IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

MISC: 134/00

IN THE MATTER of a by-election for the constituency of Pukapuka/Nassau held on Thursday the 28th day of September 2000

A N D

IN THE MATTER of a petition by a Candidate and five electors

DETERMINATION OF RESULT OF ENQUIRY INTO DISPUTED PUKAPUKA/NASSAU BY-ELECTION

Counsel: Mrs T P Browne for Petitioners
Mr M C Mitchell for Respondent, the sitting member Mr Tiaki Wuatai
Mr A Manarangi for Chief Electoral Officer

Hearings: At Rarotonga 2, 3 February 2001
At Pukapuka 5, 6 February 2001
At Rarotonga 7, 8 February 2001

Supplementary Written Submissions: 15 February 2001

INTRODUCTION

[1] This determination relates to an election petition dated 24 November 2000 in respect of the Pukapuka by-election held on 28 September 2000 ("the 2000 by-election). That by-election was carried out in accordance with the Electoral Amendment (No 2) Act 1999 ("the 1999 Act"), which called for the enrolment afresh of every elector in the Pukapuka/Nassau By-election Constituency Roll.

[2] This case is part of a long-running saga which began as long ago as 16 June 1999 when General Elections were last held in the Cook Islands. The candidates were the sitting member Mr Inatio Akaruru of the Cook Islands Party ("CIP"), and the challenger Mr Tiaki Wuatai of the Democratic Alliance Party ("DAP"). Initially, the vote gave the seat to Mr Akaruru by a very slim majority. The final count conducted by the Electoral Office several days later concluded that there was an equality of votes. That led under the Electoral Act to a judicial recount under the auspices of the High Court. The seat was then awarded the seat to Mr Wuatai by one vote.

[3] On 13 July 1999, the High Court ruled on an election petition that Mr Wuatai had not been qualified to become a candidate on the ground that he had not resigned as a public servant in accordance with the procedures laid down in the Electoral Act 1998 ("the Electoral Act"). On 11 August 1999 the Court of Appeal reversed this decision and ordered a by-election.

[4] The first by-election was held on 29 September 1999, approximately 50 days after the by-election was ordered. This time Mr Akaruru emerged the victor, again by a slim majority. Once again an electoral petition was filed. On 3 December 1999 the High Court found that numerous votes from Nassau had been improperly included in the counting of votes. It voided the result of the by-election and ordered another by-election.

[5] At this stage it was apparently thought appropriate, in view of the foregoing history of petitions and the belief that the Electoral Act is in numerous respects unclear and ambiguous, to introduce a piece of ad hoc legislation to create a special regime to govern the forthcoming by-election. Thus was born the 1999 Act, which received Royal Assent on 22 December 1999.

[6] The Hansard record of proceedings in the Cook Islands Parliament on 21 December 1988, which was produced to the Court by counsel for the Chief Electoral Officer, contains the following statement by the Honourable Tangata

Vavia, Minister of Justice, with reference to the Bill which became the 1999 Act:

> "Mr Speaker, this Bill was brought into the House because of the conflicts experienced during the two By-elections on Pukapuka and Nassau. No doubt, Mr Speaker, these By-elections in Pukapuka have affected the people on the islands of Pukapuka and Nassau. Even the legal advisers of both Parties concerned in those By-elections brought out the confusion and doubts have with the Law in our Principal Act. And this Amendment, Mr Speaker, was brought into this House only after consultations with the legal advisers of both Parties and the consultations continued even up until yesterday. As such both legal advisers were asked to be present in the in-camera discussions that we will have soon. I would just like to remind the House, Mr Speaker, that this Bill will only apply to the Constituency of Pukapuka-Nassau.
>
> At some later stage we will have a look at the principal Act and tidy it up and at that time get rid of this. Without going through the clauses I request the House that we go into camera to discuss the clauses of the Bill and hopefully all Members of the House will come to a better understanding. Thank you."

[7] Thereafter, after some delays, the 2000 by-election was held. It was the subject of a judgment by Greig CJ on 16 November 2000, which dealt with questions concerning the procedure for objections by electors to registration of an elector for the by-election under Sections 19 to 23 of the Electoral Act. Those provisions applied to the by-election, with modification, by virtue of Section 4(6) of the 1999 Act. Following that judgment, all votes were counted and the result was that Mr Wuatai was successful, having received 210 votes as against 206 for Mr Akaruru.

THE ELECTORAL PETITION OF 24 NOVEMBER 2000

[8] The Petition for Enquiry as lodged by Mr Akaruru and five other Pukapuka electors, contained two separate sets of allegations. First, it was alleged that there were eleven votes "allowed which ought not to have been allowed" because "such persons [were] not ... qualified as electors for that constituency as they did not possess the necessary residence qualifications". Secondly, there were allegations of bribery in breach of Section 83 of the Electoral Act and treating in breach of Section 84 of the Electoral Act. The precise allegations of

bribery are discussed below. There is no need to consider the treating allegations since these were abandoned during the hearing of this petition.

[9] As to relief sought, the petitioners asked for the Court to determine:

> "1. That the said Tiaki Wuatai was not duly elected; and/or
>
> 2. That the said Inatio Akaruru was duly elected and ought to have been so declared; and/or
>
> 3. That the By-election was void."

[10] The Court made a number of interlocutory directions, as a result of which an agreed statement of facts was produced. This agreed statement was the subject of two variations during the first part of the hearing in Rarotonga. Pursuant to interlocutory directions, counsel filed written submissions on the "qualifications" part of the petition and the Court was greatly assisted by being able to read these submissions before the hearings commenced in Rarotonga on 2 February 2001.

RULINGS AND DECISIONS ON QUALIFICATIONS OF ELECTORS

[11] In the hearings in Rarotonga on 2 and 3 February 2001 the primary focus was the "qualifications" part of the petition, although there was some evidence on the bribery allegations. In addition to the eleven electors whose qualifications were challenged by the petitioners, the Court by consent also dealt with three challenges on the respondent's counter-petition in case such rulings later became relevant.

[12] As to the qualifications issues, the Court made two preliminary rulings. The first related to the petitioners' contention that there had been non-compliance by the Registrar of Electors in respect of certain pre-by-election procedures. Such non-compliance was relevant in particular to Elector No 11, Litia Wuatai. After hearing argument on this matter, the Court ruled as follows:

> "The question of whether such alleged non-compliance can be pursued itself after the election had been held was considered and decided by Chief Justice Greig in the case of *The Registrar of Electors and Matenga* in a written judgment delivered on the 16th of November 2000. The ruling was to the effect that in the interests of certainty it is impermissible to pursue challenges of this kind after the poll has been held. If a Petitioner wishes to pursue the actual qualifications of the elector that can be done in compliance with the rules about formal Election petitions under Part VI of the Electoral Act. In this case, however, Mrs Browne in her written submissions conceded that if it was impermissible to investigate a S19-21 allegation this elector was entitled to vote. On that basis the ruling of the Court in relation to this elector No 11 is that the challenge is disallowed by consent."

[12] The second introductory matter considered and determined by the Court was the true construction and interpretation of Section 5 of the 1999 Act, which states:

> "5 Qualifications to Apply for Registration as an Elector – (1) Notwithstanding anything to the contrary in the principal Act, the qualifications of any person to –
>
> (a) apply for registration and be enrolled pursuant to section 4 of this Act; and
>
> (b) cast a vote as an elector in the By-election,
>
> shall be the possession by the applicant or elector (as the case may be) of the qualifications stated in section 13 of the principal Act as at the date of his or her application for registration pursuant to section 4(1) of this Act."

The Court ruled on this matter on 2 February 2001 in Rarotonga and in its oral judgment included a summary of the reasons for its conclusion that the qualifications contained in Section 13 of the Electoral Act alone governed the qualifications for electors for the September 2000 by-election. The Court indicated that it would put its detailed reasons in writing. It reserved the right to supplement the oral reasons, since its ruling was given under pressure of time. The written decision of the Court is attached as Appendix 1. The practical effect of this decision was that Counsel for the petitioner acknowledged that none of the petitioners' challenges to the qualifications of electors could be pursued because they were all based on grounds other than those contained in Section 13 of the Electoral Act.

[14] After this ruling was given counsel for the petitioner requested that the Court should nevertheless consider and determine, in a conditional and hypothetical way, the challenges to the qualifications of the electors and record its determination on those challenges. This was on the basis that if there was an appeal on the foregoing ruling (Appendix 1) and the appeal was successful, it would save further time if the decision of the Court on the qualifications issues were then immediately known, rather than the issues being considered much later on a reference back by the Court of Appeal. The Court allowed the request and agreed to examine these qualifications on such a provisional and hypothetical basis accordingly.

[15] The Court's rulings on the eleven challenges by the petitioner and the three challenges by the Respondent in its counter-petition are attached as Appendix 2. The end result of those rulings, if they ever need to be considered, would be that the majority for Mr Wuatai would be reduced from 4 to 1 (see Appendix 3). Of course, on the basis of the Court's ruling as to the relevant qualifications of electors (Appendix 1), all challenges are dismissed because none of them were based on the qualifications set out in Section 13 of the Electoral Act.

ALLEGATIONS OF BRIBERY

[16] Turning now to the bribery allegations, the bribery allegations were as follows:

> "3. **FURTHER** your petitioners say that they are dissatisfied with the result of the by-election held in that Constituency in that breach of Section 83 of the Act there was bribery by or on behalf of the said Tiaki Wuatai, including the following:
>
> (a) In accordance with a strategic plan devised by the DAP Executive or leadership in Rarotonga, certain persons from Rarotonga including Tai Ravarua, Temanaki Amosa and Moving Maia were offered and given Government jobs in Pukapuka or transferred to higher paying Government jobs in Pukapuka in order to induce them to vote for Tiaki Wuatai or to endeavour to produce the return of Tiaki Wuatai or the vote of any elector;

(b) On or about the 5th August 2000, at the SDA Church in Pukapuka, the said Tiaki Wuatai offered to Toreka William and her husband Aroti Matai offices of employment on the island of Nassau, she as a teacher and he as an Agriculture officer (when both were unemployed at the time), in order to induce them to vote for him;

(c) On or about the 13th September 2000 at about 8 o'clock in the morning, the said Tiaki Wuatai gave to an elderly elector Ararua Purotu at her home the sum of Ten Dollars ($10.00) in order to induce her to vote for him. The giving of the money was accompanied by the words: "Akamaroioi, tena taau moni ei kapu ti naau. Kua kite ua koe e eaa taau ka rave" ("Be of good courage, here is some money to buy you breakfast. You know what you have to do"). The elderly elector thought it odd that the said Tiaki Wuatai had never given her money before although he had been campaigning her for her vote up until then.

(d) On Monday the 11th September at about 9:00pm at a DAP housie function, the said Tiaki Wuatai gave Ten Dollars ($10.00) to an elector Temanu Korua with the words: "Akamaroiroi, tena te moni ei tauturu ia koe. I kimi ana au ia korua ("Be of good courage, here is some money to help you out. I have been looking for you two" (the elector and her boyfriend)). The elector states that the said Tiaka Wuatai had never given her any money before."

Paragraph 3(b): Nassau Evidence

[17] It is convenient to deal with paragraph 3(b) first. Mrs Browne wished to call Mrs William and Mr Matai in support of the allegation. They reside on the remote island of Nassau, which has no airport and is accessible only by sea. Ships visit Nassau irregularly, but usually about every two months.

[18] By letter dated 29 January 2001 Mrs Browne wrote to the Registrar, seeking guidance from the Court as to how these witnesses should give evidence. The Court issued a Minute on 1 February 2001, which recorded that the Secretary of Justice had been consulted and as a result it suggested that Mrs Browne endeavour to obtain written statements from these witnesses and have them faxed from Nassau to Rarotonga and then served and filed. If the statements could be converted into affidavits, so much the better, but it would be in order if there are any difficulties with affidavits, to make these merely signed statements of evidence-in-chief. The Court went on to say that if it became necessary to receive the evidence of these witnesses, they could be cross-

examined by way of a telephone conference call which would be made from the Court room in Pukapuka. It was noted that the Secretary of Justice had arranged a telephone link-up from the Court room in Pukapuka to Nassau to be in place during the duration of the Pukapuka hearings.

[19] This direction was made on 1 February, in New Zealand and in circumstances of some urgency. For that reason the Court did not have time to convene a telephone conference to take the views of other counsel. In any event since it was not a final ruling, the Court did not think that was necessary. However, after making the preliminary directions, a memorandum dated 1 February 2000 was received from Mr Mitchell, which stated:

> "I refer to Mrs Browne's letter of 29 January concerning the taking of evidence over the Peace Sat radio system. I believe this proposition to be totally unworkable. Cross-examination would be virtually impossible. If the consequence is that part of the petition cannot be proceeded with, then that is simply the result of persons residing on an inaccessible island. If you have forwarded Mrs Browne's letter to His Honour, I request that he be provided with a copy of this also."

[20] The matter was taken up again at the hearings in Rarotonga. The Court formally rescinded the earlier minute on the basis that it had been issued without knowledge of the opposition of Mr Mitchell and without hearing him. It then heard fresh argument from both sides on the matter. Initially it seemed as if the PeaceSat telephone connection with Nassau was out of action, but it was subsequently learned that this was not so.

[21] Mrs Browne advised that it was not possible to obtain statements from the witnesses due to the complete absence of any facilities for communication with them. The question then became whether she should be allowed to lead any evidence by way of a telephone link from witnesses on Nassau which would be heard over a microphone during the Court's visit to Pukapuka. The Court ruled against this application, on the basis that taking evidence in this fashion would be unsatisfactory and unfair for the following reasons:

1. There was no written evidence of any kind before the Court.

2. Under the provisions of the Code of Civil Procedure of the High Court of the Cook Islands the basic procedure for taking evidence, provided for in Section 175, is by way of oral evidence on oath. (There was real doubt as to whether it would be possible to administer an oath in relation to these proposed witnesses because the Court could not see what was happening on Nassau at the other end of the telephone line.) Under Section 176 proof by affidavit may be ordered, but where it appears to the Judge that any party in good faith desires the production of a witness for cross-examination and that witness can be produced, an order shall not be made authorising his evidence to be given by affidavit.

3. The allegations of bribery were serious and credibility could be an important issue. The Court would be unable to assess the demeanour of the witnesses if it could not see the witnesses.

4. There was no guarantee that it would be possible for counsel to cross-examine properly by means of a radio link.

5. The allegations made in the petition could have serious repercussions for the sitting member because under Section 83 of the Electoral Act, bribery is also made an offence which carries liability to imprisonment for a term of five years.

6. To proceed in the way proposed might breach the fundamental human rights and freedoms of Mr Wuatai guaranteed to him under Part IVA of the Cook Islands Constitution. In this respect the provisions of Article 65(1)(d) of the Constitution provide that:

> "No enactment shall be construed or applied so as to ... deprive any person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations before any tribunal or authority having a duty to act judicially."

7. Even in the case of evidence by way of video conferencing, it has been stressed that very strict procedures must be taken to ensure that there are appropriate safeguards: *B v Dentists Disciplinary Tribunal* 1994 NZLR 95 at 109. This is to ensure that the process is conducted fairly and aligned as closely as possible to the situation which applies where a witness is present in Court for cross-examination.

[22] In compliance with this ruling no effort was made while the Court was in Pukapuka to take this evidence by way of radio link from Nassau. When making the ruling, the Court reserved to Mrs Browne the right to make any further application in respect of this issue.

[23] When the case resumed in Rarotonga, Mrs Browne applied for an adjournment of the petition to enable these witnesses to give evidence at a future date in Rarotonga. Mrs Browne proposed that the Court give an interim judgment on the petition on all the issues except 3(b). In making the application, she was unable to proposed a fixed time for the adjournment. She pointed out that a boat went to Pukapuka once every eight weeks. All she could say was that if the application was allowed, the further hearing would take place some time after 11 April 2001.

[24] The application was opposed strenuously by Mr Mitchell. He pointed out that the general flavour of the Electoral Act 1998 was that petitions should be disposed of expeditiously. He said that in his 21 years' experience of election petitions in the Cook Islands, no delay of this kind or adjournment of this kind had ever been considered, let alone allowed. He further submitted that the sitting MP was entitled to know his position. Allowing this adjournment would leave a huge question mark hanging over him. It was not known for sure when and whether any ship would go to Nassau. It was unfair and would bring justice into disrepute to grant the adjournment, especially since the plaintiff did not really know what these witnesses might say.

[25] The Court dismissed the application largely for the reasons given by Mr Mitchell, but also because there was a serious danger that the Cook Islands system of justice and of election petitions would be brought into serious disrepute if, notwithstanding the long history of this matter, recorded in paragraphs 2-7 above, there was a further indefinite delay.

Elements of the Offence

[26] Turning to the remaining bribery allegations, it is first necessary to outline the legal framework with which the allegations are to be considered. Section 83 of the Act provides:

"83. Bribery – Every person commits the offence of bribery who, in connection with any election –

(a) directly or indirectly gives or offers to any elector any money or valuable consideration or any office of employment in order to induce the elector to vote or refrain from voting; or

(b) directly or indirectly makes any gift or offer to any person in order to induce that person to procure or endeavour to procure the return of any candidate or the vote of any elector; or

(c) upon or in consequence of any such gift or offer, procures or endeavours to procure the return of any candidate or the vote of any elector; or

(d) advances any money to any person with the intend that that money or any part thereof shall be expended in bribery within the meaning of this section; or

(e) being an elector, directly or indirectly receives or agrees to receive any gift, money, valuable consideration, office, or employment as aforesaid in return for voting or retraining from voting or for agreeing thereto."

Sub-section (a) and (b) appear to be in issue here.

[27] Counsel for the Chief Electoral Officer provided a helpful discussion of the law as follows:

"2. In Re Te-Au-O Tonga Election Petition [1979] 1 NZLR s26 it was said (s38 line 30) in relation to the giving of valuable consideration under s69(a) of the Electoral Act 1966 (re-enacted as s83(a) of the 1998 Act) that –

> "To sustain this allegation there must be proved to the requisite standard by the petitioners;
> (a) The giving of the consideration.
> (b) That the consideration was valuable.
> (c) That it was given to induce the voter to vote for the respondent candidates and that it was given on the express or implied condition that the voter would vote for such candidates.
> (d) That the intent to do this was corrupt.
>
> It is not necessary for the petitioners to prove that the elector did in fact carry out his part of the bargain by voting. If the act of giving the consideration is done for the purpose of inducing the voter to vote or refrain from voting for a particular person, it is no answer to say that the bribe was unsuccessful"

3. A literal reading of s83(a) or (b) suggests that neither the second part of requirement (c) or requirement (d) are elements of those offences.

4. As to the second part of requirement (c) the then Chief Justice, Sir Gaven Donne, in the Te-Au-O-Tonga case appears to have relied upon the reasoning in the judgment of Lord Wensleydale in *Cooper v Slade* (1885) 6HL cas 746:10ER 1488 at 791:506 where he said –

> "With respect of the first proposition that was laid down, that every payment of expenses, though fair and reasonable to a voter in order go induce him to vote, that is, every payment upon any condition express or implied that he should be paid his expenses if he voted for a particular candidate, is bribery within the meaning of the Act of Parliament, appears to admit of no doubt at all;"

5. It would seem to follow, that the inducement alone (namely, the gift of money or the offer of employment in the instant case) is insufficient to constitute bribery. Further, if bribery is to be established, the inducement must be coupled with an express or implied condition that the voter will vote for the Respondent.

6. One could be forgiven for enquiring whether the second part of requirement (c) is additional to the first part or if it restates the first part in a different way. It would appear from the passage quoted from Lord Wensleydale that he was simply restating the proposition by reference to the facts of that case and did not intend that the requirements for bribery be extended.

7. If an act of inducement is established, and it can be proven or inferred from the act that it was done to influence the voter to vote for, or refrain from voting against, a candidate, should it then be necessary to show that the inducement was given on the express or implied condition that the voter would vote for the candidate when that has already been shown from the act of inducement? With respect, it is submitted – no.

8. As to requirement (d), again one wonders if this adds anything to the requirements necessary to establish bribery. In the Te-Au-O Tonga case the Chief Justice (s44 line 15) adopted the interpretation of the word "corrupt" cited in his judgment in Re Mitiaro Election Petition [1979] 1 NZLR s1 (s9 line 20) where it was said –

> "A corrupt intention is an intention on the part of the person treating to influence the votes of the person treated."

9. The word corrupt is not to be found in section 83. It does appear in section 82 but is used as part of a generic description of the offences set out in sections 83 to 86. The word "induce" means "to influence"; "to persuade". Inducement also requires a subjective consideration on the part of the offender. It follows, that requirement (d) would appear to add nothing further to the elements of the offence of bribery.

10. It is submitted that petitioners in the instance case must prove to the requisite standard –

    (a) the giving of money or the offer of employment; and
    (b) that the money was given or the offer made to induce the voter to vote for the Respondent or procure the Respondent's return."

The Court sees much force in these submissions and agrees that it is best to "hug the shores of the statute" and simply apply the relevant words of section 83 to the facts as found to ascertain whether bribery is established.

Onus of Proof

[28] The Court follows the approach of Donne CJ in the *Mitiaro Election Petition* [1979] 1 NZLR S1 at S7:

> "As to the standard of proof required in proceedings such as these I am satisfied it is as submitted by Mr Temm, namely, on the balance of probabilities. These proceedings are civil and while the Court is concerned with the allegation of treating which is an offence under the Electoral Act, the standard of proof is still that which applies to civil cases. However, as was stated in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; [1956] 3 All ER 970 the standard of proof required in circumstances such as these is high. It is put this way in the *Hornal* case:
>
> > "... the standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law" (ibid, 258; 973)."

Paragraph 3(a) – the allegation of jobs in Pukapuka in return for votes

[29] Evidence was heard both in Rarotonga and Pukapuka in relation to the allegations in paragraphs 3(a), (c) and (d). It is convenient to deal with the "strategic plan" allegation in paragraph 3(a) first. To recapitulate the allegation here was as follows:

> "3. (a) In accordance with a strategic plan devised by the DAP Executive or leadership in Rarotonga, certain persons from Rarotonga including Tai Ravarua, Temanaki Amosa and Moving Maia were offered and given Government jobs in Pukapuka or transferred to higher paying Government jobs in Pukapuka in order to induce them to vote for Tiaki Wuatai or to endeavour to produce the return of Tiaki Wuatai or the vote of any elector."

[30] The only evidence called by the petitioners in respect of this allegation was that from Mr Michael Savage, who is presently employed in the CIP Opposition Office in Parliament Buildings. Mr Savage stated that on 24 February 2000 the current CIP opposition party moved into the office previously occupied by the Democratic Alliance Party at Parliament Buildings. The move on 24 February was some months after the new Government had taken office. The Opposition did not move in immediately because it wanted to have the offices refurbished. He found the condition of the office reasonable, except that quite a lot of papers had been left lying around which needed cleaning up.

[31] It was in the course of this clean-up that he found some documents in the waste paper basket, one of which was handwritten and headed "Pukapuka-Nassau By-Election Strategic Plan". The papers were produced as exhibit "A". He thought the documents were unusual. He said they should not have been there and he wondered whether they had been left there purposely. The documents were handwritten and he arranged for them to be typed up. He handed the original documents to one of his colleagues, Mr Inatio Akaruru, and said "This may be of interest. You may wish to keep it or otherwise destroy it.". He decided to type up the documents. The typed version was produced as exhibit "B". He found other documents as well and these were produced as exhibits "C" and "D".

[32] The petitioners called no other evidence on this matter. They did, however, seek to rely on the evidence of Tai Ravarua and Manako Amosa, who were called on behalf of the respondent. (This evidence is discussed below.) Counsel for the petitioners did not seek to put the strategic plan documents to Mr Wuatai when he was giving evidence in Pukapuka. It was of course open for the petitioners to cross-examine Mr Wuatai on the state of his knowledge of the strategic plan, if any. This is not a minor matter because, as counsel for the Chief Electoral Officer pointed out in is closing written submissions, to sustain the allegation Mr Wuatai or his agents must have adopted and implemented the plan.

[33] The Court accepts the following submissions of counsel for the Chief Electoral Officer as correctly stating the law:

> **"Agency**
>
> 1. There was no evidence that the respondent himself made offers of employment to Tai Ravarua, Temanako Amosa or Moving Maica. There was however evidence of a "plan" (evidence of Mr Savage and exhibits "A", "B" and "C") to employ persons as Crown servants at Pukapuka who were supporters of the Respondent.
>
> 2. If that "plan" was implemented then this raises the question of whether those who devised and implemented the plan were the electoral agents of the

respondent. It is submitted, that it is sufficient if either the author or the implementer were the electoral agent of the respondent. It is not necessary to show that both acted in that capacity.

3. If the "plan was not implemented then, electoral agency does not arise. It is submitted that authorship alone is insufficient to constitute the offence of bribery.

4. Chief Justice Donne in the *Mitiaro* case (s8) and the *Te Au O Tonga* case (s46) accepted that it is not necessary to show in the electoral context that the principal (the respondent) knew or condoned the corrupt practice of the agent. It is sufficient to show that the agent was in the employment or service (paid or unpaid) of the respondent or that there was recognition and acceptance of the agent by the principal.

5. It is submitted therefore, that to establish agency in the electoral context it is enough to show that as between agent and principal there was sufficient nexus, association or connection so as to prove or from which can be inferred that the agent was in the employ or service of the principal or that the principal recognised and accepted the agent for the purposes of attaining the principal's ultimate objective of being returned as the successful candidate.

6. In relation to the instant case, what then must be shown? It is submitted:

   (i) Was the "plan" to offer employment implemented insofar as the persons referred to in paragraph 3(a) of the petition;

   If so:

   (ii) Was the author or the person or persons who implemented the plan the election agents of the respondent in the sense that they either:

      (a) Were in the respondent's employ or service; or

      (b) Were recognised or accepted by the respondent; or

      (c) Had a nexus, association or connection with the respondent and to the respondent's objective of being returned from which either (a) or (b) can be inferred."

[33] Mr Ravarua stated that he was born in Pukapuka and his home and family are in Pukapuka. He had been in Rarotonga for some years, but wanted to return to Pukapuka. He was employed in the Ministry of Marine Resources in Rarotonga from 1990 to 1998, when he resigned. In July 1999, after the General Elections, he was employed in the Prime Minister's Department as a security officer. He was paid $220.00 per week. In November 1999 he applied for a job in Marine Resources in Rarotonga. Later he applied for a job in Pukapuka and returned to Pukapuka at the end of April 2000, after being

appointed as the head of Marine Resources in Pukapuka. He acknowledged that both positions were not advertised. He denied that he was appointed as the head of the Marine Resources in Pukapuka in return for his vote. He stated that Mr Moving Maica was appointed as a fisheries officer on his recommendation.

[34] Mr Amosa stated that he was 22 years old and had lived in Rarotonga for six years prior to travelling to Pukapuka. He was working for the Airport Authority for approximately 12 months prior to leaving for Pukapuka. He paid for his own boat fare. He saw the Minister, Robert Woonton, who arranged a job in Pukapuka. He was referred to the Minister by someone in the Public Service Commission. Currently there are four working in that department in Pukapuka, when previously there were three.

[35] The essential contentions for the petitioner were:

(i) That the documents were found in the office previously occupied by the DAP. The plan lent weight to the allegation of bribery. Particular examples were referred to in the Petition, namely Tai Ravarua, Moving Maica and Manako Amosa. All three together with the wife of Tai Ravarua and the partner of Moving Maica were referred to in the plan. The three men and the two women are now in Pukapuka and the men are employed by Government. This, it was submitted, demonstrated the corrupt intent surrounding the moving of these voters from Rarotonga to Pukapuka.

(ii) Because the "Working Committee" believed that "The results of those elections clearly demonstrate that the resident community in Pukapuka Island and Nassau Island remains faithful to the Cook Islands Party organisation in spite of our aggressive campaign policies both at National level and specific policies for Pukapuka-Nassau constituency", it constructed and implemented a plan which would shift voters from Rarotonga to Pukapuka to give them the desired result.

(iii) The evidence given by Manako Amosa showed that his appointment as an employee of the Marine Resources in Pukapuka was not done in the usual manner. The appropriate Ministry to have appointed him would have been the Ministry of Outer Island Development and not the Minister of Marine Resources.

[36] Counsel for the petitioner submitted that it was not necessary to identify the author of the documents. The fact that they were found in the opposition office was proof of the fact that the plan was constructed by a "Working Committee" (referred to at the beginning of the plan). The suggestion that it was nothing more than an "idea" could not be taken seriously. It was no coincidence that Mr Ravarua, Mr Maica (who did not give evidence), and Mr Manako Amosa all ended up being employed by the Marine Resources.

[37] For the respondent, it was submitted that Mr Ravarua's evidence proved that he was a Pukapukan who wanted to go home. This had been his wish for some time. He applied for a job at Marine Resources because "I was wanting to come back to Pukapuka". This was done on his own initiative. His weekly salary at the PM's department was $220.00; at Pukapuka $250.00, so there was not a great deal of difference in salaries. His home, wife and family are in Pukapuka.

[38] As to the evidence regarding Mr Maica, the respondent emphasised that he was already at Pukapua, and Mr Ravarua had recommended his appointment to the Secretary of Marine Resources based on his knowledge of him.

[39] Counsel for the respondent submitted that the key aspects of the evidence of Mr Amosa were that he had approached the Public Service Commissioner's office, and then the Minister of Marine Resources, Dr Woonton (whom he knew personally). He was a Pukapukan, keen to return to that island. He paid his own fare back and was now being paid less than he was receiving at the Airport Authority. It was noted that there was no evidence from the Public

Service Commissioner's office, the Secretary of Marine Resources or the Minister, to challenge or rebut the evidence of these witnesses for the respondent.

[40] The Court finds that the evidence relied upon by the respondent, summarised above, provided a reasonable explanation for the return of the three individuals to Pukapuka. Clearly the documents found at the Opposition office should inferentially be connected to the former opposition. However there was no evidence at all as to their author, or, more importantly, whether the plan was ever adopted or acted upon. There was no sufficient proof that the plan was ever implemented so far as the persons referred to in paragraph 3 of the petition are concerned. On the evidence of those persons, the Court finds it not proved that there was a connection between their offer of employment and the strategic plan. Finally and importantly, there was no proof that the author of the plan, or the persons who implemented the plan, even if I had found implementation, were agents of the respondent in the sense referred to by counsel for the Chief Electoral Officer in his submissions. The Court therefore finds on the facts that the allegation has not been made out, especially bearing in mind the standard of proof applying in these matters.

Paragraph 3(c) – the alleged gift to the elderly voter

[41] The next allegation to be considered is the allegation contained in 3(c), which, as noted above, stated as follows:

> "3. (c) On or about the 13th September 2000 at about 8 o'clock in the morning, the said Tiaki Wuatai gave to an elderly elector Ararua Purotu at her home the sum of Ten Dollars ($10.00) in order to induce her to vote for him. The giving of the money was accompanied by the words: "Akamaroioi, tena taau moni ei kapu ti naau. Kua kite ua koe e eaa taau ka rave" ("Be of good courage, here is some money to buy you breakfast. You know what you have to do"). The elderly elector thought it odd that the said Tiaki Wuatai had never given her money before although he had been campaigning her for her vote up until then."

[42] In respect of the allegation under paragraph 3(c) of the petition, evidence in support was given by Mrs Ararua Purotu and Mr Apeira Tengere. Mrs Purotu stated that the respondent stopped by at her house on Wednesday 13 September 2000 at about 8:00am in the morning. She was raking rubbish. Her account of what followed went as follows:

> "Q. Can you tell the Court what happened on the 13th September?
>
> A. I was cleaning my home and this man met me on the 13th September. While I was cleaning my home he came on the motorbike and went to the shop that belongs to Pareuto. When Tiaki returned from the shop he stopped where I was cleaning. He asked me, "mama, are you alright, have you had anything to eat" and I said "after when I finish cleaning up." Then he gave me $10.00 and asked me to go to the shop and get a packet of cabin bread and tin meat.
>
> Q. Did you take the money?
>
> A. Yes.
>
> Q. Has he given you money before?
>
> A. No.
>
> Q. Why do you think he gave you $10.00?
>
> A. I don't really understand why he gave me this money but I think it is because of this by-election.
>
> Q. Did he say anything else to you?
>
> A. No then he told me he is leaving for school, then he left."

[43] Ms Tengere, a neighbour aged 29 years, said that around about 8:00am she saw Mr Wuatai with Mrs Purotu. She stated:

> "A. What I saw I saw them talking and I saw Tiaki give the money to this lady.
>
> Q. Did you see how much money he was giving her.
>
> A. $10.
>
> Q. How do you know it was $10.
>
> A. I can see the colour of the $10 is blue because they are not far from where I was sitting, our house is just next door, that is how I know what he gave this lady."

Under cross-examination the following exchanges took place:

"Q. Was Tiaka on his motorbike when you first saw him or off the motorbike.

A. On the motorbike.

Q. Did he get off the motorbike.

A. The first time when he came up he stopped but he was still on the bike.

Q. Did you see him at any time off the bike.

A. Yes.

Q. Did you see him get off the bike.

A. Yes ...

Q. Do you say he was on it or off it at the time he gave the money.

A. On the bike he gave the money.

Q. Where did he get the money from.

A. From his pocket."

[44] In his evidence Mr Wuatai said that on the day in question he left home about 7:30am to take his wife, who is a teacher, to her school on their motorbike. He went past Mrs Purotu's house on the way to school. She is his first cousin. Having dropped his wife he went past her house again on the return trip. He said that he had not stopped at any shop on the way along the road. On the return journey he talked to Mrs Purotu, who he knew to be a firm supporter of the CIP candidate. He said when he stopped to talk to her he did not at any time get off his motorbike. He said his purpose in talking to her was to explain to her why he had become a candidate. He acknowledged he was campaigning. He spoke to her for 5 to 10 minutes. At the end of the discussion he believed she would not give him her support. He firmly denied giving her any money. He said he had no money in his pocket when he went with his wife to the school. He was asked why Mrs Purotu would make such an allegation against him. He answered as follows:

> "A. During the time when we had a conversation I asked her to help me with my campaign because she is my first cousin. This is what she said, 'I want to support you my brother but I cannot because my husband has told me if you vote for Papa Tiaki I will assault you'. This happened in one of the previous elections, the husband assaulted her, I am not sure whether it is Island Council or Parliament elections."

[45] Mr Harmon Pou, a Minister of Religion, gave character evidence for Mr Wuatai and stated that knew Mr Wuatai through the Seventh Day Adventist Church. He first met the respondent in 1964 at the Teachers' Training College in Rarotonga. Mr Wuatai was there for three years. He stated that their faith required strict compliance with Bible teachings and that he believed the respondent would always tell the truth. In cross-examination he confirmed that he was a supporter of the Coalition Government and acknowledged that his daughter was married to the respondent's nephew. He agreed that since 1967 he saw the respondent only during the times when the respondent travelled to Rarotonga.

[46] Although there were some family connections between Mr Pou and Mr Wuatai and notwithstanding Mr Pou said he was of the same political persuasion, Mr Pou impressed me as an honest and sincere witness. I place considerable weight on his assessment of the character of Mr Wuatai.

[47] Although counsel for the petitioner submitted that the evidence of Mrs Purotu as to the handing over of the $10.00 was corroborated, there were some problems with the evidence on behalf of the petitioner. In the first place the petitioner alleged that after handing over the money and saying it was for breakfast Mr Wuatai had said "You know what you have to do". There was no evidence to that effect from Mrs Purotu. She simply said that Mr Wuatai gave her the money and told her to go to the shop and get a packet of cabin bread and tinned meat for her breakfast. She said she did not really understand why he gave her money but she thought it was because of the by-election. The evidence does not establish the use of the words alleged in the petition "You know what you have to do". The Court is not satisfied to the requisite

standard, that if any money was given, and it is inclined to the view that it was not, that such a gift was in order to induce the elector to vote. Mr Wuatai said he had singularly failed in his campaigning with Mrs Purotu. In view of his family relationship with her it is by no means inconceivable that he would have given her money for her breakfast in view of her very modest circumstances.

[48] Taking into account the seriousness of the allegation, the possibility that there was an innocent explanation behind the dealings between these relatives, the Court is not satisfied that, if any money was handed over, it was designed to induce the elector to vote or refrain from voting. On the facts the Court concludes that bribery has not been established.

Paragraph 3(d) – the alleged gift of money for housie

[49] The final allegation of bribery to be considered is that contained in paragraph 3(d), which, as noted above, stated:

> "3. (d) On Monday the 11th September at about 9:00pm at a DAP housie function, the said Tiaki Wuatai gave Ten Dollars ($10.00) to an elector Temanu Korua with the words: "Akamaroiroi, tena te moni ei tauturu ia koe. I kimi ana au ia korua ("Be of good courage, here is some money to help you out. I have been looking for you two" (the elector and her boyfriend)). The elector states that the said Tiaka Wuatai had never given her any money before."

[50] In respect of this allegation, Ms Temaru Korua, a 22 year old woman, and Ms Mumila Tinara, an 18 year old girl, gave evidence in support of the petition. Their evidence may be summarised as follows. They were walking to the housie venue on the night of 11 September 2000 at about 9:00pm. They were on the road at Tavero's place when Mr Tuatai came along on his bike, stopped and asked them if they had any money for housie. He was alone. They told him that they had no money and he gave them a $10.00 note and told them to "be strong". This was the first time the respondent had given them money. They believed that the money was given to them so that they would vote for the respondent. They took the money and used it to play housie that night. At the housie gathering they gave the money to Mr Iotama, who gave

them 20 cent pieces in exchange so that they could play housie. Mrs Tinara said that when Mr Wuatai said "Akamaroiroi" ("be strong") it was "to her thinking" money to buy a vote.

[51] On the basis of this evidence, counsel for the petitioner submitted that the corroborated evidence was that Mr Wuatai directly gave to Ms Korua a ten dollar note. Mr Wuatai had not previously given money to Ms Korua or Ms Tinara. The act was carried out 17 days before the by-election. There must be a strong inference that the money was given for no other purpose but to induce both persons to vote for the respondent. As to the corrupt intent, the Court was referred to the *Wairau Election Petition* [1912] 31 NZLR 321, where it was held:

> "A corrupt intention is an intention on the part of the person treating to influence the votes of the persons treated. The question of intention is an inference of fact which the Court has to draw. ... If in any case, looking at all the circumstances the reasonable and probable effect of the alleged treating would be to influence the result of the election or to influence the votes of the individual voters, it might well be inferred that it was the intention of the person treating that this effect should follow."

[52] Mr Wuatai, Mr Iotama, Mr Vainui and Mrs Wuatai gave evidence in rebuttal.

[53] According to Mr Iotama, he did not see Ms Korua and Ms Tinara on the night of 11 September 2000. He did not recall seeing them at any of the DAP housie nights.

[54] Mr Vainui gave evidence to the effect that he was sitting on the verandah of his house (located next to the housie venue) when he saw the respondent and his wife go to housie that night. The time was about 10:30pm to 11:00pm.

[55] Mrs Wuatai stated that she and her husband and family had dinner between 7:00pm and 8:00pm and at about 10:30pm they went to housie. She accompanied her husband on the motorbike. Her husband did not go anywhere on his own between the time they had dinner and the time they went to housie.

She did not recall seeing Ms Korua and Ms Tinara on the night of 11 September 2000, nor on any other housie night.

[56] Mr Wuatai stated that he did not meet Ms Korua and Ms Tinara outside Tavero's house on the night of 11 September 2000. He and his family had dinner between 7:00pm and 8:00pm that night and went to housie with his wife at about 11:00pm.

[57] Counsel for the respondent submitted that the allegation of bribery was easy to bring and difficult to refute. There may have been a concerted plan to present a story of bribery, so it was necessary to examine the evidence to see whether there were any contradictions which might indicate fabrication. This might involve closely examining otherwise comparatively insignificant pieces of evidence. In this case, it was said that it lay in what the witnesses claim Mr Wuatai said to them.

[58] Reference was made to page 5 of Ms Korua's testimony, where she was asked: "Were you and your sister on the one hand, and Tiaki, walking in the same direction towards the place where the housie is?". The answer was: "Yes". This conflicted with evidence of her companion, who said Mr Wuatai was on a motorbike.

[59] It was submitted that it was important to compare the evidence on what was actually said with what was alleged in the petition. Ms Tinara said "He asked "Have you got any money for the housie" and we replied "Nothing". He said "Here is your $10.00 for the housie, be strong". And, under cross-examination: "Have you got anything for the housie" which translated as "e tai a korua moni no te ausie". These statements did not square with the allegation in the petition. The petition alleges as follows:

> "... the said Teaki Wurutai gave $10.00 to an elector, Temanu Korua, with the words "akamaroiroi tena te moni ei tauturu iakoe. I kimi ana au ia korua" (Be of good

> courage, here is some money to help out. I have been looking for you two" (the elector and her **boyfriend**))"

It was stressed by Mr Mitchell that this bore no resemblance to what either of the two girls said he said. There was no suggestion of the presence of a "boyfriend". It was clearly imperative that the petition must allege the facts relied on with considerable particularity, and those facts can only be amended with leave of the Court.

[60] It was further submitted that the evidence of Mr Wuatai and his supporting witnesses was that he had travelled to the housie on his motorbike with his wife and had not stopped and spoken to anyone. His time of arrival was confirmed and Mr Iotama, to whom the girls said they had given the money, said he could not recall seeing them at the housie that night.

[61] Reference was made to evidence that to meet the girls where they said the encounter had occurred, Mr Wuatai would have been travelling in the opposite direction to the hall where the housie was played. Moreover, the petition alleged that the bribery took place "at a DAP housie function". There was no evidence to that effect.

[62] The Court has taken into account the reply submissions of counsel for the petitioner dated 19 February 2001 which inter alia challenged the respondent's emphasis on the need for the evidence to square with the pleaded allegations and disputed the alleged contradictions in the evidence.

[63] The Court has carefully considered all the evidence. On key points it is conflicting. The Court finds that the burden of proof has not been discharged. The evidence falls well short of the high standard required. There were just too many inconsistencies in the evidence called for the petitioners to allow the contentions to reach the requisite standard of proof. The Court finds that the allegations of bribery have not been made out.

DETERMINATION

[64] For all of the foregoing reasons, and rejecting all submissions to the contrary, the result of the enquiry is that the petition fails and the Court determines that:

1. For the reasons given in Appendix 1 there were no votes in the constituency of Pukapuka/Nassau which were allowed which ought to have been disallowed;

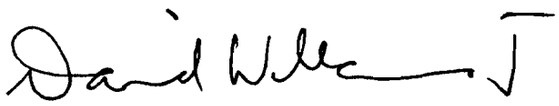
2. The allegations of bribery made by the petitioner have not been established;

3. Teaki Wuatai was duly elected.

[65] The Court directs that this determination be transmitted to the Electoral Officer, who shall forthwith publicly notify this determination.

COSTS

[66] An order of security for costs was made by the Chief Justice in the sum of $5,000.00. The parties should endeavour to agree costs. If the parties cannot agree costs, then submissions by the respondent in support of an application for costs shall be lodged no later than 5:00pm, 13 April 2001, Rarotonga time. The petitioner shall file any submissions in response no later than 5:00pm, 20 April 2001, Rarotonga time.



.....

David Williams J

SIGNED at Auckland at 4.50pm on 23 March 2001

Solicitors: **Clarke P C, Rarotonga**
for the Petitioners

Solicitors: **M C Mitchell & Co, Rarotonga**
for the Respondent

A Manarangi
for Chief Electoral Officer

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

MISC: 134/00

IN THE MATTER of a by-election for the constituency of Pukapuka/Nassau held on Thursday the 28th day of September 2000

A N D

IN THE MATTER of a petition by a Candidate and five electors

APPENDIX 1

RULING OF DAVID WILLIAMS J AS TO THE INTERPRETATION OF SECTION 5 OF THE ELECTORAL AMENDMENT (NO 2) ACT 1999 - REFER PARAGRAPH 11 MAIN JUDGMENT

[1] At an early stage of the hearing of the petition questions arose as to the interpretation and effect of Section 5 of the Electoral Amendment No 2 Act 1999 ("the 1999 Act"). After hearing argument from all counsel, the Court ruled that the qualifications contained in Section 13 of the Electoral Act 1998 ("the Electoral Act") alone governed the qualification of electors for the September 2000 by-election. There now follow complete reasons for this ruling.

[2] The 1999 Act is described in the Preamble as "An Act to amend the Electoral Act by making special provision for the holding of a by-election in the constituency of the Island of Pukapuka and the Island of Nassau". It is thus an unusual piece of legislation which applies to one by-election only and, apart from the questions which now arise in relation to it, it is now spent.

[3] The legislation appears to have come in the wake of certain judgments of this Court where it was held that problems with registration and the like, which had not been overcome before the last by-election election, were not material. Extracts from Hansard were produced by counsel for the Chief Electoral Officer. In introducing the second reading of the 1999 Amendment Act, the Minister of Justice, the Honourable T Vavia said:

> "Mr Speaker, this Bill was brought into the House because of the conflicts experienced during the two By-elections on Pukapuka and Nassau. No doubt, Mr Speaker, these By-elections in Pukapuka have affected the people on the islands of Pukapuka and Nassau. Even the legal advisers of both Parties concerned in those By-elections brought out the confusion and doubts with the Law in our Principal Act. And this Amendment, Mr Speaker, was brought into this House only after consultations with the legal advisers of both Parties and the consultations continued even up until yesterday. As such both legal advisers were asked to be present in the in-camera discussions that we will have soon. I would just like to remind the House, Mr Speaker, that this Bill will only apply to the Constituency of Pukapuka-Nassau."

[4] The gist of the 1999 Amendment was that there should be a new roll established for the by-election and each elector who was entitled to or wished to vote had to enrol again. The provision at the heart of this Court's ruling is Section 5 of the 1999 Amendment, which provides:

> "5. Qualifications to Apply for Registration as an Elector – (1) Notwithstanding anything to the contrary in the principal Act, the qualifications of any person to –
>
> (a) apply for registration and be enrolled pursuant to section 4 of this Act; and
>
> (b) cast a vote as an elector in the By-election,
>
> shall be the possession by the applicant or elector (as the case may be) of the qualifications stated in section 13 of the principal Act as at the date of his or her application for registration pursuant to section 4(1) of this Act."

[5] The principal Act referred to is the Electoral Act of 1998 Section 13 of which states:

> "13. Qualifications for Registration of Electors – A person is qualified to be registered as an elector for a constituency in the Cook Islands if that person -
> (a) is 18 years of age or over;

(b) is a Commonwealth citizen, or has the status of a permanent resident of the Cook Islands;

(d) has at some period actually resided continuously in the Cook Islands for not less than 12 months;

(e) has been resident in the Cook Islands throughout the period of 3 months immediately preceding that person's application for enrolment as an elector and has not subsequently qualified as an elector under subclause (2) of Article 28 of the Constitution;

(f) has not been convicted of any corrupt practice or any offence punishable by death or imprisonment for a term of 1 year or more unless in each case that person has received a free pardon or has undergone the sentence or punishment to which that person was adjudged;

(g) is not of unsound mind."

The plain wording of Section 5 is that only the qualifications listed in Section 13 and no other shall apply in relation to the forthcoming by-election which was held in September 2000.

[6] The petition proceeded on the implicit assumption that there was either a statutory or a constitutional requirement that there must be three months' residency in a constituency before a voter was qualified to vote in the September 2000 by-election. However in the pre-hearing written submissions both the counsel for the Chief Electoral Officer and counsel for the respondent raised the question of confining the qualifications to those in Section 13 only, as Section 5 suggests. It is convenient first to refer to the way in which this issue was presented in the comprehensive submissions of counsel for the Chief Electoral Officer. At paragraphs 16-23 it was stated inter alia:

"16. The Electoral Amendment (No 2) 1999 Act (the Amendment) came into force on 22 December 1999. The Amendment made special provision for the by-election in Pukapuka/Nassau, which took place on 28 September 2000. The Amendment required the Chief Electoral Officer to appoint dates for timetabling of the by-election subject to the approval of Cabinet (s3) and there is an obligation for persons qualified to be registered as an elector of the constituency to make fresh application for registration notwithstanding any existing registration of the elector upon a roll for the constituency compiled under s26 of the Act (s4). The roll compiled under s26 was by the Amendment suspended and declared to be of no effect for the purposes of the by-election.

17. Section 5 of the Amendment made provision for the qualifications of persons to apply for registration as an elector ...

18. The effect of s5 of the Amendment was to preclude application of most of the residential tests under the principal Act and limit the rules for qualification as an elector of the Constituency of Pukapuka/Nassau to those matters set out in s13 of the principal Act. That is, residency within the Pukapuka/Nassau Constituency was no longer a pre-requisite to enrolment, the only qualification being 3 months residence in the Cook Islands.

19. In addition, s5 of the Amendment provided that if the qualifications under s13 were satisfied "at the date of [the electors] application for registration" then not only was the elector entitled to be enrolled under s4 of the Amendment but also entitled to cast a vote as an elector at the by-election. Therefore, once a person was qualified under s13 of the Act and had been enrolled, that person, it would appear, could not be deprived of the entitlement to vote at the by-election.

20. Some support for this interpretation of s5 is found in s7 of the Amendment which provides that s16(5)(b) and (c) of the Act have no application to the by-election. Section 16(5) places a duty upon each Registrar to remove from the roll every person who is no longer possessed of the qualifications of an elector or who ceases to reside within the constituency.

21. If that is the intended effect of the Amendment then, it is against the background of the Amendment that the fate of the electors challenged in this proceeding is to be determined.

22. Consequently, the only residential tests relevant to this proceeding that survive under the Amendment are –

    (a) Residency is to be determined by reference to objective facts and not by subjective intention.

    (b) A person who has been resident in the Cook Islands throughout the period of 3 months immediately preceding application for enrolment (and who satisfies all other qualifications set out in s13 of the Act) is entitled to be enrolled as an elector of the Pukapuka/Nassau constituency – *s13(e) and Article 28(1)(b).*

    (c) Residence in the Cook Islands is displaced by an absence in excess of 3 months if that absence is not for the purpose of undergoing a course of education, or of technical training or instruction – *Article 1(1).*

23. The same difficulty referred to in paragraph 15 [the statement of facts does not disclose where the elector was during the three months immediately preceding the application for registration] prevents application of the tests but again they can be applied in a logical sequence –

    (a) Was the elector resident in the Cook Islands throughout the period of 3 months preceding the date of the elector's application for enrolment.

        YES - Qualified

NO - Then

(b) Was there a period of absence by the elector from the Cook Islands either –

(i) for reasons of undergoing a course of education or technical training or instruction; or

(ii) for 3 months or less.

YES - Disregard that period of absence in applying test (a)

NO - Not qualified"

[7] To understand this submission it is necessary to refer to certain provisions of the Constitution, the Electoral Act 1966, and the Electoral Act 1998. Article 27 of the Cook Islands Constitution describes the Parliament of the Cook Islands and then Article 27(3) states that "subject to this Article and Articles 28, 28A, 28B, 28C and 28D hereof the qualifications and disqualifications of electors and candidates, the mode of electing members of Parliament, and the terms and conditions of their membership shall be as prescribed by Act." As at 1998 before the Electoral Act 1998 came into force, Article 28 of the constitution provided:

"28. (1) Without limiting the provisions of any law prescribing any additional qualifications not inconsistent with any provision of this Constitution, a person shall be qualified to be an elector for the election of a Member of Parliament for any constituency other than the overseas Constituency, if, and only if –

(a) He is a Commonwealth citizen,or he has the status of a permanent resident of the Cook Islands as defined by Act; and

(b) He has been resident in the Cook Islands throughout the period of three months immediately preceding his application for enrolment as an elector and has not subsequently qualified as an elector under subclause (2) of this Article; and

(c) He has at some period actually resided continuously in the Cook Islands for not less than 12 months.

(2) Without limiting the provisions of any law prescribing any additional qualifications not inconsistent with any provision of this Constitution, a person shall be qualified to be an elector for the election of a Member of Parliament for the Overseas Constituency, if, and only if –

(a) He is a Commonwealth citizen, or he has the status of a permanent resident of the Cook Islands as defined by Act; and

(b) He has resided outside the Cook Islands throughout the period of 3 months immediately preceding his application for enrolment as an elector, and

(c) At the date of his application for enrolment as an elector he has been absent from the Cook Islands for a continuous period of not more than 3 years, and, has, and has had ever since he left the Cook Islands, an intention to return and reside therein indefinitely; and

(d) He has at some period actually resided continuously in the Cook Islands for not less than 12 months.

(3) Where any person has ceased to be qualified to be enrolled as an elector for any constituency by reason of his residence outside the Cook Islands for a period of more than 3 years, he shall not be entitled to apply for enrolment as an elector of any constituency unless he has returned to the Cook Islands and has actually resided in the Cook Islands throughout the continuous period of not less than 3 months.

(4) In calculating for the purposes of paragraph (c) of subclause (2) or of subclause (3) of this Article the [[period for]] which any person has been outside the Cook Islands -

(a) Any period for which he has been outside the Cook Islands for the purpose of undergoing a course of education or of technical training or instruction shall be disregarded; and

(b) His absence from the Cook Islands during any period shall be deemed to be continuous, notwithstanding any visit to the Cook Islands in that period, unless during that visit he remained in the Cook Islands for a continuous period of not less than 3 months.

[8] Article 28 needs to be read along with the definition of "to reside" in Article 1(1), which states:

> "["To reside", in relation to the Cook Islands or to any constituency in the Cook Islands, means to have a usual place of abode in the Cook Islands, or, as the case may be, in that constituency, notwithstanding any temporary absence for the purpose of undergoing a course of education or of technical training or instruction, and notwithstanding any occasional absence, for any period not exceeding three months, for any other purpose and "resident" and "residing" have corresponding meanings];

[9] It will be noted that the basic qualifications set out in Article 28(1) could be supplemented by additional qualifications not inconsistent with the Constitution. This was done in the Electoral Act 1966 Section 8, which provided:

> "8. Qualification of electors – (1) In addition to the qualifications as to nationality and residence provided for electors by Article 28 of the Constitution, every person shall be deemed to be qualified to be registered as an elector of any constituency, if he –

(a) Is or over the age of 18 years, and
(b) Has not been convicted in the Cook Islands or in any part of the Commonwealth of Australia or the Dominion of New Zealand of an offence punishable by death or by imprisonment [for life or] for a term of one year or upwards, or has [not] been convicted in the Cook Islands of a corrupt practice, unless in each case he has received a free pardon or has undergone the sentence or punishment to which he was adjudged for the offence; and
(c) Is not of unsound mind; and
[(d) In the case of constituency in the Cook Islands, -
(i) Has resided in that constituency for a continuous period of not less than three months immediately before the date of his application for registration; or
(ii) Has resided continuously in that constituency for not less than three months and has not subsequently resided continuously for three months or more in any one constituency.
[(2) If a person has two or more unusual places of abode, he shall be deemed to reside in the place in which he spends the greatest part of his time.]"

[10] Section 2(1) of the 1996 Act provided that the term "to reside – in relation to any constituency has the same meaning as Article 1(1) of the constitution and "reside" and "residing" have the same meaning".

[11] The 1998 Act did not reproduce Section 8(d) of the 1966 Act with its and the requirement of three months' residency in a constituency" and instead of defining residency by reference to Article 1(1) in Section 2(1) it provided that "residence" and "to reside" should have the meaning assigned thereto by Section 12 of the 1998 Act. Section 12 provides:

"Determining Place of Residence

12. Rules for Determining Place of Residence within the Cook Islands – (1) The place where a person resides within the Cook Islands at any material time or during any material period shall be determined for the purposes of this Act by reference to the facts of the case.
(2) For the purposes of this Act a person can reside in one place only.
(3) A person shall be deemed to reside where that person has a usual place of abode notwithstanding:
(a) any temporary absence for the purpose of undergoing a course of education or of technical training or instruction; or
(b) any occasional absence for any period not exceeding 3 months for any other purposes; or

(c) any temporary absence for the purpose of undergoing medical treatment or being required to accompany an immediate family member or relative for the purpose of undergoing medical treatment.

(4) A person who has more than one place of abode and who is qualified to be an elector for a constituency in the Cook Islands shall be deemed to reside in the Cook Islands where the greatest part of that person's time was spent during the 3 months immediately preceding the date of that person's application for registration for enrolment.

(5) A person who permanently left a former place of abode shall be deemed not to reside at that place, notwithstanding that, that person's place of abode for the time being is temporary only."

[12] Section 26(1) of the Electoral Act 1998 was applicable to the September 2000 by-election through Section 4(6). It provides:

"26. Electoral Rolls – (1) The Chief Registrar of Electors shall as far as practicable ensure:

(a) that an electoral roll is compiled and maintained for each constituency; and

(b) that every person qualified to be registered as an elector of a constituency shall, subject to the provisions of this Act, be entitled to have his or her name entered upon the roll of that constituency; and

(c) that every person who is qualified to be an elector of a constituency in the Cook Islands but has not resided in any one such constituency for a continuous period of three months shall be entitled to be registered in the constituency in wh9ich he or she spent the greatest part of his or her time during the period of three months immediately preceding the date of his or her application for registration.

(2) the electoral roll compiled for the Overseas Constituency need not be continuously updated and may remain dormant until the next ensuing election."

[13] Returning to the argument of counsel to the Chief Electoral Officer, the essence of the submission in paragraph 18 was that three months' residency within the Pukapuka/Nassau constituency was no longer a pre-requisite to enrolment, the only qualification being three months' residence in the Cook Islands.

[14] In the submissions on behalf of the respondent the same contentions were advanced. Reference need only be made to submission 3(iii), which stated that "Section 13 (as to residence) requires residence in the Cook Islands for three months, not in any particular constituency."

[15] Counsel for the petitioner filed written submissions in reply, dated 1 February 2001. Responding to the argument that Section 5 of the amendment Act restricted the qualification to those stated in Section 13, it was submitted that the argument was flawed because it would mean that all persons who had resided in the Cook Islands, in any constituency, for the requisite period would be eligible to vote in the Pukapuka by-election regardless of their usual place of abode and irrespective of the fact that they had never resided in Pukapuka. The result would be that people living in Rarotonga and the Outer Islands would be eligible to register and vote for the Member of Parliament of a constituency in which they did not live. The converse was that the Member of Parliament for Pukapuka might not necessarily be determined by the people of Pukapuka. This went against the established parliamentary convention throughout the Commonwealth that only voters that reside in a particular constituency are entitled to elect their Parliamentary Representative. Such an argument is absurd and could not have been the intent of the legislature.

[16] It was also submitted that Article 1(1) required the "usual place of abode" test to be applied in determining residence. This definition referred to "residence ... in relation to the Cook Islands or to any constituency in the Cook Islands" and thus preserved the need for 3 months residency in a constituency. This could not be displaced by Section 5 of the amending Act otherwise Section 5 of the amending Act would be unconstitutional as the amending Act was not passed in accordance with Article 41 of the Constitution. Whilst the qualification of electors was determined by Section 13(e) of the principal Act, it was absurd to suggest that Section 13 of the Act was the only section to be applied. Article 28(1)(b) of the Constitution together with Article 1(1) override Section 5 of the amending Act and in any event Section 12(3) of the Act mirrored Article 1(1) of the Constitution except for Section 12(3)(c). Section 2(a) of the amending Act provides:

> "Except as provided in subsection (1) of this section and unless the context otherwise requires, all expressions defined in Section 2 of the principal Act shall if used in this Act bear the same meaning."

[17] In short, as the Court understood the submissions, the two responses put forward by the petitioner were that one could not take Section 13(e) alone, referring to residency in the Cook Islands only; one had to take into account the constitutional provisions which it was suggested required residency in a constituency. The definition of "to reside" in Article 1(1) of the Constitution was relied upon as impliedly adding the requirement of residence in a constituency for three months because the definition "to reside" related to "the Cook Islands or to any constituency". If that was not an available interpretation of Section 13(e) then the alternative contention was that in that respect the 1999 Act was unconstitutional in its elimination of the requirement of three months' residency in a constituency.

[18] The Court notes on the question of constitutionality the following established principles of constitutional jurisprudence laid down by Brandeis J in the US Supreme Court in *Ashwander v Tennessee Valley Authority* 1936 297 US 288, 346. First, the Court should try to avoid deciding constitutional issues unless it is unavoidable. If the case can be decided on other grounds including narrow grounds of statutory interpretation, that is preferable. Second, there is a presumption of constitutionality. A corollary of that is the third principle that a party that argues a provision of unconstitutionality carries the burden of showing that the provision is in fact unconstitutional.

[19] The Court confesses to some reluctance to engaging upon the constitutional issue especially since its decision on the issue is given under conditions of urgency but the issue must be addressed.

[21] The starting point is to ask the question of whether there is anything in the Constitution requiring residency for three months in a constituency. The Court is not taken to the point of being satisfied that there is such a requirement.

[22] The Parliament of the Cook Islands is dealt with in Part III of the Constitution. The qualifications for electors are set out in Article 28, already cited. It is broadly divided into the qualifications for all constituencies other than the overseas constituency (28(1)), and qualifications for the overseas constituency (28(2)).

[23] It is true that there are references to "constituencies" in various parts of the constitution and Article 27(2) speaks of Parliament consisting of 25 members to be elected by secret ballot under a system of universal suffrage by the electors of the following islands and refers to them as "constituencies", but in the qualifications listed in Article 28 there is no such reference.

[24] As noted above, it is a matter of some interest that the 1996 Act did have such a provision requiring residency in a constituency in Section 8(d) but it was not retained in the 1998 Act. The legislative history is instructive. The provisions of Section 8(d) were introduced by the Electoral Amendment Act 1982. Around this time the definition in Article 1(1) of the Constitution of "to reside" with its reference to "in relation to a constituency" was introduced by the Constitution Amendment Act 1980-81. It seems a fair inference that such reference was related to the fact that the Electoral Act now contained a requirement of three months residency in a constituency to which the constitutional definition of "to reside" was to be aligned.

[25] It is to be noted that the Constitution in its original form contained no requirement of residency in a constituency nor did the definition of residence refer to residence in a constituency. The original Article 28 provided:

"28. Nationality and residential qualifications of electors and candidates – (1) Without limiting the provisions of any law prescribing any additional qualifications, a person shall be qualified to be an elector for the election of members of the Legislative Assembly or to be a candidate at any such election, if, and only if –

(a) He is a British subject; and

(b) In the case of an elector, he has been ordinarily resident in the Cook Islands throughout the period of twelve months immediately preceding his application for enrolment; and

(c) In the case of a candidate, he has been ordinarily resident in the Cook Islands throughout the period of three years immediately preceding his nomination as a candidate.

(2) For the purposes of this Article a person shall be deemed to be ordinarily resident in the Cook Islands if, and only if, -

(a) He is actually residing in the Cook Islands; or

(b) Having been actually resident in the Cook Islands with the intention of residing therein indefinitely, he is outside the Cook Islands but has, and has had ever since he left the Cook Islands, an intention to return and reside therein indefinitely:

Provided that any person who has been outside the Cook Islands continuously for any period of more than three years, otherwise than for the purpose of undergoing a course of education or of technical training or instruction during the whole or substantially the whole of that period, shall be deemed not to have been actually resident in the Cook Islands during that period with the intention of residing therein indefinitely."

[26] The Court is not persuaded that that current definition section in Article 1(1) operates so as to alter or add to the list of qualifications now found in Article 28 a requirement of three months' residency in a constituency. There is at least an argument, and indeed perhaps a persuasive argument, that there has never been a **constitutional** requirement of three months' residency in a constituency and that since the elimination of section 8(d) of the 1966 Act, the reference in Article 1(1) to residence in a constituency has in effect become surplusage. The Article 1(1) definition of "to reside" now only applies to the constitutional requirement of three months' residence in the Cook Islands. It was always a matter for the legislature to add a further requirement of three months' residency in a constituency if it wished. It did so in the 1966 Act but not in the 1998 Act.

[27] As to the argument that the elimination of the requirement of three months' residency in a constituency cannot have been intended because "it goes against established parliamentary conventions throughout the Commonwealth", the

Court finds that upon analysis this is not as persuasive as it might seem. In the first place, as noted above, there has never been an explicit constitutional requirement to that effect in the Cook Islands. Secondly, the argument that only voters who have resided in a particular constituency for a specified period are sufficiently knowledgeable and conversant with local issues to be entitled to vote has been found to be unpersuasive in American constitutional cases. Finally, the imposition requirement of three months residency in a constituency may conflict with certain fundamental human rights and freedoms guaranteed by Article 64 of the Constitution. In particular, there may be a conflict with the fundamental human rights and freedoms referred to in Articles 64(1)(a) and (b) namely the right of the individual to liberty, which can readily be construed as encompassing the right to travel, and the right of the individual to equality before the law.

[28] In *Shapiro* v *Thompson* (1969) 394 US 618 the Supreme Court of the United States held that a statutory provision which denied welfare assistance to residents who had not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance was unconstitutional because it conflicted with the right to travel interstate and also with the equal protection clause of the Constitution. As to the former, the Court said that it had "long ago recognised that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement." As to the equal protection clause, a waiting period clearly violated that clause because there was no compelling state interest justifying the discrimination between those who met the residency requirement and those who did not.

[29] The leading United States decision on voter durational residence requirements is *Dunn* v *Blumstein* (1972) 405 US 33. The plaintiff in *Dunn* challenged a Tennessee law that required residence in a state for a year and in the county for three months before a citizen became eligible to vote. In other words the Tennessee constitutional provisions were reflective of the position which obtained in the Cook Islands under the Constitution and the 1966 Act namely residency in the Cook Islands for the period of three months immediately preceding his application for enrolment and in a constituency for three months.

[30] The State did not deny that the plaintiff was in fact a resident (in the usual sense of someone intending to remain) but denied him the right to vote because he had recently arrived in the State. The Court proffered two reasons for subjecting the franchise restriction to strict scrutiny. First, relying principally on *Kramer v Union Free School District 395 US 621 (1969)* and *Reynolds v Sims 377 US 533 (1964)* it concluded that an "exacting test" is required for statutes that burden the right to vote. Second, it ruled that strict scrutiny was warranted because the durational residency requirement penalised those persons who moved from one jurisdiction to another and thereby burdened the fundamental right to travel. Having thus resolved that the franchise restriction was unconstitutional unless it was "*necessary*" to promote a *compelling* state interest," the Court examined the interests articulated by the state and found them inadequate to sustain the voting restriction. The Court said:

> "The subject of this law suit is the durational residence requirement. Appellee does not challenge Tenessee's power to restrict the vote to bona fide Tenessee residents. Nor has Tenessee ever disputed that appellee was a bona fide resident of the state and county when he attempted to register. But Tenessee insists that, in addition to being a resident, a would-be voter must have been a resident for a year in the state and three months in the county. It is this additional durational residency requirement that the appellee challenges. Durational residence laws penalise those persons who have travelled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them the right to vote. The constitutional question presented is whether the Equal Protection Clause of the Fourteenth Amendment permits a state to discriminate in this way among its citizens. ... durational residency requirements completely bar from voting all residents not meeting the fixed durational standard. By denying some citizens a right

> to vote such laws deprive them of a fundamental political right preservative of all rights ... In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction ... Before that right to vote can be restricted the purpose of the restriction and the assertively overriding interest served by it must meet close constitutional scrutiny."

[31] The Court then passed to consider one of the interests advanced by Tennessee in support of the durational residency requirement, namely ensuring "knowledgeable voters". The knowledgeable voter argument was said to afford some surety that the voter had, in fact, become a member of the community and that as such, he or she had a common interest in all matters pertaining to its government and was, therefore, more likely to exercise his right more intelligently. On this argument the Court said that the knowledgeable voters issue devolved into three distinct claims, all of which the Court found wanting. First, it rejected the contention that the requirement was needed to assure that the voter had become part of the community, insisting that a simple residency requirement would serve this end as well. Second, the Court deemed illegitimate the asserted state interest in assuring that the community has had ample time to impress its views on the voter; states have no right, the Court concluded, to so insulate themselves from novel ideas. Third, the Court found the durational residency requirement too crude a device to effect the state interest in limiting the franchise to voters familiar with local issues; undoubtedly, some new residents were uninformed about them but there might be some long-time residents who were equally uninformed.

[32] The Court is not suggesting that these findings against durational residency requirements necessarily apply to the circumstances of the Cook Islands. But they at least demonstrate that the case for a constituency residency requirement may not be as robust as it might seem.

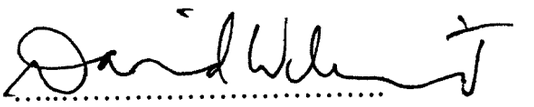
[32] It is of course of vital importance that the system of universal suffrage created by Article 27 of the Constitution should be maintained. This Court's refusal to

"read in" or infer a constitutional or statutory requirement of three months residency in a constituency supports the fundamental constitutional right of resident Cook Islanders to vote as provided for by Article 28 1(b) of the Constitution. In view of the evident difficulties with durational residency requirements, at least as they relate to constituencies, as outlined in *Dunn* v *Blumstein*, it would be unwise to read into the Constitution such a requirement which is what the petitioner urged the Court to do. This is particularly the case when the three months residency in a constituency requirement was deleted from the Electoral Act and the 1999 Act is so explicit in its statement that only the qualifications in section 13 of the Electoral Act are to apply.

[33] In short, there is enough doubt about the alleged constitutional requirement of three months' residency in a constituency for the Court to hold that the petitioner has not established a constitutional requirement of three months' residency in the constituency. It follows that the argument that Section 5 is unconstitutional because nothing in Section 13 deals with three months' residency in the constituency has not been established.

[34] It equally follows that the argument of statutory interpretation to the same effect cannot be sustained. Section 13(e) simply speaks of residency in the Cook Islands throughout the period of three months immediately preceding the application. Where the legislature has specifically confined the qualification to residency in the Cook Islands, it is not right for a Court by reference to the definition of "residency" in Article 1(1) to change the substantive statutory provision and read in a requirement of residency in the constituency.

[35] The Court notes in conclusion that the Registrar proceeded on the footing that residency in a constituency was a requirement. It makes no criticism of him for doing so because this is a difficult area of public administration.



David Williams J

APPENDIX 1

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

MISC: 134/00

IN THE MATTER of a by-election for the constituency of Pukapuka/Nassau held on Thursday the 28th day of September 2000

A N D

IN THE MATTER of a petition by a Candidate and five electors

APPENDIX 2
CONDITIONAL RULINGS ON ELEVEN CHALLENGES PLEADED IN PARAGRAPH 2 OF PETITION

Mataa Aumatangi (Page 2, Line 15, Ruling on 3 February 2001)

[1] The Court finds the primary facts as follows. The voter is the current Mayor of Pukapuka. He lived for 38 years in Pukapuka, but then went to New Zealand. He returned to Pukapuka in January 1997 and was still residing there in March 2000, having flown to Manahiki from Rarotonga. Mr Aumatangi left Manahiki by sea on 28 June. He arrived in Pukapuka on 30 June. He registered on 10 August in Pukapuka and voted in Pukapuka prior to 2 March 2000. After 2 March he resided in Rarotonga, during his attendance at a Forum on the issue of outer islands devolution policy. He returned to Pukapuka through Manahiki, arriving in Pukapuka on 30 June 2000. He registered to vote in the by-election on 10 August 2000.

[2] The oral evidence from Mr Aumatangi and documentary evidence produced as exhibits 1, 2, 3 and 4 left the Court in no doubt that this elector qualified under Section 12(3)(a) in that his usual residence was in Pukapuka and this continued to be the case notwithstanding his temporary absence for the purpose of undergoing a course of education or of technical training or instruction. It was

argued that his attendance at the seminar/Forum did not come within those words in Section 12(3)(a). However, the Court finds as a fact that he was temporarily absent for the purpose of undergoing a course of education or of technical instruction relating to devolution policy. The evidence supporting this finding was as follows.

[3] In his capacity of Mayor of Pukapuka he was instructed to participate in a forum for Outer Islands Devolution Policy Framework Development. To use Mr Aumatangi's own words in his letter to the Registrar, exhibit 5, of last September "my absence from Pukapuka to Rarotonga in April/May of this year was to attend the Mayors Forum on the issue of Devolution and what role Mayors have in devolutions policy". Details of that Forum were produced to the Court and it is plain that there was an important element of education or technical training or instruction. The letter of 20 February from the Programme Manager of the Outer Islands Devolution Programme said that it had become apparent there was a need for dialogue between Outer Island Mayors and Members of Parliament on issues arising from certain reports on that subject. It seems clear to the Court that the Government's devolution programme felt it appropriate to bring Mayors to educate and instruct them as to how this devolution policy was to work and to ensure that it did work.

[4] There is no occasion for taking a restrictive interpretation of the language of Section 12(3)(a). The Court has no doubt at all that this was a bona fide attendance for the purpose of receiving instructions on the very important question of Outer Islands devolution and related matters. Even if the Court had any doubts about this, it is noted that the Registrar accepted this explanation, the elector qualifies under the provisions of Section 26(1)(c). The evidence satisfies the Court that, as explained in the submissions of counsel for the Electoral Officer, the facts are such as to bring that section into operation. There the Court finds there is a proper factual basis for either or both the

12(3)(a) qualification and also the 26(1)(c) qualification. The Court rules that the challenge is disallowed.

Matapi Vigo (Reference Page 15, Line 3)

[5] The agreed statement of facts as amended by consent stated that Ms Vigo left Pukapuka for Rarotonga on 19 January 2000. She has remained in Rarotonga, where she is a student at the Teachers' Training College. She is still in Rarotonga on that course. She registered on 9 August in Rarotonga and voted in this by-election at Rarotonga. She was called to give evidence and it was established that she had sent an application on 24 December 1999 to the Training College. For the petitioner it was initially argued that Ms Vigo, at the time she left Pukapuka, had no place at the Training College and was just going to Rarotonga to "look for a job" and only later on she went to the Training College. On the documentary evidence from the Training College, this contention is not correct as a matter of fact, even if there was any substance to it as a matter of law. The Court has no difficulty in finding as a matter of fact that this witness clearly qualified under Section 12(3)(a) and the objection is disallowed.

Loloko William

[6] Ms William gave evidence in Pukapuka. She works for the Island Administration in Pukapuka. She was required to attend for a management course in February 2000 in Fiji for nine months. The course was interrupted in May due to the Fijian disturbances. She had to come back to Rarotonga for safety reasons. She went back and completed her course in Fiji. She returned to Rarotonga, having voted in Fiji in the by-election. She returned to Pukapuka last month. The South Pacific Commission funded her course of training in

Fiji. The Court finds that she came within Section 12(3)(a) of the Act and the objection is disallowed.

Wikiwaka Malela, Ari Poyla and Panga Mateora

[7] Counsel for the respondent conceded that these three voters were not qualified to vote and the objections are therefore allowed.

Mangere Malu

[8] The agreed statement of facts indicated that "He left Pukapuka for Rarotonga on 23 November 1999. He went to New Zealand in December 1999, returning in February 2000. He left Rarotonga by sea on 20 June, arriving back in Pukapuka on 30 June. He registered on 16 August and voted in Pukapuka". The question was whether he qualified by virtue of Section 26(1)(c), which provides as follows:

> "26 Electoral Rolls (1) The Chief Registrar of Electors shall as far as practicable ensure ... (c) that every person who is qualified to be an elector of a constituency in the Cook Islands but has not resided in any one such constituency for a continuous period of three months shall be entitled to be registered in the constituency in which he or she spent the greatest part of his or her time during the period of three months immediately preceding the date of his or her application for registration."

[9] There was disagreement between counsel as to the applicability of 26(1)(c). Mrs Browne contended that 26(1)(c) could only be availed of if a voter had not resided in a specific electorate for three months. Mr Manarangi disagreed and contended this was a clear Section 26(1)(c) case because the number of days in those months takes you over the 45 half-day mark; ie once you are over the 45 days (ie half of 90) in Pukapuka, then you qualify. For the respondent, it was also pointed out that this voter came within Section 12(4), being a voter with more than one place of abode. He owned a residential property in

Pukapuka as well as in Rarotonga. There was no evidence establishing residence other than in Pukapuka. Section 12(4) provides:

> "A person who has more than one place of abode and who is qualified to be an elector for a constituency in the Cook Islands shall be deemed to reside in the Cook Islands where the greatest part of that person's time was spent during the 3 months immediately preceding the date of that person's application for registration for enrolment."

On the facts the Court finds that this voter qualified under S26(1)(c) and/or S12(4). If he has two abodes, section 12(4) would apply. The challenge is disallowed.

Terenga Jnr Boaza

[10] The Court finds that the facts here were that Ms Boaza left Pukapuka for Rakahunga on 13 December 1999, returned to Pukapuka on 30 June 2000, registered in Pukapuka on 16 August 2000 and voted. The respondent contended this was a 26(1)(c) case. The evidence of Ms Boaza in Pukapuka was that she lives in Pukapuka. She went to Rakahunga last year due to the health reasons of her boyfriend's father, who lives in Rakahunga. She returned to Pukapuka on 30 June 2000 and registered in Pukapuka to vote on 16 August 2000 and voted in the by-election in Pukapuka. She has remained in Pukapuka ever since her return on 30 June 2000.

[11] Mrs Browne once again argued her interpretation of Section 26(1)(c), namely that if a voter has resided in a specific electorate other than Pukapuka/Nassau then one could not qualify under Section 26(1)(c). On this interpretation she contended that the voter had lost the right to vote at Pukapuka, since she had been out of Pukapuka from 19 December 1999 until 30 June 2000. Mr Manarangi, on the other hand, submitted that the elector clearly resided in

Pukapuka prior to December 1999. The elector was away for in excess of three months and therefore the elector was disqualified for Pukapuka by the three months absence due to Article 1(1). However, he contends that the next step was that the elector returned to Pukapuka on 30 June and re-established a place of abode in Pukapuka. He submitted that Section 26(1)(c) implies that if one is in a place for three months and not have demonstrated residence anywhere else, you can enrol at the end of the three months. Then 26(1)(c) lets you in. The Act does not tell us, nor does the Constitution, how you qualify for an abode. Mr Manarangi submitted that she had not resumed her residence in Pukapuka. She was not prevented from claiming Pukapuka as her abode. There is nothing in the Act or the Constitution to prevent her reclaiming residence.

[12] Mr Mitchell submitted that her residency was and remained Pukapuka. The Court finds as a fact that the elector was covered by Section 26(1)(c). It is impossible to say that the visit to Pukapuka altered her basic residence in Pukapuka. Once she returned she was entitled to vote, having come home. The challenge is therefore disallowed.

Kii Mataora

[13] This elector travelled to Rarotonga on 10 December 1999 and returned to Pukapuka on 30 June. He registered on 17 August 2000 in Pukapuka and returned to Rarotonga on 15 September and voted in Rarotonga. The respondent claimed it was a 26(1)(c) case. The facts here were similar to Ms Boaza. The evidence of the elector given in Pukapuka was that he was born in Pukapuka and lives and resides in Pukapuka. He is a fisherman. He went to Rarotonga in December 1999. He was directed to go by the island doctor because his wife was having problems and complications with her pregnancy. Ultimately a child was born by caesarean section. His wife eventually went to New Zealand. He remained in Rarotonga while she was in

New Zealand. He then travelled back on 30 June to Pukapuka and registered there on 16 August. He travelled back to Rarotonga on 15 September to pick up his wife. She came back to Rarotonga one week later. He returned by ship. She came back by air with her new baby. While in Rarotonga he stayed with his younger brother. He was also in a hostel for the last two weeks before his wife left for New Zealand.

[14] Mrs Browne submitted that the case involved Article 1(1) and Section 26(1)(c). By reference to the discussion of abode in the *Wairarapa* case, she submitted that his usual place of abode was Rarotonga. He did not lose that because he was not away from Rarotonga for three months. He did not have two places of abode, so Section 12(4) did not assist.

[15] The respondent submitted that there was no distinction between this case and the preceding case. He had taken his wife to Rarotonga and returned and registered. Then went back to meet her. When he came back the first time he came back to his abode. Everything before that was irrelevant. The three months' absence was of no moment. Then he goes back to Pukapuka not for three months and voted in Rarotonga. There is ample provision for people not in the constituency voting on voting day. He voted as a special voter. The Court finds as a fact that the voter was entitled to vote in the Pukapuka by-election by virtue of 26(1)(c).

Tauranga Tetiare

[16] There was no need to determine this matter because the voter did not vote.

Litia Wuatai

[17] The petitioner conceded that this objection could not be sustained and it was therefore disallowed by consent.

Counter-petition votes

[13] Turning to the counter-petition objections, all three related to a Pukapuka family. Two were twin brothers, namely Mariko Peua and Tiatoa Peua. They have been attending secondary school in Rarotonga. Mr Mitchell argued faintly that attending secondary school did not meet the requirements of "temporary" and "course". The Court rejects these submissions and finds as a fact that they both came within 12(1)(a). As regards Mr Tinaki Davis (number 3), he was at secondary school in Rarotonga and is now in New Zealand continuing his schooling. Mr Mitchell suggested in relation to all three, who had turned 18 (the first two being 18 on 24 June), that they needed to go back to Pukapuka for some period before they could vote. The Court rejects this suggestion. In the result, all three challenges in the counter-petition are disallowed.

.....
David Williams J