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

MISC. NO. 7/2019

IN THE MATTER	of Parts 7 and 8 of the Electoral Act 2004
AND	
IN THE MATTER	of a by-election in the constituency of Tengatangi-Areora-Ngatiarua
BETWEEN	**NANDI GLASSIE**, Candidate
	Petitioner
AND	**TE HANI ROSE ALEXANDRA BROWN,** Candidate
	Respondent

Date of Petition: 27 March 2019

Date of Amended Petition: 7 May 2019

Date of hearing: 27 & 28 May 2019

Counsel: Mr I Hikaka & Ms H Ellingham for Petitioner
Mr W Akel & Mr B Marshall for Respondent
Ms K Bell for Chief Electoral Officer

Date of Judgment (No.1): 4 April 2019

Date of Judgment (No.2): 7 August 2019

JUDGMENT (NO.2) OF HUGH WILLIAMS, CJ

[WILL0583.dss]

Results: **1. For the several reasons appearing throughout this judgment, particularly those appearing in paragraphs [95](c), [105],[122], [127]-[128] & [131]-[132], the amended petition is dismissed.**

2. All the defences, as pleaded, are dismissed.

3. Costs are to be dealt with in accordance with paragraph [165].

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The Issues

[1] In a by-election held on 18 March 2019 for the constituency of Tengatangi-Areora-Ngatiarua[1] on Atiu, one of the Southern Group of the Cook Islands, Ms Te Hani Brown, the respondent, defeated Mr Nandi Glassie, the petitioner, by 80 votes to 50[2].

[2] Mr Glassie, in an amended petition[3] claimed that, in the by-election, Ms Te Hani Brown by her electoral agents committed bribery under s 88 of the Electoral Act 2004[4] so was not duly elected; her election was void; and Mr Glassie should have been declared elected.

[3] Section 2 defines bribery as having the meaning assigned to the term by s 88 which relevantly reads:

> 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;

This petition is only concerned with s 88(b) and (c).

[4] The nub of the bribery allegations, derived from the ASF, the amended petition and the amended notice of opposition is that, during the election period prior to the by-election, Ms Te Hani Brown's father, Mr George Taoro Brown, arranged for, and committed a company to pay the costs of, a chartered flight from Rarotonga to Atiu return on 15 and 16 March 2019. The

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1 Defined by Part IV of the Cook Islands Constitution and Part 4 of the First Schedule to the Electoral Act 2004.

2 Para 31 of the Agreed Statement of Facts ("ASF") says the Chief Electoral Officer declared the result on 21 March 2019. Of the 129 voters on the electoral roll for the constituency for the by-election, 124 voted and 6 others validly voted by declaration. See the Procedural II section of this judgment for comment on the ASF.

3 For which the leave required by s 92(4) was granted without opposition on 27 May 2019.

4 All statutory references in this judgment are to the Electoral Act 2004 unless otherwise specified.

cost was charged to Super Brown Limited, the trading entity of Mr Brown and his wife, Minister Vainetutai Rose Toki-Brown. The charter cost $5,930 and, in the by-election, Mr and Minister Brown were, in the ways pleaded, the admitted electoral agents for Ms Te Hani Brown[5].

[5] The passengers on the charter flight were the Hon. Prime Minister, Mr Henry Puna; Hon. Deputy Prime Minister, Mr Mark Brown; Hon. Ministers Vaine Mokoroa and George Angene; two executive officers for those Ministers; a public relations advisor to the office of the Prime Minister; a former Cook Islands Party Member of Parliament, Mr Hagai; and five others, four of whom were family members of the respondent and other electors in the constituency. Those five persons were not the respondent's electoral agents. None of the passengers were on the Tengatangi-Areora-Ngatiarua electoral roll[6].

[6] The admitted purpose of chartering the aircraft and promising to pay for it was, to the knowledge of all passengers, "in part political, namely to enable persons on board to procure or endeavour to procure the return of the respondent or the votes of electors in the electorate"[7].

[7] A campaign rally was held on Atiu on the evening of 15 March 2019 at which the Prime Minister, four Ministers – the other three on the flight and Minister Vainetutai Rose Toki-Brown – and Mr Hagai all spoke to attendees, at least 52 of whom were on the Tengatangi-Areora-Ngatiarua roll. Ms Te Hani Brown also spoke. Apart from Ms Te Hani Brown's, the speeches were in Maori with translations provided for the hearing. It is clear all speakers supported Ms Te Hani Brown's candidacy[8].

[8] A purpose of the rally was admittedly political, namely to procure Ms Te Hani Brown's re-election, and one of the purposes of chartering the aircraft and promising to pay for the same was partly political "namely to enable some of the persons on the aircraft to speak at the rally," the latter purpose being known 'to the relevant persons on the chartered aircraft"[9].

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5 ASF 5, 7, 8 & 10. The details, pleaded and admitted, of their agency are considered later in this judgment. There was no evidence the charter cost had been paid.

6 ASF 13-15.

7 ASF 16, but ASF 20 says the charter and the promise were "one" of the purposes.

8 ASF 18-24; Schedules A & B.

9 ASF 19 & 20. The "relevant persons" were not then identified.

[9] Not all those on the outward flight returned on the charter but all the return flights were invoiced to Super Brown Limited[10].

[10] Of the speakers, it is admitted the Prime Minister, Deputy Prime Minister and Mr Hagai were Ms Te Hani Brown's electoral agents "including by speaking at the rally" and that Ministers Mokoroa and Angene were also electoral agents for Ms Te Hani Brown "by canvassing for the respondent and/or by making speeches at the campaign rally"[11].

[11] In response, Ms Te Hani Brown, in addition to a general denial of the pleaded grounds of the petitioner's dissatisfaction, avers the petitioner is unable to establish that the chartering of the flight was a "gift or offer" under ss 88(b)(c); says the four Ministers on the flight publicly supported her campaign, including in five statements in *Cook Islands News* published between 23 January 2019- 27 February 2019[12] ; and pleads that "payment of airfares and similar campaign expenditure … are necessary and incidental expenses" to ensure electors in the Outer Islands can participate in the full political discussion, debate and the other fundamental rights guaranteed by Art 64 of the Constitution. She also pleads that the by-election result was not a consequence of the charter.

Procedural: I

[12] On 4 April 2019 security for costs was fixed under s 93 at $7000 and was paid before 12 April 2019.

[13] By Minute dated 13 May 2019 the hearing of the petition was ordered to be on 27 and 28 May 2019 at the Courthouse in Rarotonga, the necessity which would otherwise have arisen for the petition to be heard, at least in part, on Atiu having been overtaken by the agreement of counsel and the parties on the ASF, thus obviating the necessity for witnesses to be called.

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10 Three of the speakers and other passengers returned on the charter flight. Others, including the two remaining Ministers plus Minister Vanetutai Rose Toki-Brown, returned on a commercial flight after the by-election namely on 21 March 2019 together with the respondent and Mr George Taoro Brown with the fares, $252 per person, being charged to Super Brown Limited in addition to the $5,930. Aircrew accommodation was included in the charter fee: ASF 24, 25 & 30 & joint memorandum of counsel of 14 June 2019 ("joint memo") responding to Minutes (Nos 3 & 4) of 29 & 30 May 2019 at 4(c)(d).

11 ASF 27 & 28.

12 The *Cook Islands News* is available on Atiu.

[14] However, the petition being a matter of considerable interest to the people of Atiu, and the electors of Tengatangi-Areora-Ngatiarua in particular, it was ordered that the hearing be broadcast on Atiu by way of Skype or similar form of transmission. That occurred.

[15] Public notice of the hearing as defined by s 2 and as required by s 95 was given on 16 May 2019 in both Rarotonga and Atiu.

The Context: General

[16] The Parliament of the Cook Islands consists of 24 Members elected by the electors of the various islands of the Cook Islands for a 4 year term by secret ballot under a system of universal suffrage[13]. The country operates on a one vote per voter First Past the Post voting system. Of the country's 24 electorates, ten are on Rarotonga, three on each of the islands of Aitutaki and Mangaia, two on Atiu – Tengatangi-Areora-Ngatiarua, the subject of the present petition, and Teenui-Mapumai – and six on individual islands.

[17] One result is that constituencies have widely varying electoral roll numbers – from 1252 to 58 in the General Election of 14 June 2018 – contrasting markedly with the electoral rolls in larger jurisdictions[14]. Consequently turnout percentages are comparatively high, but majorities often tiny[15].

[18] That means election petitions are a staple feature of General Elections in the Cook Islands[16] with the challenges usually being, broadly, either to the qualification or disqualification of voters on the electoral roll, or of the commission of electoral offences under Pt 7 of the Act, usually the corrupt practices of bribery or treating under ss 87-89. A further result is that, despite Ms Te Hani Brown saying, in her rally speech and her 3 April 2019 letter, discussed later, that she wanted "to give my seat back to my people" and "be elected by them … and not be determined by the Court", as matters currently stand, not just voter choice but Court decisions repeatedly play a part in determining the membership of Parliament and the formation of the Government of the Cook Islands.

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13 Art 27 of the Constitution.
14 Approximately 60,000 to 70,000 per electorate in New Zealand.
15 The majorities in nine electorates following the 14 June 2018 General Election were of 20 votes or fewer.
16 Though not all went to trial, 9 & 7 petitions respectively were filed following the General Elections of 9 July 2014 & 14 June 2018.

[19] There are, currently, three political parties in Parliament. They are, alphabetically, the Cook Islands Party[17] which leads the current Government, the Democratic Party, which is the Opposition in the present Parliament, and the One Cook Islands Party[18] which holds one seat in the current Parliament, that of Minister George Angene.

[20] Unlike the position in other jurisdictions,[19] Cook Islands' political parties do not require to be registered with the Chief Electoral Officer and may adopt such rules as they as they think appropriate[20]. Again unlike other jurisdictions[21] political parties in the Cook Islands are not required to declare their election expenses or donations, and there are no rules regulating or requiring disclosure of amounts, totals or donors to parties in the Cook Islands. Political parties in the Cook Islands receive no public funding and rely wholly on donations and party fundraising for their expenses[22]

[21] Similarly, again unlike other jurisdictions, political candidates in the Cook Islands are under no obligation to declare their election expenses or any donations they receive[23]. This means they are under no obligation to declare how much they spend on an election nor, if they receive donations, from whom or in what amounts. That does not, however, mean that political candidates are free to finance their campaigns as they wish because, in the small constituencies of the Cook Islands, candidates' actions are always visible and often subject to intense scrutiny for something on which to base petitions plus the provisions of the corrupt practices sections, particularly ss 88 and 89, are broadly phrased. The consequence is that actions which, in many other jurisdictions, would be regarded as normal campaign practice, financed in accordance with strict regulations, result, in the Cook Islands, in petitions alleging bribery or treating.

[22] Though this is a topic to which this judgment will need to return, this is not to say that the statutory mechanism for Regulations, covering at least financial matters relating to elections, does not exist: s 106(1) gives the Queen's Representative power to make Regulations "deemed necessary or expedient for the purpose of requiring accountability of receipts and expenditure by political parties and candidates for election campaign purposes" with subs

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17 "CIP".
18 "OCI".
19 Eg. part 4 of the Electoral Act 1993 (NZ).
20 cf s 71 of the Electoral Act 1993 (NZ).
21 cf. part 6A sub-parts 2,3,4 & 6 of the Electoral Act 1993 (NZ).
22 ASF 9.
23 cf Part 6A sub-parts 1,3,4 & 5 of the Electoral Act 1993 (NZ).

(2)(a)-(f) detailing areas such Regulations may cover and subs (2)(g) giving power to make non-compliance an offence. No Regulations have ever been promulgated under s 106.[24]

[23] Those observations are germane to this case since, rendered down to its essence, the main thrust of the bribery allegations under s 88(b) are of a funding, to the tune of $5,930, of the expenses of Ms Te Hani Brown's re-election campaign, or of a donation of that amount towards those expenses, by Super Brown Limited. So analysed, the lack of any Regulations dealing with the question of donations or limits to campaign costs of political parties and candidates in the Cook Islands becomes relevant.

The Context: Atiu

[24] In the General Election held on 9 July 2014 Mrs Vainetutai Rose Toki-Brown, standing under the CIP banner, won the Teenui-Mapumai seat.

[25] However, during the ensuing Parliamentary term she altered her alliance, aligned herself with the Democratic Party and was part of the group which in 2016 unsuccessfully attempted to have itself declared the Government. The circumstances are described in the decision of Full Court of the High Court in *Kumeroa v Attorney-General*[25]

[26] Following that decision, Mrs Vainetutai Rose Toki-Brown re-aligned herself with the CIP for the balance of that Parliamentary term and, when the General Election of 14 June 2018 was called, she was nominated, this time as an Independent, for Teenui-Mapumai and was the successful candidate for that constituency.

[27] Perhaps influenced by her mother standing in the neighbouring Atiu electorate, for the 14 June 2018 General Election Ms Te Hani Brown was nominated as the Democratic Party nominee to stand in the Tengatangi-Areora-Ngatiarua seat. She stood against Mr Glassie and was successful by 71 votes to 48.

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[24] Despite Regulations being made on the topic under the Electoral Act 1998 Pt VI A.
[25] HCCI OA2/2016, 1 March 2017, especially at [105]-[131].

[28] Immediately following the 2018 General Election, the Democratic Party held 11 seats, the CIP 10, the OCI 1, and there were two Independents, Mrs Vainetutai Rose Toki-Brown and Mr Robert Taimoe Tapaitau.

[29] However, within a short time, the CIP entered into confidence and supply agreements with Mr Angene of OCI and the two Independents, with all three becoming Ministers.

[30] That initially gave the CIP and its supporters 13 seats to the Democratic Party's 11 but, after the Rakahanga seat changed in December 2018 from being held by the CIP to being held by the Democratic Party[26], the CIP and its supporters and the Democratic Party each held 12 seats.

[31] Ms Te Hani Brown wished to join her mother in Government[27]. There were two routes by which she might have had achieved her objective: by defecting from the Democratic Party in whose interests she had won the Tengatangi-Areora-Ngatiarua seat and joining the CIP-led Government, or by resigning the Tengatangi-Areora-Ngatiarua seat, thus triggering a by-election.

[32] She chose the latter because adopting the former might have exposed her, throughout the balance of the current Parliamentary term, to the Democratic Party taking steps to declare her seat vacant under the Electoral Amendment Act 2007 if "on an issue of confidence" she failed "to support the majority of the Parliamentary Members of the political party for which [she] was elected"[28].

[33] The constitutionality of the 2007 Amendment has been considered in two decisions of this Court: *George v. Attorney General,*[29] and *Kumeroa* where it was upheld but, rather than risk the Democratic Party moving against her at any time during the current term under the 2007 Amendment, Ms Te Hani Brown chose, on 6 February 2019,[30] to resign her seat by notice to the Speaker under s 9(1)(d).

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26 *Browne v Hagai* CA 9/18, 14 December 2018.
27 *Cook Islands News* article, 23 January 2019.
28 Ss 105A-D of the Electoral Act 2004 enacted by the Electoral Amendment Act 2007 s 2.
29 HCCI OA 1/13, 28 August 2013.
30 ASF 1.

[34] The consequent by-election was that held on 18 March 2019. Ms Te Hani Brown stood, now as an Independent, against Mr Glassie, again her opponent but he, this time, standing under the Democratic Party banner. She won the by-election by the margin earlier mentioned and Mr Glassie filed his original petition for an inquiry on 27 March 2019.

[35] As a postscript, as recounted in Judgment (No.1)[31], on 3 April 2019 Ms Te Hani Brown wrote to the Queen's Representative[32] advising she wished to resign the Tengatangi-Areora-Ngatiarua seat effective immediately and saying "It is my wish borne out of respect for the will of my people that the representative for my constituency … be elected by them as electors of the constituency and not be determined by the Court" and that "I wish to give my people the opportunity to decide on their representative again". As noted in the judgment and in reliance on an interim judgment of the Court of Appeal in *Browne v Hagai,*[33] Ms Te Hani Brown's actions did not terminate the petition, the Court finding[34]:

> [19] … The position is that the Respondent has purported to file a resignation in accordance with the provisions of s.9 of the Electoral Act but the consequential declaration and the like have not yet been undertaken.
>
> [20] Therefore, the decision of the Court of Appeal in *Browne v. Hagai* binds this Court and is to be followed and the Court finds that, in terms of the decision[35], a resignation by a candidate when faced with ongoing proceedings alleging corrupt practices should not be found to terminate the process.
>
> [21] In view of that, whilst it may come as some surprise to the Respondent given the terms of her letter, the purported resignation has not yet been processed in accordance with the Electoral Act and it does not follow from her filing the letter in accordance with the early provisions of s.9 that the petition is moot.

[36] The effect of Ms Te Hani Brown's second notice of resignation requires later consideration.

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[31] 4 April 2019.
[32] The Speaker being absent from Rarotonga for legitimate reasons: s 9(1)(d).
[33] *Browne v Hagai* CA 9/18, 9 November 2018.
[34] *Glassie v Brown* Misc.7/2019, 4 April 2019, at [19]-[21].
[35] At [27].

Submissions

[37] The parties having agreed in the ASF on the facts of this matter,[36] amongst the main submissions of counsel was the fact that, if what occurred in this matter amounted to bribery within ss 88(b)(c), it was a form of bribery which was without precedent either in the Cook Islands or, as far as counsel's and the Court's researches went, in any in common law jurisdiction. Given the worldwide ingenuity of political aspirants, that lack of precedent was notable, but, of course, the outcome of this case must depend on applying the words of the statute to the facts.

[38] Both counsel reviewed the legislative history of s 88, though from different approaches.

<u>Bribery: General</u>

[39] Mr Hikaka, leading counsel for the petitioner, said the prohibition against bribery first appeared in s 69 of the Electoral Act 1966, where the definition was identical to s 88, with the exception that subparagraph (b) included the words "as aforesaid" between "gift or offer" and "to a person". Section 69 of the 1966 Act was replaced by s 83 of the Electoral Act 1998 where the electoral offence of bribery appeared in terms identical to s 88.

[40] Mr Akel, leading counsel for the respondent, however, dated bribery back to the Cook Islands Legislative Assembly Regulations 1958 and 1965[37] which, he submitted, were identical to s 88.

[41] Mr Akel then submitted that s 88 and similar provisions in other common law jurisdictions all stem from the Corrupt Practices' Prevention Act 1854 (UK) s II, paragraphs 3 and 4 which, according to his submissions, read:

> II. The following Persons shall be deemed guilty of Bribery and shall be punishable accordingly:
>
> …
>
> 3. Every Person who shall, directly or indirectly, by himself or by any other person on his Behalf, make any such Gift, Loan, Offer, Promise, Procurement, or

[36] Augmented, to a degree, at the hearing and by the joint memo.
[37] The submissions said in Regs 73 and 69 respectively, though no official text was produced.

> Agreement as aforesaid, to or for any Person, in order to induce such Person to procure, or endeavour to procure, the Return of any Person to serve in Parliament, or the Vote of any Voter at any Election.
>
> 4. Every Person who shall, upon or in consequence of any such Gift, Loan, Offer, Promise, Procurement, or Agreement, procure or engage, promise, or endeavour to procure the Return of any Person to serve in Parliament, or the Vote of any Voter at any election.

Petitioner's Submissions

Mr Hikaka did not demur from Mr Akel's history but submitted the elements of s 88(b) were that, to succeed, the petitioner had to prove on the balance of probabilities that Ms Te Hani Brown or her admitted electoral agents:

a) in connection with an election;

b) directly or indirectly made any gift or offer to any person;

c) in order to induce that person to procure or endeavour to procure the return of any candidate or the vote of any elector.

[42] He accepted there was no additional element of acting corruptly, relying on the decision of the Court of Appeal in *Wigmore v Matapo*[38] which held:

> [68] … The elements of bribery are contained in s 88. If, for example, there is an offer of money to an elector made in connection with an election and in order to induce the elector to vote, 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. This construction is confirmed in the *Borough of Limerick* case (1869) 1 O'M & H 260 in the judgment of Mr Baron Fitzgerald, … at 261:
>
> > Every forbidden act done for the purposes mentioned in this Act is to be regarded as done for a corrupt purpose, and once show that a forbidden act is done for any of the purposes mentioned in the Act it immediately becomes a corrupt act, though it would otherwise have been a purely innocent one; that is to say, in some cases the act itself affords grounds for reasonable inference of the intention with which the act is done, and there the legislature has not

[38] [2005] CKCA 1, CA 14/2004, 19 August 2005.

> introduced the word 'corrupt', and if the act is simply proved to be done, the Court is allowed to draw from it the ordinary reasonable inference *prima facie* that it was done for a corrupt purpose. But there are other cases in which the legislature, for some reason or other, appears to have thought the inference not so strong, and in these cases it introduces the word 'corruptly' for the purpose of showing that it did not intend the ordinary inference of intention to be relied upon.

[43] Mr Hikaka submitted the admissions in the ASF showed the petitioner satisfied all those requirements:

a) Payment for the Rarotonga-Atiu return flights by Ms Te Hani Brown's admitted agents was a "gift or offer".

b) It was agreed that Mr George Taoro Brown, Minister Vainetutai Rose Toki-Brown, the four Ministers on the flights and Mr Hagai were, in varying ways, the respondent's electoral agents.

c) The purpose of the charter was in part political – to enable some of the passengers to speak at the rally – and a purpose of the rally was also political, namely to endeavour to procure Ms Te Hani Brown's re-election.

d) The promise to pay for the flights was made in connection with the by-election, and the endeavours to procure the votes of electors were the speeches at the rally supportive of Ms Te Hani Brown's candidacy.

e) All of which, he submitted, satisfied the requirement that the "gift or offer" be made to enable persons to "procure or endeavour to procure" Ms Te Hani Brown's return to Parliament, and those acts, in combination, were an attempt to affect the by-election result and were therefore corrupt in the s 88/*Wigmore* sense[39].

[44] By reference to dictionary definitions, Mr Hikaka submitted what occurred in this instance was a "gift" or "offer," emphasising the phrase being preceded by "any," and submitting that deletion of the phrase "as aforesaid" from the 1998 and 2004 Acts indicated

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[39] Though, in view of *Wigmore,* he withdrew his submissions on the need to prove corruption.

Parliament intended the bribery prohibition to capture a broader range of conduct than the 1966 Act.

[45] Case law, he submitted, supported the submission that payment for the flight amounted to a "gift or offer," relying on *Re Te-Au-O-Tonga Election Petition*[40], *Cooper v Slade*[41] and *Peua v Lazaro*[42]. But, importantly, he accepted that in all those cases the impugned actions involved provision of gifts or offers directly to electors, a feature absent from the present case.

[46] Mr Hikaka emphasized the difference between the cost of the charter, $5930, and the normal commercial Rarotonga-Atiu return fare of $378-$566 per person, and the fact the charter was timed to fit the politicians' schedules. Had Super Brown Limited not met the charter fee then, he submitted, to make the trip and avoid s 88, the passengers would have had to meet their fares or the charter cost from other sources.

[47] The petitioner, he submitted, met the elements of s 88 by payment of the fares for the four ministers and Mr Hagai so they could speak at the rally and, further, in the case of Ministers Mokoroa and Angene, to enable them also to carry out canvassing for Ms Te Hani Brown.

[48] Endeavouring to meet in advance the respondent's submissions, Mr Hikaka contended from the facts that, first, the CIP announced it would field no candidate in the by-election, and, secondly, that the Deputy Prime Minister had said in *Cook Islands News* articles between 23 January – 27 February 2019 that it[43] supported Ms Te Hani Brown's candidature[44], that[45]:

> "It is no less a bribe for someone to have received payment for something they were going to do anyway, than it is for them to change their actions as a result of the bribe – if a candidate offers an elector $100 if they vote for the candidate, it does not matter that the elector had already declared that she supported the candidate. The primary intention that is examined in bribery cases is that of the briber, not the bribed".

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40 [1979] NZLR S 26.
41 (1858) 6 HL Cas 746.
42 CIHC Misc.115/2010, 17 February 2011, Nicholson J.
43 Not, strictly, the Government, but counsel did not take the point.
44 The text appeared in para 32 of the Amended Notice of Opposition but not in the ASF and it was suggested judicial notice might be taken of the articles. "Judicial notice" might extend to publication of the articles but not to the veracity of the contents, but no issue was taken on the point.
45 Petitioner's submissions, para 37.

[49] He submitted providing free flights to enable persons to speak at a campaign rally exceeded declarations of support and engaged s 88. Acknowledging that it would not amount to bribery if the CIP broadcast statements in support of Ms Te Hani Brown at its expense or paid the Ministers' own fares to speak to electors, he nonetheless submitted that speakers travelling on customized services designed to make their attendance possible with fares being paid by the respondent's agents elevated those otherwise innocent actions to bribery.

[50] In submissions designed to meet the respondent's defence that what occurred in this matter was part of electors' freedoms of speech, expression, peaceful assembly and association guaranteed under Arts 64(1)(e)(f) of the Constitution, Mr Hikaka submitted the events on which the amended petition was based did not infringe any of those rights for any individual; the Ministers and others were free to attend the rally and speak, but had to fund their attendance themselves to avoid breaching s 88.[46]

[51] In any event, he submitted, s 88 is a measure designed to protect public order and the general welfare and is accordingly within Art 64(2), relying on a comment in the United Kingdom that:

> "if an election is proved to have been tainted by corrupt or other improper practices which are directed towards securing the election of a candidate, then surely the election of that candidate cannot be democratically acceptable[47]"

and that

> "… the main object of the legislature in dealing with the conduct of elections is to secure the electors in free exercise of the franchise and whatever interferes with that object violates the purposes of these provisions and strikes at the highest interests of the whole body politic"[48].

[52] Mr Hikaka submitted that any restrictions on the Art 64(1) rights imposed by s 88 are longstanding, proportionate and designed to "remove the corrosive effect of money on the electoral process but do not prevent a person who truly wishes to assert their rights from doing so".[49]

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[46] The defence claimed infringement only of the rights of the electors of Tengatangi-Areora-Ngatiarua, not of anybody else, including the public, respondent and politicians.

[47] *Re Central Ward, Slough Election Petition, Simmons v Khan* [2008] EWHC B4 at [37].

[48] *Re Te-Au-O-Tonga Election Petition*, supra at S 66.

[49] Petitioner's submissions para 45.

[53] Endeavouring to meet the submission that the charter cost was an election expense, Mr Hikaka pointed to the lack of an expenses' regime for candidates or parties in the Cook Islands. That led to a submission that, irrespective of whether expenditure might also be an election expense, if it fell within s 88, it must be found to be bribery. Accordingly, drawing on other jurisdictions with statutory election expense and donation regimes, was unhelpful[50]. While he accepted that enactment of a candidate or party expenses' regime may be of assistance to the Cook Islands in reducing the prevalence of election petitions, he submitted treating the charter fee as an election expense was a matter for Parliament, not the Court.

[54] As to the consequences given the seat is prayed in this case, Mr Hikaka submitted that a finding of bribery attributable to Ms Te Hani Brown must necessarily lead to a declaration under s 98(1) that her election was void. Thereafter, there needed to be a scrutiny to remove from the votes cast the vote of every person who voted at the election who was proved to have been "so bribed"[51]. Those, he argued, were the persons whose votes were tainted by the corrupt practice attributed to Ms Te Hani Brown, namely those subject to the endeavours of the Ministers and Mr Hagai to procure votes for her. If, on the scrutiny, more than 30 votes were removed, Mr Glassie should be declared to have won the seat: if fewer than 30 were removed, a by-election should be ordered.

Respondent's Submissions

[55] For Ms Te Hani Brown, Mr Akel summarised her case by saying the expenses of the charter flight were lawful campaign expenses, not bribes, and not a "gift or offer" under ss 88(b)(c). Further, they were necessary incidental expenses to ensure voters in the constituency had the benefit of, and could effectively engage and participate in, full political discussion and debate in a free and democratic society such as the Cook Islands. Freedom of thought, speech, expression and peaceful assembly and association encompassed the freedom to seek, receive and impart information and opinions, an aspect of the Art 64 fundamental rights of special importance in a political setting. Finally, he submitted the result of the by-election was not a consequence of the charter.

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[50] Eg. Part 6A and 6AA of the Electoral Act 1993 (NZ), Broadcasting Act 1989, Pt 6 (NZ) and part 2 of the Representation of the People Act 1983 (UK).

[51] s 98(3).

[56] Enlarging on that summary Mr Akel submitted s 88(a) was enacted to outlaw direct vote buying while ss 88(b) and (c) were designed to outlaw indirectly "buying a seat in Parliament". Mr Akel submitted the petition effectively alleged Ms Te Hani Brown, by the acts of her agents, "bought" the Tengatangi-Areora-Ngatiarua electorate. He further summarised Ms Te Hani Brown's position in the following way[52]:

> First, examination of the legislative history and context of s 88 establishes that the provision is not intended to operate as a general prohibition on contributions to an electoral candidate's campaign expenditure.
>
> Second, Ms Brown submits that, on a purposive reading, s 88 does not prescribe limits on financial contributions to lawful campaign expenditure by candidates or their agents.
>
> Third, s 88 has to be read consistently with the rights of the [Tengatangi-Areora-Ngatiarua] electors to hear from the members of the Executive who visited the island on 15 March 2019, as part of the electors' right to participate in the election, and in furtherance of their right of freedom of speech and expression (which includes the right to receive information).

[57] Mr Akel reviewed the legislative history of bribery, particularly in the United Kingdom and the Cook Islands, submitting that the secret ballot reduced opportunities for bribery by increasing transparency and probity in electoral administration amid provisions for limiting campaign expenditure. That, he submitted, turned concern towards fair electoral competition and other forms of regulation rather than a Procrustean attempt to align modern campaign practices with a definition of bribery largely unchanged in nearly 170 years, despite considerable changes in societies in the interim.

[58] The 1854 United Kingdom Statute, he submitted, was directed against the more wholesale traffic in votes at the time – the "buying" of a seat – but this is a circumstance of little contemporary importance, at least in Britain where payment of a candidate's expenses has been held not to be bribery[53].

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52 Respondent's submissions, para 12.

53 *Rogers on Elections*, Vol III (1906), p380-82, 37 *Hals Laws* "Elections and Referendums" paras 709 and 711, fn14, citing the *Coventry Case*; *Berry v. Eton & Hill* (1869) 1 O-M&H, 97 at 101-2.

[59] In New Zealand, no case of election bribery has been reported for more than a century: not since *The Bay of Islands Electoral Petition*[54]. The present case, Mr Akel submitted, was akin to the United Kingdom situation described in *Parkers Law and Conduct of Elections*[55] where the following appears:

> "the reasonable and necessary expenses of a canvass by volunteers may be incurred by the candidate's election agent, for although the payment of canvassers is illegal there is no prohibition against expenditure for the materials for a canvass … In addition, an individual canvasser may pay out of his pocket any *small* legal expense, if such sum is not repaid to him."

[60] Despite the passage from *Wigmore* earlier recounted, Mr Akel submitted that proof of corruption was necessary for a finding of bribery; corruption in the electoral sense importing notions of influencing the behaviour of a public official or agent contrary to recognised rules of probity, perverting the judgment or influencing the action of a person in a position of trust, or procuring an illegal or dishonest action in favour of the giver[56]. Paying travel expenses of speakers was lawful and legitimate campaign expenditure, never intended to be proscribed by s 88.

[61] Mr Akel additionally submitted payment of the fares of the charter flight passengers was not an inducement by Mr George Taoro Brown to procure or endeavour to procure the return of his daughter to Parliament: it simply enabled individuals to attend a campaign rally and speak on her behalf. The speakers would willingly have spoken in support of Ms Te Hani Brown anyway, but without payment of their expenses, by themselves or others, could only have done so from afar. What happened on this occasion was, in Mr Akel's words, "what politicians and parties do" to secure election.

[62] He referred to s 5(j) of the Acts Interpretation Act 1924 (NZ)[57] which requires a purposive approach to statutory interpretation to identify the "mischief or defect" the provision was intended to cure, and a construction to "supress the mischief and advance the remedy"[58].

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[54] (1915) 34 NZLR 578, 584 where an offer to procure a seat in the Upper Chamber of Parliament to induce a putative candidate to withdraw from standing for the Lower House was held to be to amount to bribery as a corrupt offer of a seat in the Legislative Council amounted to an offer of an "office".

[55] Loose leaf edition, para 9.13, p9.4-5.

[56] *Field v R* [2012] 3 NZLR 1, at [18].

[57] In force in the Cook Islands per s 622 of the Cook Islands Act 1915, which is reflected in Art 65(2) of the Constitution.

[58] *Heydon's Case* (1584) 3 Co Rep 7a.

In combination, those provisions can lead to Courts adopting a narrow rather than a wide meaning, unless grammar yields to purpose[59]. Here, Mr Akel submitted, the strict grammatical words of ss 88(b)(c), if taken in isolation, should, properly construed, yield to their obvious purpose. Mr Akel submitted the petitioner's approach to ss 88(b)(c) was overly literal as, on a purposive interpretation, the subsections were not intended to cover the mere payment of travel expenses associated with canvassing for a candidate. Seen otherwise, canvassing by Ministers would be restricted to areas close to Rarotonga which, in its turn, would be a significant limit on the freedom and rights of electors in the more remote areas of the Cook Islands to see and hear their politicians personally.

[63] Noting that, in the Cook Islands, political parties receive no public funding but meet expenses from donations and fundraising, Mr Akel submitted Super Brown Limited's assumption of the costs of the charter flight was a private donation, with any perceived inequality in campaign funding capable of being addressed by Regulations as to the limits of what was considered by Parliament as a reasonable regime in that arena.

[64] In so doing, Mr Akel, relied on a number of cases, both here and overseas, particularly *Lineen v Macquarrie & Vaitamanga Holdings Ltd*[60] – "to assist in ascertaining the purpose of the legislation the Court may look for an understanding of the theme and context of the Act" – and *The Green Room Limited v The Landowners of Nukupure Section 3D1 Ngatangiia*[61] where the Court of Appeal held:

> ….. statutory interpretation involves considering the text and purpose of the relevant provisions, taking into account the scheme of the particular legislation, the wider legislative landscape and the social and economic context. Furthermore, without usurping the policy-making functions of Parliament, Courts should interpret statutory provisions in order to make them work in a practical and common-sense fashion.

[65] Mr Akel stressed the approach recently adopted by the High Court of Australia in *Spence v Queensland*[62] where, answering the rhetorical question of how far Regulations should go to combat corrupting influence on elections, Edelman, J held that such regulations were

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59 *McKenzie v. Attorney General* [1992] 2 NZLR 14, at 17.
60 CIHC OA 3/2008, 26 September 2008, Grice J, at [27]-[29].
61 CICA CA 9/2015, 16 June 2016, at [22], citing *Northern Milk Vendors Association Inc v. Northern Milk Limited* [1988] 1NZLR 530, at 537-8.
62 [2019] HCA 1 at 137, para 343.

"quintessentially a matter for political judgment" and, after identifying certain possible parameters, said they were "hardly a judgment which Courts are equipped to second-guess".

[66] Mr Akel accepted, however, that "if there are concerns about campaign funding, any further consideration of policy reform in this area is not for this Court to undertake in the context of the present case"[63].

[67] His submissions then passed to consideration of s 106 and its historical antecedents, noting that under s 106D of the Electoral Act 1998 electoral expenditure of candidates and parties could not exceed amounts prescribed by the Chief Electoral Officer. Thus, in his submission, electoral expenditure within those limits could never amount to bribery but, he submitted, Mr Glassie's approach would bring about that result. The absence of Regulations under s 106 was, Mr Akel submitted, an indication from Parliament that s 88 was not to be regarded as a proxy for an election expenses regulatory regime, but this case was an attempt to "bolt an election expenses regulatory regime onto s 88". The petitioner's interpretation of s 88, if accepted, would effectively ban all paid political advertising, but there was no evidence Parliament intended to restrict legitimate election expenditure, including such avenues.

[68] Turning to the fundamental rights and freedoms in Art 64, he submitted that the language of s 88 should be construed in accordance with those rights and should be limited, only to the extent necessary, so as to strike a fair balance between the rights of the individual and the interests of the community. So approached, facilitating attendance of the speakers at the rally gave electors of the constituency a meaningful opportunity to see and hear the leading members of the Government to which Ms Te Hani Brown would, if elected, give her vote. Such an approach, he submitted, was consonant with the correct approach to interpretation where constitutionality is challenged, as in the judgment of the Privy Council in *Arorangi Timberland Limited v Minister of the Cook Islands National Superannuation Fund*[64].

[69] Here, the fundamental rights in Art 64(1)(e)(f) included the right to receive and impart information. Those rights included being at the rally when the speakers addressed the gathering, and thereafter exercising the right to vote[65].

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[63] Respondent's submissions, para 54.
[64] [2016] UKPC 32, 17 November 2016, at [29]-[40].
[65] *International Covenant on Civil and Political Rights*, Art 19(2), *George* supra, at [95]-[100].

[70] Under Art 64(2), s 88 may not be construed to abrogate, abridge or infringe any of the freedoms in Art 64(1). Thus the legislation should be read down to comply with those Constitutional requirements[66].

[71] Reading down, however, Mr Akel contended, was unnecessary as s 88 was never intended to limit campaign funding through the payment of legitimate travel expenses to attend campaign rallies. At the most, any reading down of s 88 must be done proportionately to strike the fair balance mentioned involving the rights of individuals, including candidates, though he accepted that is a matter for Parliament. Thus, in Mr Akel's submission, a purposive construction of "bribery" would only include deliberate attempts to influence an election outcome through wrongful means, that being the least possible intrusion on electors' rights under Art 64(1).

[72] Turning to s 98, Mr Akel submitted that, for the Court to conclude s 98 was engaged, it must have accepted that those on the flight received a "gift or offer" but, in the respondent's submission, s 98(3) can only ever apply to the votes of recipients of that gift, that is to say, those on the flight, and, as none were electors in the Tengatangi-Areora-Ngatiarua constituency, no relief should follow. Those hearing the speakers were not the recipients of the gift or offer and, accordingly, could not have been bribed. Given the admitted electoral agencies, the allegation of bribery was, Mr Akel submitted, tantamount to the agents and the candidate bribing themselves, an impossibility at law.

Petitioner's Submissions in reply

[73] In reply, Mr Hikaka said the respondent's submission that she and her electoral agents were bribing themselves failed on the issue of inducement. It was the respondent who was asking the Court to legislate.

[74] Most of the cases cited by the respondent were, Mr Hikaka submitted, irrelevant as they were decided in jurisdictions with statutory regimes covering election expenses. Here the issue of intent was crucial. Were there Regulations under s 106, the likelihood was that this case may never have been launched with s 106(2)(a-e) providing examples of topics which might have been covered.

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66 Art. 64(2), *Arorangi Timberland*, at [30].

[75] The "bribing oneself" submission disregarded, Mr Hikaka submitted, the way in which Ms Te Hani Brown's electoral agents came to be such. The speaker-passengers only became electoral agents because of their speaking and canvassing, not more generally.

Discussion and Decision

[76] The appropriate approach to the necessary decisions in this matter is first to decide whether the matters complained of fit within the wording of s 88(b)(c) by considering the agreed facts and pleadings in the light of the correct approach to such issues and then, if it be held the case satisfies the requirements of s 88(b)(c), consider whether the respondent's submissions derogate from that tentative initial conclusion. But, before embarking on that exercise, some observations on the procedure adopted by the parties and counsel are germane.

Procedural: II

[77] As will appear throughout this judgment, the procedure adopted by the parties and counsel in agreeing on the ASF and thus dispensing with witnesses, while convenient, cost-saving and, to a point, efficient, was shown, as the hearing and preparation of this judgment proceeded, to have significant limitations.

[78] Some of the difficulties inherent in the procedure utilised were set out in a minute issued on 13 May 2019 which said:

> …
>
> [3] The parties and counsel are to be commended on agreeing on the contents of the Agreed Statement of Facts with the savings in Court time and legal costs for the parties which results. But, amongst the drawbacks in parties and counsel adopting an Agreed Statement of Facts approach, is that they can effectively become the sole arbiters of relevance without additional matters of relevance arising from the calling of evidence becoming part of the case. Further, Judges are the final decision-makers on matters of relevance and, as the process of agreeing on Agreed Statements of Facts does not include the Judge, the Judge's own insights relating to the case cannot be incorporated.
>
> [4] In this case, once submissions are received and the approaches of the parties become more readily apparent than is discernible from the Amended Petition and the Notice(s) of Opposition, counsel and the parties may be asked to provide additional factual material.

[79] While certain information additional to the ASF was provided by counsel after the hearing,[67] given the breadth and depth of the material furnished in the joint memorandum, for the Court to have sought further clarification to address the numerous lacunae elsewhere identified might have risked the Court descending too far into the arena. Ultimately, the way they plead and present their case, and the evidence they choose to adduce, is parties' and counsel's choice, and the success or failure of their case is the consequence of that choice. It is not for Courts to supplement parties' choices, especially as far as their pleadings and chosen causes of action are concerned..

[80] A further difficulty stemming from the procedure the parties followed is that they argued that, all factual matters having been covered by the ASF, the decision in the case was purely a matter of law.[68] That approach may perhaps have been open were this, say, an application for a declaratory judgment founded on statutory interpretation, but when, as here, remedies, such as the seat being prayed, are sought, the factual bases, agreed or found, to support such a remedy being granted must be rigorously scrutinised, inferences taken be only those logically available, and any evidential and pleading gaps taken into account in reaching the result.

[81] Finally in this area, arriving at the necessary decisions in this matter was not assisted by differences or omissions in and from the wording of the main documents. Some have been noted. Others will appear. All are important. In addition, the ASF consisted merely of verbatim recitation of the 31 paragraphs in the "particulars" section of the amended petition and the amended notice of opposition only consisted of routine admissions of all 31 paragraphs, prefaced by denials of the two paragraphs setting out the grounds of the petitioner's dissatisfaction, and succeeded by details of the defences earlier summarised. That approach proved unilluminating.

[82] The result of the matters discussed in those last paragraphs bears out the concerns expressed in the Minute of 13 May. There were found to be significant gaps in the ASF, some of which are pivotal, but all of which could easily have been covered, one way or another, in evidence had witnesses been called.

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[67] In the joint memo.

[68] Eg: Applicant's submissions, para 1; Respondent's submissions, para 78; Joint memo, 5(e); Joint memo of 9 May 2019, para 5.

Interpretative Approach

[83] Mr Hikaka submitted the correct approach to matters of this type is for the Court to "hug the shores of the Statute"[69] applying the words of s 88 to the agreed facts.

[84] Assuming the metaphor was intended to indicate, colourfully, that the proper approach is to apply the precise words of the statute to the facts as found or agreed, it is uncontentious and conforms with other expressions of the principle such as that of the Court of Appeal in *Browne v. Hagai*[70] that "in defining electoral offences the words that Parliament chooses are critical" and that, at least in relation to the electoral offence of treating under s 89, the Court of Appeal has said a strict approach is to be followed. In that case, rejecting a defence, the Court said "Parliament decided to adopt the strict principles of electoral law in a modern democracy"[71].

[85] That strict approach is also consonant with the passage earlier cited from *Wigmore.* The offence of bribery is complete if there is an offer to an elector in connection with an election to induce the elector to vote[72]. Even if there is no proof the offeror acted corruptly in the electoral sense "the mere commission of the acts [is] declared to be corrupt"[73].

[86] Several additional matters must be added to the mix in settling on the correct approach to the interpretation of s 88 and the actions alleged to constitute bribery in this case.

[87] The first of those is, as has been mentioned in most of the cases decided since the mid-late1800s, actions undertaken with the intention and object of doing things the statute forbids are corrupt in the sense that they are intended to influence voters and thus undermine and pollute the integrity of the democratic process.[74] A strict, even conservative, construction of law and fact is therefore appropriate.

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69 The phrase is recorded as a quote, though unsourced, in the judgment in the procedurally unusual decision in *Re Pukapuka/Nassau By-Election* HCCI Misc.134/00 15.2.01, David Williams, J now Sir David Williams, P. at [27].

70 Supra fn 30, at [71].

71 At [74], p22.

72 Though the passage refers to s 88(a), not in issue in this case.

73 Supra at [42] .

74 *Hals Laws,* Vol 38A, para 709, p222, fn 11; *Slough Central Ward supra* para [51]fn [47] at 13, 36-7.

[88] The second matter which conduces towards a strict interpretation of the electoral offences in Pt 7 of the Act is that s 87 makes the corrupt practices defined in ss 88-91 serious criminal offences, the maximum punishment for which is imprisonment for up to five years, and ss 87(2) and 100 require electoral officials and the Court to refer certain electoral offences to the Police. While, because they undermine the integrity of the electoral process, actions which clearly breach the Act are deserving of such serious consequences, those committing them are entitled not to suffer those consequences unless their breaches are clear.

[89] All those factors strongly suggest that strict observance of the prohibitions, and strict interpretation of the wording in Pt 7, particularly ss 88 and 89, coupled with strict interpretation of the facts, is required of persons engaged in the electoral process and by the Court.

[90] However, before turning to assessing whether the pleaded actions of the various persons involved in this matter breach the terms of s 88, two additional matters need noting.

[91] First, all the allegations against Ms Te Hani Brown result from actions of her two admitted groups of electoral agents. That makes the ambit of agency in electoral law relevant. Secondly, and following on from that, it is necessary to analyse precisely what actions are alleged or agreed each of the five persons or groups of persons directly involved in the matter undertook to assess what they knew or did and, with the groups of electoral agents, whether they constitute a breach of s 88. The consequences – for actors and those whom the actors make liable – can be so severe that only actions which, strictly considered, fit within actions forbidden by statute should be held to constitute a breach.

Electoral Agency

[92] It is settled law that agency, in the electoral arena, is a separate category of agency, wider than criminal agency or civil agency. The result for candidates of a finding that a person or persons are their electoral agents is as follows[75]:

> A candidate's liability to have his election avoided under the doctrines of election agency is distinct from, and wider than, his liability under the criminal or civil law

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[75] *Hals Laws*, 5th Ed, vol 37, (2013), p 421-2, paras 244-5 (citations omitted). As Mr Hikaka submitted, even a single act of corruption by a candidate or an agent voids an election: The *Norwich Case; Stevens v Tillett, Ray's Case* (1871) 2 O'M & H, at 41.

> of agency. Once the agency is established, a candidate is liable to have his election avoided for corrupt or illegal practices committed by his agents even though the act was not authorised by the candidate or was expressly forbidden. The reason for this stringent law is that candidates put forward agents to act for them; and if it were permitted that these agents should play foul, and that the candidate should have all the benefit of their foul play without being responsible for it in the way of losing his seat, great mischief would arise.
>
> 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

Or, as it was put in *Re Te-Au-O-Tonga*[76]

> … no matter how well the Member may have conducted himself in the election, no matter how clear his character may be from any imputation of corrupt practice in the matter, yet if an authorised agent of his, a person who has been set in motion by him to conduct the election, or canvass voters on his behalf, is in the course of his agency guilty of corrupt practices, an election obtained under such circumstances cannot be maintained. As it has been expressed from early time, no person can win and wear a prize upon whose behalf the contest has not been legitimately and fairly carried on…
>
> …whether it has been the principal who has been guilty of illegality, or whether the illegality has been committed by his agent only, even without his authority or against his will, provided it be done in his agency and for the supposed benefit of his principal, such principal must bear the brunt, and cannot hold the benefit in respect of that in which the agent has compromised him, and would in a matter of this description have also betrayed the public, who have a right that a just election shall be had. The amount of the injury done by the agent, if the injury has been done of the character … described, is immaterial. If an agent bribe one voter with 2s 6d, and that voter votes for the candidate, election void. If an agent bribe one voter with 2s 6d, and the voter taking the 2s 6d with purpose, express or implied, of voting accordingly, should break his promise, and vote for the other side, election still void. Although the result of the bribe was nothing as to the poll, the result was in point of law that an illegality of so gross a character and so difficult to trace would have been committed that no election would be safe, no community would be sure but that elections were gained by the exercise of corrupt practices, unless, for the sake of all, the election in which an agent has been guilty of such a malpractice were held void as against the principal of that agent. It is not by way of punishment to the principal that the election is held void, it is not because the majority has been swayed or even affected by the malpractice that the election is held void, but it is because malpractices designated as corrupt by the common law and by the Legislature in the Corrupt Practices Act, are so odious and are so dangerous, that it is thought better to hold void an election where either such practices have generally prevailed, whether traceable to a Member or his agents or

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[76] Supra at [45] at S 46-7, citing the *Blackburn Case* (1869) 1 O'M & H, 198.

> not, or where a single instance of such corrupt practice has been distinctly traced to the Member or to an agent of the Member…

[93] A different formulation of the principle was endorsed in *Slough*[77] where the following appears:

> By election law the doctrine of agency is carried further than in other cases. By the ordinary law of agency a person is not responsible for the acts of those whom he has not authorised, or even for acts done beyond the scope of the agent's authority … but he is not responsible for the acts which his alleged agents choose to do on their own behalf. But if that construction of agency were put upon acts done at an election, it would be almost impossible to prevent corruption. Accordingly, a wider scope has been given to the term 'agency' in election matters, and a candidate is responsible generally, you may say, for the deeds of those who to his knowledge for the purpose of promoting his election canvass and do such other acts as may tend to promote his election, provided the candidate or his authorised agents have reasonable knowledge that those persons are so acting with that object.

Personnel: A Summary

[94] That leads on to consideration of what the five persons or groups of persons most involved in this matter did or knew. A summary is all that is necessary at this stage to set the scene: more detailed comments appear later in consideration of the wording of the particular phrases.

[95] The five persons or groups are:

a) The respondent, Ms Te Hani Brown. One of the unusual aspects of this case is that she is not alleged to have done anything personally which could be argued as amounting to bribery. Not even her speaking at the rally is claimed to breach s 88. All the actions said to amount to bribery are those of one or other of her two groups of electoral agented which are claimed to be attributable to her.

b) Minister Vainetutai Rose Toki-Brown. She is admitted to be an electoral agent of her daughter by the respondent adopting her actions, by being her mother and by the Minister canvassing for her, but in no other way. Her speaking at the rally

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77 Supra at [51] at 57-8 citing the *Wakefield Case XVII* (1874) 2 O'M & H, 100.

is not said to amount to bribery and, since her canvassing for her daughter – undetailed in the ASF – is pleaded separately, it must be the case that her campaign speech did not qualify as canvassing[78].

c) Mr George Taoro Brown. He is admitted to be the respondent's electoral agent, but only by being her father, canvassing for her and she adopting his actions. All his actions in arranging the charter flight and committing Super Brown Limited to pay for it are not said to have involved Ms Te Hani Brown or her mother. None were pleaded to have been done by him as Ms Te Hani Brown's electoral agent. His canvassing was similarly unparticularised, and it was not suggested the chartering arrangements fell into that category[79].

d) (i) The 13 passengers on the charter flight, of whom the five who spoke are a subgroup.

(ii) Nothing relevant to the amended petition is alleged as to the eight non-speakers, though most, if not all, attended the rally[80].

(iii) The five speaker-passengers were admitted to be electoral agents for Ms Te Hani Brown, all five by speaking at the rally, and, additionally, two by canvassing for her, again in an unspecified way[81].

e) (i) The electors on the Tengatangi-Areora-Ngatiarua roll, of whom the 52 attendees at the rally are a subgroup.

(ii) The arranging of the charter at Super Brown Limited's expense is at the heart of the amended petition, but there was no allegation that either of the electors' groups knew anything of those arrangements.

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78 ASF 5.
79 ASF 5 compared with ASF 7 & 8.
80 Joint memo 5(c).
81 ASF 27 & 28.

Section 88

[96] The judgment turns to the words of s 88 applied to the actions of those involved.

"In connection with any election"[82] (s 88)

[97] In relation to the phrase "in connection with any election", it is pertinent to observe that Ms Te Hani Brown's amended notice of opposition denied the whole of the two global pleadings of dissatisfaction in the amended petition, including that she or her agents made gifts or offers to electors under s 88(b) "in connection with the election".

[98] However, as her pleading was not pursued in submissions and it is clear that all the matters raised in the pleadings and the ASF were "in connection with" the Tengatangi-Areora-Ngatiarua by-election, that aspect of the defence fails.

"every person"; "any person" (s 88 & 88(b))

[99] These phrases could hardly be wider, but in a statutory analysis, measured against the ASF, such as this primarily is, it is to be noted that "person" is not defined in the Electoral Act 2004 so the inclusive definition of "person" in s 4 of the Acts Interpretation Act 1924 applies. That includes corporations sole and bodies of persons "whether corporate or unincorporate". The breadth of s 88 is accordingly such that even political parties, however organised, may be within the reach of the section[83].

[100] The phrase "any person" clearly applies to Ms Te Hani Brown notwithstanding that, as the earlier summary of the groups' involvement shows, there were no actions by Ms Te Hani Brown personally which are alleged to have amounted to a breach of s 88. Her speaking at the rally is not alleged to be bribery, which, of relevance to Ms Te Hani Brown's defence that the charter arrangements were "necessary and incidental expenses", is open to being construed as an acknowledgment by the petitioner that candidates soliciting votes by speaking at campaign meetings, and having neighbouring MPs do the same, does not amount to bribery, or at least

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[82] By-elections are governed by the same rules as elections: s 105(3).

[83] So their opponents might regard extravagant election promises as amounting to bribery? See Geddis *Electoral Law in NZ: Practice and Policy,* 2nd ed (2014), para 8.3.2, p 122. The language of s 88 is so wide actions of saboteurs, even of well-wishers might, in certain circumstances, avoid an election.

did not do so in these circumstances, though any such acknowledgment says nothing about money.

[101] Elaborating on the summary, in the particulars and ASF it is admitted[84] that Mr George Taoro Brown "arranged for, and promised to pay the costs of" the chartered aircraft and "requested" that the invoice for the charter be made out to Super Brown Limited.

[102] However, it is now agreed that the rally was "conceived of" by Mr George Taoro Brown and the Secretary-General of the CIP and was 'planned before the flight was arranged", the flight being "organised by Mr Brown after the … Prime Minister … raised the possibility of a charter flight" with the Secretary-General because "it was always the idea that senior members of the coalition government would campaign for [Ms Te Hani Brown] in the lead up to the by-election". The political passengers "discussed the campaign and the rally" with Mr George Taoro Brown and the Secretary-General before the flight, and the flight was planned to fit in with the schedules of the speakers and the timing of the rally[85].

[103] Though Mr George Taoro Brown did not know the cost of the charter until it was invoiced to the company on 31 March 2019,[86] after the by-election, he knew the likely general cost from previous charters and his former employment with Air Rarotonga Limited.[87]

[104] Notably, there is no allegation or admission that Minister Vainetutai Rose Toki-Brown was aware, before the flights occurred, of her husband's actions on behalf of Super Brown Limited. While it must be possible she knew, beforehand, of the chartering and financing arrangements, no assertion or admission is made to that effect and, although they are the two directors of the company,[88] it could not be argued that it was beyond Mr George Taoro Brown's capacity as a director unilaterally to organise the flights and arrange for them to be charged to Super Brown Limited. He is said to have "conceived" of the rally – which suggests unilateral action – and to have discussed the venture, but only with those mentioned on Rarotonga, not with his wife or daughter on Atiu.

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84 Amended Petition, paras 7 & 8. ASF, paras 7 & 8.
85 Joint memo, para 5(a)-(c).
86 Together with other flights that month.
87 Joint memo, para 4(e).
88 The allegation in para 3 of the petition that Minister Vainetutai Rose Toki-Brown was party to the arranging of the charter and the payment for it was omitted from the amended petition. During the hearing it was confirmed that Ms Te Hani Brown has no interest, legal or beneficial, in Super Brown Limited.

[105] In assessing – despite the lack of pleading that such was the case – whether Ms Te Hani Brown's actions might have breached s 88, it is to be noted there is no assertion she was aware of the actions alleged against her father. She must, of course, have known that somebody – unidentified – had organised a rally and known the meeting time, date and place to know to turn up to speak and, in all probability, knew her speech would be supported by speeches in her favour by senior politicians, most of whom, she may have known, would be flying in for the purpose, perhaps on a charter flight. But that does not logically support an inference that she was aware, at any relevant time, how the cost of their attendance was being met. Since the nub of the pleading that s 88(b) was breached is not the arranging of the charter, but having the speaker-passengers on it and the manner of payment, and since those actions on Mr George Taoro Brown's part are not asserted to have been undertaken as Ms Te Hani Brown's electoral agent, the appropriate conclusion on this point of the case must be that it has not been proved that Mr George Taoro Brown's actions in arranging, and committing Super Brown Limited to pay for, the charter were other than actions he undertook unilaterally, in the sense of not being proved to have been known to, still less adopted by, his daughter. They have not been shown – or pleaded or agreed – to be his actions as her electoral agent and they are not therefore legally attributable to her.

[106] Then, looked at from a different viewpoint, does, despite the pleadings and the ASF, what occurred here affect Ms Te Hani Brown's situation in terms of the authorities? They make clear that unauthorised or forbidden activities can be attributed to candidates, even, in certain limited circumstances, those done without their knowledge[89]. Mr George Taoro Brown's actions were obviously designed to enhance his daughter's chances of re-election, but when the source of the charter and the fee – the only way, in this case, that a "gift or offer" are alleged in the amended petition and the ASF to have been made by her father – is not pleaded against her, it is not agreed she knew of them and they were not pleaded to have been undertaken as her electoral agent, those unilateral acts, cannot be seen as coming within the electoral agency authorities.

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[89] *The Wakefield Case supra* at [87].

"Directly or indirectly makes any gift or offer" (s 88(b))

[107] It makes little difference in this case whether Mr George Taoro Brown's actions were direct rather than indirect as the more pivotal question is whether his actions in arranging and committing Super Brown Limited to pay the transport costs for those who spoke at the rally – and, in the case of Ministers Mokoroa and Angene, additionally canvassed for the respondent – amounted to, or come within, the phrase "any gift or offer".

[108] The Electoral Act 2004 containing no definition of either "gift" or "offer", counsel pointed to dictionary definitions. Mr Hikaka submitted a "gift" is a "thing given willingly to someone without payment, a present". The *Oxford English Dictionary*[90] relevantly defines "gift" as "something the possession of which is transferred to another without the expectation, or receipt of an equivalent; a donation, a present." Mr George Taoro Brown's actions could qualify as a "gift".

[109] Mr Hikaka also relied on the dictionary definition of "offer" as "an expression of readiness or to do or give something desired". The *OED*[91] defines the word as "holding forth or presenting for acceptance; an expression of intention or willingness to give or do something unconditionally on the assent of the person addressed; a proposal". Again, Mr George Taoro Brown's actions might amount to on "offer".

[110] However, though not pleaded in this way, it needs to be noted that, without more, arranging the charter flight could not amount to a "gift or offer" breaching s 88, nor could Mr George Taoro Brown's request for the cost to be charged to Super Brown Limited. Had he chartered the aircraft at Super Brown Limited's cost and flown its cargo and passengers to Atiu and return, with no meeting this case would never have arisen: those actions would not have been "in connection with any election".

[111] The only way in which Mr George Taoro Brown's actions in organising the charter and requesting the cost be charged to the company are pleaded to have anything to do with the by-election are in the agreed purposes, namely "to enable persons on board to procure or endeavour to procure the return of the respondent or the votes of electors in the electorate" and "to enable

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[90] "OED" 2nd ed, Vol VI, p 503.
[91] 2nd ed, Vol X, p 726.

some of the persons on the aircraft to speak at the rally"[92]. The former does not say how the object was to be attained, or by whom, and the latter only says the speeches of the six speakers "encouraged those in attendance to vote for the respondent at the election" if paragraph 21 of the ASF is read into both purpose allegations.

[112] Seen in that light, the only way Mr George Taoro Brown's chartering and costing actions could amount to a "gift or offer to any person" is if the allegations and the ASF are regarded as being combined and expanded beyond their pleaded terms. This would require including first, knowledge on Mr Brown's part that some unidentified person had organised a rally on the night of 15 March 2019 in furtherance of what he had "conceived" and, secondly, that, of the passengers who were on the manifest, the five who later spoke at the rally had indicated their preparedness to travel to Atiu if a convenient[93] flight could be organised plus a willingness to speak at the rally on Ms Te Hani Brown's behalf.

[113] Were the pleadings and the ASF only to be read in the bald terms in which they appear, the amended petition might arguably not disclose a cause of action in bribery, but if they are read, as now found they are to be read, as if they pleaded that the chartering and costing arrangements included the purposes of the speaker-passengers speaking at the rally in favour of the respondent to endeavour to procure her return to Parliament, they make a cogent whole. As summarised, the respondent's submissions approached this matter in a more elevated way but did not take issue with such an approach, and the Court is prepared to treat the pleadings and the ASF in that manner throughout this judgment.

[114] Notwithstanding that approach, there may, however, be a gloss on those views, namely that although some of the passengers, leaving aside the Ministers and Mr Hagai, attended the rally[94] there was no pleading that any of the other passengers were involved in the matter in a way which might breach s 88. The "gift or offer" for the purposes of s 88(b) must therefore be regarded as limited to the Rarotonga-Atiu return flights for the five passengers who spoke at the campaign rally and, though quantum of a bribe is, in light of the passage earlier cited from

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92 ASF 16 & 20.
93 Seats were not available on any convenient regular flights.
94 Joint memo, para 5(c).

Re Te-Au-O-Tonga, irrelevant, it is noted that the charter cost did not vary according to passenger numbers or freight[95].

[115] Additionally, though not pleaded, it is reasonable to assume that payment of the charter cost was not conditional on any reimbursement being expected from any of the 13 passengers. So regarded, and reading the pleadings and the ASF by taking the extensions into account, Mr George Taoro Brown's actions concerning the charter and its cost, reduced but still having value, could come within the ambit both of the word "gift" – a donation or present by Super Brown Limited, to which he could commit it, to the speaker-passengers – and "offer" – an intention or willingness to give or do something not conditional on the assent or payment of the passengers, but, for the reasons explained, did not breach s 88 as the actions were not undertaken by the respondent's electoral agent.

"to any person" (s 88(b))

[116] Clearly the five passengers who spoke come within the phrase "to any person", but it is important to reiterate that the crucial distinction between the cases on which Mr Hikaka relied[96] and this case is that, in those instances, the "gift or offer", of whatever amount, was made directly to electors, whereas here the "gift or offer" was only made to the five passengers who later spoke at the rally. As per the summary, there was no evidence that any rally attendee or voter in Tengatangi-Areora-Ngatiarua was involved in Mr Brown's arrangements or even knew of them, particularly as none of the pleaded electoral agents or speakers were on the constituency roll for that electorate. As far as the attendees at the rally – not wholly aligned with the voters of Tengatangi-Areora-Ngatiarua of course – were aware, a public meeting had been arranged at which a number of speakers, including the Prime Minister and Deputy Prime Minister, would be present and would, with Ms Te Hani Brown, speak in favour of her candidacy, and they would be urged to vote in her favour. There is no evidence any of the voters, either present at the meeting or generally, knew anything of the background beyond that, certainly not who arranged, and was meeting the cost of, the five speaker-passengers' personal appearance at the rally. Importantly, they being unaware how the cost of attendance

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95 Joint memo, para 4(a). Sed quaere whether the quantum of the "gift or offer" may be further diminished by Ministers Mokoroa & Angene returning after the by-election on separate fares: should travel and fares arranged and incurred after the by-election breach s 88? v fn 10 supra.

96 Supra at para [45].

of the five speaker-passengers was being met, there was no "gift or offer" to the voters of Tengatangi-Areora-Ngatiarua, either those who attended the rally or generally.

[117] The conclusion from that is that the "gift or offer to any person" for the purpose of s 88(b) includes the expansions of the pleadings and ASF, but is confined to Mr George Taoro Brown committing Super Brown Limited to meeting the whole of the charter cost, or that part of the charter cost equating to the Rarotonga-Atiu fares of the five speaker-passengers and, at least, the Atiu-Rarotonga fares of the three who returned before the by-election, but possibly not the return fares of the Ministers who flew to Rarotonga after the by-election.

"in order to induce that person to procure or endeavour to procure" (s 88(b))

[118] The ASF simplifies considering the applicability of the phrase "in order to induce that person to procure or endeavour to procure" but, even so, it is crucial to note that both the amended petition and the ASF omit any allegation of inducement. And procurement – or endeavouring to procure – are only pleaded in relation to the political purposes of, first, "to enable persons on board"[97] to procure or endeavour to procure the respondent's return or electors' votes and, secondly, "to enable some of the persons on the aircraft to speak at the rally"[98]. Again, to make out any possible breach of s 88(b), it is necessary to extend Mr George Taoro Brown's actions in the ways mentioned, but only as far as earlier noted.

[119] However, for the reasons elsewhere discussed, while the expanded and pleaded actions of Mr George Taoro Brown might meet the dictionary definitions of "endeavour" which means "to try, make an effort for a specified object, to attempt strenuously"[99] and "enable" which is "to make possible or easy, to give effectiveness to"[100] they do not satisfy the definition of "procure" as: "to obtain by care or effort; to gain, win, get possession of, acquire"[101] or "induce" which is "to lead (a person) by persuasion or some influence or motive that acts upon the will *to* some action … to lead on, move influence, prevail upon (any one) to *do* something."[102]

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97 Which included the speaker-passengers: Joint memo, 5(c).
98 ASF 16 & 20.
99 OED 2nd ed, vol VII, p 887.
100 OED 2nd ed, vol V, p 291.
101 OED 2nd ed, vol XII, p 599.
102 OED 2nd ed, vol VII, p 887.

[120] That is, however, insufficient to satisfy the phrase under consideration because s 88(b) is worded as above and that differs markedly from the way this aspect is dealt with in the amended petition and ASF[103]. By omitting reference to inducement, and substituting enabling, the petitioner cannot avoid the statutory requirements, an element of which is that, semantically, inducement requires to be proved, and procurement, or endeavours to procure, only breach s 88(b) if they are induced by the "gift or offer".

[121] In the context of this case, for Mr George Taoro Brown to "induce" the speaker-passengers to participate in their procurement or endeavours to procure must mean he had to make an effort to that end, or had to win their actions. Alternatively, it needs to be proved he led them by persuasion or influence to action, or prevailed upon them to do something. But when the CIP had earlier publicly said it would support Ms Te Hani Brown's candidacy and "it was always the idea that senior members of the coalition would campaign for the respondent in the lead up to the by-election" that meant no effort, no persuasion, no prevailing on the speaker-passengers was needed on Mr George Taoro Brown's part for them to embark on the flight and speak. He did not have to make any effort to win their agreement. His actions might have made it possible or easy for them to attend the Atiu rally, but that is not the statutory test.

[122] So the conclusion must be that, to prove a breach of s 88(b), the petitioner had to plead, and to prove, that Mr George Taoro Brown's actions induced the speaker-passengers' endeavours to procure electors' votes for Ms Te Hani Brown. He did not plead that occurred, he has not proved inducement, he is therefore unable to satisfy that element and the s 88(b) allegation accordingly fails.

"upon or in consequence of any such gift or offer, procures or endeavours to procure" (s 88(c))

[123] Again, for the above provisions of s 88(c) to be met, the expanded construction of Mr George Taoro Brown's actions needs to be read into the amended petition and the ASF.

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[103] Paras 14 & 15 of the petition pleaded that the charter was a gift or offer to induce the four Ministers to endeavour to procure votes for the respondent, which they, consequentially did. But the amended petition and the ASF omitted both assertions, implying that the petitioner accepted his inability to prove those elements. The respondent's notice of opposition denied the petition's inducement and consequential pleadings, but, though, her amended notice of opposition, repeating her general denial of the former inducement claim, pleaded nothing specific about it.

[124] As has been held, the ASF and the transcript of the speeches make clear the five passenger-speakers plus Minister Vainetutai Rose Toki-Brown and the respondent herself were all endeavouring to procure Ms Te Hani Brown's return to Parliament or gain the votes of those electors attending the meeting. So, has it been shown the speaker-passengers' travel and speaking was "upon or in consequence" of Mr George Taoro Brown's "gift or offer"?

[125] The CIP-led Government's public attitude to Ms Te Hani Brown's candidacy, the *Cook Islands News* articles and what is now known as to the actions of those involved in realising Mr George Taoro Brown's conception are relevant to the question whether the five passenger-speakers travelled to Atiu and spoke on Ms Te Hani Brown's behalf "upon or in consequence" of Mr George Taoro Brown's "gift or offer". So seen, the question is whether the actions of the passenger-speakers in accepting the free transport costs and speaking at the campaign rally can amount to a breach of s 88(c) when it was always the intention that those persons would campaign for Ms Te Hani Brown in Atiu during the by-election period.

[126] Mr Hikaka's submissions that the speaker-passenger's actions breached s 88(c) were earlier cited,[104] but while it is correct that bribery cases do not focus on the quantum of the bribe, and focus more on the briber than the bribed the submission is inapplicable in this instance. Mr George Taoro Brown's actions have been held not to breach the section, but, even so and substituting his actions for those of a briber in Mr Hikaka's maxim, neither his actions, or those of the speaker-passengers – or those of the electors of Tengatangi-Areora-Ngatiarua for that matter – amount to breaches of s 88, for all the reasons discussed.

[127] Ms Te Hani Brown obviously hoped to gain benefit from the halo effect of having five Ministers of the Crown and a senior CIP official speak on her behalf and hoped that would assist her re-election. But when the CIP-led Government had already announced it would "be putting its full support behind her"[105], and "it was always the idea that senior members of the coalition would campaign for the respondent in the lead up to the by-election"[106], the proved conclusion is that the appearance of the five speaker-passengers at the rally and their endeavours to encourage their hearers to vote for Ms Te Hani Brown in the by-election was not "upon or in consequence of [Mr George Taoro Brown's] … gift or offer". Their appearance

104 At [48].
105 *Cook Islands News,* 18 & 27 February 2019.
106 Joint memo, para 5(b)(c).

was to fulfil their previously announced intentions and was consequential on those prior public promises, not consequential on the Prime Minister's comment which was what led to Mr George Taoro Brown conceiving of, and arranging, the charter and committing Super Brown Limited to the cost. Those actions were not consequent on his arrangements: they arose subsequently to the announcements, separately and merely facilitated their[107] travel to fulfil those promises in person, rather than by other means.

[128] For obvious reasons, once the speaker-passengers became aware of Mr George Taoro Brown's actions, other means of exhibiting their support, including funding their personal appearance in Atiu, went out of their minds, but there was nothing in the ASF to say they would not have fulfilled their intentions by other means or, if they decided to attend the rally in person, that they would not have met the charter cost from other sources. To deduce that such might have happened would be speculative, but the appropriate conclusion is to hold that the consequentiality necessary for a finding that Ms Te Hani Brown's travelling group of electoral agents travelled "upon or in consequence" of Mr George Taoro Brown's "gift or offer" and therefore breached s 88(c) has not been proved.

"the return of any candidate or the vote of any elector" (s 88(b)(c))

[129] This phrase, too, needs to be read in the extended sense referred to and, so read, the actions of the speaker-passengers were endeavours to procure Ms Te Hani Brown's by-election success. Speaking at the rally is agreed to be one of the purposes of the charter and payment arrangements, so the first part of the phrase has been demonstrated, but there is no allegation of inducement and that lack of an inducement pleading or proof of inducement has been held fatal to the s 88(b) claim.

[130] The disjunctive nature of the concluding words of s 88(b)(c) are not entirely easy to construe,[108] but, the case being able to be decided on other grounds, and as the concluding words of s 88(b)(c) were not addressed by counsel, the proper construction of the concluding phrase may be left to a case where it arises.

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[107] And other passengers and cargo.

[108] As mentioned during the hearing, the words of s 88(b) are so wide, an offer by somebody to meet the cost of an advertisement urging people to vote could be a gift or offer to the media to induce them to endeavour to procure the votes of electors, but would hardly be properly regarded as bribery.

Summary

[131] Summarising all of the above the conclusions are that, as s 88 says, a person who makes a gift or offer to another to induce that other to endeavour to procure the return of a candidate or the votes of electors during an election may commit the offence of bribery under the section but here Mr George Taoro Brown's gift or offer to have Super Brown Limited meet the Rarotonga-Atiu return transport costs for the five speaker-passengers, while amounting to a direct or indirect gift or offer to those persons, was not made by him as the respondent's electoral agent and did not induce them to endeavour to procure Ms Te Hani Brown's return to Parliament or the votes of electors for her since they had previously publicly committed themselves to that course. No case has therefore been made out that what occurred in this case constituted a breach of s 88(b).

[132] Further, on the facts in the ASF, the actions of the speaker-passengers did not satisfy the wording of s 88(c) because their endeavours to procure Ms Te Hani Brown's return to Parliament or the votes of electors for her were not induced by Mr George Taoro Brown's gift or offer to procure or endeavour to procure that result, and, further, were not consequential on Mr George Taoro Brown's gift or offer.

Defences

[133] The petition having failed it is, strictly, unnecessary to deal in detail with Ms Te Hani Brown's defences but, against the possibility of this judgment being reviewed, some indication of views may be helpful.

[134] Already dealt with are the defences that what occurred in this instance were not "in connection with the election"; that the charter was not a "gift or offer" within s 88; and that the four passenger-speakers[109] publicly supported the respondent's return and had said so in the five *Cook Islands News* articles[110].

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[109] Mr Hagai's name was initially omitted and was only added in the amended petition (at 21).
[110] Though, strictly considered, that does not appear to be a defence.

[135] The first two of the three remaining defences read:

> The payment of airfares and similar campaign expenditure such as this are necessary and incidental expenses to ensure the electors in the outer islands have the benefit of, and can effectively engage and participate in, full political discussion and debate in a free and democratic society as enshrined in Article 64 of the Constitution of the Cook Islands.
>
> Freedom of thought, speech, expression, assembly, and association encompass the freedom to seek, receive, and impart information and opinions, which is of particular importance in a political context in a healthy democracy.

Necessary and incidental election expense?

[136] The defence that the payment of airfares and similar campaign expenditure is a necessary and incidental expense of elections in the Cook Islands faces a number of difficulties, some of which have already been highlighted.

[137] The first is the lack of any Regulations under s 106. While any such Regulations would apply to both political parties and candidates, it is notable they must all be financial in content and would thus leave conduct by political parties and candidates unaffected, (other than to the extent that such conduct carried financial consequences).

[138] The second, and much the major, objection is that, as Mr Hikaka submitted, were the Court to endeavour to prescribe allowable campaign expenditure which did not breach, here s 88, it would be trespassing on Parliament's role. Regulations under s 106 must be made by the Queen's Representative by Order in Executive Council. There is no role for the Courts, (except for adjudicating, in some future petition alleging breach of any future s 106 Regulations, whether the Regulations had been complied with). The wording of the corrupt practices sections is very wide, so, as the comments on their phrasing appearing in this judgment demonstrate, the reach of their proscriptions is correspondingly broad and might catch much activity which would be regarded as unexceptionable in jurisdictions with candidate and party expense regimes. Within that wide wording and against the strict interpretation required, nearly all campaigning activity and electoral expenditure is open to being challenged as offending against ss 87-91.

[139] No doubt any Regulations made under s 106 would help define what candidates and political parties are able to do against what could be seen as an otherwise constantly shifting line between allowable electioneering and expenditure and the generic prohibitions of the corrupt practices sections, but, without such Regulations, or evidence as to what appears to have been accepted as legitimate campaign practice or unchallenged electoral expenditure, the Court cannot undertake the task Regulations or such evidence would enable it to undertake. It can only work with what is given.

[140] In this case, a remarkable facet of this aspect is that, apart from her speech, there are no assertions as to how Ms Te Hani Brown waged her re-election campaign or, if it cost her money, how that was defrayed. That is relevant under both s 88 and in assessing whether Ms Te Hani Brown's claim that what happened here was necessary and incidental campaign expenditure. To ground that defence it might have been expected that she would have given details of electioneering practices, especially if unchallenged, and if not throughout the Cook Islands, then at least on Atiu. But there was nothing.

[141] As examples, in this or other elections, did she – or do other candidates – electioneer by circulating flyers or posters, or by publishing advertisements (including in print or electronic media or on motor vehicles) and, if so, how was the cost met? Did she use social media and, if so, in what manner? Did she campaign in the more traditional way by knocking on doors and speaking to voters? Was hireage payable for the hall in which the campaign rally was held, and, if so, how was it paid? Did she utilise other methods of advancing her candidacy, and, if so, which, and if they came at a cost, how was that defrayed? In particular, where other politicians campaign for candidates, how is any cost of their attendance paid?[111]

[142] In default of any s 106 Regulations, it would have been relatively straightforward to reach a view on what are "necessary and incidental expenses" had there been evidence on the topic from Ms Te Hani Brown, or anybody else, or had the pleadings or ASF covered how political parties and candidates in the Cook Islands customarily campaign and meet the cost, but, with no evidence, the only conclusion open is that the defence is unproved.

[111] Eg: In the unappealed bribery aspect of *Browne v Hagai* how were any travel costs and accommodation of the PM met?

Necessary and incidental expense to ensure electors' rights under Art 64?

[143] The next aspect of the defence is that the payment of airfares and other campaign expenditure was necessary to ensure electors[112] could exercise their fundamental rights as outlined in Ms Te Hani Brown's amended notice of opposition.

[144] The first point to be noted in relation to that defence is that the right to participate in full political discussion and debate is not a right expressly appearing in Art 64, though it is accepted that it is embraced within the rights of freedom of thought, speech, expression, peaceful assembly and association and thus within the second defence recited above[113].

[145] There being no evidence that any voter on the Tengatangi-Areora-Ngatiarua roll, including the 52 at the meeting, had any knowledge as to how the cost of getting the five passenger-speakers to Atiu was being met, and given the multiplicity of channels by which support for a political candidate can be expressed nowadays[114] it could not be concluded that Mr George Taoro Brown's actions, or the words of s 88, limited the fundamental freedoms of those electors. Indeed, by meeting the fares of the five passenger-speakers to appear in person at the meeting rather than by any other mode of expressing their support for the respondent, Mr George Taoro Brown's actions might arguably have enhanced those voters' rights.

[146] The lack of any Regulations prescribing limits on election expenditure by candidates is again relevant. There being no regulatory boundaries on expenditure, there is nothing limiting electors' Art 64 rights. On the other hand, the wording of the corrupt practices sections being so widely embracing, all candidate expenditure – and their other actions – risks being characterised as breaching Pt 7. With no statutory or regulatory yardstick, only on the evidence on a case-by-case basis can it be assessed whether any particular action or expenditure offends Pt 7. All that can be said with reference to Art 64 is that, with no express rules, nothing has been shown to cramp the exercise of electors' rights generally, though the breadth of the corrupt practices sections may restrict the Art 64 rights of candidates and parties in the individual case. That, however, is not the issue as raised by Ms Te Hani Brown, and therefore does not need to be addressed further.

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[112] V fn 46.

[113] Probably for political parties, candidates, electors and, less obviously, the general public as well.

[114] E.g. The 2014 & 2018 General Election and by-election results strongly suggest a following by Atiu voters for Ms Te Hani Brown and the Brown family.

[147] Of course the freedoms listed in Art 64 and the defence must include the freedom to "seek receive and impart information and opinions," and of course such rights are of particular importance in a political context, and, in this case, as already found, Mr George Taoro Brown's actions could be said to have enhanced the rights of all persons involved in the by-election, including the voters: they certainly did not limit them. Even if he had not made the gift or offer he did, there is no evidence that the speaker-passengers would not have found some other way to speak at the rally or found some other method such as the Skype facility used during the hearing to be electronically present, express their views and, in so doing, both exercise their fundamental rights and facilitate the exercise by the electors of their correlative Art 64 rights.

[148] The appropriate conclusion is accordingly that the defence correctly expresses the fundamental human rights in Art 64 of electors but to hold Mr George Taoro Brown's actions infringed those rights is not a justifiable conclusion, nor that his gift or offer resulted in any encroachment on them.

By-election result not a consequence of the charter arrangements?

[149] The final defence raised by the respondent is that the by-election result – not the meeting, or anything to do directly with it – was "not a consequence" of the charter. It is unclear what the defence was intended to cover.

[150] Were it intended to introduce a causation element linking the charter and the by-election result, unless Ms Te Hani Brown could show there was no connection between the charter and her electoral success, it would be unpersuasive and outside the pleadings in a petition the prime focus of which is whether a breach of s 88 can be demonstrated. In any event, there being no evidence on the topic, and, given the multitude of factors that might have lead the 80 voters who supported her to do as they did[115], it is unlikely hard evidence could be found. Were it intended to do no more than assert that the charter arrangements had to be shown to be "in connection with" the election to breach s 88, that defence has already been rejected. And were it intended to implead s 88(b), it misquotes the subsection and consequentiality in that regard has been dismissed.

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[115] See fn 114.

[151] Formally, therefore, the Court's conclusion is that the by-election result may have been "a" consequence of Mr George Taoro Brown's actions but it has not been shown that the by-election result was the consequence of his chartering arrangements, and the Act does not require such to be demonstrated. Accordingly, on the way the defence is pleaded, it is unproved.

Section 98

[152] For completion and again against the possibility this judgment is reviewed, some observations on the effect of s 98(1)(3) in the circumstances of this matter may be pertinent. The section relevantly reads:

> 98. Result of inquiry (1) Without limiting the Court's powers under section 96(1), where a candidate who has been elected at any election is found at the hearing of an election petition to have committed any corrupt practice at the election, that candidate's election shall be void.
>
> (3) Where at the hearing of an election petition claiming the seat for any person, a candidate is found by the Court to have committed bribery, treating or undue influence in respect of any person who voted at the election, there shall, on a scrutiny, be struck off from the number of votes appearing to have been received by the candidate, the vote of every person who voted at the election and has been proved to have been so bribed, treated or unduly influenced.

[153] As has been noted, the absence of any action pleaded against Ms Te Hani Brown apart from her speaking at the campaign rally is remarkable. There is no assertion or agreement that she was personally aware of her father's impugned actions in conceiving, arranging or committing Super Brown Limited to pay for the charter. They were not amongst the actions he is claimed to have undertaken as her electoral agent, the actions of her other group of electoral agents has not been shown to have breached s 88, and none are therefore legally attributable to her. Therefore, she is not "a candidate … found at the hearing … to have committed any corrupt practice …".

[154] If, despite the previous findings, it would have been necessary to declare Ms Te Hani Brown's election void, that is to say in law as if it had never been, a scrutiny would have had to be ordered. But if, as a result of that process, as required by s 98(3), the petitioner was not shown to have been successful at the by-election and therefore entitled to be declared the Member for Tengatangi-Areora-Ngatiarua, it was common ground, though not stated in s 98(3), that a further by-election would have to be ordered. The position is as described by the majority

of the Court of Appeal in *Ioane v Ioane and the Chief Electoral Officer*[116] in the following passage:

> [47] If the words of s 98(1) are given their ordinary and usual meaning, there is a mandatory obligation to void the election if a corrupt practice has been committed. This is the plain meaning of "shall be void" (underlining added). Further as submitted by Mr Hikaka, counsel for the appellant, a purposive approach cannot assist the First Respondent. The section or its equivalent feature in legislation in several Commonwealth and South Pacific nations. In the High Court of Australia in *Crouch v Ozanne* [1910] 12 CLR 532, the Court noted:
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> > If I were to find bribery proved, I would have no option than to declare the election void and, necessarily, the sitting candidate unseated. It even might be that the act of bribery was an attempt only which failed and that no single vote was affected by it, yet if I were to find that bribery had been established, I should be obliged to declare the election void.
>
> [48] We are of the view that the same considerations apply to the applications of s 98(1).
>
> [49] In our view, s 98(3) is not an alternative to the mandatory requirement of s 98(1). Its purpose is to require that the vote of the person bribed be discounted. This may be relevant in certain circumstances particularly where there are more than two candidates.
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> …
>
> [54] In the circumstances of this case, procedural fairness would indicate a less draconian remedy than voiding the election and calling a by-election. However, s 98(1) is so clear in its terms that the majority cannot see that the subsection can be ignored on the grounds of procedural fairness. Compensation for the unfairness can be provided particularly in the costs order in favour in favour of a procedurally wronged party.
>
> …
>
> [56] In the circumstances therefore the majority is of the view that there is a statutory requirement to be complied with which means that the election is to be declared void.
>
> [57] There is an absence of authority as to what follows when an election is declared void and the non-elected party does not have sufficient votes to

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[116] CA 11/14, 15 December 2014, Barker and Paterson JJA.

> obtain a majority of the votes legally cast. The appellant suggested that as there were only two candidates, if the election is declared void, the First Respondent should be declared the elected candidate. Counsel's alternative and less favoured submission was that this Court should order a scrutiny and if the appellant has not received the greatest number of lawful votes cast, then a by-election should be ordered.
>
> [58] We see no point in a scrutiny. There has been an election petition hearing which establishes the votes recorded for each of the two candidates. When the vote of the elector who was bribed is discounted, the First Respondent does not have the greatest number of lawful votes cast. In the circumstances it is our view that a by-election should be ordered.

[155] In *Browne v Hagai* the Court of Appeal, having decided s 98 was triggered, assumed[117] that all electors who attended the meetings challenged in that case had been bribed and awarded the seat to the appellant.[118]

[156] The position appears to be different in this case: who are the electors of the Tengatangi-Areora-Ngatiarua electorate who have "been proved to have been so bribed" in terms of s 98(3)?

[157] In *Browne v Hagai* the Court of Appeal observed that persons organising the campaign meetings under challenge as treating in that case "could not be found to have treated themselves,"[119] so the question here arises as to whether Ms Te Hani Brown's two groups of electoral agents, in different ways, bribed themselves or, to put it in the appropriate statutory formula, has it been proved that the electors of Tengatangi-Areora-Ngatiarua attending the campaign rally were "so bribed"?

[158] Mr Hikaka submitted that it was the electors at the meeting whose votes were tainted by the respondent's corrupt practice – without the charter arrangements and payment they would not have been subject to the speaker-passengers' endeavour to procure their votes[120] – and accordingly it was they who were "so bribed", but is that correct?

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117 The point was not covered in evidence at trial.
118 At [141]-[142].
119 At [141].
120 Petitioner's submissions, para 57.

[159] Even reading the extensions into Mr George Taoro Brown's pleaded actions would not logically lead to the conclusion that, when the electors attending the campaign rally are not shown to have known anything of the financial arrangements in the background, they were the persons "so bribed" by arrangements which resulted in the five passenger-speakers being at the rally in person. At least 52 electors attended the rally. They heard the speakers. The turnout figure shows almost all must have voted. But that does not logically lead to the conclusion that the 52 were "so bribed" by background actions, of which they had no inkling, which resulted in the politicians' personal appearance. So, even if Mr George Taoro Brown's and the five speaker-passengers' actions had been held to satisfy the requirements of bribery under s 88(b)(c), it was the passenger-speakers who would have been bribed, not the electors. A bribe is a[121] "consideration given to a voter to procure his vote." There was no consideration given to any Tengatangi-Areora-Ngatiarua voter, and substituting "speaker-passenger" for "voter" in that definition shows none of the electors on the constituency roll present were "so bribed" at the rally.

[160] Though the findings to date make it unnecessary to decide, what has been said indicates that this may not be an example of persons bribing themselves. Even if Mr George Taoro Brown's actions concerning the charter had been proved to be actions by him as the respondent's electoral agent, this would appear to have been a case of one electoral agent bribing another group of electoral agents in circumstances where the second group only became the respondent's electoral agents by acting consequentially on his "gift or offer". So it would seem not be a case of bribers bribing themselves but a case of two separate groups acting individually, and differently, in ways that amounted to breaches of different subsections of s 88, with the fact that their actions were attributed to the respondent being only by operation of law, not arising as a matter of fact.

Further steps

[161] Either party to this proceeding has, of course, a right of appeal to the Court of Appeal on a point of law under s 102(2) if dissatisfied with this decision, utilising the Case Stated procedure for which the subsection provides.

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[121] OED 2nd ed, Vol II, p 536.

[162] Section 102 does not prescribe a time for appeal so the ordinary civil time limit applies[122] but Ms Bell, counsel for the Chief Electoral Officer, raised the issue of a possible mismatch between the time for appeal under s 102 and the obligations of the Speaker and the Chief Electoral Officer under s 9(4) having regard to Ms Te Hani Brown's second notice of resignation.[123] She asked the Court, if the situation arose, to grant those officials some indulgence in relation to the times for declaring Ms Te Hani Brown's seat vacant and for the Chief Electoral Officer publishing notice of the vacancy and appointing a date for the by-election under s 105(2).

[163] The interim judgment of the Court of Appeal in *Browne v Hagai* indicates that Ms Te Hani Brown's second notice of resignation became effective upon its receipt by the Queen's Representative. But no action has been taken by the Speaker or the Chief Electoral Officer to discharge their duties under s 9(4) or s 105(2), the Chief Electoral Officer having accepted Crown Law Office advice to do nothing in that regard in the circumstances of this matter.[124]

[164] Compliance by the Speaker and Chief Electoral Officer with their statutory duties are, at best, ancillary to the matters at issue in the amended petition and no more than consequential on the Court's findings. They are thus beyond the ambit of this judgment but, given nobody has challenged the inactivity of the Speaker or the Chief Electoral Officer since Ms Te Hani Brown's second notice of resignation, it would seem unlikely that a continuance of that state of affairs will be challenged by any person until after expiry of the time for appeal against this judgment or, if an appeal is brought, determination of the appeal. Section 97 may be of assistance to them in the event of a challenge.

Costs

[165] If costs are sought by the respondent or the Chief Electoral Officer and the parties are unable to agree – including on the disposition of the amount paid for security – memoranda may be filed with that from the respondent or the Chief Electoral Officer being due within 20 working days from delivery of this judgment and that from the petitioner within 30 working

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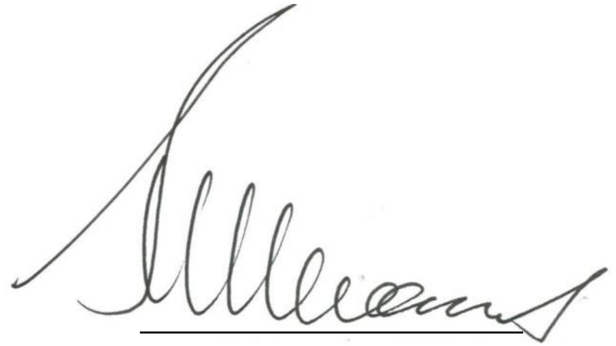
122 20 working days: Court of Appeal Rules 2012, R 13.
123 Supra, paras [35]-[36].
124 Judgment (No.1), at [11] and discussion in Court.

days from that date. Upon receipt the Court will decide if costs can be decided on the papers or if further information is required before that occurs**.**

Result

[166] The result is that, for the various reasons appearing throughout this judgment, the amended petition is dismissed, with costs to be dealt with in accordance with paragraph [165].



Hugh Williams, CJ