

**IN THE COOK ISLANDS COURT OF APPEAL  
HELD AT RAROTONGA**

**CA No. 12/14**

IN THE MATTER of Part 8 of the Electoral Act  
2004

AND  
IN THE MATTER of the constituency of  
Tengatangi-Areora-Ngaiarua

BETWEEN **EUGENE TATUAVA**  
Appellant

AND **NANDI TUAINE GLASSIE  
AND OTHERS**  
First Respondent

AND **THE CHIEF ELECTORAL  
OFFICER**  
Second Respondent

Coram: David Williams P  
Barker JA  
Paterson JA

Counsel: Mr P David QC and Mr I Hikaka for Appellant  
Mr P.J Dale and Mr A.M Manarangi for First Respondent  
Ms Catherine Evans for Second Respondent

Hearing: 17 November 2014  
Judgment: 21 November 2014

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**JUDGMENT OF THE COURT**

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## INTRODUCTION: NATURE OF THE CASE

- [1] In the Cook Islands General Election of 9 July 2014 the First Respondent, Mr Glassie, won the Atiu constituency of Tengtangi-Areroa-Ngatiarua by 88 votes to 73, a majority of 15.
- [2] On 23 July 2014 Mr Glassie's unsuccessful opponent, the Petitioner Mr Tatuava, issued a Petition for an electoral inquiry into the result in Tengtangi-Areroa-Ngatiarua alleging that Mr Glassie had committed the electoral offences of bribery (three allegations) and treating and stating that other offences of bribery and treating were reported to have occurred in the constituency, particulars of which would be swiftly furnished if verified.
- [3] On 6 August 2014 an amended Petition was filed altering one of the original allegations of bribery to include the electoral offence of undue influence and adding a new allegation of bribery.
- [4] The Petition which was heard on Atiu and Rarotonga between 2-5 September 2014. The two detailed allegations which required consideration were:

“1. Your petitioner states that the said election was held on the 09th day of July 2014 and that Nandi Taine Glassie was declared to be elected as a representative for the constituency of Tengtangi-Areroa-Ngatiarua.

2. That he is dissatisfied with the result of the election in that:

### **i) Bribery:**

The First Respondent committed an act of bribery within the meaning of s88 of the Act in connection with the election in that he offered to an elector office of employment:

- a. to induce the elector to vote for him and refrain from voting for the Petitioner, and/or
- b. to induce that person to procure or endeavour to procure his return, or the votes of the electors, or

## PARTICULARS

- a. On or about the 2<sup>nd</sup> May 2014 the First Respondent at his Ministerial Office in Avarua, Rarotonga offered Upokoina Roland Toki (6/24) (“Upokoina”), an elector in the Tengtangi-Areroa-Ngatiarua Constituency the position of Executive Officer for the local Government in Atiu in order to induce Upokoina.

### **ii) Bribery and Undue Influence**

The First Respondent committed acts of bribery within the meaning of s88 of the Act and undue influence within the meaning of s90 of the Act in that he offered an elector an office of employment and threatened termination of employment:

- a. to induce the elector to vote for him and refrain from voting for the Petitioner; and/or
- b. to induce that person to procure or endeavour to procure his return, or the votes of the electors.

### PARTICULARS

On two occasions during the month of June 2014 the Chief Administration Officer of the First Respondent telephoned an elector, Maire Tere-Evangelia George (1/22) (“Maire”) at his place of work in Atiu, being the Atiu Electric Power Station, promising the continuation of his participating in a training programme associated with his employment and threatened that his job would be terminated if he did not vote for the First Respondent, and that his expectation was that the members of Maire’s family, Joy Tina Tangi Jim (6/3), Patikura Jim (2/21), Joshua John Jim (2/20) and Marona Teiotu (6/12) would similarly vote for the First Respondent.”

### **THE HEARING AND DECISION**

- [5] The hearing took place before Sir Hugh Williams J on 2-5 September 2014 on Atiu and Rarotonga. In a brief Judgment on 9 September 2014 he advised that, having considered all the evidence in relation to the two remaining allegations, bribery (i) and bribery and undue influence (ii) (these allegations are referred to hereafter as Allegation 1 and Allegation 2) neither of those allegations had been made out. The amended Petition was dismissed.
- [6] Detailed Reasons for Judgment were issued on 11 September 2014. After referring to the statutory definitions of bribery and undue influence and relevant case law including the decisions of the New Zealand Supreme Court in *Field v R* [2012] 3 NZLR 1, the Judge explained why he had dismissed Allegation 1 relating to Mr Upokoina Toki.
- [7] His two reasons for dismissing Allegation 2 were set out in paragraphs 61-71 of the Reasons for Judgment. It is convenient to record the key parts of his first reason for finding against the Petitioner (emphasis added):

“[61] The essence of bribery is providing or agreeing to provide something valuable to somebody in return for their vote. The essence of undue influence is applying violence or other pressure to a voter to vote in a way other than in accordance with their original intention.

[62] Although counsel in their submissions seemed to accept that Mr Unuia’s calls to Mr George, if proved, amounted to bribery or undue influence, the Court’s view is that neither conclusion is clear cut. *There was nothing offered to Mr George in return for his vote. The highest it could be put is that Mr Unuia threatened to undermine any application Mr George might make for further training should not vote for Mr Glassie but given that both parties must have known Mr Unuia no longer had any power to intervene in the selection process for the Ministry of Education’s further training courses, when put that way the calls hardly amount to bribery. The nearest the calls could come to conferring a benefit on Mr George was the implicit promise not to do anything to interfere with Mr George’s*

*selection for any further training course if he voted for Mr Glassie, but again Mr Unuia had no power to do that and it is something of a stretch to say that it amounts to bribery.*

[63] As mentioned, the ambit of the electoral offence of undue influence is difficult to define, but, for Mr Unuia to state that he could not help Mr George advance his electrical training – something over which he no longer had any influence in any case – could not amount to “*restraint*” under s90 and it would be a strained interpretation to say Mr Unuia’s statement inflicted “*damages, harm or loss*” on Mr George when there was no evidence there was any certainty of further courses being offered or Mr George being selected for them.

[64] The upshot of those observations is that, had it been necessary so to do for the purposes of these Reasons, the Court would have sought further submissions from counsel as to whether the actions found to have been undertaken by Mr Unuia amounted to bribery or undue influence. *Such is unnecessary because there are two reasons why, even if those elements were thought to be satisfied, the allegation of bribery and undue influence (ii)<sup>1</sup> was not proved.*

[65] *The first of those is that, even if threat were made in the terms Mr George gave in evidence, it could only be ineffectual since neither Mr Glassie nor Mr Unuia have any part to play in the selection of those who participate in the Ministry of Education courses. Selection is made by the Manager of the Power Station, the Executive Officer of the Atiu Islands Government and the Island Mayor so, even if the threat were made, it was a threat which could not be carried out by the first respondent or, since he had left his position as Executive Officer on Atiu, his CEO, Mr George must have known that as he had participated in similar courses almost two years earlier.”*

[8] Paragraph 65 was a clear finding that Allegation 2 had not been proved. The Judge then went on in paragraphs 66-70 to provide an alternative reason why there was no infringement, namely that Mr Ununia’s actions, even if they occurred in the terms of Mr George’s evidence, were not shown to have infringed the law of Electoral Agency. In that respect he referred to the well-known passages on the law on Electoral Agency as described in Halsbury including the following passages:

**“244. Candidate’s liability.** A candidate’s liability to have his election avoided under the doctrine of election agency is distinct from, and wider than, his liability under the criminal or civil law of agency. Once the agency established, a candidate is liable to have his election avoided for corrupt or illegal practices committed but his agents even though the act was not authorised by the candidate or was expressly forbidden. The reason for this stringent law is that candidates put forward agents to act for them; and if it were permitted that these agents should play foul, and the candidate should have all the benefit of their foul play without being responsible for it in the way of losing his seat, great mischief would arise. In this respect the relationship between candidate and agent resembles that of employer and employee.

...A candidate’s liability for corrupt or illegal practices committed by such an agent is limited to acts within the agent’s authority...

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<sup>1</sup> The text referred to (iii) but there was no allegation (iii) relating to Bribery and Undue Influence.

**245. Evidence of agency.** In order to prove agency it is not necessary to show that the person was actually appointed by the candidate or that he was paid. The crucial test is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of his work when done, ...”

[9] Thereafter he ruled that though Mr Unuia was deeply involved in Mr Glassie’s re-election campaign, there was no evidence he ever told Mr Glassie about any call he made to Mr George. He recorded that Mr Glassie had said “I know nothing of ... the phone call alleged to have been made by Mr Unuia” and was not cross-examined on that denial.

[10] In those circumstances he considered it was not possible to conclude that Mr Unuia’s actions in relation to Mr George were within his authority from Mr Glassie or that Mr Glassie adopted everything Mr Unuia did in relation to Mr George. While Mr Glassie may have put himself in Mr Unuia’s hands in the sense of the latter actively promoting the interest of the former, the specific means alleged to have occurred in relation to Mr George cannot be said to have been proved to be within Mr Unuia’s authority or accepted by Mr Glassie. He considered that they appeared merely to have been actions taken by Mr Unuia as part of his general brief to promote the First Respondent’s re-election and, Mr Glassie not being advised of them, he could not be said to have authorised or accepted them. Indeed, had he been told of them, the evidence suggested he would have disavowed them in the circumstances of an ongoing election campaign.

[11] At the end of the section of the judgment dealing with electoral agency the Judge stated at paragraph 71 that “For all those reasons bribery and undue influence Allegation (ii) was dismissed.”

#### THE CASE STATED

[12] Relevant passages from the Case Stated are as follows:

“3. The Appellant is dissatisfied with the decision of the Court as being erroneous on a point of law. In particular, the Appellant is dissatisfied with the following part of the Judgment:

- a. The decision that what was said during the telephone calls made by Mr Unuia to Maire George on 2 May 2014 and probably 8 May 2014 did not amount to bribery or undue influence under sections 88 or 90 of the Electoral Act 2004 (Judgment at [71] (**Decision**)).”

[13] Since paragraph 71 was mentioned, this was a reference to both legs of the Judge’s finding that Allegation 2 had not been established. Later in the Case at paragraph 2(a)-(f) the Judge recorded his determinations on the facts as follows:

“2. I determine on the facts –

- a. The statements by Mr Unuia when he telephoned Mr George were likely not to have been held to prove bribery or undue influence (ii) or both but a finding to that effect could not be made until further submissions had been received and such was unnecessary for the reasons set out in paragraph [65]-[71].

- b. The nearest calls could come to conferring a benefit on Mr George was the implicit promise not to do anything to interfere with Mr George's selection for any further training course if he voted for Mr Glassie but Mr Unuia had no power to do that. [62]
- c. Mr Unuia's statement that he could not help Mr George with his electrical training could not amount to restraint, damage, harm or loss on Mr George under section 90 of the Act. [63]
- d. Mr Unuia's actions were not shown to have infringed the law of electoral agency. [66]
- e. Mr Glassie may have put himself in Mr Unuia's hands in the sense of the latter actively promoting the interests of the former but the specific means alleged to have occurred in relation to Mr George cannot be said to have been proved to be within Mr Unuia's authority or accepted by Mr Glassie. [70]
- f. I applied the test for Electoral Agency as set out in *Halsbury* 5<sup>th</sup> ed Vol 37 23013 para [244] p 421 para [245] p 422."

[14] The Judge was confirming in paragraph 2(a), (b) and (c) that Allegation 2 had not been established on the facts. Paragraphs (d), (e) and (f) referred to his alternative finding that Mr Unuia's actions were not within the scope of his authority.

#### ISSUES ON APPEAL

[15] The questions posed for this Court in the Case Stated were as follows:

##### **“Questions on which the opinion of the Court of Appeal is sought**

1. If a threat is made but is unable to be carried out does that mean that the offences of bribery and undue influence cannot be proved to have been committed?
2. Does a person who is deeply involved in a candidate's election campaign and who has a brief to promote the candidate's election need to tell the candidate about any particular action he takes before the action is attributable to the candidate under the law of election agency?
3. In relation to Mr Unuia:
  - a. Was the correct test as to Electoral Agency applied?; and;
  - b. Was he proved to have been Mr Glassie's electoral agent?; and
  - c. If so, were his actions as Mr Glassie's electoral agent proved to have been attributable to Mr Glassie pursuant to the law of Electoral Agency?"

[16] The contentions of the Appellant were then set out.

#### SUBMISSIONS ON APPEAL

[17] For the Appellant it was submitted that the decision dismissing the electoral petition was in error. The Appellant contended, first, that even if a threat is made that is unable to be carried out it is still capable of being bribery or undue influence under the Electoral Act 2004 (Act) and his Honour erred in finding otherwise. Secondly, a person who was deeply involved in a candidate's election campaign and had a brief to promote the candidate's election does not need to advise the candidate of the actions being taken in order for them to be attributed to the candidate under the law of electoral agency properly understood. Thirdly, the statements made by Mr Unuia to Mr George were bribery and/or undue influence under the Act. Accordingly, the election of Mr Glassie was void.

[18] As elaborated in more detail, the Appellant's arguments were as follows:

*Threat*

- a. It does not matter if a threat made is unable to be carried out, the making of it is sufficient to amount to undue influence or bribery.
- b. This is in accordance with case law and principle of the sanctity of the election process which the prohibitions on bribery and undue influence are intended to protect.

*Agency*

- c. The doctrine of electoral agency is wider than criminal or civil law agency and attributes conduct by agents more broadly than under the general law for sound policy reasons. Once agency is established, a candidate's election is liable to be avoided for corrupt or illegal practises even if the act was not authorised or was in fact forbidden.
- d. In the present case, Mr Unuia was authorised by the First Respondent to do election work, including canvassing. That satisfies the requirements of electoral agency and so Mr Unuia's actions are attributable to the First Respondent.
- e. This is in accordance with case law and the principles underlying the protection of the electoral process.

*Bribery and undue influence*

- f. The statements by Mr Unuia were either:
  - i. The actual or threatened infliction of damage or harm upon Mr George in or to induce or compel him to vote for the First Respondent; or
  - ii. Duress, applied to Mr George to impede or prevent the free exercise of his franchise; or
  - iii. An indirect offer of valuable consideration to Mr George in order to induce him to vote for the First Respondent.

[19] For the Respondent it was its primary case that section (f) represented a challenge to the Judge's factual findings. It did not articulate a question of law.

[20] The Respondent asserted that the Court below had found that Mr Unuia's actions in telephoning Mr George did not amount to either bribery or undue influence. In short, the allegations were not proved. That was because, as correctly found by the Judge:

- i. There was nothing offered by Mr Unuia to Mr George in return for his vote;
- ii. The nearest the calls could come to conferring a benefit on Mr George was the implicit promise not to do anything to interfere with Mr George's selection for any further training course if he voted for Mr Glassie. But Mr Unuia had no power to do that.
- vi. Mr George knew that Mr Unuia was not offering anything because he also knew that Mr Unuia could not intervene in the selection process for the Ministry of Education Training courses.
- vii. There being no offer there could be no inducement and therefore the elements of bribery were not satisfied;
- viii. There was no evidence of further courses offered or Mr George being selected.
- ix. For Mr Unuia to state that he could not help Mr George advance his training could not amount to restraint, damage, harm or loss on Mr George.
- x. It follows that the elements of undue influence were not proved.

[21] It was further submitted by the Respondent that the Court having found on the facts that the elements of bribery and undue influence had not been proved, no inference of agency needed to be drawn from the facts. It was only for completeness that the Judge in his decision had gone on to say that even if those elements were thought to be satisfied, there were two further reasons why bribery and undue influence were not proved. They were:

- i. Even if a threat were made in the terms Mr George gave in evidence, it could only be ineffectual since neither Mr Glassie nor Mr Unuia have any part to play in the selection of those who participate in Ministry of Education courses. Mr George must have known this as he had participated in similar courses previously;
- ii. Mr Unuia's actions, even [if] they occurred in the terms of Mr George's evidence, were not shown to have infringed the law of electoral agency.

[22] In addition there was no evidence of the extent of Mr Unuia's authority from Mr Glassie because Mr Glassie knew nothing of the calls and was not cross-examined on this, and furthermore, there was no evidence that what was alleged to have occurred in relation to Mr George was within that authority or accepted by Mr Glassie. In short, the question was not whether Mr Unuia was an electoral agent of Mr Glassie, but rather the extent of his authority. There was no direct evidence of that authority, but the Judge concluded on the evidence at [70] that the evidence did not go



far enough to prove the acts were "...within Mr Unuia's authority or accepted by Mr Glassie". The Respondent argued that all such findings of fact were open to the Judge and not amenable to appeal.

#### DETERMINATION

[23] It can be seen that there were two elements to the finding which led to Allegation 2 being dismissed. The first was that the allegation was not proved. Since nothing was offered to Mr George in return for his vote, a critical component of the definition of bribery and undue influence was absent. This, in the view of this Court, was a finding of fact and there was no suggestion in the arguments before us that the Judge had misdirected himself in law in relation to that factual finding. It is not permissible to challenge such a finding of fact by way of Case Stated and the finding must stand. It follows that the appeal must be dismissed. The second element was that the actions of Mr Unuia in relation to Mr George were not within his authority as Mr Glassie's agent.

[24] As to the second element, while the Court is of the view that the learned Judge may possibly have misstated and misapplied the principles of electoral agency, in the end that is beside the point. The primary holding was the factual finding that the Petitioner had not proven that the elements of bribery and undue influence existed on the facts of the case. That finding is determinative and cannot be challenged in a Case Stated appeal on questions of law.

[25] For the foregoing reasons there is no answer required on any of the three questions set out in the Case Stated.

[26] The Appeal is dismissed and the Respondent is entitled to costs. By its Minute of 11 November 2014, the Court of Appeal ordered security in this Appeal in the sum of \$3,000. The registrar is authorised to release that sum to the solicitors for the First Respondent.

Dated this 21<sup>st</sup> day of November 2014 at Rarotonga



David Williams (President)



Sir Ian Barker (Justice of Appeal)



B.J. Paterson (Justice of Appeal)