

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

MISC. NO. 30/2018

IN THE MATTER of Parts 7 & 8 of the Electoral Act
2004

AND
IN THE MATTER of a General Election for
Members of the Parliament of the
Cook Islands

AND
IN THE MATTER of the election for the constituency
of Rakahanga

BETWEEN **TINA PUPUKE BROWNE,**
Candidate
Petitioner

AND **TOKA HAGAI,**
Candidate
Respondent

Dates of Hearing: 10, 11 and 13 August 2018

Counsel: Messrs I Hikaka and B Marshall for Petitioner
Mr B Mason for Respondent
Ms K Bell for the Chief Electoral Officer (9-9.30am on 10 August 2018 only)

Results Judgment: 7 September 2018

Reasons for Judgment: 19 September 2018

REASONS FOR JUDGMENT OF HUGH WILLIAMS, CJ

[WILL0478.dss]

Introduction

[1] On 12 April 2018¹ the Queen's Representative, acting pursuant to Article 37 of the Cook Islands' Constitution, dissolved the Parliament of the Cook Islands and fixed 14 June as the date for the next General Election of the Members to form the 24 seat Parliament for the ensuing four year term.

¹ All dates in this judgment are in 2018 unless otherwise specified

[2] Nominations of candidates for the General Election closed on 30 April.

[3] Since 5 August 1965 the Cook Islands has been a self-governing nation in voluntary free association with New Zealand. Her Majesty Queen Elizabeth II in Right of New Zealand is its current Head of State. She is represented by the Queen's Representative living on Rarotonga². It operates on a one vote per voter, First Past the Post voting system with the Prime Minister being the person appointed as leader of, usually, the party with the most seats in Parliament or the party which is predominant in any coalition. Of its 24 electorates³ 10 represent Rarotonga against 14 for the remainder of the Cook Islands – 3 seats for each of Aitutaki and Mangaia, 2 for Atiu and 6 for individual islands

[4] One result, as far as the Cook Islands is concerned, is that constituencies have widely varying electoral roll numbers – from 1252 to 58 in 2018 – contrasting markedly with the electoral rolls in larger jurisdictions⁴. Consequently turnouts are comparatively high but majorities often tiny⁵. That means Court challenges are a staple feature of General Elections with the challenges being, broadly, either to the qualification or disqualification of voters on the electoral roll or of the commission of electoral offences under part 7 of the Electoral Act 2004,⁶ usually of the corrupt practices of bribery or treating under ss 87-89. Some observations on that situation appear as Schedule 2 at the end of these Reasons.

Electorate Contest in Rakahanga

[5] These Reasons for Judgment concern the election for the one constituency on the island of Rakahanga.

[6] Rakahanga is in the Northern Group of the Cook Islands and is one of the less accessible. It lies 1248km north of Rarotonga. There being no airstrip, access is only possible by sea, either by a 44km voyage by small boat from Rakahanga's nearest neighbour, Manihiki, or by occasional visits from larger ships which, the island having no sufficient break in its surrounding reef, anchor offshore and are serviced by lighter. Although, in relatively recent

² Arts 2 & 3 (1) of the Constitution.

³ Set by the first schedule and Article 27 of the Constitution and the first schedule to the Electoral Act 2004 ("the Act")

⁴ Approximately 60,000 to 70,000 per electorate in New Zealand

⁵ The majorities in nine electorates following the 14 June General Election were of 20 votes or fewer

⁶ All section references in these Reasons are to the Act unless otherwise specified

times, it has gained electronic access to the internet and the outside world, contact with and from Rakahanga remains – by comparison with others of the Cook Islands – relatively tenuous.

[7] Like islands in other nation states around the world, the attractions of Rarotonga and the wider world by way of employment and societal contact has led to Rakahanga having a declining population. While it was estimated that there were 500 inhabitants when the island was discovered in 1606 according to Wikipedia, its population had declined to about 300 around a century ago, to 127 at the 2008 census and, and now, according to the petitioner, about 95. All are concentrated in the one major village in the southwestern quarter of the 4km² island.

[8] A consequence of all those factors, the evidence showed, is that everybody on the island knows, and is known, to everybody else, and the spasmodic supply chain from the outside world leads to a higher than usual degree of collaboration and mutual self-support.

[9] In the 14 June General Election there were two candidates for the Rakahanga constituency: the petitioner, Mrs Tina Browne, who, as president of the Democratic Party, stood in its interest, and the respondent, Mr Toka Hagai, since 2014 the MP for Rakahanga, who stood under the Cook Islands Party⁷ banner.

[10] The main electoral roll for Rakahanga (dated 19 April 2018) contained 56 names and the supplementary roll (which closed on 10 May) added seven names and deleted two.

[11] The declaration of the provisional count showed Mr Hagai polling 28 votes and Mrs Browne 20. When the final vote count was declared (dated 28 June) the numbers had increased to 39 and 24 respectively, thus resulting in a turnout approaching 100%.

Petition and Amended Petition

[12] Section 92 gives any candidate, (or five electors) who is dissatisfied with the result, the right to file a petition in the Court demanding an inquiry into the conduct of the election within 7 days after the final declaration of the result of the poll.

⁷ “CIP”

[13] Mrs Browne filed a petition on 5 July and followed that with an amended petition dated 7 August for such an inquiry⁸. Mr Hagai filed no cross-petition.

[14] The salient remaining allegations in the Amended Petition were:

Section 89: Treating

1. On 24 May, 31 May 2018 and 7 June 2018 – three separate allegations - the Respondent or his agents directly or indirectly gave, provided or paid for wholly or in part the expense of giving or providing food, free drinks of beer and other alcoholic drinks for the purpose of corruptly influencing their vote or procuring himself to be elected.
4. The Respondent at the gathering publically asked the electors to vote for him.
5. The Respondent at that gathering publically stated that after voting for him the electors could have a barbecue with him.
17. The purpose, or one significant purpose, for the provision of the free food and alcoholic drinks in the period leading up to the election was political, namely to procure the election of the Respondent.
18. Alternatively, the provision of free food and alcoholic drinks were corrupt or illegal practices committed for the purpose of promoting or procuring the election of the Respondent that so extensively prevailed that they may reasonably be supposed to have affected the result.

Section 88: Bribery

24 May 2018

19. The Respondent at the gathering on 24 May 2018 publically stated that after voting for him the electors could have a barbecue with him.

25 May, 1 and 8 June

20. On 25 May 2018 Electors were marked down on the time sheet as being at work when in fact they were not at work.
21. The electors were absent from work because they were drinking on those days.
22. The Executive Officer, who was an electoral agent of the Respondent, paid all of the workers, knowing that they were not at work and without a legitimate excuse.

⁸ Leave to file which was granted, with further amendments and deletions, at the commencement of the hearing of the petition on 10 August. This was the only part of the hearing where counsel for the Chief Electoral Officer appeared.

23. A purpose, or one significant purpose, for the payment of the electors despite their not working was political, namely to procure the election of the Respondent.

32. As to the Executive Officer's electoral agency:

The Petitioner says the Executive Officer in his capacity as an electoral official ... was responsible for approving the payment of the Island Administration employees. He did so at times when employees did not work and did not have approved leave (whether annual or sick leave).

The Executive Officer was also responsible for approving the payment of all the Island Administration employees on 14 and 15 June 2018 (with the exception of Una Banaba on 14 June). He did so when none of those employees worked and did not have approved leave (whether annual or sick leave).

In addition the Executive Officer was involved in the preparation, completion and forwarding to the Electoral Office in Rarotonga of the nomination form for the Respondent.

The Respondent and/or his agents accepted and/or adopted the actions of the Executive Officer such that the Executive Officer became his electoral agent.

12 June

33. On 12 June 2018 the Respondent held a meeting at his home, at which speeches were made to the electors.

34. The caretaker Prime Minister (and leader of the Respondent's political party, the Cook Islands Party), Hon. Henry Puna, addressed the electors at the meeting. He declared that 14 June and 15 June would be public holidays on Rakahanga.

35. Workers were paid by the Government for 14 and 15 June 2018, though they did not work on either of those days.

36. A purpose, or one significant purpose, for the declaration of a public holiday by the caretaker Prime Minister was political, namely to procure the election of the Respondent.

37. Alternatively, the payment of the electors despite their not working was a corrupt or illegal practice committed for the purpose of promoting or procuring the election of the Respondent that so extensively prevailed that it may reasonably be supposed to have affected the result.

38. Alternatively, the declaration of a public holiday by the caretaker Prime Minister was a corrupt or illegal practice committed for the purpose of promoting or procuring the election of the Respondent that so extensively prevailed that it may reasonably be supposed to have affected the result."

[15] Each of the allegations concerning the pleaded dates was followed by lists of attendees or those paid. In the iterations of the pleading the lists varied but in the final version they named 31, 37 and 35 (24 and 31 May and 7 June respectively), 7, 9 and 7 (25 May, 1 and 8 June respectively) and 9 (paid when not having worked) persons.

Treating

[16] The electoral offence and corrupt practice of treating is defined in s 89 which reads:

89. Treating – Every person commits the offence of treating who, being a candidate at any election, by himself or herself or by any other person on his or her behalf, either before or during an election, directly or indirectly gives or provides or pays wholly or in part the expense of giving or providing any food, drink, entertainment, or other provision to or for any person -

(a) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or

(b) for the purpose of procuring himself or herself to be elected:

Provided that it shall not be an offence against this section for a candidate to provide at any time after the close of the poll, hospitality according to local custom or practice.

[17] Overseas cases on the law of treating neither depart from the wording of the section to any great degree nor are very contemporary. That may be because a text cited by Mr Hikaka, leading counsel for the petitioner, *Parkers Law and Conduct of Elections*, apparently comments that “so far as is known, the practices of bribery and treating no longer take place at elections”⁹. However, as has been observed, while that comment may apply in larger jurisdictions, allegations of bribery and treating are common after Cook Islands’ elections.

[18] Most of the decisions cited by Mr Hikaka were from late 19th century Britain or early 20th century New Zealand. There is an obvious dissonance and mismatch in endeavouring to apply precedent, over 100 years old, based on very different social mores and values, and stemming from densely-populated, industrial states, to sparsely-populated 21st century Pacific Islands – especially such as Rakahanga – and, for that reason, it is considered appropriate to give greater weight to the terms of s 89 and to such Cook Islands authority as there is.

⁹ At [19.64] Another commentary, *Adventures in Democracy* (Atkinson 2003) describes a 1922 NZ treating case as a “rare occurrence in the 20th century”

[19] The authorities may, in the main, be old and foreign, but the seriousness of treating should not be overlooked. If found, it invalidates the candidate's election under s 98(1), brings with it the other consequences set out in s 98(3) and must be referred to the Police¹⁰ pursuant to s 100. It may be for that reason that the standard of proof is the civil one, but enhanced by the seriousness of the allegation¹¹.

[20] All that said, it is useful to record the compendious advice of *Halsbury*¹² which notes "the essence of the offence of treating is that it should be corrupt. Treating, in fact, is often innocent; and prima facie it will be taken so to be" but that "no man is bound to abstain from customary and harmless hospitality because an election is pending". Of relevance to this matter is *Halsbury's* note that "custom is only relevant as having some bearing on the intent of a particular individual"¹³

[21] Paragraph (b) of s 89 does not expressly require proof of a corrupt motive but it is clear that such a motive must be proved – and the motive must have a significant political aspect¹⁴ – for the offence of treating under s 89(b) to be found, as its commission is a corrupt practice under ss 2 and 87(1) and, as the Court of Appeal said in *Wigmore v Matapo*¹⁵, though speaking of bribery, that once the offence is complete, "that then becomes a corrupt practice for the purposes of s 87. There is no additional element of acting corruptly – the mere commission of the acts are declared to be corrupt". What amounts to "corruption" in the electoral sense is now to be found in the decision of the Supreme Court of New Zealand in *Field v R*¹⁶ where that Court held:

"...I am of opinion that there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election. I think the word 'corruptly' in this statute means not 'dishonestly', but in purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any particular manner. Both the giver and the receiver in such a case may be said to act 'corruptly'. The word 'corruptly' seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence. I agree with

¹⁰ But, despite the terms of ss 87-91, 98 & 100, conviction is not a pre-requisite to referral: *Ioane v Ioane* CA 11/14 15 December 2014 per Barker & Paterson JJ at [47]-[52]

¹¹ *Eg Pokoati v Tetava* [1978] CKHC 2 24.7.78 Donne, CJ,p7

¹² *Halsbury's Laws* 5th ed, 2013, Vol 38A, para 722, p 231-2

¹³ *Halsbury's Laws* *ibid* and cases there cited, particularly *in re Great Yarmouth Borough Case* (1906) 5 O'M&H 176,193.

¹⁴ *Wigmore v Matapo* [2005] CKCA 1 at [37]

¹⁵ [2005] CKCA1 at 68

¹⁶ [2012] 3 NZLR 1, 17 @ [34] citing *Cooper v Slade* (1856) 6 H L Cas 746; 10 E R 1488

what was said by the learned Judge at the trial, that if the moving cause of giving the money is the voter having voted for the particular candidate, such gift is contrary to the statute, as being given by way of reward for the vote, and therefore corrupt. [Emphasis in *Field*.]

[22] Other components of treating are to be found in the decision, oft-cited in the Cook Islands, of the New Zealand Election Court in *In re the Wairau Election Petition*¹⁷ where the following appears:

“In order, therefore, to amount to treating, a corrupt intention must be proved. A corrupt intention is an intention on the part of the persons 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 there are numerous occasions during the election on which drink has been supplied, the inference would be that it was the intention of the person supplying it to influence the election. If meat or drink were supplied on numerous occasions to a single voter the inference might be drawn that it was done to influence his vote, and the treating would be corrupt. So, also, if a good meal were supplied to an elector was in indigent circumstances the fact that he was given something which he could not procure for himself would lead to the inference that the meal was supplied to influence his vote. Where, however, on exceptional occasions a very small amount of drink is given to a man who is in independent circumstances, it would be absurd to suggest that the drink so given would be likely to influence his vote, or that the intention of the person giving it was to influence his vote. If in any case, looking at all the circumstances, the reasonable and probably 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.”

[23] The 1978 Cook Islands case, *Pokoati v Tetava*¹⁸ held that elements of treating were the giving or provision of food for the purpose of procuring a candidate’s election or any other purpose calculated to influence the votes of electors, with the giving or providing being with a corrupt intent. The judgment held that that terms “gives or provides” in the then treating section did not require proof of ownership of the food or drink on the part of the candidate because “the clear connotation of the words is to supply, furnish or make available and the concept of ownership may or may not be present”¹⁹.²⁰

¹⁷ (1912) 31 NZLR 321, 326-7

¹⁸ [1978] CKHC2 reported as *In Re Mitiaro Election Petition* [1979] 1NZLR S1, Donne CJ

¹⁹ At p7

²⁰ Other authorities include *Wigmore v Matapo* at first instance (*Matapo v Wigmore* Misc 84/04: the appeal judgment does not deal with treating separately) & *George v Tatuava* Misc 73/04 in both of which treating was dismissed on the facts

[24] The next legal issue relating to both the allegations of treating and bribery in this case is the question of the electoral agency of Mr Hagai by the Rakahanga CIP Planning Committee. In that respect, it is pertinent to record references from *Halsbury*. After noting that the “crucial test is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of his work when done” *Halsbury* notes:²¹

In the absence of authorisation or ratification the candidate must be proved either by himself or by his acknowledged agents to have employed the agent to act on his behalf, or to have to some extent put himself in the agent’s hands, or to have made common measure with him for the purpose of promoting the candidate’s election. The candidate must have entrusted the alleged agent with some material part of the business of the election. Mere non-interference on the candidate’s part with persons who, feeling interested in the candidate’s success, may act in support of his canvass is not sufficient to saddle the candidate with any unlawful acts of theirs of which the candidate and his election agent are ignorant. Employment in the business of the election is a question of degree but it has never yet been distinctly and precisely defined what degree of evidence is required to establish such a relationship between the candidate and the person guilty of corruption as should constitute agency. No one yet has been able to go further than to say that, as to some cases enough has been established, but as to others, enough has not been established, to vacate the seat. All the circumstances of the case must be taken into consideration...

[25] The following passage from *Halsbury*²² is also of assistance:

“What constitutes agency on the trial of a petition is a question to be decided on the circumstances of each case. However, the concept of agency is much wider in election law than in other areas of the law, such as contract, and a candidate is responsible generally for the deeds of those who, to his knowledge, do such acts as may tend to promote his election, provided the candidate or his authorised agents have a reasonable knowledge that those persons are so acting with that object. It follows accordingly that, in order to give in evidence the commission of such acts by an agent, it is not necessary to prove that they were authorised or sanctioned; it is merely necessary to prove at the trial that the person committing them was an agent

[26] *Pokoati* also dealt with electoral agency in the Cook Islands. Donne CJ held²³:

The first respondent’s subsequent actions show he fully accepted what was done by the Minister. In such circumstances he must be bound by the Minister’s action. As was stated by Hosking J in *The Bay of Islands Electoral Petition* (1915) 34 N.Z.L.R. 578 at 585, 586:

²¹ *Halsbury’s Laws* 5th ed, Vol 37, 2013, paras 245 (p422) and 832 (p369)

²² *Halsbury’s Laws* 5th ed 2013, Vol 38A, para 832, p369

²³ p8-9

“The entrusting to an agent of the acts to be done may either be in express terms or arise from implication. As was said in *The Dungannon* case, “The circumstances of each case may differ, but that implication ordinarily must arise from the knowledge which it appears that the candidate has of the part which the person is taking in the election. If that part of the business of an election which ordinarily and properly belongs to the candidate himself be done to the knowledge of the candidate by some other person it appears to me that the other person is an agent of the candidate, and the candidate is responsible for any corrupt act done by the person”. In *The Harwich* case the law is stated thus:

“As regards the seat, the candidate is responsible for all the misdeeds of the agent committed within the scope of his authority, although they were done against his express directions and even in defiance of them... The authority may be actual or it may be implied from circumstances. It is not necessary in order to prove agency to show that the person was actually appointed by the candidate. If a person not appointed were to assume to act in any department of service as election agent, and the candidate accepted his services as such, he would thereby ratify the agency, so that a man may become the agent of another in either of two ways, by actual employment or by recognition and acceptance.”

[27] Also relevant, because what amounts to candidate hospitality during an election campaign is in issue in this case, it is helpful to note that in *Pokoati*²⁴, where meat, drink and entertainment was provided to “fly-in” voters, it was held that:

I accept Mr Brown’s submission that what was done here was consistent with traditional Polynesian hospitality. It would have been considered by the travelling voters as their due and I am satisfied would not be regarded as a “treat” in the sense of section 70 of the Electoral Act. Nor should those providing the feast have imputed to them a corrupt intent in doing so, since every Polynesian knows what according to custom is required to be done for visitors: the most important obligation is to provide customary hospitality. Baron Pollock in the case of *Lancaster* (1896) 5 O’M & H. 39 at 43 when considering the provision during an election of a smoking concert in a working class environment said, as follows:

“However, that is done; that is the habit in that class of meeting; it is established from month to month and from year to year, and you cannot expect that it should be stopped because an election is coming at some time....”

[28] Also of assistance in this area is the observation in *Field*²⁵ that an assessment of whether a gift amounts to bribery, “must address the extent of the gift and the particular context in which it occurs”. The Court there held that “there must be a de minimis defence in relation to gifts of token value which are just part of the normal courtesies of life”

²⁴ [1978] CKHC 1 24 July 1978 Donne, CJ p28

²⁵ At [65] p 28

24 May, 31 May and 7 June

[29] As – with certain variations – all three gatherings on 24 May, 31 May and 7 June largely followed a similar pattern, it is convenient to consider the evidence relating to all three together against the background of s 89 and the authorities.

[30] All three functions were organised by the CIP Planning Committee on Rakahanga. The committee consisted of Puapii Ngametua Greig (known as “Bundy”), Trainee Maea, Papa Tuteru Taripo, Maggie Taripo, Enea Maea and Ngametua Tarau. All three meetings were held at Mr Hagai’s brother’s home, next door to Mr Hagai’s own home. Although Mr Greig said the functions’ purpose was to get Mr Hagai’s supporters together and suggested the committee meetings were only to plan the food, it is clear the meetings were not just to organise the refreshments. Mr Hagai regarded them as campaign meetings²⁶: that was a reasonable description.

[31] That is clear from a number of factors. The first is that Mr Hagai spoke to all those attending the gathering on 24 May, (and may – the evidence was unclear – have also spoken at the gathering on 31 May). Tiata Tupou²⁷ recorded the speech, posted it on Facebook and an agreed translation – the speech was in Maori – was produced in evidence. While the speech was, by comparison with contemporary political discourse elsewhere, in reasonably temperate terms, it clearly extolled Mr Hagai’s achievements for Rakahanga in his four years as its MP, lauded the actions of the Government of which he was a member, spoke of future projects assisting Rakahanga and was mildly critical of Mrs Browne. It concluded by saying “we thought we would have a little barbecue, have a few drinks, but ... you have showed a good sign tonight by displaying your interest in bringing me back as your member of Parliament” and, “those of you who want to support me tonight, thank you very much” and, later, “this is my message to all of you tonight, June the 14th, you have only one name to vote for, look for Toka Hagai, cross, then we come home and start our barbecue”.

[32] In light of that, the conclusion must be that all three of the gatherings were convened by Mr Hagai’s campaign manager and the CIP Planning Committee and that at least one of their significant purposes was political, namely, to support Mr Hagai’s campaign for re-election. The gatherings had, as at least part of their aim, the shoring up of support for Mr

²⁶ Evidence p 58

²⁷ A witness for the petitioner

Hagai's re-election among his known supporters and, possibly, waverers. That was an object with which he agreed²⁸. He said he regarded the speech as one of the best he had made²⁹. It was a message intended to encourage people to think about the good things he had done for Rakahanga with the aim that they voted for him if they wished.³⁰

[33] That said, to attendees other than Mr Hagai and the CIP Planning Committee, the political purposes of the gatherings – claimed to be uncommonly large by Rakahanga standards – cannot have been unvarying. Mr Hagai delivered his speech at the first so its political purpose at that point must have been unmistakeable, but the gathering went on for some hours by which time its purpose may have become less obvious. There was some evidence he spoke at the 31 May function but he had no memory of so doing and, his recollection of his speech on 24 May being so vivid, it is reasonable to conclude he did not speak on the second occasion. That being so, the overt political purpose of the second function would only have been discernible from his attendance and the fact the function was organised by the CIP Planning Committee. There was no suggestion he spoke at the third gathering so, again, its political purpose would only have been discernible from the same factors.. There might have been said to have been some political purpose to be inferred from three similar gatherings being organised by the same people in a fortnight on Rakahanga when a General Election was in progress, but the possibility was not put that way by counsel so that possible motive seems pallid.

[34] To qualify as treating, the law requires at least one of the purposes of the impugned actions to be political and that that purpose also be significant. It is accepted that all three functions had a political purpose, but, for the reasons just discussed, the significance of their political motivation must also have varied. That is a factor to be taken into account in deciding if that element of treating is made out.

[35] The second factor to be weighed is the nature of the invitation.

[36] While it is clear that a large proportion of those attending the functions (most, though there were varying attendances, were pleaded to have attended all three) may have been supporters, the lengthy lists of attendees at each of the functions appearing in the amended petition – and agreed to by the Mr Hagai and his witnesses – showed, when compared with the

²⁸ Evidence p58

²⁹ Evidence p59

³⁰ Evidence p6 **NB**

number of votes he received, first, that those attending must have gone well beyond Mr Hagai's known supporters and, secondly, that invitations to attend were not restricted to those supporters. The invitations were extended by anybody, not just the CIP Planning Committee, and were informal. As an example, Tiata Topou was invited to a "get together with Uncle Toka" at the completion of a tennis competition on 24 May. So it was clear that anybody who wanted to attend could attend and, when they did, would have heard Mr Hagai's speech directed towards his re-election. While many of those attending may not have been voters – a number of children were said to be present – those attending represented a considerable proportion of those on the electoral roll.

[37] In assessing that matter, it is to be noted that Nga Takai³¹, the Executive Officer of the Rakahanga Island Administration and the Returning Officer for the election, apart from a fleeting visit to one of the functions to collect his wife, did not attend any of the functions because he knew that s 5(6) debars any election official from holding "any official position in connection with any political organisation". In terms of the invitations, however, there was no suggestion he could not have attended any of the functions had he wished.

[38] While much of the evidence did not differentiate between attendances at each of the three functions, there was specific evidence concerning the casualness of the invitation list for that held on 31 May because Mrs Browne, having arrived on the island two days earlier, and her family, attended an unveiling for her late father that afternoon. Almost all the islanders were present for the unveiling in accordance with custom. After the traditional *kaikai* following the ceremony, Mrs Browne saw a number of persons walking towards the respondent's brother's home. She said the gathering became noisy later that evening. She did not attend the function – though, however unlikely it might have been, there would appear to have been no bar to that and she could have politicked there, if she wished – and saw no one bringing food or drink to the gathering but Tiata Topou did and confirmed in evidence – as did others -that alcohol and food was available to anybody, without charge, at that function.

[39] The third factor – and a major one in the circumstances – was the provision of that free food and alcohol at each of the functions.

³¹ The name he used in evidence. His full name in the electoral roll is Ngatoko Takai

[40] There is a high correlation between the list of attendees in the amended petition and those being present listed in the evidence of Mr Greig and others and it is clear from all the evidence that almost without exception, all who attended brought food of various types – taro, “famous chicken curry”, soup, spaghetti, corned beef, pizza, fish, ika mata, noodles, rice, pancakes, donuts and salad and other foodstuffs were mentioned– and many also brought alcohol, either Coopers, a local homebrew, or beer or spirits purchased through the island’s only licensed alcohol seller, Taunga Tuteru.

[41] Messrs Greig and Trainee Maea were the only members of the CIP Planning Committee to give evidence and, of Mr Greig’s list of the members, he said he took nu to each function and, though his evidence did not greatly differentiate between the three, he said Tuteru Taripo brought alcohol and Trainee Maea brought kuru and ika mata. Mr Maea added kopa to Tuteru Taripo’s contribution and said he took ika mata to the second function and chicken to the third plus, possibly, alcohol.³² More generally, Mr Greig said the Planning Committee contributed fish, meat and poultry towards the functions³³ but did not say how much.

[42] A few attendees made no contribution to the functions they attended including Tangaroa Rongo, the oorometua – who contributed the prayers – Enuake Takai and Tiata Topou.

[43] Mr Greig and Kavana Kavana, later assisted by Ratu Rodoko³⁴, barbecued the food. At all functions, nearly all present took part. Nobody paid for the food or alcohol, even though alcohol is expensive on Rakahanga.

[44] Looking at all that evidence in terms of the components of treating it is clear that at each of the functions on 24 and 31 May and 1 June, that is during the interval between the dissolution of Parliament, Mr Hagai’s nomination on 26 April and the election itself, free food and drink was available to any person, elector or not, known CIP supporter or not, who attended the gatherings at the respondent’s brother’s home. Some witnesses spoke of music being available at the functions so it might be possible to conclude that entertainment was also available. Since it has already been held that all three gatherings had – though with varying significance – Mr Hagai’s re-election as one of their purposes, the remaining components of s 89 which require consideration are:

³² Evidence p90

³³ Evidence p71

³⁴ A witness for the petitioner, the island nurse and, as a Fijian, a non-voter.

- a) Whether Mr Hagai or “any other person on his ... behalf ... directly or indirectly” gave or provided or paid for the food drink and, possibly, entertainment;
- b) Whether that those gifts or provisions were for the purpose of corruptly influencing voters to vote or refrain; and
- c) Whether the defences outlined above are available to Mr Hagai

[45] Mr Hagai attended all three functions. He made a political speech at one. He no doubt sought to curry favour at all. He capitalised on and must be taken to have adopted the organising actions of the CIP Planning Committee. In terms of the authorities the committee was therefore either acting on his behalf or he had “to some extent put himself in the agent’s hands” or made “common measure” with them to promote his re-election. Attending and participating in meetings which the committee organised, which any elector on Rakahanga might attend and which were to boost his chances of re-election clearly amounts to Mr Hagai entrusting the committee with a “material part” of his election bid. In terms of the authorities that makes Mr Hagai responsible for the actions of the Planning Committee in promoting his re-election. That amounts to other persons directly or indirectly giving or providing food and drink on his behalf. Accordingly that element of s 89 is satisfied.

[46] The remaining questions are therefore whether it is shown to the required standard that the actions of Mr Hagai through the CIP Planning Committee were or were not corrupt within the meaning of the authorities, namely in purposely doing an act which was not dishonest but which the law forbids as tending to corrupt voters, and whether any defence is available.

[47] That raises the question as to whether what occurred in the provision of food, drink and, possibly, entertainment at the three gatherings has been shown to be a “moving cause” towards Mr Hagai’s re-election or whether, as held in *Hosking v Browne*, what was done by the committee was merely providing hospitality so he, through the committee, should not have “imputed to them a corrupt intent... since every Polynesian knows what according to custom is required to be done for visitors; the most important obligation is to provide customary hospitality”.

[48] In considering that, what must be kept in mind is that the three gatherings were held on a remote island with a tiny population where all the inhabitants, not just the electors, know one

another, where many are related to one another, where they socialise together and where many work together, particularly in central or local government service – the only significant employers on the island – and all, no doubt, collaborate in producing the food which sustains them on an island where outside deliveries are spasmodic so a degree of mutual support, sharing and self-sufficiency is to be expected, and may be vital.

[49] In the Cook Islands, and, the evidence shows, also in Rakahanga, contributions towards the kaikai which commonly – almost invariably – follow gatherings of any sort is mutual and universal. Only attendees such as the oorometua who contributed the prayers at these gatherings, are exempt from the usual and customary obligation to contribute to attendees' sustenance at all such gatherings. Mr Hagai said bringing food to help the small community is a habit on Rakahanga³⁵

[50] It is also crucial to keep two additional things in mind.

[51] The first is that contributions to the food and drink at the gatherings by any of those attending other than Mr Hagai and the CIP Planning Committee could not breach s 89: contributions by anyone else were not contributions by Mr Hagai “or by any other person on his .. behalf”. It is only contributions by Mr Hagai or the CIP Planning Committee which are relevant to whether s 89 was breached.

[52] The second is that the terms of s 89 make clear that it is only the provision of food and drink to electors which is relevant to whether that provision amounts to treating. The provision of food and drink to non-voters is beyond the scope of the section.

[53] Mr Hagai, mindful of guidance the Chief Electoral Officer gave him and other MPs as to permissible actions by them during an election campaign, said he contributed nothing to the food or drink at any of the three meetings. His evidence in that respect was not challenged.

[54] Any possibility that the actions of the CIP Planning Committee might therefore have breached s 89 comes down to their contribution of food and drink at the three functions. And the evidence on that is Mr Greig's acknowledgment that the committee contributed an unspecified amount of fish, meat and poultry generally while the more specific evidence is that

³⁵ Evidence p 62

Mr Greig contributed nu to each, Mr Taripo and his wife contributed alcohol to all three functions and Mr Maea contributed ika mata to the second and chicken to the third.

[55] Set alongside the extensive list given by Mr Greig of the nature and extent of the contributions by virtually everybody else who was there, the contributions by the four members of the Committee who took part in contributing what would seem to have been small amounts of food and drink to the large proportion of the island's population at the gatherings should be properly regarded as minimal – particularly when it is only the provision of food and drink to electors which is relevant – and to be no more than custom requires both in the Cook Islands and in Rakahanga.

[56] In the mutually supportive community on Rakahanga, the Court's conclusion is that, accepting the guidance of the "substantial merits and justice of the case"³⁶, and giving appropriate weight to the cited observations from *Hosking v Browne* as to the obligations of Polynesian hospitality, the minimal proved contributions by members of the CIP Planning Committee on Mr Hagai's behalf to the sustenance at the three meetings comes within the New Zealand Supreme Court's finding in *Field*³⁷ of a "de minimis defence in relation to gifts of token value which are just part of the usual courtesies of life". Acting in accordance with, and to no greater extent than is required by, custom - one of those usual courtesies - meant that it was not proved that Mr Hagai, through the members of the CIP Planning Committee, acted corruptly in the sense explained in the authorities, of doing something not dishonestly but which the law forbids as tending to corrupt voters: he and they were fulfilling the dictates of custom, no more. Their contributions were not a reward for voting in a particular way.

[57] In light of that, the appropriate conclusion was that the allegations of treating by Mr Hagai in respect of the meetings organised by his electoral agents on 24 and 31 May and 7 June were not made out because a recognised defence was available to him and the allegations in the amended petition in that regard relating to those dates were accordingly dismissed.

Bribery

[58] Bribery is relevantly covered by s 88 which reads:

³⁶ S 99

³⁷ At [65], p28

“88. 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 intent that that money or any part thereof shall be expended in bribery within the meaning of this section; or...”

[59] The following passage – with relevant deletions from the source to avoid repetition – is of assistance³⁸:

[13] The elements of electoral bribery are well settled. It is sufficient to cite from *Matapo v Wigmore*³⁹ where the following appears.

The elements of bribery are:

- i) *The giving of consideration;*
- ii) *That the consideration was valuable;*
- iii) *That it was given to induce the voter to vote for the respondent candidate and that it was on the express or implied condition that the voter would vote for that candidate;*
- iv) *That the intent to do this was corrupt;*

[14] In *Tuariki v Beer*⁴⁰ the following appears:

“[99] It is to be noted that in *Wigmore v Matapo*⁴¹ the Court of Appeal adopted counsel’s submission that “conferring a benefit on someone (whether an elector or not) in order to enlist his or her efforts or services to procure the candidate’s return or the vote of some other elector, is what is covered by s.88(b).

³⁸ *George v Toki Brown*, Misc.33/2014, 16 September 2014, Hugh Williams J, paras 13-18

³⁹ HC CI Misc.88/06, 8 December 2006 (NZT), Weston J paras [80]-[82] and citing *Cowan v Taia* Misc.80/06, 23 November 2006

⁴⁰ HC CH Misc.6/2014, Reasons for Judgment 30 May 2014, Hugh Williams J, paras [99]-[102]

⁴¹ [2005] CKCA 1 para [63,64]

[100] *In terms of what amounts to a corrupt purpose, counsel relied on the decision of the Full Court of the High Court of New Zealand in Re Wairau Election Petition*⁴² where the following appears –

In order, therefore, to amount to treating, a corrupt intention must be proved. 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.

[101] *The statement in Matapo v Wigmore that the standard of proof is on the burden of probability needs to be tempered with the observation that the seriousness of the allegation enhances that standard*⁴³.

[102] *It needs to be added that it is unnecessary for the petitioner to prove that electors carried out their part of the bargain by voting for the candidate. It is not an element of bribery that it be successful but the inducement must be coupled with an express or implied condition that the voter will vote for the respondent, even if they do not do so*⁴⁴.”

[18] It is well established that proximity of an alleged bribe to an election is an important factor in deciding whether bribery has been proved⁴⁵.

[60] The comment as to the burden of proof may be amplified by reference to the Cook Islands case of *Piho v Puna*⁴⁶ which, while holding that the standard of proof is the civil standard on the balance of probabilities went on to hold that the “the allegation of a finding of bribery requires cogent evidence” and that standard may be reached “by drawing inferences from proved facts, if those inferences allow the judge to determine the matter to the higher degree of probability required”.

25 May, 1 and 8 June

[61] The first set of bribery allegations centred around the assertion that on 25 May, 1 June and 8 June, 7, 9 and 7 named employees were marked on an Island Administration timesheet as working and were paid by the Executive Officer of the Island Administration when they were not at work and were without a legitimate excuse, they being said to have been drinking on the previous days. One significant purpose of all that was pleaded as being political, namely to procure Mr Hagai’s re-election.

⁴² (1912) 31 NZLR 321.326 dealing with the electoral offence of treating

⁴³ *Re Mitiaro Election Petition* [1979] 1 NZLR s1 at s7 cited in *Pitt v Ioane* s1 at s7 HCCI Misc.82/2006 31 October 2006, DAR Williams CJ para 4.16

⁴⁴ *Pukapuka-Nassau Petition* HTCI Misc.134/2000 p10-12 cited in *Pitt v Ioane* HTCI Misc.82/2006 para 4.15

⁴⁵ Eg. *Halsbury* Op cit para 716 p227-8 Andrew Geddis; *Electoral Law New Zealand; Practice and Policy* (2 ed 2014) para 8.3.2 p122

⁴⁶ CA 10/14, 28 November 2014, at 26

[62] There is limited private enterprise on Rakahanga – outposts of Bluesky and Bank of the Cook Islands were the only examples mentioned – so almost all employment on the island is by the Rakahanga Island Administration or central Government. The allegations in the amended petition all relate to the former.

[63] The Rakahanga Island Administration timebook in which the 22 Island Administration employees and their hours of work were entered over the election period became a prime exhibit in the case. But, as all the allegations in the amended petition relating to this aspect of the case were dependent on proving that the Island Administration’s Executive Officer was, as a matter of law, Mr Hagai’s electoral agent, it is convenient to first focus on that component, bearing in mind the authorities previously considered as to when electoral agency arises.

[64] As mentioned, the Executive Officer of the Rakahanga Island Administration was Nga Takai. He is well versed in Island Administration having been acting Island Secretary in mid-2001, Island Secretary between 2004-06 and again in 2011 and Mayor of the Island Council from 2007 to 2010. The last time he was involved in politics was in 2000 and, importantly, he was the Returning Officer for the Rakahanga constituency at both the 2014 and 2018 General Elections. As earlier mentioned, in that capacity he was very aware of the s 5(6) bar on his holding any official position with any political organisation. He is related to both candidates. Though a witness for the respondent, he gave steadfastly neutral evidence and was a persuasive and convincing witness.

[65] A significant portion of the pleading as to why the Executive Officer was Mr Hagai’s electoral agent was deleted on 10 August. The remainder – without the names – was set out earlier.

[66] Mr Takai emphasised on a number of occasions in evidence that the most important thing for him is enhancing his working relationship with the Island Administration employees and his overriding wish is to ensure the completion of the various projects on which they are engaged. He is, he said, “output rather than time orientated”⁴⁷ and to achieve that he is at the Island Administration building before 8am every morning and insists on the workers signing the timebook when they arrive and when they finish for the day (or, sometimes, by signing at the commencement of the next day’s work). If workers fail to appear he gets on his motorbike

⁴⁷ Brief para 27

and rounds them up. He accompanies them to the worksites and often works alongside them but he said “I give my workers specific tasks and if they complete them early then I let them go home”⁴⁸.

[67] The months leading up to the election were very busy ones for the Island Administration. There was a large tere party of Australians and New Zealanders coming to the island to mark the coming of Christianity to Rakahanga. That necessitated the renovation of the rundown community hall to accommodate them as well as the gathering of a considerable amount of food to feed them. The island was also preparing for a large number of its citizens to travel to Rarotonga for the Te Maeva Nui festival in early August. And there was the usual time needed for employees to grow or gather sufficient food to support themselves and their families in addition to gathering that required for the visitors’ hospitality. The Island Administration allocated one day a week for the renovation work to begin with but, as the visit approached and the work was still not completed, it extended that in May and June to four or five days a week.

[68] Although, after he returned to the island on 1 May, Mr Hagai participated in the renovation work as part of a working bee, no other part of the Mr Takai’s duties involved the respondent. Other than the forwarding of the nomination form, there was no evidence of contact between Mr Takai and Mr Hagai in the run-up to the election. As mentioned, Mr Takai, apart from a brief domestic visit, did not attend the three meetings which are the subject of the treating allegation. He never heard Mr Hagai’s speech. There was no evidence to suggest that Mr Hagai was in any way involved in the payment of the Island Administration employees.

[69] In those circumstances, in terms of the law of electoral agency, it is clear Mr Hagai did not employ or authorise Mr Takai to do anything concerning payment of the Island Administration employees. That payment was not election work. Mr Hagai was not shown to have authorised or adopted any part of Mr Takai’s work. Payment of the Island Administration employees was quite separate from the election and formed no material part of it. Mr Takai deliberately did not act in support of Mr Hagai’s candidature and did nothing to promote his re-election.

⁴⁸ Brief para 26

[70] In those circumstances, the only available conclusion was that Mr Takai was not shown to have been Mr Hagai's electoral agent in any of the ways pleaded and accordingly the whole of that allegation failed.

[71] For completeness, there are difficulties reconciling the names in the pleading with the lists in the amended petition because in the electoral roll the surname appears first unlike in the balance of the amended petition but, even so, some names were never mentioned in evidence and some differ from the pleading. The lists included surnames that witnesses did not use and contractions which were unexplained. Additionally, with certain exceptions, the employees listed in the amended petition all have their times of working entered in the timebook for the days listed though there appear to be significant discrepancies. Reconciliation is accordingly problematic.

[72] Further to that, on 25 May H Tianini is shown as being on sick leave, T Thorpe and T Takai have no hours listed for 1 June and on 8 June T Thorpe, H Tianini, C Setephano, P Hagai and S Aratangi are shown as being on annual leave and T Maea with time off. Such entries are normally made by Mr Takai.

[73] Against that, Mrs Browne saw few workers at the hall on 1 and 8 June, Tuanga Tuteru said that on 8 June Noah Tianini, Sema Aratangi, Lesley Thorpe and Riki Aramu were at Mr Tianini's house drinking and in no condition to work, Ratu Rodoko said that he was drinking with Tuteru Taripo, Ngatakoa Elikana and Lal Narayan on the early morning of 1 June and continued drinking all day from the five cartons of Heineken beer bought from Tuanga Tuteru early that morning. He said that about midday Noa Tianini and Frances Tupungangaro came to the house and were both intoxicated. He said Noa Tianini, Tamaro Thorpe, Temu Greig and the others mentioned did not go to work that day. Pupuke Robati also said that on 8 June about 10am he went to Noa Tianini's house where he, Frances Tupungangaro, Semi Aratangi, Temaru Thorpe and Riki Aramu were drinking. Riki Aramu and Frances Tupungangaro are not Government employees. Later that morning he went to Tuteru Taripo's house and found him there with Lal Narayan. Both were drinking and did not go to work that day

[74] As far as 1 June is concerned, of those able to be identified in the timebook T Thorpe has no hours entered, others may have entered hours in the timebook and the timebook entries for 8 June have already been recorded.

[75] It may be that it was those inconsistencies which lead counsel only generally to endeavour to reconcile the work records and the workers in their final submissions.

[76] Further to that, although Mr Takai's entries in the timebook for annual leave, time off and the like may not have entirely married with the facts or the evidence, it seems inherently unlikely that someone who is so diligent in rounding up his employees for work would not have followed up on fairly widespread absenteeism of the Island Administration employees from work, particularly when he and they were under considerable pressure to complete the projects on hand, especially the renovation of the hall. It seems implausible that Mr Takai would have done such a thing, and the allegations were dismissed on that basis as well.

[77] Electorally, the significance of that conflicting evidence could only have been if Mr Takai authorised payment to the named Island Administration employees on 24 May and 1 and 8 June when they were not at work, were absent without a legitimate excuse and that Mr Takai in so doing was acting as Mr Hagai's electoral agent. Since the proposition of agency has already been dismissed it must follow that all the allegations of the commission of electoral offences in relation to workers being paid for their unjustified absence from work on those days were consequently also dismissed.

[78] For all those reasons, all the allegations in the amended petition of bribery relating to 25 May and 1 and 8 June failed.

12-18 June 2018

[79] The bribery pleadings concerning the events of 12-18 June were recounted earlier.

[80] On 12 June the caretaker Prime Minister and leader of Mr Hagai's Cook Islands Party, the Hon Henry Puna, travelled to his home electorate of Manihiki. He was immediately ferried to Rakahanga and spoke that evening to a meeting of about 40 CIP supporters and their families held at Mr Hagai's brother's home.

[81] Recollections varied as to the content of the Prime Minister's speech.

[82] Mr Greig⁴⁹ recalled the Prime Minister saying there would only be two things after the election namely that they will be happy and celebrate or apare, to comfort someone after a death. Meti Tarau⁵⁰, the Mayor of Rakahanga said the Prime Minister wished those present to stick together, to be strong for their party and not to apare after the election. Kavana Kavana⁵¹ recalled the Prime Minister talking about extending child support for parents and of his efforts to get a vaine Rakahanga, a better vessel to ferry passenger to and from Manihiki.

[83] What is clear is that in questions and answers during the Prime Minister's speech the Mayor's wife Mata (or Moni) Tarau-Dean first asked him first whether the gathering was breaking any law by getting together so close to the election, and received a positive response. She then asked whether it "would be all right if we were to have a holiday on Thursday (Election Day)" to which he responded that electors had to be given time off to vote and in that sense there would be a holiday on 14 June, but that it was up to the Mayor and the Island Government if there were to be time off on Friday, 15 June, and it was more important for them to decide how they wished to spend their time on the Thursday, either by celebrating a win or mourning a loss. All the speeches were in Maori and the questions and answers were, the Prime Minister said, made in a jocular fashion and in a jovial atmosphere where he was speaking to known CIP supporters.

[84] Mr Puna is a long-serving politician and knew a Prime Minister has no power to grant public holidays – something he thought his listeners also knew – but he said in evidence that it has been a practice for as long as he could remember under successive Governments for polling day in the Northern Group to be a day when people vote but do not turn up to work. He accepted that the Rakahanga Island Council also has no legal power to grant public holidays but he said from time to time they have done so, and that the practice applies in all the Cook Islands other than Rarotonga.

[85] Cross-examined on the speech, Mr Puna said he laughed at the second question and responded in Maori that she should "ask your husband, he's the boss, whether people would get time off on Friday" but acknowledged:

"Q. There has been evidence that people were told that you had declared a holiday on Friday. Will you accept the people could have taken that from what you said?

⁴⁹ Brief para 28

⁵⁰ Brief para 25

⁵¹ Brief paras 37 & 38

A. I guess if they wanted to take it, yes, they might have.”

[86] Though not an electoral matter, it was put to him that the informal practice of giving Government employees holidays without appropriate legal backing was an irresponsible use of public money. He replied that it was appropriate in the right circumstances that Island Councils grant time off to their employees when circumstances warrant. when the solar array was opened on Rakahanga and the Island Council gave its workers time off for the rest of the day.⁵² It was, he thought, appropriate that Island Governments should have the discretion to make such a call even though it involved expenditure of public funds.

[87] What followed the Prime Minister’s 12 June speech was a matter of controversy.

[88] What was acknowledged was that Una Banaba⁵³, the finance officer for the Rakahanga Island Administration and, on 14 June, working in the polling booth, wrote, on the afternoon of Monday 18 June, the words “ELECTION DAY (HOLIDAY)” in the time book for 14 June and the words “HOLIDAY BY PM” at the top of the page for 15 June.. She did that, she said, because, on the afternoon of 14 June, she was told by Mr Takai, the Executive Officer, “that I didn’t need to come in on the 15th, the day after the election, because it was a holiday given by the PM and so I asked him about the 14 June and then he also told me that it was a holiday as well”⁵⁴. On the afternoon of Monday 18 June when 21 and 20 of the Island Administration’s employees respectively had signed the timebook for 14 and 15 June⁵⁵ she said she put the endorsements in it “as a reference for me when I do the payroll for the workers in case some of them hadn’t signed in by the time I have given our timesheet excel sheet then I would know why they didn’t sign it”.⁵⁶

[89] The thrust, if not the precise wording of Una Banaba’s evidence as to Mr Takai’s direction was vehemently rebuffed by him in the following passage:

“Q. Did you authorise her to write that [the words at the top of the timebook for 14 and 15 June]?

A. No.

Q. She says that on Monday 18th you instructed her to write that.

A. She’s lying.

⁵² Evidence p125

⁵³ A witness for the petitioner and the only witness who gave evidence by Skype

⁵⁴ Evidence p37

⁵⁵ Excluding E Kararoa on 14 June and Una Banaba on both days although her entry for 14 June is marked, in red, “8-4 electoral duties”.

⁵⁶ Evidence p37

...

- Q. When did you first see the words Election Day, holiday, holiday by PM, when did you first see that?
- A. The week after the election. I told her not to write anything inside the timebook because she has no right to write anything in the time[book] but she never listens.
- Q. Did you say anything to her that would cause that, was there anything you said to her about a holiday?
- A. No.⁵⁷

[90] Additional evidence bearing on the topic came from Tuanga Tuteru⁵⁸ who was the supervisor of the hall renovations and is the overseer of all Island Administration workers on Rakahanga. He said that there was no work on 14 and 15 June because:

“I was instructed by the executive officer on 14 June that he was advised by the Prime Minister that public servants working for the administration would not be required to work on those two days”.

and that, of the 23 public servants, all but two – Una Banaba and Ngatoko Takai who were working in the polling booth on 14 June – did not show up to work on both days and that “the administration workers did not work on 15 June because it was a holiday given by the Prime Minister”⁵⁹.

[91] In cross-examination he said the words quoted were exactly what the Executive Officer told him on 14 June, and that the instruction was given him before 8am that day, even though some workers would have been at work for several hours at that point. On 14 June he voted, then went home but signed the timebook for 14 June on 18 June “as instructed by the Executive Officer”⁶⁰

[92] Taunga Tuteru’s evidence on the point was not, unfortunately, directly put to Mr Takai. The relevant passages read⁶¹:

- Q. In respect to Tuteru, did you give him any instructions about holidays-
- A. I can't remember doing that, usually I would write if there's like a public servant meetings, holidays like that I would write it out and put it on the wall in our administration office. But I told him that, I can't see the reason why I told him

⁵⁷ Evidence p104-5

⁵⁸ A witness for the petitioner

⁵⁹ Brief para 10

⁶⁰ Evidence p48-50

⁶¹ Evidence p107

that, because I had, if I told him that then I would expect him to go out and tell the workers that its a holiday-

- Q. That would be his job, would it?
- A. Yeah because he's the overseer but I can't remember saying that. Like I said I usually write it down and pin up in our administration office.

And⁶²:

- Q. Taunga Tuteru has said that you told him on the morning of the 15th that he didn't have to go to work, did you tell him that?
- A. I might have but I can't remember but usually I would write it on a piece of paper and put it in the office for when workers come to sign the timebook they can see this saying okay its public holiday or we're going to have a public servant meeting.
- Q. So did you tell workers there would be a public holiday on 14 June?
- A. I didn't say that but like I said I never attended that function for the PM for me to note that the PM agreed to have a public holiday.

[93] As preliminary points to a more general consideration, it is held that one of the significant purposes of the 12 June visit was political and that, though not pleaded as such, the Prime Minister was Mr Hagai's agent in the electoral sense discussed in the authorities. Mr Hagai invited the Prime Minister to the island. He probably spoke at the meeting. He obviously hoped the halo effect of the Prime Minister's visit would redound in his favour in the election two days later and assist in his campaign for re-election. He thereby entrusted material aspects of his electoral campaign to the Prime Minister. However, three interrelated questions arise from that:

- a) Did the Prime Minister declare 14 and 15 June to be public holidays on Rakahanga and was a significant purpose of that announcement to assist in Mr Hagai's re-election?
- b) Did Mr Takai know of the Prime Minister's declaration and instruct all the Island Administration employees, including Una Banaba and Tuanga Tuteru, that 14 and 15 June would be public holidays?
- c) If the answer to (a) and (b) is in the affirmative, what were the legal consequences?

⁶² Evidence p109

[94] As to the first question, the Prime Minister, a lawyer, an experienced politician and one who knows the limitations of his office, was suitably cautious in response to the second question from the Mayor's wife. He did not declare 14 and 15 June to be public holidays, or appear so to do. In a jocular fashion, he merely told the gathering of supporters what their options were after commenting on the gist of s 50 as to 14 June, Election Day. As to 15 June, he made it explicit that were there to be time off on that day was a matter for the Mayor and the Island Government, not for him or central Government.

[95] Although he accepted that those who were so minded might have interpreted his remarks as saying he had declared a holiday on 14 or 15 June, or both, in light of the words the Prime Minister actually used, it could only be by a purposive, perhaps even wilful, misinterpretation of his actual reply by anybody with that frame of mind that could have led to such a conclusion, a conclusion which could have had no foundation.. And the remarks about a possible celebration or a wake are no more than the possibilities available to any politician or party after an election.

[96] Then it must be remembered that the Prime Minister's claimed declaration was only made to a gathering of CIP supporters, not to Rakahanga electors at large. Had there been any declaration that everybody on the island – CIP and Democratic supporters alike, voters as well as non-voters, Island Administration employees and those not so employed – were to have two days' holiday, it might have been expected that there would have been evidence of the dissemination of that news. Bar Tuanga Tuteru, there was none.

[97] Additional to that, had 14 or 15 June or both been declared to be public holidays, it is likely there would have been evidence of the wider population of the island taking advantage of the declaration. Again, there was none.

[98] And, had the declaration been found as pleaded, its possible impact in persuading voters to support Mr Hagai would have been diluted by the declaration benefitting all the island's population, not just those voting for him or being likely so to do. That would have undermined the s 88 requirement that the Prime Minister's declaration must have been directed towards Mr Hagai's re-election or was made to influence electors' votes

[99] Summing all that up, analysis of the Prime Minister's remarks shows that, alert to his powers, he answered the second question by differentiating between 14 and 15 June, was

Careful to do no more than summarise s 50 in relation to the former, and make no promise in relation to the latter. In relation to 15 June, he did no more than refer his questioner, the Mayor's wife, to her husband's Council, which, if anybody was to take up her suggestion concerning the practice, was the body to do it. The Mayor said the council did nothing about the proposition. It would have made little sense when work was already behind schedule and, after all, Island Administration workers (and electors) were, on 14 June, doing no more than their civic duty.

[100] The conclusion was accordingly that it had not been shown that the Prime Minister, at a political meeting on 12 June, declared that 14 and 15 June would be public holidays on Rakahanga.

[101] As to the second question, the high points for the petitioner are, of course, Una Banaba's evidence of being told by the Executive Officer on the afternoon of 14 June and again on 18 June that 14 and 15 June were public holidays, coupled with her annotations in the timebook. There is also Tuanga Tuteru's evidence of having been instructed by Mr Ngatai on 14 June of the advice he had received from the Prime Minister that Island Administration employees did not need to work on those two days.

[102] In that regard, it is significant that Mr Takai's only contact with the Prime Minister during his visit was to exchange greetings as he was embarking on the morning of 13 June. Mr Takai did not attend the 12 June meeting, maintaining his neutral stance, and there is no evidence of any attendee telling him what was said to have occurred on the previous evening about holidays. It follows that Tuanga Tuteru's evidence that Nga Takai told him what the Prime Minister was said to have told him must be erroneous.

[103] Mr Takai was forthright in rebutting Una Banaba's evidence about his instructions and, as already mentioned, was a convincing witness. His evidence was accepted and accordingly the appropriate conclusion was that Mr Takai's evidence was the more credible and consistent and that he gave no instructions about holidays to Una Banaba or Tuanga Tuteru and in fact did not know of the suggested public holidays until 18 June.

[104] Thirdly, it is significant that the claimed instructions were not said to be given until, illogically, workers were already at work on 14 June and there was no evidence of Mr Takai

following his usual practice of notifying those affected by a notice in the administration building near the timebook.

[105] True, Una Banaba annotated the timebook as she did, but there was strong evidence of her previous disobedience of Mr Takai's instructions in that regard, and it is noteworthy that she did not make the endorsements until the following Monday, 18 June, and then made them mainly as a prompt for her when making up the Islands Government's employees' wage records.

[106] Before dealing with the evidence as to attendance and non-attendance at work of Island Administration employees on 14 and 15 June, there are two issues to note.

[107] The first is that, although Island Administration employees are paid by the hour, the evidence was they were still paid for public holidays⁶³.

[108] On that basis, it must be the case that all Island Administration (and other) employees would be paid for 14 and 15 June regardless of whether they worked. So the fact that they were paid for those days would have had no impact on the Island Council's financial position and the most the petitioner could allege in this regard is that, on those two days, the Island Government had to meet the cost of the employees' wages but received nothing of value in return, despite the Island Administration being under pressure to complete the various projects. The other side of that is that because all Island Administration employees were to be paid for 14 and 15 June irrespective of whether they worked, even if had it been found that the pleaded declaration of 14 and 15 June being public holidays had been made, having no financial impact it is unlikely that the declaration would have had any significant influence on the way the workers voted so could not have amounted to the corrupt or illegal practice of promoting or procuring Mr Hagai's re-election.

[109] The secondary preliminary comment is that s 50 requires every employer on Election Day to allow every worker-electors to have time off before 4pm for voting and debars any employer deducting from the worker-electors' wages any sum in respect of a reasonable time taken to cast their vote, breach being a criminal offence.

⁶³ Evidence p76

[110] In relation to the Rakahanga election that means the 23⁶⁴ Island Administration employees were statutorily entitled to a reasonable time off to vote without deduction from their wages. In fact, the evidence shows that so many voted early on 14 June that by mid-afternoon Una Banaba and Nga Takai were aware only a handful of electors had not cast their vote, but the relevant point for present purposes is that at least for a reasonable period of 14 June the Island Administration employees would not be at their usual workplace but would not be penalised in their wages.

[111] That had the result of explaining the movements of some of the workers during that day and in part explains why Mrs Browne and others saw so few working on the hall on Election Day.

[112] To the extent the amended petition pleads as a corrupt or illegal practice the payment of electors despite their not working, the effect of s 50 diminishes the impact that might otherwise have had.in relation to 14 June.

[113] What was the evidence as to attendance or non-attendance at work on 14 and 15 June?

[114] Mrs Browne saw none of the administration staff at work on 14 and 15 June except for Nga Takai and Una Banaba. Una Banaba worked as an electoral official on 14 June but did not work the following day (and did not sign the timebook for that day). Taunga Tuteru who, as supervisor of the employees, was probably in the best position, other than Nga Takai, to observe the situation said Una Banaba and Nga Takai (on 14 June) were the only workers who showed up on both days and listed the 21 he said were absent. He also listed seven others who are central Government, not Island Administration, employees and are therefore not in the timebook who he claimed were absent from work on both 14 and 15 June.

[115] Una Banaba said that “I know on the 14th no one worked and even on the 15th I didn’t see anyone working but added “as we get closer to lunchtime through the afternoon they would’ve completed most of their jobs by that time except when they’re working on the church hall”⁶⁵. Her capacity to observe workers’ actions on 14 June was hampered by her electoral duties that day but she explained her evidence as to the absences of 15 June by saying that most

⁶⁴ Including Nga Takai and Una Banaba

⁶⁵ Evidence 37

of the work is done outside and she passed the church hall between 9-10am and there were no activities there for some hours afterwards⁶⁶.

[116] Against that, Mr Hagai said that on 14 June people signed and voted and went home but on 15 June he saw public servants going to work on the hall next door to his house and indeed helped with the work on the hall on the morning of 15 June. Mr Greig said that on 15 June he worked half a day at the machinery shed near the administration block with eight named others dismantling a scaffold and they spent the afternoon ferrying the ballot boxes to the *Lady Moana* moored offshore. The mayor, Neti Tarau, said all those listed in the timebook worked on both 14 and 15 June but he was clearly relying on no more than the entries in the timebook so his evidence in that regard carried the matter no further.

[117] However, he said that it has long been a practice on Rakahanga for Island Administration workers on Election Day to go to work, sign the timebook, exercise their vote and go home⁶⁷ and that although he believed – erroneously, it was accepted – Island Councils have the legal ability to declare public holidays for overworked staff he did nothing in that respect in May or June 2018⁶⁸.

[118] Trainee Maea went to work on 14 June, voted at about 2pm and spent the rest of the day at the workshop before he went home. He also worked on 15 June⁶⁹. He was doing work for the road on 14 June and maintenance on the tractor on 15 June⁷⁰. Nga Takai said that on 14 June people were working collecting rubbish after signing in and then went to vote⁷¹ but he was occupied at the polling booth for the rest of the day. On 15 June he organised the employees to shift the island boat from its anchorage to the wharf to ferry the ballot boxes to the *Lady Moana*⁷². He worked all day on 15 June⁷³ mainly organising the workers' collection of the rubbish with the tractor⁷⁴. The employees on 15 June were working in the machinery shelter though he accepted that on 14 June most worked on their own projects after voting⁷⁵. Kavana Kavana signed the timebook on 14 June, went to work, voted about 10am, went home,

⁶⁶ Evidence 40

⁶⁷ Evidence 81

⁶⁸ Evidence 82

⁶⁹ Evidence 91

⁷⁰ Evidence 92

⁷¹ Evidence 106-7

⁷² Evidence 108

⁷³ Evidence 116-7

⁷⁴ Evidence 117

⁷⁵ Evidence 118

being unwell, but returned to work at the machinery shed and worked all day on 15 June, though he accepted his timebook record was inaccurate for those days⁷⁶. He listed at least nine workers other than he who worked with him on the scaffolding on 15 June.

[119] The conclusion to be drawn from that conflicting evidence is that, although the entries in the timebook for 14 June are erroneous to some degree, that is partly because they make no allowance for the s 50 absences and seem to be no more erroneous than the eight hours claimed on other days. The evidence, especially that of Nga Takai, is that he distributes the workplan for the day when the workers sign in at the administration building about 8am but that if they complete their allotted tasks before the claimed 8 hours has expired, the practice is that they may go about their own business or, on occasions, do paid work outside those hours, including at night, fishing or accumulating food for the tere party or the Te Maeva Nui expedition. On many days, not just on 14 and 15 June, the timebook contains multiple “8.00-12.00, 1.00-4.00” entries, but those, while accepted as being accurate enough for wage payment records, often, the evidence showed, do not reflect the hours actually worked by the Island Administration employees.

[120] As far as the timebook records for 15 June are concerned, while not all the employees gave evidence, that of witnesses such as Mr Greig, Trainee Maeva and Kavana Kavana, when seen in association with Nga Takai’s evidence, indicates that most of the employees were occupied at their allotted tasks in the usual way during that day and the evidence to the contrary from the petitioner’s witnesses was mainly because of the numbers of employees at the machinery shed rather than working on the hall.

[121] In terms of the amended petition, it was therefore not established to the required standard that Island Government employees who were electors were wrongfully paid on 14 and 15 June – especially the latter – despite not being at work. Accordingly the allegations of corrupt or illegal practice in that regard were not made out.

Barbecue Comment

[122] The next aspect relating to the events of 24 May is the claim Mr Hagai committed bribery and treating by stating at that day’s gathering that on 14 June, “you have only one name to vote for, look for Toka Hagai, cross, then we come home and start our barbecue”.

⁷⁶ Evidence 95-6, 98, 99

[123] That statement, whilst taken directly from the transcript of his speech, was within the proviso to s 89 in that it was clearly “hospitality according to local custom or practice” after the poll had closed in the sense that the offer was only open after people had voted. It therefore did not amount to treating.

[124] Similarly and for the same reasons, it did not amount to bribery because, to offend against s 88, the comment must have been “in connection with any election” and, once electors had voted, the election was, for them, over.

[125] In relation to both claims, it must also be doubtful that, since he made no offer to pay for or provide sustenance for the barbecue, Mr Hagai’s invitation was of sufficient value to amount to “valuable consideration” or to be a “gift or offer” made with the required intent to induce or influence voters’ intentions

[126] In the context of a General Election and in the Rakahanga environment, this, too, should be seen as an offer of “token value which are just part of the usual courtesies of life”⁷⁷ and, as noted, his actions were protected by the proviso to s 89.

Nomination Form

[127] Dealing finally with the nomination pleading, although Mr Takai was involved in the nomination of Mr Hagai in the sense that he may well have forwarded the latter’s nomination form to the Chief Electoral Officer, nothing hangs on that as far as the petition is concerned. That was no more than Mr Takai complying with his duties as Returning Officer under Part 4, especially s 36.

[128] Further, s 31 requires nomination forms to be signed by “at least two registered electors of the constituency for which the nomination is made”⁷⁸. Mr Takai did not sign the form as a nominator and, even had he done so, there is no disqualification for someone like him, a Rakahanga elector, doing that. Nomination merely enables a person to become a candidate⁷⁹, so is a neutral, not a partisan action, and – particularly as it affected Mr Takai’s position – could not be said to infringe s 5(6).

⁷⁷ Field at [65]

⁷⁸ S 31(1)(b)

⁷⁹ “Candidate” as defined in s 2


[129] That allegation accordingly failed.

Conclusion

[130] As demonstrated by the conclusions recorded in the Results Judgment and in these Reasons for Judgment, all the allegations in the amended petition having been dismissed, the amended petition itself was dismissed.

[131] Any issues of costs will be dealt with in overall judgment once the current round of election petitions is concluded.

[132] The certificate required by s 104 appears as a schedule to these Reasons for Judgment.



Hugh Williams, CJ

SCHEDULE 1**Certificate of Court as to Result of Election for the constituency of Rakahanga**

To the Chief Electoral Officer

At the conclusion of the hearing of an amended election petition brought in relation to the Rakahanga constituency in the General Election of 14 June 2018 the Court certifies that it determined that Toka Hagai, a candidate for the said constituency, was duly elected and returned as a Member of the Parliament of the Cook Islands.

A handwritten signature in black ink, appearing to read 'H Williams', written over a dotted line. The signature is fluid and cursive.

Hon. Justice Hugh Williams CJ

SCHEDULE 2

[133] While resort to Courts of Disputed Returns, such as this one, are a not uncommon feature of electoral contests in other jurisdictions, the invariable invocation of the Courts jurisdiction following General Elections in the Cook Islands means the Court becomes part of the electoral process. That may be seen as unfortunate given resolution of the petitions and recounts following a General Election inevitably delays the formation of government and the calling of Parliament and can be argued to downgrade the democratic process in the Cooks.

[134] On the other hand, it is, of course, of prime importance that both elected MPs and the general public have the confidence that due electoral process has been followed and the former have been elected correctly. To that end, resort to the Courts, as provided by law, is perfectly legitimate

[135] However, much of that might, arguably, be avoided were the Electoral Act to be amended so as to constitute a small, independent Electoral Commission with an adjudicative function to determine all objections to inclusion or exclusion from the electoral rolls, subject only to appeals to this Court for errors of law, law which is now reasonably well settled. That would formalise the informal actions now taken by the Returning Officers and the Chief Electoral Officer under ss 24-27, but would have the advantage of restricting the s 28 right of appeal to appeals for error of law only.

[136] Further, experience shows that petitions based on the alleged commission of electoral offences very often involve the provision of hospitality by way of food or drink to electors. But, given that meetings of almost any type in the Cook Islands are followed by a *kaikai*⁸⁰, if the offences of bribery and treating are to remain corrupt practices and electoral offences, to align them with the way of life in the Cook Islands, consideration might perhaps be given to amending the Act to extend the exemption of “hospitality according to local custom or practice” in s 89 to the giving of ordinary Cook Islands hospitality by candidates during the period between the close of nominations⁸¹ and the closing of the poll on Election Day.

⁸⁰ Involving the giving of food but not always alcohol

⁸¹ Definition of “candidate” in s 2