land and Titles Court, they will presumably be held to run both ways. So, if the res judicata argument prevails against his claim to be President of the new Land and Titles Court, he may well be held to have rights under the April 2022 judgment that are also protected by res judicata and may have been breached. On this basis, we [are] left with the view that the validity of the appellant's 'removal' in October last year from the transitional role recognised in the April 2022 judgment may be questionable."

of their salaries, allowances and benefits". However, despite the opportunity to do so via the December 2022 amendments to the LTA 2020, Parliament made no such changes. By then, the Plaintiff had been removed from office while all the other judges of the old LTC were permitted to retain their corresponding position in the new LTC. It appears, he submitted, that it was only the Plaintiff that "required replacing".

Defendants' submissions

226. The Attorney General submitted that the primary issue raised by the Plaintiff for determination in this proceeding in relation to his appointment as President is subject to the principle of *res judicata*. In doing so, she adopted some of the arguments posited by the Court of Appeal in the July 2023 decision,[187] namely:

(a) in its April 2022 decision, this Court expressly concluded that the Plaintiff, along with the other judges appointed under the LTA 1981, only had jurisdiction under ss 66(2) and (4) and did not have any other jurisdiction under the LTA 2020;

(b) the tone of that judgment strongly suggests that it was a final judgment;

(c) the Plaintiff did not appeal the decision; and

(d) pursuant to that judgment, steps have subsequently been taken, namely, amending the LTA 2020 and the appointment of the Second Defendant as President of the LTC under Part IX of the Constitution.

227. The Attorney General identified the well-established principles of *res judicata* by reference to the decision in *McCarthy v Samoa National Provident Fund*.[188] There, the Court cited *Craig v Stringer*,[189] where the New Zealand Court of Appeal observed:

> *"[16] Access to the courts will be denied where a litigant seeks to reopen a dispute that has already been determined. This is precluded by the doctrine of res judicata which serves the public interest in finality in litigation and upholds the principle that a party should not be vexed twice in the same matter. Res judicata applies where a cause of action has been determined in earlier proceedings between the same parties or their privies — cause of action estoppel. The doctrine prevents re-litigation of the same cause of action in any subsequent proceedings. Res judicata can also apply where there has been a determination in earlier proceedings between the same parties or their privies of an issue that was essential to the determination of the claim such that the judgment could not stand without it — issue estoppel.*

[187] [49]
[188] [2020] WSSC 41 at [73].
[189] [2020] NZCA 260

> *Issue estoppel is narrower, and less absolute in its application than cause of action estoppel.*
>
> *[17] A related principle is that the parties are required to bring forward their whole case and will generally be prevented from later attempting to re-open the same subject on a different basis. This principle was first recognized by Wigram V-C in Henderson v Henderson…"*

228. The Attorney General also identified that in proceeding MISC 41/22, she, on behalf of the Government, opposed the Plaintiff's application, on bases that included that his tenure as President was revoked upon the commencement of the LTA 2020 pursuant to ss 67(6); that continuation of the Plaintiff's tenure as President under the LTA 1981 had not been preserved by any transitional or savings provisions; and the Plaintiff had not been appointed as President in accordance with Article 104D of the Constitution. The Plaintiff's Motion was filed on 14 December 2021, on a pickwick basis, but was not heard until 14 March 2022. Therefore, the Plaintiff had ample time and opportunity to prepare for a full hearing. Substantive written and oral arguments were presented on the issue of the Plaintiff's appointment before the three-member Bench, who "examined, deliberated and determined substantively the issue of the President's appointment pursuant to Article 104D of the Constitution".

229. Accordingly, by application of the principles in *McCarthy* and *Craig*, the Attorney General submitted that:

    (a) the issue advanced by the Plaintiff in this proceeding has already been determined and he should be barred from re-opening it; and

    (b) the two proceedings involve "essentially the same parties", with the Plaintiff being common to both and the Defendant being the Attorney General for and on behalf of the Honourable Prime Minister and the Government of Samoa.

Consideration

230. In *Reed v Matailiga*,[190] then Chief Justice Sapolu provided a comprehensive survey, at that time, of the common law principles of res judicata, action estoppel and issue estoppel.[191] His Honour noted the underlying policy considerations for the principles as being the public interest in an end to or finality in litigation and that a party should not be

[190] [2005] WSSC 1
[191] Pages 3 to 6.

vexed or harassed twice by the same matter.[192] His Honour identified the requirements for issue estoppel as that:

(a) the same question has been decided;

(b) the judicial decision which is said to create the estoppel was final; and

(c) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

231. As noted in the submissions above, those principles have been applied in a number of cases since.[193]

232. For the reasons which follow, I do not consider that the Plaintiff's principal claim in this proceeding is precluded or barred on the basis of res judicata or issue estoppel.

233. Firstly, the questions in each proceeding are materially different:

(a) In the April 2022 decision, the Court considered and determined whether the Ministry's then failure to provide administrative support for the judges of the LTC was unlawful, and if so, what was the meaning of ss 67(6) of the LTA 2020 which purportedly revoked the appointment of the Plaintiff as President and the other Judges. The answer to the first question depended, in part, on whether the Plaintiff had standing to seek the relief sought, which in turn required a determination as to whether he was still had any authority as the President of the LTC. That second enquiry arose by way of the Attorney General's opposition to the application. It was determined by the Court's interpretation of s 67 to effect that the Plaintiff and the other Judges of the LTC then only had jurisdiction, that is, their appointments remained valid, only in respect of cases then pending before them in the LTC.

(b) It is also relevant, in my opinion, that the subject matter of that proceeding and the purport of the Court's April 2022 decision were directed at issues concerning the urgent provision of administrative support services to the LTC. While the Court identified the lacuna in the relevant legislation, at that time, the Constitutional validity of ss 67(6) was never considered or determined, directly or at all.

[192] Citing *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853 per Lord Reid at 909, per Lord Guest at 933, per Lord Upjohn at 946; *Johnson v Gore Wood & Co* [2001] 1 A11 ER 481 per Lord Bingham of Cornhill at 498 – 499; The Doctrine of Res Judicata (1996) 3rd edition by Spencer Bower, Turner and Handley at 10.

[193] For example, *Ainuu v Land and Titles Court* [2011] WSSC 36; *Silipa v President of Land and Titles Court* [2017] WSSC 32; *McCarthy v Samoa National Provident Fund* [2020] WSSC 41; *Malielegaoi and anor v Speaker of the Legislative Assembly* [2023] WSSC 37.

(c) In this proceeding, the Plaintiff has taken the enquiry the next step as it were. He directly challenges the validity of ss 67(6) as the basis for his removal from office. In so doing, he also relies on other relevant provisions such as ss 67(3) of the LTA 2020 and Articles 104D and 111(6) of the Constitution, which were not considered by the Court in its April 2022 decision.

(d) Further, in my view, it is appropriate for the Plaintiff to be permitted to agitate his claims, and for the important issues which arise from them to be considered, in the statutory context of the subsequently corrected versions of the CAA 2020 and LTA 2020, since their re-assent in October 2022, and the significant December 2022 amendments to the LTA 2020. Even though they post-dated the April 2022 decision, and the Plaintiff's official removal from office in October 2022, their commencement was expressly backdated to 15 March 2021.

234. Secondly, in light of that finding, it is, strictly speaking, unnecessary to determine whether the April 2022 decision was final. If it were, I am of the view that the only finality that could be ascribed to the Court's decision was in respect of its interpretation of s 67 and its declaration that the Executive was required to resume provision of support services to the Plaintiff and Judges of the LTC for the purposes of the transitional provisions of the LTA 2020. Neither of those decisions involved final determinations of the issues now advanced by the Plaintiff, in particular, the validity of ss 67(6) as a lawful basis for his removal from office.

235. Further, it is patent from the terms of the April 2022 decision, that it was, as the Court of Appeal described it, a "here and now" solution. The concluding referral back to Parliament to "consider how to take these matters forward" indicates, in my view, that that Court had in mind that the situation as it then stood, based on a literal interpretation and application of ss 67(6) alone, in which the LTC would have been left inoperative with no judges, might well change if and when Parliament addressed it by amending legislation to fill the lacuna in respect of the appointment, etc, of judges to the new Court.

236. I also note that in his Honour's October 2022 decision, the Chief Justice considered the interpretation of s 67, and whether the Plaintiff had been summarily dismissed, to be a serious question to be tried. That would hardly have been the case had that issue been determined, in April 2022, for all time and for all purposes.

237. Thirdly, and in any event, the parties to the respective proceedings are different. In proceeding MISC 41/22, the Respondent was effectively the Minister of Justice and Courts Administration. In the instant proceeding, the Defendants are the Prime Minister, the Hon Justice Vaai and the Government. Even if the Minister, Prime Minister and the Government may be viewed as different emanations or representatives of the same Constitutional organ, there is, in my view, clearly no privity of 'blood, title or interest' between them across the various proceedings and the issues in those proceedings.[194] The causes of actions, parts played, relief sought, and interests of each, are distinct and different.

238. However, if I am wrong about that, then I consider there to be merit in Mr Ainu'u's first alternative or fall-back submission.

239. In *The Speaker of the Legislative Assembly v Malielegaoi*,[195] two Members of Parliament were suspended by the Speaker for 'contempt' of Parliament. The first suspension was overturned by the Supreme Court. The Members were then suspended a second time by the Assembly on the same complaint. A challenge in this Court to the first suspension concerned the legality of the process by which the Assembly dealt with the matter. However, the Court did not determine that issue but resolved the case on the basis of a breach of natural justice.[196] That decision was not appealed. During the subsequent proceeding in respect of their second suspension, the two Members sought again to challenge the legality of the process applied by the Assembly for both the first and second suspensions. The Speaker raised a defence of res judicata. He contended that:

(a) the process issue was argued in the first case;

(b) if the Members disagreed with it, they ought to have appealed that decision; and

(c) since they had not, they were estopped from raising it on the second suspension.

240. The Court of Appeal determined the substantive issues by finding that Parliament did not have authority to deal with 'contempt'. On the issue of *res judicata*, their Honours held that even if the issue were properly to have been treated as having actually been adjudicated on between the parties in the first suspension judgment, that would not

[194] *Reed v Matailiga*, ibid, citing C*arl Zeiss Stiftung v Rayner & Keeler* Ltd, ibid, per Lord Reid at 910; *Ramsay v Pigram* [1968] HCA 34; (1968) 118 CLR 271 per Barwick CJ at 279; *Halsbury's Laws of England* 4th ed, para 1543, p 1641; *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd* [1993] FCA 342; (1993) 43 FCR 510, 521, 539; cited with approval in *The Doctrine of Res Judicata* (1996) 3rd edition by Spencer Bower, Turner and Handley at 199.

[195] [2024] WSCA 1.

[196] *Malielegaoi v Speaker of the Legislative Assembly* [2022] WSSC 35.

necessarily have precluded its reopening between the parties in the circumstances. They explained that 'res judicata plays a restricted role in administrative law, since it must yield to two fundamental principles of public law, namely that jurisdiction of a public body cannot be exceeded, and that statutory duties and powers cannot be fettered.' As the first of those principles was 'in play' in the case, especially when the jurisdiction (that of the Assembly) is conferred by, and is subject to, Samoa's Constitution, the Court exercised its discretion to permit the Members to reopen the question.[197]

241. In my view, that discretion should be exercised in the present case in favour of the 'citizen', namely, the Plaintiff. The central issue in the case concerns the jurisdiction of Parliament insofar as it calls into question the legality and Constitutionality of ss 67(6) and its effect on the Plaintiff and his rights. Although a little over two years has elapsed since the April 2022 decision, and the Second Defendant has since been appointed, the withdrawal by the Plaintiff of his challenge to that appointment, denudes that factor of any weight it might otherwise have had. There is a significant public interest in having any matter concerning judicial independence correctly determined. The Attorney General did not submit that the remaining Defendants would be prejudiced if the legality question is reopened.

Issue 2: Did ss 67(6) remove the Plaintiff from office?

Plaintiff's submissions

242. Mr Ainu'u submitted that the relevant "legislative scheme" and "legislative history" supports the Plaintiff's contention that ss 67(6) of the LTA 2020 did not have the effect of removing him as President of the LTC.

243. As to the legislative scheme, Mr Ainu'u submitted, in summary:

(a) In its April 2022 decision, the Court found it difficult to attribute to Parliament an intention to remove all LTC judges without due process, or to leave the LTC without judges at all.

(b) The Court concluded by declaring that the jurisdiction of the President and Judges of the LTC were "confined within the parameters of ss 67(2) and 67(4) of the LTA 2020" and left the matter for Parliament to consider and take forward.

[197] [83] to [86], citing *Wade & Forsyth's Administrative Law*, 12th edition, p. 286; *Re Wakim* (1999) 198 CLR 511, per Gaudron J at [80].

(c) Parliament did not do that. It simply reaffirmed through an inquiry that ss 67(6) remains part of the LTA 2020. That exercise did not alleviate or eliminate the difficulties referred to by the Court, as demonstrated by the "termination and removal of the Plaintiff, without process".

(d) In the absence of amendment to ss 67(6), "all the Judges of the LTC would have to be removed in the same manner as the President" leading to a result which the Court in the April 2022 decision held could not be regarded as an intention attributable to Parliament.

244. Mr Ainu'u then submitted that the *Acts Interpretation Act* 2015[198] allows the Court to also consider the legislative history of ss 67(6), which points, he said, to the "glaring conclusion that ss 67(6) was intended for assessors". He referred to the July 2023 decision in which the Court of Appeal traced the legislative history of the LTC and opined (as detailed in the Background section above) that it was "possible to construe" s 67 so that the Plaintiff became President of the new LTC. It will be recalled that their Honours also then outlined arguments for and against that proposition.[199]

Defendants' submissions

245. The Attorney General submitted, in summary:

(a) ss 67(6) revoked any appointment under the LTA 1981 that is not provided for in the LTA 2020;

(b) ss 67(6) does not reference assessors or any specific appointment;

(c) therefore, this Court is obliged to interpret the provision consistent with the approach described in *Moala v Electoral Commissioner*:[200]

> *"[18] The Court is duty bound to give effect to the intention of Parliament, not to second guess it. The intention of Parliament is to be derived from the words of the Act having regard to 'the plain meaning of ordinary words' – s.7(3)(a) AIA 2015. It would be a breach of the doctrine of separation of powers for us to impute into legislation words or a limitation that Parliament has deliberately omitted. If the omission is accidental only Parliament can correct this, not the Court because that would mean the Court would be making law which is not its function."*

[198] ss 7(4) and (5).
[199] [57]
[200] [2020] WSSC 88

(d) the above interpretation of ss 67(6) is also supported by the April 2022 decision where the Court held that "*The President and Judges who were appointed under the 1981 LTA do not have the authority to exercise jurisdiction with respect to the other provisions of the 1981 LTA, or under any of the provisions of the LTA 2020…*";[201]

(e) in light of that aspect of the April 2022 decision, it was incumbent on the Honourable Prime Minister to appoint a President pursuant to the provisions of the Constitution; and

(f) accordingly, the Plaintiff was not "terminated" due to any decision by the Prime Minister, but as a consequence of the passage of the three Acts.

Consideration

246. This issue calls for the interpretation of ss 67(6) in the context of, and for the purposes of, the claims in this proceeding. The proper construction is to be found in the meaning of the statutory language, read in its statutory context and in light of its statutory purpose.[202] It is appropriate, therefore, that I commence by having regard to the same interpretative principles and statutory directives applied by the Court in its April 2022 decision.

247. Section 7 of the *Acts Interpretation Act* 2015 provides, relevantly:

> **7. Principles of interpretation**
>
> (1) An Act is considered as speaking from time to time, and if a matter or thing is expressed in the present tense, the Act applies to the circumstances as they arise, so that effect may be given to the Act according to its spirit, true intent, and meaning.
>
> (2) An Act must be interpreted in such manner as best corresponds to the intention of Parliament.
>
> (3) The intention of Parliament is to be derived from the words of the Act, having regard to:
>
> (a) the plain meaning of ordinary words; and
>
> (b) the technical meaning of technical words; and

[201] [79b]

[202] Burrows and Carter "Statute Law in New Zealand", 6th ed, 2021, Chapter 11.

(c) the whole of the Act and the specific context in which the words appear; and

(d) headings and any limitation or expansion of the meaning of words implied by them; and

(e) grammar, rules of language, conventions of legislative drafting and punctuation.

(4) If the application of subsection (3) would produce:

(a) an ambiguous result; or

(b) a result which cannot reasonably be supposed to correspond with the intention of Parliament,

the words are to receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

(5) In applying subsection (4), the intention of Parliament may be ascertained from:

(a) the legislative history of the Act or provision in question; and

(b) the explanatory memorandum or any other material that was before Parliament; and

(c) the second reading speech made to Parliament during the passage of the Bill that became the Act;

(d) any relevant report of a commission, committee (including a committee of Parliament) or other similar body that was tabled in Parliament before the Act was passed;

(e) the official record of proceedings of Parliament; and

(f) treaties and conventions to which Samoa is a party.

(6) This section does not limit the material, rules or principles of interpretation that may be considered by the courts in interpreting an Act.

(7) …

248. Section 25 provides, relevantly:

25. Effect of repeal

(1) The repeal or expiry of an Act does not affect:

(a) the validity, invalidity, effect, or consequences of anything already done or suffered; or

(b) an existing status or capacity; or

(c) a right, interest, or title already acquired, accrued, or established, or any remedy or proceeding in respect of the right, interest, or title; or …

249. In relation to the interpretation of savings and transitional provisions, this Court endorsed, as being applicable in Samoa, the following summary from *Hilder v Port Otago Ltd*:[203]

> *"Generally speaking, the function of savings provisions, where a substantive statute replaces another, is to preserve any rights, powers or privileges which may have accrued under the earlier enactment, and which would or might otherwise cease to have effect. It is used to 'save' what already exists. The function of transitional provisions, on the other hand, is to make special provision for the application of the new legislation to the circumstances which exist at the time the legislation comes into force. In other words, such provisions regulate and modify the provisions of the new statute during the period of transition."*

250. Further, in construing statutes, Courts must give effect to the principle of legality and should therefore be slow to impute to Parliament an intention to override established rights and principles where that is not clearly spelt out.[204]

251. In my opinion, it may be observed at the outset that ss 67(6) was a blunt instrument. Contrary to its positioning within s 67, and prior to the insertion of Part 5A, it neither saved nor transitioned anyone or anything - it eliminated.

252. The approach taken by the Court in its April 2022 decision was clearly predicated, initially at least, on a literal interpretation, that is, a consideration of the plain meaning of words, of ss 67(6) in the context of the LTA 2020 as it then was. It is common ground that the Act did not contain any provisions for appointments of Assessors in the new Court. It did not refer to them at all. As a consequence, the appointments of all Assessors under the LTA 1981 were revoked.

253. At that time, the same approach would have yielded the same result in respect of the Plaintiff and all the other Judges of the LTC. Contrary to the Plaintiff's pleaded position, there was no ambiguity in the language of the provision. As there were then no provisions for the appointment of a President or Judges of the new Court, the appointments of the existing judicial officers under the LTA 1981 would have been revoked. That was the very eventuality the Court eschewed as not reasonably to be supposed as corresponding with the intention of Parliament. Their Honour's purposive and broader resort to the other (genuine) savings and transition provisions of ss (2) and (4) produced a result that enabled the LTC and its Judges to continue to operate, albeit with limited jurisdiction. It is also

[203] [1996] 1 NZLR 289, at 294-295.

[204] E.g. *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SCNZ) at [26]; *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2016] 1 NZLR 1 (SCNZ).

apparent that, at that time, their Honours did not know and could not have known for how long that transitional jurisdiction might operate or how long it might take for Parliament to address the matter.

254. As noted, the Court's interpretation, insofar as it constituted an indispensable element in its decision, was not appealed by either party in that proceeding. No basis has been advanced in this proceeding for departing from the decision in the circumstances as then obtained.

255. But those circumstances have since changed. In light of the retrospective operation of the amendments to the LTA 2020, it is now necessary to revisit or update the interpretation of ss 67(7) to answer the present issue.

256. The position in respect of Assessors has remained the same. However, Part 5A provided for the appointments of all other judicial positions, save for the President. Therefore, ss 67(6) no longer had the effect of revoking the appointments of those other judges of the old LTC, despite the repeal of the LTA 1981, and they have since, almost seamlessly it would seem, been transitioned across to the new Court. As the provision for appointment of the President of the new LTC now resides solely in Part IX of the Constitution, unsurprisingly perhaps, there is no provision for that appointment in the LTA 2020. The references to the President and his or her role within various provisions of the LTA 2020 cannot, in my view, be interpreted as appointments under that Act. Section 67(6) does not speak of 'roles' being provided for; it speaks only of 'appointments'. Part 5A, Division 2 of the Act is entitled "*Appointment of Judges for the Land and Titles Court*". The term does not appear anywhere else within the Act in relation to the President.

257. Therefore, at that level of analysis, the Plaintiff's appointment under the LTA 1981 was revoked by ss 67(6).

258. Neither the 'legislative scheme' nor the 'legislative history', as contended for by Mr Ainu'u, alter that conclusion. Both Counsel informed me that there are no extrinsic materials, such as the second reading speech, explanatory memoranda, or the like, which shed light on this issue. The arguments postulated by the Court of Appeal,[205] and referred to by Mr Ainu'u, have been or will be addressed in the further issues below, or were answered by their Honours' own "countervailing arguments". Where any of those competing arguments were finely balanced, Mr Ainu'u did not seek to advance or

[205] *Ropati v Attorney General* [2023] WSCA 2 at [57], [58].

persuade me in respect of those in favour of his client's interpretation that ss 67(6) was only intended to abolish Assessors.

259. The next inquiry then is whether that result, namely, that the only judicial officer of the old LTC not to retain their appointment or be transitioned across to the new LTC was the Plaintiff, can be reasonably supposed to correspond with the intention of Parliament. In my view, it was. The omission of the provisions for appointment of President from the new Act, and the insertion of them in the Constitution, makes pellucid Parliament's intention that the President of the old LTC was not going to automatically be (or "taken to be") the President of the new. Moreover, the revocation of the Plaintiff's appointment by virtue of ss 67(6), without any statutory provision for reallocation, and no offer by the Prime Minister, or the Komisi for that matter, of some other position on the new Court, meant that he lost his position as a judicial officer entirely.

260. It was at this point that Mr Ainu'u sought to further the Plaintiff's case by submitting, effectively, that the Prime Minister and the Government had inappropriately used the legislative reforms to "single out" the Plaintiff and to "get rid of him". In other words, that the legislative power had been exercised in bad faith. Accusations of bad faith (or even possibly malfeasance in public office) are very serious. Like allegations of fraud, they must not be advanced without a proper basis, and they must be specifically pleaded, particularised and proven by admissible evidence or by inferences reasonably drawn from facts established by the evidence. As noted above, none of the various iterations of the Plaintiff's Statements of Claim included allegations of bad faith or similar.

261. But even if it had been pleaded, the only factual basis for the submission advanced by Mr Ainu'u was the Prime Minister's correspondence and the consequence described above whereby the only judicial officer of the old LTC ultimately to have his appointment revoked was the Plaintiff. He added that the failure by the relevant Defendants to adduce any evidence to explain that process and outcome warranted the Court drawing an adverse inference.

262. A party's unexplained failure to call relevant evidence *may* facilitate adverse findings being made against them.[206] A witness' evidence is not "unexplained" unless the opposing party has adduced evidence requiring contradiction.[207] Nor can any adverse

[206] *Jones v Dunkel* (1959) 101 CLR 298 at 308; *R v H* (2001) 20 FRNZ 473, 474.
[207] *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at 141–3.

inference arise where the absent witness was equally available to both parties.[208] No adverse inference can arise from a mere absence of evidence. The absence of contradictory evidence cannot remedy a deficiency in the case of the party that bears the ultimate onus of proof.[209] Where the requisite circumstances are present, the limited inference is merely permissible, and not mandatory.[210] Two consequences can flow. The first is that the trier of fact may infer that the evidence of the absent witness would not have assisted the case of that party. The second is that the trier of fact may more confidently draw an inference unfavourable to that party.[211] Importantly, however, the rule does not enable a trier of fact to infer that the evidence of the absent witness would have been positively averse to that party.[212] Further, no inference is open (at least in the absence of proper notice and reasoned analysis) that a party deliberately (and thus dishonestly) refrained from adducing the evidence because they apprehended it was unfavourable to their case.[213] The proper ultimate finding must, in every case, depend on the actual evidence that has been adduced. If that evidence provides (or fails to provide) a sufficient basis for a particular finding, the force of an inference that other unadducted evidence "would not have assisted" adds little to the proper evidentiary assessment. Consequently, this aspect of the *Jones v Dunkel* reasoning operates to influence an impressionistic assessment about the actual sufficiency of the evidence that has been adduced on the particular matter, or as to whether any relevant inference should fairly be drawn.[214]

263. Special considerations may apply in judicial review proceedings. It has been said that "proceedings for judicial review should not be conducted in the same manner as hard-fought litigation".[215] The duty requires a respondent public authority to cooperate and make candid disclosure of the relevant facts and, so far as it is not apparent from the disclosed documents, the reasoning behind the decision challenged.[216] While the Courts recognise that they "should not trespass into the legitimate policy sphere of Ministers" in

[208] *Payne v Parker* [1976] 1 NSWLR 191 at 197 per Hutley JA and at 202 per Glass JA.
[209] *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371.
[210] *Newell: Muriniti v De Costi* (2018) 97 NSWLR 398.
[211] *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361.
[212] *Brandi v Mingot* (1976) 12 ALR 551 at 559–60; 51; *Manly Council v Byrne* [2004] NSWCA 123 at [51].
[213] *Kuhl v Zurich Financial Services Australia Ltd*, supra, at [63]–[77].
[214] *State Bank of NSW v Brown* (2001) 38 ACSR 715 at [17]–[18]; *Payne v Parker* [1976] 1 NSWLR 191 at 200, 201.
[215] The Privy Council's advice to Her Majesty in Belize Alliance of Conservation Non-Governmental Organs v Department of the Environment [2004] UKPC 6, per Lord Walker.
[216] *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941 at 945G. See also *Banks v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1031; *Glaxo New Zealand Ltd v Attorney-General* [1991] 3 NZLR 129.

judicial review proceedings, the "constitutional corollary should be Ministerial candour with the Courts about their policy".[217] Where the Crown does adduce evidence by the persons involved, it is desirable for the evidence to be full and candid. If it is not, it invites an adverse inference, and can promote an application for cross-examination.[218]

264. Any understandable sympathy for the Plaintiff's plight is nonetheless founded, to a significant extent, on suspicion and speculation as to the respective Governments' motives in the restructuring of the LTC. That suspicion may also be fuelled by the Plaintiff's unfortunate criminal conviction, unsuccessful attempted removal, and the extension, via s 61I of the LTA 2020 of the grounds for removal of the President to include behaviour which brings, or is likely to bring, the office of the President or the Court into disrepute; or behaviour which may affect the confidence of the public in the LTC. However, suspicion alone cannot discharge the Plaintiff's evidentiary burden.

265. While the circumstances of this case and the manner in which it has been conducted for and on behalf of the Government, meet some, but not all, of the above criteria for the drawing of an adverse inference, the inference contended for by Mr Ainu'u in his oral submissions, namely and in terms, that the restructuring of the LTC and resulting revocation of the Plaintiff's judicial appointment as President, and exclusion from the new Court, was an improper exercise of legislative power, runs headlong into the explanation proffered by the Attorney General.

266. She noted, in relation to issue 5 below, and correctly, that until Mr Ainu'u's submissions, there had 'never been any suggestion' in the case (which I interpret to mean as pleaded or within the Plaintiff's affidavit material) that the legislative reforms were designed other than for the genuine re-organisation of the LTC to better serve the administration of justice, or that they were designed for the purpose of removing the Plaintiff or interfering with judicial independence. Mr Ainu'u did not seek to refute that.

267. The Attorney General further explained, by objective reference to relevant legislative provisions, that the new LTC, with its enhanced and self-contained jurisdiction, is designed to be more legalistic and therefore requires judges with appropriate legal qualifications and experience. She went as far as suggesting that given the fundamental

[217] New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544 (CA), per Cooke P at 554.

[218] *Inder v Commissioner of Crown Lands*, HC Christchurch CIV-2009-409-1219, 28 May 2010, Fogarty J. See also *Henderson v The Privacy Commissioner* HC Wellington CIV-2009-485-1037, 29 April 2010, per Miller J; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

importance of lands and titles in Samoa, and the fact that decisions on such matters can affect generations, the LTC could arguably be regarded as the most important Court in the land. That characterisation echoes the tenor of Article 104(2) of the Constitution.

268. As will be discussed further in issue 4 below, the Attorney General also contended that the Plaintiff could not have been considered for appointment as the new President because he did not possess the legal practice qualifications required under the new Constitutional provisions. That explanation, however, did not extend to any reason for the Plaintiff not being offered a different judicial position within the new LTC in line with the widely recognised principles of judicial independence discussed above. To that enquiry from the Bench, the Attorney General said that the Government required a determination on whether the Plaintiff's removal was unlawful before consideration could be given to any alternative solutions such as an offer of reallocation within the new Court.

269. For those reasons, I am not prepared to draw an adverse inference as contended for by the Plaintiff.

270. But that is not the end of the matter.

271. The final question on this topic is when did any revocation of the Plaintiff's appointment occur? Notwithstanding the relevant provisions of the LTA 2020, once corrected and amended, stipulating that the Act still retroactively commenced on 15 March 2021, and ss 67(6) specifying revocation as at the date of the Act's commencement, regard must be had to the effect of this Court's April 2022 decision. As discussed above, the effect of that judgment was to extend the authority and jurisdiction of the Plaintiff and the other judges of the LTC to hearing and determining all pending cases commenced by petition prior to the LTA 2020. The Attorney General accepted that the completion of those cases naturally extended to and included any appeals which might have been generated from the first instance decisions on those positions.

272. The evidence before the Court is insufficient to enable any accurate assessment (or even an educated estimate) as to when the Plaintiff's transitional tenure might naturally have expired in accordance with the terms of the April 2022 decision. The affidavit evidence of Leugamata Lofipo was that between May and October 2022, the Plaintiff heard 71 cases including 30 applications for leave to appeal. It is reasonable to assume, and neither Counsel contended otherwise, that at least some of those applications would have been granted, so that as at October 2022, when the Prime Minister directed him to vacate his

office, the Plaintiff would still have had some appeals pending before him. There was no evidence before the Court as to the timeframes or outcomes of those cases, after the Plaintiff vacated his office.

273. A related issue arises from the use in ss 67(6) of the word "revoked". In a legal context, the word is defined as denoting that a thing has been cancelled totally that leaves nothing to be valid; or to annul an act by calling or taking it back.[219] A literal application of the term here would mean that the Plaintiff's appointment was 'cancelled' from when it was made. A slightly less absurd result would be that his appointment was recalled on 15 March 2021. Either interpretation, if accepted, would result in doubt being cast over the lawfulness of the Plaintiff's (or his part in) numerous LTC decisions. That could hardly have been the intention of Parliament.[220] The April 2022 decision clearly contemplated and provided for the Plaintiff's lawful authority as President (along with the other judges) of the LTC to continue until Parliament remedied the mischief in the LTA as it then stood.

274. Accordingly, the answer to this issue is 'yes', but subject to the operation of the April 2022 decision.

Issue 3: Did Article ss 67(3) and/or 111(6) save the Plaintiff from removal?

Plaintiff's submissions

275. Mr Ainu'u submitted that even if the Court were to interpret ss 67(6) in the manner contended for by the Attorney General, ss 67(3) of the LTA 2020 and Article 111(6) of the Constitution when read together, have the effect of "saving the Plaintiff's position as President of the LTC", because:

    (a) (borrowing, it would seem, from the Court of Appeal's posited arguments) ss 67(3) provides, relevantly and in terms, that all appointments originating under the repealed LTA 1981, and which were subsisting at the commencement of the LTA 2020, shall inure for the purposes of the LTA 2020 as fully and effectually as if they had originated under the corresponding provisions of the LTA 2020 and shall, where necessary, be deemed to have originated under the LTA 2020. Therefore, it was submitted, the Plaintiff's appointment as President of the LTC, under the now

[219] Black's Law Dictionary, 2nd Ed.

[220] *Contract Pacific Ltd v Commissioner of Inland Revenue* [2011] 1 NZLR 302 (SCNZ) at [39], where Blanchard J said perverse results "can never have been within the legislative purpose".

repealed LTA 1981, inures for the purposes of the LTA 2020 as if it had originated under the LTA 2020; and

(b) when the CAA 2020 commenced and the position of President of the LTC became a Constitutional one by virtue of Article 104D(1), Article 111(6) of the Constitution has the effect, and leads to the "logical conclusion", that the reference to the President at that time could only have been to the Plaintiff. Therefore, his removal as President ought to have been carried out pursuant to Article 104D(3).

Defendants' submissions

276. In relation to ss 67(3), the Attorney General submitted:

(a) ss 67(3) only saves and transitions appointments made under the repealed Act that have corresponding provisions under the LTA 2020;

(b) when the LTA 2020 first came into effect in March 2021, there were no corresponding provisions for the appointment of the President or Judges of the LTC as had been provided by the LTA 1981;

(c) the same approach was taken to a similar savings and transitional provision by the New Zealand Court of Appeal in *Quake Outcasts v Minister of Canterbury Earthquake Recovery*;[221]

(d) the December 2022 amendments to the LTA 2020 had the effect of saving and transitioning the appointment of Judges from the LTA 1981 to corresponding judicial positions under the LTA 2020; and

(e) those amendments did not apply to the position of President because those provisions are now enshrined in the Constitution.

277. In relation to Article 111(6), the Attorney General submitted:

(a) the Plaintiff was not appointed as President pursuant to the Constitution;

(b) he does not meet the criteria to qualify as President;

(c) Article 111(6) did not transition the appointment of the President of the LTC from the repealed LTA 1981 to an appointment under the Constitution;

[221] [2017] 3 NZLR 486 at [102].

(d) rather, Article 111(6) "clarifies the designation of any Officer in the Constitution" and does not take away from the clear legislative provisions for the new criteria and procedure for the appointment of President of the new LTC; and

(e) the Court's April 2022 decision on the Plaintiff's authority under the LTA 1981 "rules out" his interpretation that Article 111(6) is a "catchall savings provision".

Consideration

278. The Attorney General's primary argument in relation to ss 67(3) must be accepted. The Plaintiff was appointed President pursuant to the provisions of the LTA 1981. There are no corresponding provisions in the LTA 2020 for the appointment of President.

279. Further, ss 67(3) is intended to save, relevantly, appointments originating under the repealed Act which were "subsisting at the commencement of" the LTA 2020. But for the transitional effect of the April 2022 decision, ss 67(6) revoked the Plaintiff's appointment as at the commencement of the new Act, that is, his appointment was no longer subsisting.

280. Accordingly, ss 67(3) did not save the Plaintiff from removal. The April 2022 decision only deferred it.

281. Article 111(6) raises different considerations. It will be recalled that in its April 2022 decision, the Court did not consider it necessary to have regard to this provision. The Article resides in Part XI of the Constitution, entitled "General and Miscellaneous", and forms part of the interpretation provisions. Its work is facilitative; it does not confer any substantive rights. In that regard, I agree with the Attorney General that the Article did not have the effect of transitioning the Plaintiff to being the new President of the LTC, nor is it a 'catch all savings' provision. True it is also that the Plaintiff was not a President appointed pursuant to Part IX of the Constitution. But that, with respect, is not to the point.

282. The "logical conclusion" contended for by Mr Ainu'u is, in my view, inescapable. Again, by virtue of the April 2022 decision, at the commencement of the Constitutional Part IX amendments on 15 March 2021, the only person "for the time being lawfully performing the functions of" President of the LTC was the Plaintiff. And he was still the only person lawfully performing those functions in October 2022, when the Prime Minister directed him to vacate his office. It was not until November 2022 that the Second Defendant was appointed. Prior to that, there could only be one President and that was the Plaintiff.

283. But what then does that interpretation mean for this issue? It does not follow that because the Plaintiff was the lawful President of the LTC, albeit with limited jurisdiction, at the time of his removal, that he was or ought to have been 'saved' from removal for all time. Such a proposition would fail to appreciate the limits of the April 2022 decision, even though at the time, they were not capable of precise temporal definition. Rather, it is implicit in the Court's reasons that the transitional tenure would continue until either the pending cases had been completed or Parliament remedied the lacuna in the Act. That remedy, at least for the other judges of the LTC, was not achieved until December 2022.

284. Therefore, while Article 111(6) read together with the April 2022 decision, has the effect of treating the Plaintiff as the President of the LTC as that office is referred to in the Constitution, at the time of the commencement of Article 104D and when the Plaintiff was removed, the question is not whether Article 111(6) saved the Plaintiff from removal but rather what implications, if any, does Article 111(6) have on the lawfulness of the Plaintiff's removal. It was here that Mr Ainu'u sought to inject a next proposition into the debate: that the Plaintiff could only be removed pursuant to Article 104D(3). That question bleeds into issue 5 and I will deal with it there.

Issue 4: Did the Plaintiff fulfil the requirements of Article 104D and is that relevant?

Plaintiff's submissions

285. In his submissions, Mr Ainu'u did not engage with whether the Plaintiff possessed the new qualifications for appointment as President such as a minimum of 10 years practice as a lawyer in Samoa. Instead, he described the issue as "important to the Prime Minister" but that it was "hard to understand why" because:

(a) there is no evidence from the Prime Minister as to whether she formed an opinion that the Plaintiff was disqualified from appointment as the new President;

(b) the Prime Minister's correspondence leading to the Plaintiff's removal from office did not contain any assertion that he was not qualified under Article 104D;

(c) the Second Defendant's selection was not the subject of any recruitment process;

(d) alternatively, if there was, the Plaintiff was "precluded from applying" for the position;

(e) the Plaintiff was not afforded an opportunity to be heard on the matter, especially when the consequences of his removal had drastic effects on his and his family's livelihood;

(f) those matters amount to a breach of the principles of natural justice;

(g) the Prime Minister's position has always been that the Plaintiff's removal was by operation of law and not by any decision or action on her part;

(h) to attempt now to say that the Plaintiff was disqualified under Article 104D would be to contradict that position and to concede that the Prime Minister did make a decision to remove the Plaintiff, and acted upon it; and

(i) therefore, the requirements of Article 104D are not relevant in this case because:

(i) the Prime Minister did not rely on it when she directed the Plaintiff to vacate his office; and

(ii) there has been no evidence adduced that Article 104D was engaged in the selection of the Second Defendant.

Defendants' submissions

286. The Attorney General submitted:

(a) under the LTA 1981, the Plaintiff could not have been appointed as President on the basis of being qualified to be appointed as a Judge of the Supreme Court under (former) Article 65 of the Constitution[222] but he was qualified to be appointed as a Samoan Judge under ss 26A and 28 of the former Act;[223]

(b) the criteria under which he was appointed as President under the LTA 1981 is now repealed and is not provided for in the LTA 2020 nor the Constitution;

(c) under Article 104D(1)(a), the criteria for appointment as President now includes a minimum of 10 years practice as a lawyer in Samoa;

(d) Parliament's intention to change the criteria for President is clear as it needed to be aligned with the increased jurisdiction of the new LTC;

[222] Prior to the passage of the three Acts, the qualifications for a Supreme Court judge included being a lawyer who had practiced as a barrister or judge in Samoa or in an approved country for a period of not less than eight years.

[223] Section 26A(2) required at least five years relevant work experience in a senior position in the administration of justice and such qualifications as may be determined by the Judicial Service Commission by Notice. Section 28 required that person be a matai; be considered by the Judicial Service Commission to be qualified for appointment by reason of character, ability, standing and reputation; and have not attained the age of 65 years.

(e) the hearing process in the old LTC required the President to examine evidence to draw out facts relevant to the issues and to form the basis for the Court's final decision. Those determinations were entirely reliant on an assessment of facts in accordance with custom and usage as opposed to the application of legal principles in relation to legal and Constitutional rights;

(f) the newly established three-tier Court structure now has a special individual jurisdiction over matters of Samoan customs, usages and titles. It also has jurisdiction previously exercisable only by the Supreme Court such as judicial review and power to determine any question on the interpretation or effect of any provision in part IX of the Constitution; and

(g) the Plaintiff does not possess the new 10-year legal practice qualification required for appointment as President of the new LTC. He only worked as a lawyer for two years after he completed his legal studies. He was then employed in administrative and management roles until he was appointed President in July 2016.[224] He held that position until October 2022, except for a period in 2018/2019 when he was on special leave and/or suspension pending the outcome of his criminal matter.

Consideration

287. The relevance of this issue remains elusive.

288. Mr Ainu'u's approach was to use it as a purported vehicle to raise unpleaded complaints of breaches of natural justice and, it would seem, some form of bias complaint against the Prime Minister. I have already determined that it would be unfair to the Defendants for me to countenance those claims now. They did not form part of the case the Defendants were required to meet. The content of Mr Ainu'u's submissions do not sway me from that view. Again, he did not apply for leave to amend. Nor am I persuaded that the interests of justice require an indulgence in favour of the Plaintiff to the likely detriment of the Defendants.

289. Further, and in any event, these purported complaints go more to why the Second Defendant was favoured over the Plaintiff for appointment as the new President. With the Plaintiff's abandonment of his originally pleaded challenge to the appointment of the

[224] Per the agreed statement of facts.

Second Defendant and an order that he, the Plaintiff, be reinstated as President, those complaints must fall away.

290. They are also legally and, in part, factually misconceived. For instance, there is no evidence that the Plaintiff was 'precluded from applying' for the new president position or the Prime Minister was required to undertake any form of 'recruitment' process. True it is that the Plaintiff was not informed that he could apply but, as the Attorney General submitted, he did not ask to apply either. I do not suggest for a moment that was a satisfactory response to the situation being conveyed by the Prime Minister in her correspondence to the Plaintiff. However, the fact remains that the Plaintiff could have applied for the position or some other within the new LTC. The preferable approach, in my view, given the circumstances, would have been for the Prime Minister to make that clear to the Plaintiff. However, it is clear that by the time of her letters to the Plaintiff, the decision to appoint the Second Defendant had already been made.

291. A further example of the misconception is that Article 104D(1) has never been pleaded as the basis for the Plaintiff's removal from office. Only ss 67(6) has. Article 104D(1) only arose in the context of the Plaintiff's complaints that upon his position as President of the LTC being revoked, he was not appointed and apparently not considered for appointment as the new President. None of that advances the case one way or the other on the question of the lawfulness of the Plaintiff's removal from judicial office. It is no longer a case about whether he should have been appointed the new President.

292. Which brings us back to the principal enquiry on this issue. Despite his repeated submissions that the Plaintiff possessed the qualifications for appointment under Article 104D, Mr Ainu'u never engaged with the first of those, namely, no less than 10 years' experience as a practising lawyer in Samoa. Having considered the Plaintiff's work history as chronicled in the statement of agreed facts, and his affidavit evidence, I accept the Attorney General's submission that the Plaintiff did not possess that legal qualification. While it may seem curious, Article 104D(1) makes no reference to taking into account any judicial experience of a person such as the Plaintiff. Despite the unhappy drafting of Article 104D(1) (referred to above), it is sufficiently clear that the subparagraphs therein are intended to prescribe prerequisites or criteria for eligibility. The Plaintiff did not possess the first.

293. Accordingly, the answer to the primary element of this issue is "no": the Plaintiff was not eligible for consideration for appointment as President of the new LTC.

Issue 5: Was the Plaintiff's removal pursuant to ss 67(6) inconsistent with the Constitution?

294. This issue asks whether ss 67(6) is inconsistent with the Constitutional security of tenure protections (both before and after the CAA and LTA 2020), and if so, whether pursuant to Article 2(2), ss 67(6) is void to the extent of any such inconsistency?

Plaintiff's submissions

295. Mr Ainu'u submitted that if, on its proper interpretation, ss 67(6) is found to operate, as a matter of law, to remove the Plaintiff from judicial office, without cause, then it should be declared void to the extent of its inconsistency with the principles of judicial independence, particularly security of tenure. He based that submission on the following:

(a) judicial independence has long been a principle to be taken into account in interpreting the law and is a serious principle to be considered when carrying out legislative reform or Executive action;

(b) as the New Zealand Court of Appeal stated in *Claydon v Attorney-General* (excerpted from the reference above):[225]

> *"…The principle of judicial independence calls for restraint from the legislative and executive branches of government in actions they undertake affecting the judiciary.*
> *…*
> *The tradition of judicial independence, freedom from favour as well as from fear, is of fundamental constitutional importance in maintaining a proper balance in the continuing relationship between the State and the citizen. In revising the structure of the Courts this basic principle must not be eroded. …"*

(c) pursuant to Article 2, the Constitution is the supreme law of Samoa and any other law which is inconsistent with it, shall, to the extent of the inconsistency, be void;

(d) the Defendants' argument that the effect of ss 67(6) was the appointment of a new President of the LTC is not maintainable because:

(i) if so, the expected outcome would be that it applied to all other judges of the LTC;

[225] [91]

(ii) that did not occur - only the President was removed;

(iii) the December 2022 amendments set out new criteria for the appointment of judges to the new LTC, yet none of the existing judges of the LTC were required to reapply for their posts;

(iv) the Second Defendant's appointment was not the subject of any calls for expressions of interest or other recruitment or selection mechanism; and

(v) in any event, the Plaintiff was not able to apply.

(e) the Prime Minister's position on the effect of ss 67(6) poses a threat to the independence of the judiciary, and to allow it to remain, would be to weaken the independence of the Court;

(f) that position means that, potentially, judicial tenure would no longer be tied to a judge's age, health and performance but rather to political and policy changes by which any judge may be removed by restructuring the legislative framework in which they work; and

(g) that result, and any termination and summary removal through a restructure, poses a threat that judges will no longer be perceived as impartial given their tenure is no longer secured or tied to the usual reasons for termination.

Defendants' submissions

296. The Attorney General submitted:

(a) there is no suggestion that the legislative reforms of 2020 were designed for the purpose of removing the Plaintiff from judicial office or interfering with judicial independence;

(b) there is also no suggestion that it was unlawful or unconstitutional for the Government to restructure the LTC;

(c) the Executive is allowed to introduce reforms for the genuine re-organisation of the country's court system that are calculated to better serve the administration of justice: *Attorney-General (NSW) v Quin*;[226]

[226] Ibid, at [26].

(d) the introduction of Part 5A into the LTA 2020, which provided a transitional procedure for the other judges, cured any possibility of ss 67(6) offending the Constitution.

297. During oral submissions, the Attorney General added that with the repeal of the LTA 1981, the Plaintiff's tenure was no longer protected by the Constitution. Therefore, (as I apprehended the argument) there could be no inconsistency between ss 67(6) and provisions of the Constitution which protected judicial tenure.

Consideration

298. There is no issue that the Executive may introduce reforms for the genuine reorganisation of the country's courts system that are calculated to better serve the administration of justice or that it was lawful for the Government to restructure the LTC. I have already declined to draw any inference that the legislative reforms were designed for the purpose of removing the Plaintiff, although they had that consequence. As I have alluded to above, those considerations are no longer to the point. The focal point of this case is now what is to be done with judges from the court to be restructured.

299. In oral submissions, Mr Ainu'u characterised his client's case as one of breach of his Constitutional right not to be removed from judicial office other than by reason of retirement (which is not removal) or upon a two thirds majority vote of Parliament on the grounds of stated misconduct or incapacity (which has not occurred).

300. That asserted right had its roots in ss 26D(2) of the LTA 1981, under which the Plaintiff was appointed, and which incorporated by reference (then) Article 68 of the Constitution. As such, on any question of removal, the Plaintiff was to be treated the same as a Judge of the Supreme Court under that Article. Therefore, from the date of his appointment in 2016 to the date of commencement of the subject legislative reforms, the Plaintiff's judicial tenure was protected by the Constitutional guarantee in Article 68.

301. Pausing at that point, although Parliament, itself a creature of the Constitution, has full legislative powers, they are, pursuant to Article 43, always subject to the provisions of the Constitution.[227] Article 2 of the Constitution provides:

> **The Supreme Law**
>
> (1) This Constitution shall be the supreme law of Samoa.

[227] Pita v Attorney General [2007] WSSC 99, citing Sua Rimoni Ah Chong v Legislative Assembly of Samoa [1996] WSCA 2.

> (2) Any existing law and any law passed after the date of coming into force of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

302. When then might a law be inconsistent with the Constitution? Appellate decisions in Samoa appear to have approached the question on the basis of the plain meaning of the word 'inconsistent'. In a legal context, 'inconsistent' means mutually repugnant or contradictory; contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other.[228] In the absence of submissions on the point, I have been guided by Australian High Court authority on the principle by reference to which inconsistency within the meaning of s 109 of the Australian Constitution (which is in analogous terms to Article 2) is determined, namely, that when a State law, if valid, would "alter, impair or detract from" the operation of a law of the Commonwealth Parliament, then to that extent, it is invalid.[229] The 'alter, impair or detract from' test may be applied so as to produce inconsistency in two ways: from rights and obligations created by the Commonwealth law; or from the object or purpose sought to be achieved by the Commonwealth law.[230] A State law can also impair or detract from a Commonwealth law by directly or indirectly precluding, overriding or rendering ineffective that law.[231]

303. There can be no doubt, in my view, that ss 67(6), insofar as it operated (and was deployed) to revoke the Plaintiff's appointment as President and remove him from office, altered, impaired or detracted from the removal protection rights of former Article 68, and/or the object or purpose sought to be achieved by it. It also purportedly precluded, overrode and/or rendered that protection ineffective. To the extent of that inconsistency, ss 67(6) was void.

304. I am cognisant of the obiter remark of the Court of Appeal that "*legislation that, on its true interpretation, removed the [Plaintiff] from office, would not be unconstitutional*".[232] However, from a reading of the whole July 2023 appeal decision, I respectfully consider that their Honours had in mind there provisions such as former Article 68 and current 104D(3), as well as the provisions of the old and new LTA for the removal of judges of

---

[228] Blacks Law Dictionary, 2nd edition.

[229] Dixon J in *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630; *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 337; *Northern Territory v GPAO* [1999] HCA 8; 196 CLR 553 at [59]; *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; 224 CLR 322 at [205]

[230] *New South Wales v The Commonwealth and Carlton* (1983) 151 CLR 302 at 330.

[231] *Burns v Corbett & ors* [2018] HCA 15 at [85].

[232] [55]

the LTC.[233] The grounds prescribed by those provisions fall within the widely accepted principles of judicial independence. Further, the judgment does not indicate that any issue of possible inconsistency, pursuant to Article 2(2), between ss 67(6) and the Constitutional removal provisions, was raised before or considered by their Honours.

305. Moving forward in time, however, the Attorney General submitted that the repeal of the LTA 1981 meant that the Plaintiff no longer had the benefit of that Constitutional protection. The same might be said of the Constitutional amendments to Article 68 itself. Although from what the Attorney General explained, there appears to be some doubt about the current state of its successor, Article 67, which is intended to now provide for the tenure, suspension and removal of Judges of the Supreme Court, but in fact only provides the procedure and grounds for removal of the Chief Justice, while the cross reference to s 79 for removal of Judges presently appears incomplete and/or uncertain.

306. Section 25(1) of the *Acts Interpretation Act* provides, relevantly, that the repeal or expiry of an Act does not affect a right already acquired, accrued, or established. The question therefore arises whether, despite the repeal of the LTA 1981, the Plaintiff had an accrued right not to be removed from office other than in accordance with Article 68.

307. It is convenient at this point, and on that question, to refer to two of the cases relied on by the Attorney General in respect of issue 6 (for the proposition that once a judicial office no longer exists, there is no right to receive remuneration as a holder of that office). The other two – *Claydon* and *Quin* – have already been considered above.

308. In *R v Reilly*,[234] the appellant (or 'suppliant') was appointed a member of the Federal Appeal Board which had been established by an Act to Amend the Pensions Act, 1923 (Can.), c. 62. He was appointed for a term of three years. His term was extended on several occasions. However, in 1930, the Canadian Legislature passed amending legislation by which the Federal Appeal Board was replaced by a Pensions Tribunal. Reilly's office was thus abolished. Neither he nor any of the Board members were appointed to the new Tribunal, nor was any compensation paid to them. Reilly was subsequently requested to vacate the premises he had occupied in pursuance of his office. He brought a case upon his dismissal for breach of contract and claimed damages. Two intermediate Courts decided, but apparently on different grounds, that by reason of the

[233] ss 29(4) of the LTA 1981; ss 61H(1) of the LTA 2020.
[234] UK JPC [1934] 1 DLR 434.

statutory abolition of his office, Reilly was not entitled to any remedy. On the final appeal, the Privy Council agreed, but on the principal basis that if further performance of a contract becomes impossible by legislation having that effect, the contract is discharged. As Reilly's office was abolished by statute ("The jurisdiction of the Federal Appeal Board was gone"), it was illegal for the Executive to continue him in that office or pay him any salary, and impossible for him to exercise his office. In response to Reilly's reliance on a provision of the Canadian *Interpretation Act* (in similar terms to s 25 of the corresponding Samoan Act), the Committee held that there was no right acquired under the appointment to the office except a right which from the inception was subject to be determined by the office being abolished by statute. Further, either the amending Act did not interfere with any civil right, or, if it did, its interference was necessarily incident to the undoubted power of the Dominion to abolish the old and create the new office.

309. *Reilly* is readily distinguishable from the instant case. Reilly's office was not within a Court of record, his tenure was never the subject of any Constitutional protection, his claim was brought in contract, and the decision pre-dates the emergence and development of the international principles of judicial independence, including security of tenure, discussed above.

310. Similarly, the cases of *Claydon* and *Quin* may be distinguished from the present. They too involved inferior courts, tribunals or boards, without any form of Constitutional protection or limits on removal from judicial office. Further, the complainants in those cases were either offered, or were able to apply for, positions on the restructured court or tribunal.

311. More recently, in *Australand Corporation (Qld) Pty Ltd v Johnson*,[235] the Queensland Court of Appeal dismissed an appeal against declaratory orders that the purported avoidance by the appellants of contracts with the respondent pursuant to ss 1073(2) of the *Corporations Law* was of no effect because the section was repealed by the *Managed Investments Act*. The issues at trial, and on appeal, were whether the appellants had, in terms of s 8 of the *Acts Interpretation Act* (also in substantially similar terms to s 25 of the Samoan act as excerpted above[236]), an acquired or accrued right under s 1073, which survived the repeal of that section.

[235] [2007] QCA 302.

[236] Although the Commonwealth Act contains the proviso "unless the contrary intention appears" which the Samoan Act does not.

312. The appellants equated the "right acquired [or] accrued under an Act" with a "right conferred by an Act", or "a right arising from an Act" and the "liability incurred under an Act" with a "susceptibility to the creation of a liability". The appellants' submission had the effect of preserving the right conferred by, or arising from, the Act after its repeal.

313. The respondent argued that, as Keith J said in *Claydon v Attorney-General*: "A right simply cannot continue to arise under a provision which is no longer in force." That is, the right conferred on each appellant by s 1073 was a right to choose to terminate the contract; but the contract could not be terminated until the choice was exercised, and the repeal of s 1073 removed the appellants' right to choose to terminate the contract before it was exercised by any of them.

314. After surveying high English and Australian authorities,[237] their Honours (in separate judgments) observed, inter alia, that s 8(c) of the *Acts Interpretation Act* operated to preserve an accrued right even if it be inchoate, conditional or contingent. Therefore, when a statute is repealed, it is as to new matters as though it had never existed, yet as to transactions already completed under it, it still has full effect.[238] That does not leave it open to anyone who could have taken advantage of any of the repealed enactments still to take advantage of them after they are repealed. The power to take advantage of an enactment may be termed a 'right', but the question is whether it is a 'right accrued'. A distinction was drawn between a mere power to take advantage of an enactment and when facts or events had occurred in respect of the enactment which conferred a substantive right, in existence at the time of the repeal of the enactment. Keane JA explained it this way:

> *"[117] It is, I think, manifest from the text of s 8(c) itself that the accrued or acquired right which it postulates is a right in one person in respect of which a correlative liability has been incurred by another person. Within the text of s 8(c), the concept of 'a right ... acquired or accrued' is matched by an 'obligation or liability ... incurred'; the collocation of 'right ... acquired or accrued' with "obligation or liability ... incurred' is a contextual indication that a 'right' within s 8(c) presupposes a correlative liability. That relationship, and its implications for a correct understanding of what is involved in an accrued or acquired right, have been recognised at least since the decision of the Privy Council in Abbott's Case. For the learned trial judge to recognise, and give effect to, that relationship was not to engage in an inappropriate exercise in analytical jurisprudence; it was simply to*

[237] Including, inter alia, *Butcher v Henderson* (1868) LR 3 QB 335; *Abbott v Minister for Lands* [1895] AC 425 at 431; *Hamilton Gell v White* [1922] 2 KB 422; *Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261; *Ogden Industries Pty Ltd v Lucas* [1967] HCA 30; (1967) 116 CLR 537; *Esber v The Commonwealth* [1992] HCA 20; (1992) 174 CLR 430.

[238] '*Nova constitutio futuris formam imponere debet, non praeteritis'*.

> *acknowledge that s 8(c) is not intended wholly to reverse the principle referred to in the first paragraph of the citation from the reasons of Dixon J in Maxwell v Murphy at paragraph [109] above but is intended to ensure that substantive rights which are enforceable by a court do not cease to be enforceable as an unintended consequence of the repeal of a statute."*

315. Here, the Plaintiff's right not to be removed from office other than in accordance with the limits imposed by former Article 68 was one which accrued and subsisted from the date of his appointment in 2016. It carried with it a correlative liability or obligation on the part of the Executive not to remove or seek to remove him other than in accordance with those Constitutional proscriptions. It is incumbent on this Court to ensure that those substantive rights did not cease to be enforceable as an unintended consequence of the repeal of the LTA 1981.

316. For those reasons, I am of the view, pursuant to s 25 of the *Acts Interpretation Act*, that the Plaintiff's accrued or acquired right of tenure as described was not affected by the repeal of the LTA 1981.

317. But if I am wrong about that, then Article 111(6) resurfaces for consideration.

318. As discussed in issue 3, the combined effect of that provision and the April 2022 decision was that as at both the formal commencement of the legislative amendments under consideration (15 March 2021), and when the Plaintiff was removed by the Prime Minister's directive (end of October 2022), he was the only person, for the time being, lawfully performing the functions of President of the LTC. That analysis is supported by the Court of Appeal's comment, in the context of the res judicata considerations, that the Plaintiff may well have rights under the April 2022 decision that may have been breached. On that basis, their Honours were left with the view that the validity of the Plaintiff's removal from the transitional role recognised in the April 2022 decision "may be questionable".[239]

319. As the Court of Appeal also observed, the CCA 2020 and LTA 2020 recognise continuities between the old LTC and two of the three component courts of the new LTC.[240] Section 25 of the old LTA commenced with the words "*There shall continue to be a Court of record called the Land and Titles Court, which is the same Court as that existing under the same name prior to the commencement of this Act*". Article 104A

[239] [61]
[240] [57(f)]

commences with the words "*There shall continue to be a Land and Titles First Court which shall be a Court of record*". The title of the Court remains the same. Its core jurisdiction – all matters pertaining to land and titles – remains the same. The position of President of the LTC has not been abolished; it has continued from the old Court to the new. While the procedure and qualifications for appointment now differ, their Honours also noted that the role of President of the old LTC corresponds broadly to that of President of the new LTC.[241]

320. Against that, the Court of Appeal also noted that:[242]

> *"… The Constitution and LTA 2020 both make it clear that the President of the new [LTC] is to be appointed under Part IX of the Constitution and the [Plaintiff] has not been so appointed. It is arguable that this implies that there was to be a new start for the new [LTC]. If so, it is arguable that what may be seen as implications in s 67 of the LTA 2020 should not be taken to depart from that position…"*

321. Be that as it may, I consider that by operation of the April 2022 decision, at the time of his removal, the Plaintiff was the only person who could lawfully be regarded as the President of the LTC as that office appears in Part IX of the Constitution.

322. The Attorney General's submission that the introduction of Part 5A into the LTA 2020 "cured any possibility of ss 67(6) offending the Constitution" cannot be accepted. As has been noted, Part 5A only provided a transitioning pathway for the other Judges of the LTC, not the Plaintiff. It will also be observed that the other Judges did not, and do not, enjoy any form of Constitutional protection in terms of security of tenure (even, as the Court of Appeal remarked, one that "borrowed" from the Constitution[243]). As such, Part 5A could have, but in fact did nothing to "cure" or prevent ss 67(6) from offending the Plaintiff's constitutional right.

323. The security of tenure protections for the President of the LTC now reside directly in Article 104D(3). They should be interpreted therefore as applying to the Plaintiff at the relevant time during his transitional tenure. As such, he could only be removed by the Head of State on an address of the Legislative Assembly carried by not less than two-thirds of the total number of Members of Parliament (including vacancies), praying for his or her removal from office on the grounds of stated misbehaviour or of infirmity of

[241] [57(a)]
[242] [58]
[243] [54]

body or mind, or as prescribed by an Act. His removal by purported operation of ss 67(6) was inconsistent with Article 104D(3). Therefore, even after the repeal of the LTA 1981, and to the extent that it purported to remove the Plaintiff from office, ss 67(6) was void.

324. That analysis is supported by the following interpretative principles:

(a) Principles of judicial independence must be of relevance to the interpretation of legislation.[244]

(b) It has long been held that Constitutions must be interpreted as *sui generis*, taking into account the context, purpose, and textual setting of a provision requiring interpretation.[245] The interpretation must keep in mind that "the question is not what may be supposed to have been intended [by the framers], but what has been said".[246] Constitutional interpretation does not preclude close textual analysis when required, but the interpretation must always be in the context of the broader purpose of the Constitution and its status as supreme law.[247] A Constitution cannot be interpreted in a vacuum. Its interpretation can be affected by the historical background and conditions. Respect must be paid to the language which has been used and to the traditions and usage which have given meaning to that language.[248] Its provisions are to be given a large and liberal interpretation and are not to be "cut down... by a narrow and technical construction".[249]

(c) ss 7(4) of the *Acts Interpretation Act* also requires that where a construction based on the features prescribed by ss (3) produces an ambiguous result or a result which cannot reasonably be supposed to correspond with the intention of Parliament, the words are to receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

325. I am also fortified in the above assessment by the Court of Appeal's comment: [250]

---

[244] *Claydon*, ibid, at [111].

[245] *Minister of Home Affairs v. Fisher* [1979] UKPC 21; [1980] AC 319 at 328-329; D. Feldman, "Statutory interpretation and constitutional legislation" (2014) 130 L.Q.R. 473.

[246] *Edwards v Attorney-General for Canada*, [1929] UKPC 86; [1930] AC 124 at 137 per Viscount Sankey L.C.

[247] *Republic of Nauru v Lambourne*, ibid, [58].

[248] *In re the Constitution, Attorney-General v Olomalu* [1982] WSCA 1, citing *Home Affairs v Fisher* [1979] UKPC 21; 1980 AC 319.

[249] *Edwards v Attorney-General for Canada* [1929] 3 WWR 479 at 489 (PC); *Attorney General of Samoa v Saipa'ia Olomalu and others* (1983) WSLR p 41; *Sia v Peteru* [1998] WSSC 37 citing *Minister for Home Affairs v Fisher*, ibid; *Malifa v Sapolu* [1999] WSSC 47.

[250] [57(h)]

> *"Given the importance of judicial independence and its reliance on secure judicial tenure – considerations that were reflected in s 26D of the LTA 1981 – it would be surprising if the Parliamentary purpose underpinning the CAA and the LTA 2020 was to deprive the President of the old Land and Titles Court of judicial office."*

326. Here, I do not consider it reasonable to impute to Parliament an intention to confer on the Plaintiff, when he was appointed President, a right of tenure as provided by then Article 68, as an essential feature of judicial independence and homage to the separation of powers, but then extinguish it as an incident merely of the restructuring of the LTC. I consider that, in the absence of express and clear language to the contrary, Parliament may reasonably be presumed to have intended, both before and after the LTC reforms, that the President of the LTC (as is the case with the Chief Justice) may only be removed from office by the Head of State on an address of the Legislative Assembly carried by not less than two-thirds of the total number of Members of Parliament (including vacancies), praying for his or her removal from office on the grounds of stated misbehaviour or of infirmity of body or mind, or (since the reforms) as prescribed by an Act. That conclusion is consistent with a fair, large and liberal construction of the relevant provisions.

327. Accordingly, I find that the Plaintiff's removal from office was in breach of the Constitution and therefore unlawful.

328. However, again, if I am wrong about that, and the Plaintiff's removal is elsewhere held to have been lawful, then I am even more firmly of the view that the Plaintiff's removal was contrary to the internationally recognised and accepted principles of judicial independence discussed above. Even if it be accepted that the revocation of his appointment as President of the old LTC was a necessary consequence of Parliament's power to establish the new LTC, those principles clearly conferred on the Plaintiff a right either to be offered an appropriate position on the new Court or compensation. He was offered neither.

Issue 6: Damages/compensation?

329. The Court of Appeal's expressed "*discomfort at the notion that a senior judge can be removed from office in the way contended for, both generally, and particularly without compensation*",[251] is a fitting introduction to the final chapter of these reasons for judgment.

[251] [62]

330. Counsel confirmed the somewhat surprising fact that, at present, apart from annual salaries (which are determined by Cabinet on advice from the Remuneration Tribunal), there were (and are) no written terms of service or conditions of appointment for Judges nor any written policy or procedure within either the Ministries of Justice and Court Administration or of Finance pertaining to judicial allowances or other benefits (save for the Judicial Retirement Fund which is provided for by the *National Provident Fund Act* 1972).

331. However, for the purposes of this proceeding, the parties agreed that, during his tenure as President of the LTC, the Plaintiff was entitled to:

(a) a base annual salary of WST $135,187.47;

(b) 25 days sick leave per year;

(c) 25 days annual leave per year;

(d) allowances for special sittings of the LTC.

(e) a phone allowance of WST$ 3,821.52 per year; and

(f) if he had continued his appointment as President, he would have been entitled to Government contributions to his Judicial Retirement Fund of 20% of his base salary as provided by s 65 of the *National Provident Fund Act*.

Plaintiff's submissions

332. In his written submissions, Mr Ainu'u argued that, in the event the Plaintiff's removal from office is found to be unlawful, then:

(a) it is open to the Court to declare that the Plaintiff is entitled to payment of his judicial salary, allowances and other benefit, pursuant to Article 104G of the Constitution,[252] until he reaches retirement: *Sharma v The President of the Republic of Fiji*, ibid;

(b) the Government's liability for damages is provided for by s 3 of the *Government Proceedings Act* 1974 which provides, relevantly, that:

> (2) Subject to this Act and any other Act, a person (whether a citizen of Samoa or not) may enforce as of right, by civil proceedings taken against

[252] **104G. Salaries and benefits -** The salaries, allowances or any other benefits for the President or Deputy President of the Land and Titles High Court, Vice President or a Judge of the Land and Titles First Court, are expenditures by law and shall be paid out of moneys appropriated by the Legislative Assembly, and as provided in the Act.

the Government for that purpose under this Act, a claim or demand against the Government in respect of any of the following causes of action:

(a) the breach of a contract or trust; or

(b) a wrong or injury for which the Government is liable in tort under this Act or under any other Act which is binding on the Government; or

(c) a cause of action, which is independent of contract, trust, or tort, or any Act, for which an action for damages or to recover property of any kind would lie against the Government if it were a private person of full age and capacity; or

(d) any other cause of action in respect of which relief would be granted against the Government at common law or in equity."

(c) here, the wrong committed was the unconstitutional removal of the Plaintiff as President of the LTC, not in accordance with the LTA 2020 or the Constitution, thereby depriving him of his salaries, allowances and benefits he would have been entitled to receive until his retirement at 68 years of age, unless he retired or was removed earlier in accordance with Article 104D(3);

(d) as such, the Plaintiff seeks damages as pleaded in his Fifth Amended Statement of Claim and as deposed to in his affidavit material[253] representing what he expected to receive in salary, allowances and benefits for 14 years to his expected retirement at 68, as well as exemplary damages.

333. During oral submissions, Mr Ainu'u maintained that the Plaintiff should be compensated for what should have been the balance of his career to age 68, not 65 as provided for under the LTA 1981, because by reason of the April 2022 decision and Article 111(6) (as submitted above), the Plaintiff was still President at the time of the amendments to the Constitution which raised the retirement age to 68.

334. As to the basis for, and approach to be taken to, damages for breach of the Constitution, Mr Ainu'u relied on the decision on *Punitia and others v Faumuina Tutuila*[254] (discussed further below).

335. When asked about the approach to the assessment of damages taken in the Fijian decision in *Sharma*, ibid (discussed further below), Mr Ainu'u conceded that the Plaintiff's claim here for 14 years should be discounted for the usual contingencies and vicissitudes.

[253] Paragraph 17 and 8th paragraph of the prayer for relief in his Fifth Amended Statement of Claim; paragraph 34 of his First Supplementary Affidavit.
[254] [2014] WSCA 1

However, unlike in *Sharma*, the Plaintiff, he said, has been a "career public servant", who is evidently not in the Government's favour, and whose "employability" or prospects of being able to earn an income in the future are uncertain. For those reasons, Mr Ainu'u nominated a reduced period (or 'multiplier') of 10 years.

336. After lengthy exchanges about some of the components of the Plaintiff's claim, Mr Ainu'u conceded or abandoned the claims for 'untaken; sick leave, as well as the claims for future sick and annual leave. He continued to press the claims for phone allowance but acknowledged that there was "some difficulty" with them. However, he maintained and elaborated on the claim for the value of 'untaken' annual leave on the basis that the Plaintiff's abrupt removal from office at the end of October 2022 meant that he did not have the opportunity to take that leave over time and in advance of any known future end date such as the case with retirement.

337. In relation to the claim for exemplary damages, Mr Ainu'u also relied on the decision in *Punitia*. He submitted that the Court here should first assess special damages then determine whether any exemplary damages should be awarded. He further submitted that exemplary damages are required here because special damages alone "do not reflect the weight and seriousness" of what has occurred, namely, a breach of the principles of judicial independence, whereby the Plaintiff was summarily removed from office without cause. He said that required the Court to "send a message to Parliament" to ensure that a similar removal does not occur again in the future.

338. Mr Ainu'u did not point to any authority which supported the quantum of the claim for exemplary damages of $500,000. He noted that in *Punitia*, the Court of Appeal reduced an award of $150,000 to $50,000 because special damages in that case had "exacted a heavy toll" on that defendant. Otherwise, he did not rely on any statements of principle in that decision but referred, for that purpose, to the primary decision appealed from of *Tutuila v Punitia*.[255]

339. On this topic, Mr Ainu'u referred again to the decision in *Sharma* where exemplary damages of $150,000 were awarded in circumstances where that plaintiff (former Solicitor General) was removed from office after the Fijian government had "strung him along for a long time" with threats of allegations, commissions of enquiry and then

[255] [2012] WSSC 107

ultimately terminated his appointment without any inquiry. By comparison, Mr Ainu'u submitted that exemplary damages of the amount claimed are warranted here because:

(a) the Plaintiff was only given a few days' notice to vacate his office;

(b) that decision contradicted this Court's April 2022 decision;

(c) the Plaintiff was never informed that he could apply for the new President position;

(d) the Prime Minister never explained to the Plaintiff why he would not be the new President;

(e) the Prime Minister's direction for the Plaintiff to vacate his office carried with it an "implicit decision" that the Plaintiff was not going to be the new President notwithstanding that "he possessed the criteria under Article 104D";

(f) the manner in which the Plaintiff was removed from office carries a threat to all judges that, at some point in the future, the Executive might decide that a judge is no longer suitable and "get rid of them";

(g) there is no evidence before the Court that the legislative reforms and enactment of ss 67(6), and the impact of them on the Plaintiff, were the product of an innocent but mistaken belief as to the correct legal approach to be taken to the restructuring of the LTC; and

(h) it is therefore open to the Court to infer that the Prime Minister "intended to single out the Plaintiff" in relation to the transitioning of the old LTC judges to the new Court, as there had been an opportunity since 2022 to further amend ss 67(6) to avoid inflicting any harm to the Plaintiff, which was not taken.

Defendants' submissions

340. In her written submissions, which were premised on a finding that the Plaintiff's removal from office was lawful, the Attorney General rejected the Plaintiff's claim for damages for the following reasons:

(a) the repeal of the LTA 1981 abolished the role of President under that Act;

(b) the Court's April 2022 decision permitted the President to exercise transitional jurisdiction only insofar as expressly saved and provided for under ss 67(2) [and 67(4)] of the LTA 2020, with respect to petitions filed before the commencement of that Act;

(c) the Plaintiff's appointment under the repealed legislation was for a position/office that no longer exists in the new Court system;

(d) once a judicial office no longer exists, there is no right to receive remuneration as a holder of that office;[256]

(e) the Plaintiff's claim for damages is neither based on any contractual arrangements or a legitimate expectation to continue receiving a salary and benefits until he is 68 years old;

(f) the amounts claimed are "unsubstantiated and highly exaggerated";

(g) "[w]hilst it is accepted that the [Plaintiff] ought to receive some form of compensation for the end of his tenure, it is not reasonable to expect 14 years' of salary and benefits" because:

(i) such compensation "must be calculated on a principled basis";

(ii) the retirement age under LTA 1981, by which the Plaintiff was appointed President of the old LTC, was 65 years (not 68);

(iii) the approach should be similar is that taken for a "redundancy payout"; or

(iv) it could also take into account what other judicial officers have been paid at the end of their tenure upon resignation;

(h) notwithstanding that there is no written or approved policy for leave entitlements for judges, it appears that all Judges are granted 25 days sick leave and 25 days annual leave per year;

(i) the "general practice is that upon cessation of tenure, untaken sick leave and annual leave entitlements are forfeited";

(j) "Counsel is aware that there has been early end of tenure payments made using a formula of 10 weeks for every five years in office (or 10 days per year)"; and

(k) phone allowance and Judicial Retirement Fund benefits are only available to judges during their tenure and would not ordinarily be available after that.

341. In relation to exemplary damages, the Attorney General submitted that the Plaintiff had not particularised his claim, either as to basis or amount. Therefore, she said, in

[256] *R v Reilly* UK JPC [1934] 1 DLR 434; *Claydon v Attorney General* [2004] NZAR 16; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at [26]; *Australand Corporation (Qld) Pty Ltd v Johnson* [2007] QCA 302, citing *Claydon* with approval.

accordance with the decision of Nelson J in *Enosa v Samoa Observer Company Ltd*,[257] that claim must be rejected.

342. During oral submissions, the Attorney General expressed sympathy for the Plaintiff's "unfortunate position" and repeated that even if his removal from office is found to have been lawful, as the Defendants contended, he should still be entitled to compensation because of the effect of ss 67(6). She conceded that a redundancy approach such as found in employment law cases would not be sufficient in this case. She then submitted that a reasonable approach would be to allow one to two years' worth of salary (only) to enable the Plaintiff to "transition out". When asked if there was any rationale for that approach, the Attorney General responded that it was not based on any authority but that it "just sounds reasonable".

343. In relation to the Plaintiff's claim for exemplary damages, the Attorney General also referred to the Court of Appeal's decision in *Punitia*, to emphasise that exemplary damages should only be considered where there has been "extremely bad conduct". Here, she said, there had been no demonstrated malice and the restructuring of the LTC was genuine. She added that if the purpose of any exemplary damages was to send a message to Parliament not to repeat what occurred in this case, then, having regard to the economic effects on Samoa, and the fact (anecdotally) that the majority of the population earns less than $50,000 a year (with which Mr Ainu'u appeared to agree), any primary award of between 1 to 10 years' worth of salary would be sufficient for that purpose.

Consideration

344. In *Punitia v Tutuila*, ibid, the appellants were leaders of the village of Tanugamanono. In the Supreme Court, they were ordered to pay damages for unlawfully banishing the respondent and her family from the village, and thereby breaching their rights pursuant to Article 13(1)(d) and (4) of the Constitution and being party to subsequent damage to their property. They were all ordered to pay damages totalling $963,710 (which included exemplary damages of $150,000).

345. On the assessment of damages, the Court of Appeal confirmed that in Samoa, as in equivalent overseas jurisdictions, breach of the fundamental rights and freedoms conferred by the Constitution can itself give rise to liability for damages in appropriate

[257] [2009] WSSC 95

circumstances.[258] In Samoa, the power to impose damages flows from Article 4 which provides:

> **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.

346. Article 4 refers to "this Part" meaning Part II "Fundamental Rights". The Plaintiff's claim here does not directly engage Part II rights, although it may be said that any action which undermines the independence of the judiciary indirectly offends Article 9. Article 70 confers on the Supreme Court all the jurisdiction, power, and authority necessary to administer the laws of Samoa. Those laws include the Constitution itself and the *Declaratory Judgments Act*. No challenge was raised by the Defendants in this proceeding to the Court's power to grant declaratory relief as to the Plaintiff's entitlement to damages or compensation for breach of the Constitution, if so found.

347. In *Punitia*, their Honours went on to provide guidance in relation to constitutional remedies, which may be summarised as follows:[259]

(a) Whether to grant a constitutional remedy, and if so, the nature and scope of the remedy, are ultimately discretionary.

(b) The Courts will not grant damages in every case in which there has been a breach of the Constitution causing harm to the plaintiff. Relief for a constitutional breach must be tailored to the particular case. In some cases, the modest nature of the breach, or the minor harm to the plaintiff, will mean that no remedy is warranted at all other than perhaps a declaration. Some cases may call for an injunction. In some, nothing less than monetary relief will meet the case.[260]

(c) To the extent that the damages sought are compensatory, as distinct from vindicatory, a causal link must be shown between breach and loss. However,

[258] [45], citing *Piteamoa Mauga & Ors v Fuga Leituala* WSCA 4 March 2005; *Italia Taamale v Attorney-General* (18 August 1995, C.A 2/95B).

[259] [45], [51], [67] to [85].

[260] Citing *Simpson v Attorney-General* [Baigent's Case] [1994] 3 NZLR 667 (CA); *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385; [1978] 2 All ER 670 (PC).

because constitutional damages involve broad discretions and value judgments, the casual link does not need to be approached on an unduly refined or technical basis.

(d) Even where a Court decides that constitutional damages should be granted, there will be a preference for moderation when it comes to quantum.[261] There is ample opportunity for restraint in those areas in which large value judgments are involved. There is necessarily a degree of arbitrariness in the figure adopted for general and vindicatory damages.

(e) Moderation can be applied only after considering the potential elements of damage in the particular case. For that purpose, a useful distinction can be drawn between compensatory damages (damages designed to financially restore the plaintiff to the position that he/she would have occupied but for the breach of the constitution) and vindicatory damages (damages designed to vindicate constitutional rights in the eyes of the parties and the community as a whole).[262]

(f) The normal purpose of compensatory damages is to restore the plaintiff to the position he or she would have occupied but for the wrong done (*restitutio in integrum*). Compensatory damages can in turn be subdivided into general damages for intangible injury (e.g. physical or mental suffering, humiliation, invasion of privacy, loss of freedom of speech, and loss of freedom of movement) and special damages for proven and tangible losses (e.g. payment of a finite medical expense or loss of a specific item of property shown to have had a particular value).

(g) Punitive damages and exemplary damages are the same thing. The modern term subsuming such concepts in the wider need to vindicate constitutional rights is "vindicatory damages".

(h) Although both the compensatory and vindicatory elements of damages must be considered, it is ultimately the total award that matters. One must guard against adding vindicatory damages to compensatory damages without regard for the vindication which compensatory damages may have achieved without more. The most convenient way of avoiding that trap is to start with compensatory damages and then to see whether anything additional is required for vindicatory reasons. Having identified an appropriate sum (if any) to be awarded as compensation, the

[261] Referring to *Mauga* at p12.
[262] *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429 (SC) at 480, 514 and 532.

> Court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right.[263]

348. *Punitia* was followed in *Woodroffe v Fisher*,[264] a case concerning judicial immunity.

349. Counsel did not refer to any authorities on the appropriate approach to the assessment of compensation for breach of the principles of judicial independence concerning security of tenure. That is not to say that such relief springs from a separate or discrete legal cause of action. As noted in the discussion above, the extent to which those principles give rise to rights and therefore relief when those rights are offended, depends on the extent to which they have been enshrined in domestic Constitutions and other legislation. It may also depend on the extent to which, by convention or otherwise, those principles have been observed by the Executive in particular jurisdictions and given curial effect by the Courts in those jurisdictions. I have found that the principles of judicial independence are sufficiently rooted and reflected in the Constitutional provisions which have been considered, for a breach of them to sound in damages.

350. During argument, the Attorney General suggested, without authority, that an assessment of damages for breach of constitutional rights might be expected to be greater than an assessment of compensation for a breach of judicial independence. Any basis for that distinction, if it exists, was unclear. It will be recalled that in *Claydon*, Glazebrook J referred to a judicial officer in the Plaintiff's position having "a right to continue to receive the benefits of office". Article 29 of the *Beijing Statement of Principles* refers to "full compensation".

351. I confess to some disquiet at the notion that a Judge in the Plaintiff's position should be compensated on the basis of his full base judicial salary and any other financial entitlements being paid to him for what would have been the expected balance of his judicial career to statutory retirement. Sure enough, support for that proposition may be found in the fact that his tenure would likely not have been cut short but for the Government's breach of his rights and that such an award might be regarded simply as the cost of the wrong. However, insofar as compensatory damages are designed to financially restore the Plaintiff to the position that he would have occupied but for the

[263] *Subiah v The Attorney General of Trinidad and Tobago* [2008] UKPC 47 at [11].
[264] [2017] WSCA 9

breach, his judicial salary and other entitlements were only payable to him for services rendered to the community during the period of his tenure as a judicial officer in the management, hearing and determination of disputes before the LTC. As matters presently stand, since the end of October 2022, the Plaintiff has not rendered, and will not be rendering, those services. Therefore, any award based on what his full judicial remuneration for the balance of his judicial career, for no service, presents a certain asymmetry which, in my opinion, is inconsistent with a principled approach to the assessment of compensatory damages.

352. For those reasons, and for those which follow, I am on the view that in this case, there ought be no significant difference in the approach to any assessment of damages compared to compensation.

353. I also approach the task on the basis that the Court "should assess compensation in a robust manner, relying on the presumption against wrongdoers, the onus of proof, and resolving doubtful questions against the party whose actions have made an accurate determination so problematical".[265] I have also considered a number of wrongful dismissal cases.[266] However, I have found them to be a very limited assistance for the simple reason that they are all essentially based on contractual principles and considerations as modified by relevant employment legislation. As such, they bear little resemblance to the Plaintiff's claims in constitutional law.

354. I turn now to the components of the Plaintiff's claims in the order they were pleaded.

355. The lion's share of the pleaded claim totalling over $3.4 million was for $1,892,624.58 being 14 years of salary. That was attenuated by Mr Ainu'u during submissions to 10 years. The Attorney General suggested one to two years. For the reasons which follow, I consider the appropriate discounting factor or 'multiplier' should be an award for five years from the date of the Plaintiff's removal in October 2022:

    (a) I accept the Attorney General's submission that the starting point should be based on an anticipated retirement age of 65, not 68. The Plaintiff was appointed under the LTA 1981 which provided for a retirement age of 65. That is the provision upon which any legitimate expectation could have been based. Even though it has been

[265] *Fiso v Reid* [2000] WSSC 51, citing *LIP Investments Pty Ltd v Howard Chia Investments Pty Ltd*. (1990) 24 NSWLR 499 at 508.

[266] For example, *Liki v Samoa Breweries Ltd* [2005] WSSC 3; *Faamau v Samoa Breweries Ltd* [2009] WSSC 85; *Toremana v Samoa Water Authority* [2019] WSSC 16.

determined that the Plaintiff had a right not to be removed from office other than in accordance with Article 104D, it does not follow, in my view, that he could also legitimately take advantage of the increased retirement age introduced by that Article as a term of the position of President of the new LTC. The only link between the Plaintiff's status and rights and Article 104D was by operation of the April 2022 decision read together with Article 111(6). They resulted in the Plaintiff being the regarded as the President of the LTC "for the time being" and only for the purposes of Article 104D(3) as at the date of his removal from office. They did not derogate from the Court's determination that the Plaintiff's tenure was transitional only and limited to pending cases initiated under the old LTC regime. In other words, it did not guarantee tenure beyond that, and certainly not to the age of 68. As the Plaintiff was 54 years of age when removed from office, the starting point therefore is 11 years.

(b) During the course of argument, Mr Ainu'u appeared to recognise (and tentatively embraced as a further alternative claim) the possibility that any award of compensation might only be limited to the balance of the Plaintiff's transitional tenure in accordance with his "rights" under the April 2022 decision. Apart from the fact that, on the evidence, that was impossible to calculate, I consider that such an approach would distract from the real gravamen of the manner in which the Plaintiff was removed from office and the effects on him of that removal. To put it another way, any balance of a transitional tenure period has been subsumed within the greater overall period in which the Plaintiff was entitled to expect to remain as President, but of which he has now been deprived.

(c) The Plaintiff's primary loss is in truth a loss of opportunity to continue to serve as President or in another judicial position on the new LTC. Claims for loss of opportunity will normally attract discounts for normal vicissitudes and contingencies. Here, they may include the not fanciful possibilities that the Plaintiff might have resigned, been removed on proper grounds, or even passed away before the age of retirement.

(d) They may also include an assessment of the Plaintiff's ability and prospects of earning replacement income. That raises a question as to whether, in a case such as the present, the Plaintiff is under duty to take reasonable steps to mitigate his loss,

as will normally be imposed in tort and contract cases.[267] In principle, there seems no good reason why a duty should not apply in breach of Constitution cases.[268] The fundamental premise is clear: if a plaintiff's inaction or unreasonable action leads to avoidable loss, the compensation awarded may be adjusted accordingly. In simpler terms, if a plaintiff fails to take appropriate steps to mitigate their damages, the court may assess their compensation based on the assumption that these mitigative measures were taken.

(e) There is a further significance: if the Plaintiff were awarded full remuneration to retirement and then went out and took employment or started his own practice, and thereby earned income, the result would be a form of double recovery.

(f) As observed by the Court of Appeal,[269] since his removal from office, the Plaintiff has been in an 'awkward situation'. It may be accepted that, until the abandonment of his claim for reinstatement during the trial, he has not wished to take any action – such as securing alternative employment - that might have been taken to be an acceptance that he was not the President of the LTC. He has been embroiled in this and the related litigation since 2021. That position has now changed.

(g) In his evidence, and his Counsel's submissions, the Plaintiff portrayed difficulties and uncertainty in terms of his future employability and therefore his ability to earn income. He described himself as a career public servant who is "out-of-favour" with the Government and is therefore unlikely to secure any position back within the Public Service. However, his affidavit material exhibited emails between he and his banker. Their purpose was to demonstrate that because he has not received any income since the $70,000 ordered to be paid by the Court of Appeal, he has fallen into default on certain loans with his bank. I pause to note that although Mr Ainu'u asserted from the Bar table that the Plaintiff has, as a result, incurred default interest

[267] *Lolagi v Asco Motors Ltd* [2008] WSSC 30; *Eletise v Lutuiloa* [2018] WSSC 52 referring to *British Westinghouse Electric & Mfg Co Ltd v Underground Electric Rail Co of London Ltd* [1912] UKLawRpAC 43; [1912] AC 673 at 689 (HL). Cf *Pialba Commercial Gardens v Braxco Pty Ltd* [2011] QCA 148, Wilson JA.

[268] Cf New Zealand Bill of Rights cases, e.g *Binstead v Northern Region Domestic Violence Approval Panel* [2002] NZFLR 832; [2002] NZAR 865 (HC) at [38(g)]; *Brown v Attorney-General* [2003] 3 NZLR 335. See also *Jorsingh v Attorney-General* [1997] 3 LRC 333, where the plaintiff successfully sued the state for loss of income caused by an industrial court's delay in delivering judgment in his favour, Sharma JA in the Trinidadian Court of Appeal would have reduced the sum recoverable to reflect the plaintiff's failure to mitigate his losses by seeking new employment.

[269] [60]

on his loans, there was no actual evidence of that, it was not pleaded, and was not pressed. Nonetheless, on 6 May 2024, the Plaintiff advised his banker that:[270]

> *"FYI: my court case hearing on 27 May 2024 will determine whether I will be reinstated as President of the Land and Titles Court, if not, I will start a law office."*

(h) That being the Plaintiff's stated intention, and in the absence of any other evidence or submission to contradict or qualify it, I proceed on the basis that the Plaintiff considers he has the ability to start a law practice. However, the Plaintiff did not adduce any evidence upon which to base any assessment of the likely income (or range) any such practice might generate or over what period of time.

(i) The Plaintiff's experience as President of the old LTC has obviously equipped him with special experience in land and titles disputes which is very likely to be viewed as valuable in the market for those legal services. Counsel explained that unlike the old LTC,[271] the new Act[272] now permits lawyers to appear on judicial review proceedings before the Appeal and Review Court. That would appear to present opportunities for the Plaintiff. Against that, there may well be a section of the relevant market which will view the circumstances of the Plaintiff's removal in a negative light. However, this judgment is likely to go some way to providing a level of vindication which should ameliorate any such adverse perceptions. On balance, I consider the Plaintiff has reasonable prospects of establishing a successful legal practice of his own.

(j) However, once again, there is no evidence before me by which to assess whether any such successful legal practice is likely to generate income at a level less than, equivalent to, or greater than the Plaintiff's previous judicial salary and other benefits. That uncertainty is exacerbated given the consensus among Counsel about the average earnings in Samoa being less than $50,000 per annum. In undertaking this assessment as best I can, I have endeavoured to take into account the possibility that the Plaintiff may never earn as much as he was earning as President of the LTC or that his income in private practice may turn out to be erratic over time.

[270] Exhibit I to his First Supplementary affidavit.
[271] Section 92 of the LTA 1981 prohibited solicitors from appearing before the Court.
[272] Section 64.

(k) I also take into account the Plaintiff's current age and the fact that the general retirement age is 55.

(l) Neither Counsel gave consideration to the need to apply a present value calculation to any award of compensation based, in part, on an annual amount (annuity) over a number of years into the future. I have taken that into account, in a broadbrush manner, by the discounting exercise undertaken.

(m) The approach I have taken is also broadly consistent with that taken in the only comparative decision to which I was referred. In *Sharma*, ibid, for loss of future earnings, the Court adopted a multiplier (i.e, a discount from the full 22 years the Applicant's career potentially had to run) of 10 "*considering the circumstances such as having fair prospect of employability but there will not be constitutional security as to tenure, considering his experience and qualifications and other uncertainty*… ".

(n) The five years I have allowed takes account of the fact that for at least the last two, the Plaintiff has been left in a sort of limbo whilst the various legal proceedings, including this proceeding, have played out. Now that he has some certainty about his future, the allowance gives him approximately three years to "transition out" (as the Attorney General put it) from judicial life to private practice.

(o) While the Plaintiff did not plead any discrete claim for general damages for say redress for his dispossession of office, and loss of status, reputation, etc; and while the Defendants may consider the allowance of five years to be overly generous, I consider it appropriate for the overall award to provide some salve for those intangible losses to the Plaintiff which have naturally flowed from the manner in which he was removed from office and has been treated since, including the unexplained and unacceptable failure by the Government to pay him any further provisional sums even in the face of a consent Court Order to that effect.

356. I do not accept Mr Ainu'u's submission that the Plaintiff is entitled to receive his salary, etc, by virtue of Article 104G of the Constitution. That provision does not confer any individual right on the Plaintiff. It is an appropriation provision to enable the salaries, allowances or any other benefits of all judicial members of the LTC to be paid as expenditures by law out of moneys appropriated by the Legislative Assembly. Section 61J of the LTA 2020 provides that pursuant to Article 104G, the President is entitled to

be paid such salaries, allowances and other benefits as are fixed by the Head of State, acting on the advice of Cabinet, after consulting the Remuneration Tribunal.

357. By the same token, I accept the Attorney General's submission that once a judicial office no longer exists, there is no right for the officer to receive remuneration as a holder of that office. The decisions relied upon for that proposition have been considered and, where required, been distinguished from the present.[273]

358. However, neither submission is to the point. Upon the above findings as to liability, the task of the Court now is to determine what damages or compensation the Plaintiff should be awarded. That does not involve any order or declaration that he continue to receive his judicial salary or other benefits as if he continued to be President of the LTC. That is no longer legally or factually possible. It is an exercise in determining the level of loss and damage he has suffered as a result of the breaches found. That enquiry necessarily includes consideration of the salary, etc. he was earning, as a comparator for his claim for future pecuniary loss. As demonstrated above, while the Plaintiff's previous judicial salary is a relevant consideration, and an important one, it alone is not determinative of the ultimate calculation of any award.

359. For the five years allowed, the Plaintiff should be entitled, in my view, to an amount equivalent to his after-tax annual salary over that period. His last pay slip indicated a tax rate of approximately 23%. That calculates to $104,094 per annum[274] or $520,470 for the period.

360. Consistent with the Court of Appeal's interim order as to any repayment,[275] it is convenient at this point to allow a credit for the $70,000 which the Plaintiff has received since his removal. That reduces the above figure to $450,470.

361. In order to place the Plaintiff, as far as money can, in the same position he would have been in but for the breaches which resulted in his removal, I consider it appropriate to also allow for that same period, an amount equivalent to what would have been his Judicial Retirement Fund contributions of 20% of his gross salary.[276] Those contributions together with his after-tax salary represent what were his principal financial benefits

[273] R v Reilly; Claydon v Attorney General; Attorney-General (NSW) v Quin; Australand Corporation (Qld) Pty Ltd v Johnson.
[274] Annual salary of $135,187 minus 23% tax ($31,093) = $104,094 p/a.
[275] [68(b)]
[276] As indicated by his last payslip.

whilst in office. The contributions amount to $27,037 per annum or $135,187 (one year's salary) over the five-year period.

362. The pleaded claims for future sick and annual leave were abandoned during the trial. Similarly, the pleaded claim for untaken sick leave was not pressed.

363. However, Mr Ainu'u maintained the claim for untaken annual leave. It is common ground that the Plaintiff, like all judges, was entitled to take 25 days per year as annual leave. By contrast, there was no evidence available, by way of legislative instrument, terms of appointment or Cabinet or Ministerial policy, as to whether any portion of those days not taken in a given year may be rolled over or accrued in subsequent years. Similarly, there was no evidence as to whether untaken annual leave may be converted to cash upon a Judge's departure from the Court. I consider it appropriate to give the benefit of that doubtful situation, which lies at the feet of Government, to the Plaintiff.

364. Annual leave does not represent an additional financial entitlement to salary. It forms part of salary in the sense that a judge may be absent from court, on leave, but still receive his or her usual salary for the year notwithstanding his or her absence during that leave period. It would follow, in the ordinary course, and in the absence of any other special arrangement or agreement, that once a judge has exhausted his or her 25 days of annual leave, any further leave taken of that kind would be unpaid. Were that the complete analysis, I would have rejected this part of the Plaintiff's claim.

365. However, Mr Ainu'u advanced this claim on the basis that the Plaintiff's abrupt removal from office did not enable him sufficient time to use his accrued leave in advance of his departure from the Court. I consider there to be force in that submission. If it be accepted that an annual leave entitlement amounts to an acceptance by an employer (here, the Government) that the employee may be absent from work for up to 25 days per year, and still be paid for those days, it must follow, in my view, that if the employee does not take that leave but works for the entire year, for the same salary, the employer will be receiving a greater benefit than that contracted for. The corollary is that the employee will have provided a greater benefit by working without taking leave. Here, the Plaintiff was never challenged on his evidence as to why he did not take all his annual leave over the period it accrued. It appears from his evidence in the first proceeding that the workload in the LTC was such that he elected to forego his leave in favour of continuing to serve the Court and the parties before it by working on those cases.

366. Following the April 2022 decision, the Plaintiff continued to work and hear many cases. He would not then have known when his transitional tenure would come to an end. Further, at that time, he appeared to be under the impression, that the Court's message to Parliament to remedy the obvious lacuna in the LTA 2020 would result in his tenure, like the other judges, continuing on to the new Court. In circumstances where that has resulted, effectively, in the Government receiving greater service from the Plaintiff, and the Plaintiff suffering a greater detriment, than would otherwise have been the case had he taken all his annual leave each year or had an opportunity to take the accrued balance in advance of his departure date, I consider it reasonable to allow this part of his claim. The number of days (158) and value ascribed to them ($82,147), as pleaded, was not challenged.

367. The claim for phone allowance must be rejected. Ultimately, Mr Ainu'u was only able to apply a 'soft-pedal' to this claim. Again, without the benefit of any clear terms or policy, one can only assume that the phone allowance was intended to be a reimbursement or contribution towards the costs of the Plaintiff's use of his private phone for work related matters. His last pay slip shows he was paid that allowance up to the date of his departure. When his work on the Court ended, so too did any entitlement to that allowance.

368. The total of compensatory damages is therefore $667,804. In the interests of moderation and given the necessary degree of arbitrariness involved, I round that figure down to $650,000.

369. Having assessed compensatory damages, I must now consider whether that sum affords the Plaintiff adequate redress or whether an additional award should be made to vindicate his Constitutional rights.

370. Before doing so, however, I must deal first with the Attorney General's procedural defence to this claim, namely, that as the Plaintiff failed to particularise the claim, it must be rejected.

371. There is no doubt that the Plaintiff here failed to properly particularise his claim for exemplary damages, either as to basis or amount. It was a bald claim for "$500,000 for exemplary damages".[277] During oral submissions, Mr Ainu'u sought to resist the attack by pointing to the Plaintiff's affidavit evidence as providing proxy particulars and by which, he said, the Defendants knew the case they had to meet. While it may be accepted

[277] Fifth Amended Statement of Claim, paragraph 17(i)(vi)(F) and prayer for relief, paragraph 8(a)(x).

that, on a generous reading, the Plaintiff's evidence provided some basis for a claim of exemplary damages (essentially, how he was treated by the Prime Minister and the Government throughout this unfortunate matter), there was no attempt, either in evidence or in submissions, to substantiate the quantum claimed.

372. The Attorney General relied on the defamation case of *Enosa v Samoa Observer Company Ltd*.[278] In rejecting the plaintiff's claim there for exemplary damages, Nelson J explained:

> *"4.6.9. As stated earlier, I have found no persuasive evidence that in effecting these publications, the defendants or any of them were actuated by malice. Exemplary or punitive damages as they are sometimes known are awarded to punish and deter a defendant where the defendant has acted in flagrant disregard of the rights of the plaintiff: Uren v John Fairfax and Sons Pty. Ltd. (1966) 117 CLR 118 (High Court of Australia) and Taylor v Beere [1982] 1 NZLR 81 (CA). But such cases are rare and the common law authorities show this will only be awarded in exceptional circumstances. There are no such exceptional circumstances present, there is nothing in my view in the defendants conduct requiring punishment or justifying an award of exemplary or punitive damages.*
>
> *4.6.10. The plaintiffs claim for such damages is not assisted by the failure to plead the basis upon which he seeks exemplary damages. As stated in Peter Meredith & Co. Ltd v Drake Solicitors Nominee Co. [2001] WSSC 32:*
>
> > *'A claim for exemplary damages and the facts on which it is based should be pleaded with sufficient particularity to enable the defendants to prepare a proper reply. A mere inclusion of exemplary damages as a separate item of damages in the prayer for relief is not enough……..*
> >
> > *In Television New Zealand Ltd v Quinn [1996] 3 NZLR 24, 30, Lord Cooke made it clear that a plaintiff must signal its intention to claim exemplary damages, and why. The general rule of modern pleading is that a plaintiff is required to state its case with sufficient particularity for the defendant to be able to formulate a proper reply. A claim for exemplary damages is analogous to fraud, and therefore ought to be pleaded with great particularity; a bald averment of flagrant disregard for the plaintiff's rights is insufficient. Full particulars of the conduct relied on, and its egregious nature, should be supplied. The amount sought in respect of exemplary damages should also be particularised, the defendant is entitled to know its potential liability in respect of the claim.'*
>
> *The claim for exemplary damages fails."*

[278] [2009] WSSC 95.

373. A moment's reflection on the above passage reveals that his Honour's primary reason for rejecting the claim for exemplary damages was the lack of any evidence of exceptional circumstances warranting punishment or justifying such an award. He then added that the plaintiff's claim was *not assisted* by the failure to properly plead the basis for the claim for exemplary damages. However, in my view, and with respect, neither his Honour's reasoning in that case, or the authorities to which he referred, support the proposition, as contended for by the Attorney General, that a defectively pleaded claim for exemplary damages ought automatically result in the Court's rejection of that claim. In that regard, I note that while *Enoser* has been referred to in a number of decisions since, it has not been relied on or applied for that proposition.[279] Relevantly, as far as my research has been able to indicate, *Enoser* and *Meredith v Drake* have been referred to on many occasions but only in the context of strike out applications.

374. If a claim has been inadequately particularised such that a defendant genuinely does not know the case it has to meet, it is open to that defendant to serve a request on the plaintiff for particulars. If that does not produce a satisfactory response, then the defendant may apply, pursuant to Rules 15 and 16 of the *Supreme Court (Civil Procedure) Rules* 1980, for an order requiring the plaintiff, at or before the trial of the action, to file a fuller and more explicit statement of his claim, failing which, the Court may order that the action be stayed until that has been done. Yet another avenue is to file a motion to strike out that part of the Statement of Claim as failing to disclose a cause of action or that it is frivolous, vexatious or an abuse of process.[280]

375. Here the Defendants did not seek particulars, nor did they avail themselves of any relief under the Rules. Their Defence simply denied that part of the claim without averment as to any lack of particulars or indication that, in that state, the claim ought to be struck out. As far as I could tell, the first time any formal indication of their position was communicated to Mr Ainu'u was in the Attorney General's written submissions filed shortly before the commencement of the trial.

376. It is now well accepted that modern litigation processes require all parties to work together to identify the real issues in any dispute and to seek to either resolve them or identify fair and efficient methods for having them heard and determined by the Court.

[279] E.g. see *Ponifasio v Apia Broadcasting Ltd* [2011] WSSC 136; *Apia Broadcasting Ltd v Ponifasio* [2012] WSCA 5; *Stowers v Stowers* [2020] WSSC 93; *Oeti v Samoa Observer Company Ltd* [2021] WSSC 8.

[280] *Peter Meredith & Company Ltd v Drake Solicitors Nominee Company Ltd* [2001] WSSC 32.

For the most part, in the lead up to trial, Counsel for both sides demonstrated a high degree of co-operation and professionalism which reflected those expectations. However, on this particular issue, the approach taken by the Defendants was not consistent with those ideals, even moreso when the principal Defendant, the Government, is expected to conduct its part in any proceeding as a model litigant.[281]

377. For those reasons, I decline to dismiss the Plaintiff's claim for exemplary damages solely for want of particulars.

378. In *Vermeulen v Attorney-General*,[282] the plaintiff sought relief arising from his dismissal and failure to be appointed Director-General of Health, which he claimed was the product of malfeasance in public office by high-ranking Government officials and the Public Service Commission, and breaches of the Constitution. Among other things, he sought general (including exemplary) damages of 200,000 tala. Mahon J considered that the plaintiff's claim was "the strongest possible case for such an award". In following the guidelines set by the New Zealand Court of Appeal in *Taylor v Beare*[283] and *Donselaar v Donselaar*,[284] his Honour had no doubt there were grounds for applying the principle of aggravated compensatory damages in view of the protracted distress and injury to feelings sustained by the plaintiff. However, he "submerged" that factor within the concept of exemplary damages as reflecting the condemnation of the Court at the "arbitrary and flagrant disregard of the Plaintiff's rights" by the first, third and fourth defendants, who acted as public officers, in wilful and knowing contravention of the plaintiff's rights under the Constitution, with the additional element, of exercising malice against him. On that basis, his Honour assessed exemplary damages in the sum of 75,000 tala.

379. In *Maimoaga v Vaai*,[285] the Plaintiff was found to have been the object of hostility on the part of the then Prime Minister, the Minister of Health, and others, who, in different ways, made her job difficult and put together a plan to have her dismissed from her position as Superintendent, Division of Nursing. Relevantly, Ryan J awarded her 100,000 tala for

[281] *Kun v Secretary for Justice and Border Control* [2015] NRSC 18; *Barrick (Niugini) Ltd v Nekitel* [2020] PGSC 135; *Hausia v Fatongiatau* [2002] TOCA 11; *Republic of Vanuatu v FR8 Logistics Ltd* [2020] VUCA 15.
[282] [1985] WSLawRp 1; [1980-1993] WSLR 105.
[283] (1982) 1 NZLR 82.
[284] (l982) 1 NZLR 97.
[285] [1988] WSSC 1

general and exemplary damages, which his Honour hoped would provide some solace for the Plaintiff and sheet home to the liable Defendants that "nobody is above the law".

380. In *Tutuila v Punitia*,[286] Justice Slicer set out the principles of aggravated and exemplary damages, with emphasis on the trespass element of the banishment claim before him.[287] His Honour noted that English Courts had confined the remedy of exemplary damages to three categories namely: oppressive or unconstitutional conduct by government; where the defendant's conduct was designed or calculated to make a profit; where it is expressly authorized by statute.[288] That confinement has not been followed by Australian and New Zealand appellate Courts.[289] His Honour found that the plaintiff and her family had been treated with contempt. They were not afforded the opportunity to be heard on the banishment issue, were given but short and unreasonable time to vacate the premises, refused permission to return to at least check their assets, provided with no opportunity to remove their livestock and had their plantation destroyed long after the event. No other compromise was ever offered by the Defendants and the affidavit of one of them was self-serving, equivocal and disingenuous. On that basis, his Honour assessed punitive damages at $100,000 and exemplary damages in the amount of $50,000.

381. The Court of Appeal considered that by reason of the very high special damages, coupled with the general tendency to moderation in constitutional damages, the award of $150,000 should be reduced to $50,000.[290] Even though their Honours regarded that sum as "*modest*", they opined that it would "*serve as symbolic recognition of the suffering of the family and the outrageous conduct of the appellants over and above the already heavy special damages*".

382. In *Sharma*, ibid, the Court ordered "*aggravated vindicatory damages of $150,000*", although the reasons for decision do not appear to explain the basis for (although that might be self-evident given the conduct involved) or quantum of that award.

383. In my view, the instant case warrants an award of exemplary or vindicatory damages. The undermining of judicial independence in the manner effected by the Government sets this case apart from other examples of unconstitutional conduct. Whereas those cases tend

[286] [2012] WSSC 107.
[287] From *OF Nelson v Sia'aga & Others* [2010] WSSC 43 at 46 to 51.
[288] Citing *Rookes v Barnard* [1964] AC 1129; *Cassell & Co. Ltd v Broome* [1972] AC 1027.
[289] *Uren v John Fairfax & Sons Pty* [1966] 40 ALJR 124, *Australian Consolidated Press v Uren* [1966] 1AC 590, *Truth (NZ) Ltd v Bowles* [1966] NZLR 303, *Corbett v Social Security Commissioner* [1962] NZLR 878, *Taylor v Beere*, ibid.
[290] Ibid, at [95].

to involve the rights of individuals or families, the conduct here has affected not just the Plaintiff but the broader Samoan community and every citizen's entitlement to expect that the Executive will observe and maintain the Constitutional separation of powers, including by ensuring and protecting the independence of the judiciary.

384. The treatment of the Plaintiff has been extremely poor. Notwithstanding the belated but salutary treatment of the other judges of the old LTC, the use by Parliament of a purported savings and transitional provision within amending legislation to revoke the Plaintiff's appointment, as the most senior judicial officer in that Court, demonstrated a flagrant disregard for the principles of judicial independence. It must be assumed that the Government had or had access to legal advice on those principles. That disregard was exacerbated by the Government's failure to offer the Plaintiff an appropriate position on the new LTC or compensation. That overall conduct, if not adequately redressed, will be left to stand as a silent threat to the tenure of all other judges who might also be 'left out' as a result of any future reforms or court restructuring. Appropriate orders must include a component for deterrence against any possible future recurrence.

385. For those reasons, I consider that the sum awarded by way of compensation is inadequate to mark the Court's disapproval of the impugned conduct. Having regard to the comparative decisions above, and comparatively unique and serious nature of the conduct in this case, I assess exemplary damages at $100,000.

Conclusion

386. The Plaintiff's claim against the First Defendant is dismissed.

387. The Plaintiff's claims against the Second Defendant were withdrawn during the trial.

388. There will be judgment against the Third Defendant in the form of the following declarations:

    (a) the revocation of the Plaintiff's appointment as President of the LTC and removal from judicial office pursuant to ss 67(6) of the LTA 2020 was inconsistent with the Constitution and offended the principles of judicial independence, and was therefore unlawful; and

    (b) as a result, the Plaintiff is entitled to compensation in the sum of WST$750,000.

389. In the ordinary course, costs ought follow the event. However, during oral submissions, both Counsel indicated that there have been without prejudice offers of compromise

which may have a bearing on the final result in respect of costs. I am also reminded of the very broad discretion conferred on the Court by s 14 of the *Declaratory Judgments Act*. There is also a potential question as to the Second Defendant's costs, if any.

390. Accordingly, I direct that:

(a) the Plaintiff file and serve submissions on appropriate costs orders, limited to four pages, within seven days of the date hereof;

(b) the Defendants file and serve submissions in response, also limited to four pages, within seven days of the Plaintiff's submissions;

(c) any request for a further oral hearing on costs is to be filed and served within seven days of the Defendants' submissions, failing which, costs will be determined on the papers.

391. Finally, I direct that the documents on the court file marked Annexure E to the Plaintiff's affidavit in proceeding MISC 381/21, sworn 14 December 2021, namely, letter dated 13 December 2021 from the Attorney General to the Head of State attaching a letter dated 13 December 2021 from the Attorney General to the Minister of MJCA in relation to appointment under Article 104E of the Constitution of the Deputy President and Judges of the Land and Titles Court, and a letter from the Samoan Law Reform Commission to the Attorney General in relation to Tulafono Taufaaofi o le Komisi o le Faamasinoga o Fanua ma Suafa 2021, be kept and marked confidential, in a sealed envelope on the Court file, and are not to be opened without a Court Order.

.....

Honourable Justice Whitten KC

17 June 2024