

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

MISC NO. 6/2014

IN THE MATTER of Section 92 of the Electoral Act 2004

AND

IN THE MATTER of an election of Members of Parliament of
the Cook Islands held on 19 February 2014

BETWEEN **Kaota TUARIKI**

Candidate

Petitioner

AND **James Vini BEER**

Candidate

First Respondent

AND **Chief Electoral Officer**

Second Respondent

AND **Returning Officer of the Murienua
Constituency**

Third Respondent

AND **Registrar for the Murienua Constituency**

Fourth Respondent

AND **Chief Registrar of Electors**

Fifth Respondent

Hearing: 7 – 10 April 2014

Counsel: Mr T Manarangi for the Petitioner
Mrs T Browne for the First Respondent
Ms C Evans for the Second, Third, Fourth and Fifth Respondents

Judgment: (1st) 8 April 2014
(2nd) 10 April 2014

Reasons for Judgment: May 2014

REASONS FOR JUDGMENT OF HUGH WILLIAMS, J.

Introduction

[1] For a number of years the Member of Parliament ("MP") for the Murienua constituency on Rarotonga was Mr Tom Marsters but, in mid - 2013, as the term of the longstanding Queens Representative, Sir Fred Goodwin K.B.E, was drawing to a close, Mr Marsters was named as his successor. As a result, Mr Marsters resigned his Murienua seat in Parliament.

[2] As required by the Electoral Act 2004 ("The Act")¹ Mr Marsters' resignation prompted a by-election in Murienua. This was held on 19 September 2013 ("the September by-election"). The candidates were the present petitioner, Mr Kaota Tuariki, standing for the Cook Islands Party ("CIP"), and the present first respondent, Mr James Beer, standing for the Democratic Party ("DP"). Mr Tuariki was successful in the September by-election by a majority of 25 votes, 219 to 194.

[3] Mr Beer filed a petition for an inquiry into the by-election² alleging a number of grounds including treating of electors by Mr Tuariki on by-election day and bribery. Mr Tuariki both opposed the petition and filed a counter - petition alleging treating by Mr Beer and bribery but, following the exchange of witness statements and only a few days before a special fixture for the hearing was to start, Mr Tuariki, on 6 December 2013, resigned his office as Murienua MP by handing notice of resignation to Madam Speaker. The petition and counter - petition accordingly lapsed.

¹ All statutory references herein are to the Electoral Act 2004 unless specified otherwise

² Misc 18/2013

[4] Mr Tuariki's resignation as MP for Murienua required a further by-election. That was held on 19 February 2014 ("the February by-election") with Messrs Beer and Tuariki again the candidates. The February 2014 result reversed that of the September by-election, with Mr Beer being declared elected by a margin of 8 votes, 216 to 208.

[5] That result led Mr Tuariki to issue this further petition for an inquiry on 27 February 2014 (amended on 28 February 2014) on grounds of voting by a number of disqualified electors, disallowance of a valid vote, bribery and undue influence. On 28 March 2014 Mr Beer gave notice of his intention to oppose the petition and counter-petitioned on the grounds that a number of votes should be disallowed plus an allegation of bribery.

Procedural

[6] As noted, both the amended petition and the counter-petition challenged votes from unqualified electors, disallowance of valid votes, bribery and undue influence.

[7] Because the rulings on qualification or disqualification had the potential to affect - even reverse - the outcome of the by-election, counsel agreed that it would be efficient for the hearing to proceed in the following stages:

- a) Hearing the evidence on the disqualification issues raised in the amended petition. That included factual disqualification and, following submissions, disqualification as a matter of law. The Court would then rule on those issues.
- b) Unless all the disqualification issues were dismissed - so the Gazetted majority in the by-election could not be affected - a re-count under s.96 (2) should be directed to follow with the re-count being conducted, as far as appropriate, in accordance with s.79(5), (and by extension, s.77).

- c) If as a result of the re-count the result – even if not the majority – of the by-election remained unchanged, the Court would then proceed to hear the evidence and submissions on the petitioner's allegations of bribery and undue influence and make a ruling on those matters.
- d) The rulings available were either to dismiss the allegations of bribery and undue influence (with the result the re-count would then stand as the final result in the by-election) or, if any of the allegations of corrupt or illegal practices were found proved, to declare the successful candidate's election void under s.98(2). (If particular electors could be identified as those whose votes were received by the candidate as the result of bribery, treating or undue influence, their votes were to be subtracted pursuant to s.98(3).)

[8] While variance in the allegations in other electoral petitions or counter-petitions may render the above procedure not universally applicable, it was adopted in this case and proved a flexible and efficient means of determining the matter. The above may accordingly provide a useful template to be followed in similar electoral petitions, and would seem to accord with the s 99 requirement for Courts, in hearing election petitions, to observe "real justice".

[9] What happened in this case was:

- a) By the time of the hearing and as a result of disclosure, the swapping of witness statements and sensible discussion between counsel and the parties there was agreement that a number of electors were disqualified from voting and a number of challenges to eligibility should be withdrawn. Three and four respectively factual challenges to eligibility remained on the petition and counter-petition with two challenges on the petition and one on the counter-petition remaining alive on legal grounds.

- b) At the commencement of the second day of the hearing, 8 April 2014, the parties were advised that the challenges in the petition would be disallowed in respect of Mathew John Mare, but allowed in respect of Metua John, Shannon Livingstone, Deon Oloff Roussow, Marcelle Monique Roussow and Shaun Tauei Kofoed Solomon (also known as Solomon Solomon) and that the reasons for those determinations would be issued at a later date. These are those reasons.
- c) The Court, not having disallowed all disqualification challenges, directed a re-count under s96(2) to be undertaken by the Chief Electoral Officer with a scrutineer for each candidate present. That was undertaken commendably quickly and, after considering the Court's ruling on disqualification and the parties and counsel's concessions and withdrawals on the same topic, the Chief Electoral Officer advised that Mr Beer's Gazetted majority of eight votes following the February by-election was reduced to two votes, 204 to 202. The public was advised of that directly afterwards.
- d) The by-election result not having changed the outcome, the hearing then proceeded to hear the evidence relating to the amended petition's allegations of bribery and undue influence. At that point, because the outcome for Mr Beer, could only be confirmation of the by-election result or a declaration that the by-election was void, Mrs Browne, counsel for the DP, withdrew the counter-petition.
- e) The Court then made a ruling on the allegations of bribery and undue influence – dismissing both - and confirmed Mr Beer (DP) as the MP for Murienua for the balance of the term of the current Parliament.

Qualifications for Registration of Electors.

[10] Since 2003, Art 28 of the Constitution has prescribed the qualifications for a person to be an elector in any constituency as being:

- (1) *No person shall be qualified to be an elector for the election of a Member of Parliament unless –*
 - (a) *The person is a Cook Islander (as defined in an Act prescribing the qualifications of electors), a New Zealand citizen or has the status of a permanent resident of the Cook Islands (as provided for by Article 76A); and*
 - (b) *The person has at some time resided continuously in the Cook Islands for a period of not less than 12 months.*
- (2) *A person who meets the qualifications imposed by sub clause (1) (or re-qualifies under sub clause (3)) is disqualified from being an elector for the election of a Member of Parliament if the person is subsequently absent from the Cook Islands for a continuous period of 3 months or more.*
- (3) *A person disqualified under sub clause (2) shall re-qualify to be an elector for the election of a Member of Parliament if the person returns to the Cook Islands and at any time thereafter remains in the Cook Islands for a continuous period of 3 months.*
- (4) *The following shall not be regarded or treated as a period of absence from the Cook Islands for the purposes of subclause (2):*
 - (a) *Any continuous period not exceeding 4 years spent by a person outside the Cook Islands for the purpose of –*
 - (i) *Receiving education, technical training, or technical instruction; or*
 - (ii) *Receiving medical treatment;*
 - (b) *Any period spent by a person outside the Cook Islands as –*
 - (i) *A member of a Cook Islands diplomatic or consular mission; or*
 - (ii) *A spouse, partner, or member of the household of a person referred to in subparagraph (i) of this paragraph.*
- (5) *Nothing in this Article limits the provisions of any law prescribing additional qualifications from being an elector for the election of a Member of Parliament, insofar as the law is not inconsistent with any provision of this Constitution."*

[11] The Act also prescribes the qualifications for registration of electors in s.7 which reads:

- (1) A person shall be qualified to be registered as an elector of a constituency if that person –
- (a) is a Cook Islander or a New Zealand citizen, or has the status of a permanent resident of the Cook Islands;
 - (b) has at some period actually resided continuously in the Cook Islands for not less than 12 months;
 - (c) is 18 years of age or over;
 - (d) has been actually resident in the Cook Islands throughout the period of 3 months immediately preceding that person's application for enrolment as an elector;
 - (e) has not been convicted of any corrupt practice or any offence punishable by death, or imprisonment for a term of 1 year or more unless in each case that person has received a free pardon or has undergone the sentence or punishment to which that person was adjudged;
 - (f) is not of unsound mind.
- (2) The constituency for which a person shall be entitled to be enrolled and to vote as an elector shall be the last constituency in which that person has actually resided continuously for 3 months or more.
- (3) Every person who at the time of first making application for registration or who having become disqualified pursuant to subsection (4) requalifies under subsection (5) to be an elector of a constituency but has not actually resided in any one such constituency for a continuous period of three months shall be entitled to be registered in the constituency in which that person spent the greatest part of his or her time during the period of three months immediately preceding the date of his or her application for registration.
- (4) A person who meets the qualifications imposed by subsection (1) or who requalifies under subsection (5), is disqualified from being an elector, or as an elector for a particular constituency if the person is subsequently absent from the Cook Islands or from the particular constituency for a continuous period exceeding 3 months.

- (5) *A person disqualified under subsection (4) shall requalify to be an elector or as an elector for a particular constituency if the person returns to the Cook Islands or to the constituency and at any time thereafter actually resides in the Cook Islands or in the constituency as the case may require, for a continuous period of not less than 3 months.*
- (6) *The following shall not be regarded or treated as a period of absence from the Cook Islands or from a constituency as the case may be for the purposes of subsection (4) –*
 - (a) *any continuous period not exceeding 4 years spent by a person outside of the constituency for the purpose of –*
 - (i) *receiving education, technical training or technical instruction; or*
 - (ii) *receiving medical treatment;*
 - (b) *any period spent by a person outside the constituency as –*
 - (i) *a member of a Cook Islands diplomatic or consular mission outside of the Cook Islands; or*
 - (ii) *a spouse, partner or member of the household of a person referred to in subparagraph (i); or*
 - (c) *any occasional absence for any purpose, for a period not exceeding 3 months.*

Residential Qualifications

[12] As the challenges to the eligibility of Metua John, Shannon Livingstone and Mathew John Mare to be electors in the Murienua constituency at the February by-election were based on an assertion they were not qualified because they had not “actually resided continuously” in Murienua for 3 months or more, it is necessary to examine the requirements of s.7. It is not an easy section to construe, partly because the conjunctive requirements of the section are not clearly made out

[13] It is immediately obvious on comparing Art 28 with s.7 that the latter refines and tightens the former's criteria for electors' qualifications. Since Art 28 prescribes the qualifications to be electors in any constituency and s.7 prescribes the qualifications to be on the roll for a particular constituency, it is not difficult to understand why s.7 would tighten the qualifications appeared in Art 28.

[14] That said, while s.7 (1)(a) follows the terms of Art 28 (1)(a) and s.7 (1) (b) effectively reproduces the terms of Art 28 (1)(b), s.7 (1)(c)(e) and (f) have no parallel in Art 28 and the tests in Art 28 (1)(b) and in s.7 (1)(d) differ: residence in the Cook Islands for the three months prior to the enrolment application as opposed to being "actually resident" in the Cook Islands for that period.

[15] It is clear that both Art 28 and s.7 impose four residential qualifications before persons can qualify as electors in any particular constituency; that they have resided in the Cook Islands or the constituency for some period of at least 12 months; that they have resided in the Cook Islands for the three months immediately preceding their application for enrolment; that their residence has been continuous; and that they have "actually" resided continuously in the constituency for at least three months (or spent the greatest part of their time there).

[16] What then amounts to 'residence' for the purpose of Art 28 and s.7?

[17] Etymologically and by usage "residence" is a word with wide and disparate meanings.

[18] The meaning of "residence" or "resident" most germane for electoral purposes is the "act or fact of living in a place" especially for some length of time or "the fact of living or staying regularly at or in some place for the discharge of special duties or to comply with some regulation"³ Though the language of the quote is dated, one source gives the definition as relating to a place which the claimant "is always able to enjoy personally and to which, whilst away, he has the animus revertendi", a property over which he has "dominion"⁴.

[19] Mr Manarangi counsel for Mr Tuariki / CIP, relied on s.12 of the Electoral Act 1998 which recited rules for determining an elector's place of residence but caution must be exercised in adopting a set of qualifications from a repealed statute since, if Parliament chooses not to re-enact provisions, it is not for Courts to resurrect them.

³ Penguin Dictionary (2004) p1189; Oxford English Dictionary 2nd ed Vol XIII p 707

⁴ Stroud's Judicial Dictionary of Words and Phrases 3rd ed(1953) Vol 3 p 2575

[20] Mrs Browne relied on the decision of Weston CJ in *Ioane v. Kake*⁵ where, dealing with the law on electors' qualifications, the Chief Justice said:

[10] *This issue turns on what it means to reside in a constituency. Section 7, and particularly s7(2), uses the expression "actually resides" (or variations of it). There is, however, no definition in the Act of 'resides' and there is no definition in the Constitution, although there was previously but this has been removed. Section 7 recognises that the concept of "continuous residence" is not without difficulty. For example, s.7(3) recognises that if one cannot show actual residency in a constituency then that place at which one spends the greater amount of time is to be regarded as the place of residence. Section 7(6)(c) speaks of occasional absences without breaking the continuity.*

[11] *I am troubled by that reference to "occasional", absences because I do not think that this reflects the reality of life in the Cook Islands. In my view, s 7(2) needs to be interpreted in a sensible and pragmatic way that reflects the reality of life in the Cook Islands. The reality is that people do not live and work within the straight – jackets of their constituency. Constituencies are small and people come and go from these constituencies very regularly. The word "occasional" does not appear to be entirely apt to deal with that sort of circumstance.*

[12] *In Matapo v Robert Wigmore & Ors*⁶ I noted in that Judgement:

Continuous residency does not prevent an elector from moving outside the relevant constituency to undertake work. If it did, no one would afford to leave the constituency to work at some other place. The fact that an elector may then spend nights living in a hotel does not necessarily mean that a person has ceased to reside at what is otherwise their place of residence.

[13] *In my assessment, 'residence' is a matter of fact to be assessed in each case. Where a person resides is not, in the usual course, to be a simple exercise of adding up how many hours or days they have spent at a particular place. That sort of exercise might need to be undertaken under s 7(3), but it is not the general test to be undertaken in a test of residence under s 7(2). That would recognise the fact that people do work outside their constituencies, travel frequently to other Islands within the Cook Islands and also travel to New Zealand and Australia.*

[14] *There is a particular problem in the Cook Islands because many people have multiple house-ownership or family homes, and families themselves have quite fluid dimensions with children, even adult children, living with different family members from time to time. Constituencies are very small and relatively small movements result in an elector crossing the constituency boundary. I do not want to interpret the*

⁵Misc N 112/201 2010 Aitutaki 3 February 2011 paras [10]-[14]

⁶Misc No 88/06 1 December 2006 at [17]

Act so strictly that I would disenfranchise virtually every elector from ever voting in an Election. Plainly, Parliament could not have intended that. Having said that, I am equally careful to assess that where a person thinks they reside is not to be determinative. It may be a relevant factor, but an emotional attachment to a particular house does not mean that is where one resides. Ultimately, it comes down to an assessment of what the facts show. If the elector's choice of residence happens to coincide with the facts then that means we can identify where the person resides for the purposes of the Act.

[21] Not unexpectedly, given the wide range of meanings which can be ascribed to the word "resided" and in order to ensure that only those with a residential affinity or connection with an electorate can vote in that constituency's elections or by-elections, Parliament has imposed two further qualifications on the fact of residence, namely that it has been for three months or more "continuously" and that the elector has "actually" resided continuously in the Cook Islands or the constituency for the qualifying period.

[22] The words "continual" and "continuous" and their adverbs are etymologically troublesome.

[23] Strictly, the difference between the two is demonstrated by what the Penguin Dictionary⁷ calls the "classic" illustration of the difference: a dripping tap "continually" drips because there are breaks in between the drips but the stream from a flowing tap is "continuous" because it is unbroken. "Continuous" and its adverb therefore, strictly, mean "uninterrupted" or "unbroken" but, largely for the reasons adopted by Weston CJ in *Ioane v. Kake* in the passage earlier cited, is doubtful whether Parliament was intending to require unbroken or uninterrupted residence for the purpose of section 7. In a nation with geographically small constituencies, almost every elector in the larger islands crosses electorate boundaries almost every day in living their lives and, Cook Islanders being a mobile people, many are often absent from the country on visits elsewhere, especially visits to New Zealand and Australia. That situation is recognised in Art 28(4) and s.7(6). Within the parameters of the Article and section, residence of an elector "continuously" within the Cook Islands or the constituency should be regarded as remaining even though the elector is absent from the country or the constituency, even frequently, as long as they retain their

⁷ op cit, p 297

intention to return and occupy their residence within the country or the constituency throughout their absences.

[24] Though it might be thought simplistic, and though, as *Ioane v Kake* makes clear, elector's views on their residence for electoral purpose is not definitive, residence should, in most cases, be regarded as established and as being continuous if the elector, wherever they are, names the Cook Islands or the constituency in response to the questions, "where is your home?" or "where is your main home?" and "do you intend to return to it?".

[25] The third qualification is that the person is "actually" continuously resided in the constituency. "Actually" is not a qualification in Art 28(1)(b).

[26] This third qualification for registration as an elector in a constituency makes the application of s.7(2) (and s.7) more problematic.

[27] Dictionary definitions define "actually" as "really; in fact" and the Penguin usage note says the word is "used to reinforce or emphasise a point".

[28] Seen in that light the use of the word "actually" in s.7(2) should be seen as reinforcing the statutory requirement that the continuous residence be a factually true one i.e. one which exists in fact and is not a temporary or one adopted solely for the purposes of qualification as an elector.

[29] The word 'actually' is not, however, surplusage. It serves the purpose of demonstrating that the elector's connection to the constituency for the required period must be a real one. Electors who have several residences or whose absences from their residence are frequent or lengthy are thereby reminded of the necessity for them to demonstrate, in response to the question "where is your home" or "where is your main home", that there is only one answer for electoral purposes and that answer must be to nominate the constituency of their true continuous residence. However, as mentioned, in deciding that essentially factual matter, electors' views are indicative, not definitive.

Reasons for Ruling on Disqualifications of Electors.

Mathew John Mare

[30] Mr Mare said he had lived at Rutaki, Murienua for 7 years in one of three houses on a section, the other two of which were occupied by his brothers.

[31] He said his occupation was a casual one collecting and selling chestnuts in the February – September season, tending his 7 pigs and helping his aunt Mouauri Tangimetua of Matavera in preparing traditional Maori medicines

[32] He said he did not vote in the September by-election despite, he thought, being enrolled. He was unable to find his name on the roll for that by-election.

[33] When he went to the voting place on 19 February 2014 he discovered his name was not on the roll and was given a form to vote by declaration. He firmly denied not being on the roll because he was not resident in the Murienua constituency.

[34] Mr Mathew Mare's evidence was corroborated by his brother Jim Jim Mare who occupies one of the three houses on the brothers' section. He said that Mathew Mare "sleeps and carries out the normal functions associated with residency in Murienua", a view to which he adhered under cross-examination. He said his brothers' husbandry of his pigs was "mostly" every weekend and sometimes during the week.

[35] Mrs Tangimetua also confirmed that Mathew Mare helped her prepare traditional Maori medicines at her residence at Matavera. but he did not reside with her: "this boy goes back to his land". Occasionally, however, if he had had too much to drink he remained overnight at Mrs Tangimetua's.

[36] That evidence notwithstanding, Ms Metua Andrews, another aunt of Messrs Mathew and Jim Mare, said she went to the boys' section regularly during the chestnut season to gather fruit and that "all of last year I did not see Mathew at his house [and] I was told by his brothers he has gone to live with his girlfriend at Matavera". She said his house was unkempt, untidy and looked not lived in.

[37] In cross-examination, she acknowledged never entering or peering into Mr Mathew Mare's house but said it was securely locked. She said in her evidence that it was possible, as Mr Mathew Mare said, that Mrs Andrews had not seen him gathering chestnuts at times because he was gathering them further up the mountain.

[38] Mr Bob Mare, an uncle of Mr Mathew Mare, confirmed Mrs Andrew's statement. He said he visited the brothers' land frequently and "for the last year I've not seen Mathew at his house".

[39] As a CIP official, he assisted in Mr Tuariki's election campaign and as part of that, canvassed many households including twice visiting that of the brothers. He did not see Mr Mathew Mare on either occasion.

[40] He was told the day after the by-election that Mr Mathew Mare had voted, went to speak to him in Aroa about that and was told that Mr Mathew Mare "had been living in Matavera but that he had been coming back to Aroa in the weekend to feed his pigs [but] as far as I am aware does not keep any pigs". He also said he had not seen him selling chestnuts in Rutaki this year. He, too, spoke of the untidiness of Mr Mathew Mare's house and adhered staunchly to that version of events in cross-examination.

[41] The starting point for evaluating the evidence on this aspect of the matter is Mr Mathew Mare's declaration made on 19 February 2014 to enable him to vote in which he gave his residential address as Rutaki and his occupation as "unemployed".

[42] Starting from the standpoint that Mr Mathew Mare correctly fulfilled the requirements of s.59 to vote by declaration coupled with the fact that he described himself as unemployed, the Court's view is that he correctly described his residence and that his frequent absences from his property noticed by Mrs Andrews and Mr Bob Mare are explicable by the extent of his chestnut gathering and the obviously significant periods of time he spent with Mrs Tangimetua helping her with traditional medicines. The evidence – backed by that of his brother – that he kept pigs was persuasive. That occupation requires daily attention and the fact that the surroundings to his house may have been untidy does not necessarily lead to the conclusion that it was unoccupied as Mr Mare and Mrs Andrews suggested, but merely be a comment on Mr Mathew Mare's standard of housekeeping

[43] When all that evidence was balanced one against the other, the Court's conclusion was that Mr Mathew Mare's declaration and evidence were correct and it had not been demonstrated that he had not "actually resided continuously for 3 months or more" in the Murienua constituency.

[44] The challenge to his qualification as an elector in that constituency was accordingly dismissed.

Metua John

[45] Metua John said he was on the Murienua roll for the February by-election and voted. He had lived at Akaoa in 2013 but returned to live with his partner, Ms Mani Taana, in Murienua in September 2013 and had lived in the constituency since.

[46] Were that evidence to be accepted at face value, Mr John would have been entitled to be enrolled in Murienua for the February by-election as being the "last constituency in which [he] actually resided continuously for 3 months or more".

[47] He elaborated on that evidence in his witness statement saying that Ms Taana and he had lived together some years ago and had children of their relationship. At least one of them, a feeding daughter Ms Nooroa Tai, is an adult who, with her husband, lives in an house at Akaoa rented from a Mrs Tuatata Toeta for the past two years.

[48] Mr John said that after he and Ms Taana ceased living together she formed a relationship with a Mr Letdown Marsters and they lived together in Murienua for some years in a house belonging to Ms Ngapoko Longtime. However, Mr Marsters died in late August 2013 and Mr John then moved back into Mr Longtime's house in Murienua with Ms Taana and the pair had continued to live in Murienua since.

[49] He acknowledged that from January 2014 the pair had spent part of their time in Akaoa at their daughter's house but that "our animals, taro plantation and belongings are in Murienua" so he took the view that he resided in that constituency.

[50] Were that evidence accepted without question the probable result would be that Mr John could properly claim to have been "actually residing continuously for 3 months or more" in the Murienua electorate and thus be qualified to vote there in the February by-election, but the evidence was somewhat more complicated than that the Court accordingly turns to the detail.

[51] Ms Taana filed affidavits both for Mr Tuariki and for Mr Beer. In the former she described Mr John as her "ex-partner" and said Mr John had lived with Mr and Mrs Tai for the past year. She visited the house regularly to look after her grandchild. She said Mr John did not live with her "but around once a month he may stay for the weekend" and also goes with her to Aroa to help look after her taro and mow the lawns at the property.

[52] However, in her affidavit filed on behalf of Mr Beer, she described herself as Mr John's partner and confirmed his statement to that effect.

[53] Unsurprisingly, both Mr John and Ms Taana were cross-examined on the issue of his residence though since a significant part of the cross-examination was based on what evidence others – in the event not called as witnesses – would say, it was difficult to evaluate the answers. However, when it was put to Mr John that Ms Taana said they did not live together he replied that they "did not live together but I reside there." He acknowledged living with Ms Taana and Mr Marsters up until the latter's death but was unable to explain the contradiction in saying he lived with his feeding

daughter at Akaoa and with Ms Taana in Murienua. He did, however, say that since January this year most of his time had been spent in Akaoa.

[54] Ms Taana acknowledged that Mr John lived in the same house as Mr Marsters and herself on a "come and go" basis and he reared taro and fed pigs at her property. She, however, asserted that Mr John's residence was with Mr and Mrs Tai.

[55] Some relatively independent evidence was given by Mr and Mrs Tai's landlady, Mrs Toeta, but since the evidence was that Mr John paid Mrs Toeta Mr and Mrs Tai's rent but it was Mrs Toeta's husband who carried out any landlord's inspection of the property, the weight of her evidence on the residential point was somewhat diminished.

[56] Mr Bob Mare gave evidence of speaking with Mrs Tai and her acknowledging that Mr John had lived with her for the last 2 years – an admission she retracted the following day – and a Ms Metuavaine Foster said she had lent Ms Taana utensils to assist her in her time of grieving for Mr Marsters and that when she returned to retrieve her equipment just before Christmas 2013 Mr John was cutting the grass in Ms Taana's yard: "They gave me the impression they had been living together in Aroa since September 2013" because she had seen Mr John's apparel at the house.

[57] It would be possible from that evidence to infer that Ms Taana no longer qualified as an elector in the Murienua constituency in the February by-election, but the question is whether Mr John was so qualified, not whether Ms Taana continued her residential qualifications. The conclusion the Court drew was that after Mr John and Ms Taana's association some years ago, Ms Taana moved to live in Ms Longtime's house in Murienua with Mr Marsters with Mr John occasionally spending the night there. His principal residence during the past two years, however, was with his feeding daughter and Mr Tai at Akaoa outside the Murienua constituency. Once Mr Marsters died in late August 2013, it would seem that Mr John sought to revive his former longstanding relationship with Ms Taana, but that it appears, has been only partially successful and, in addition, Mr John has spent as much time living out

of the electorate – both with his daughter and with Ms Taana at Akaoa - as in the Murienua constituency.

[58] The conclusion accordingly was that Mr John had not been shown to “actually reside continuously for 3 months or more” in Murienua immediately prior to the February by-election and accordingly was disqualified from voting in that by-election.

Shannon Livingstone

[59] The principal issue in relation to Ms Shannon Livingstone – someone who voted in the February by-election – was whether she had “actually resided continuously for 3 months or more” at her grandparents’ house within the constituency or whether her residence during that period was more correctly described as being with her boyfriend, Mr Paul van Eijk. He lives outside the Murienua constituency, namely at Turoa, Titikaveka.

[60] It seemed clear that Ms Livingstone regularly stayed at her grandparents’ home, partly to help look after her infant son who resided there and partly to assist in caring for her infirm grandfather. That appears to have been the case since her return from Australia in 2011.

[61] That said, she admitted she spent most weekends at Mr van Eijk’s house and “half and half” during the week. She acknowledged having at least part of her wardrobe at Mr van Eijks and driving his car. She said she sometimes cares for her son at Mr van Eijk’s and that “over the last couple of months I have been living more at Pauls”.

[62] That evidence contrasted somewhat with her affidavit in which she said that all her belongings were at Aroa at her grandparents’ house and that she cooked there, slept and did chores at that address.

[63] Contrasting evidence was given by Ms Nani Papa, Mr van Eijk’s next door neighbour, who said that Ms Livingstone “lives in the same house as Paul and has done so for about 2 years”; she often leaves from that address for work in the

morning, though she “goes back to her grandmother’s house in Aroa to stay a night or two but that is not often”.

[64] Ms Metua Andrews spoke of a conversation with Ms Livingstone’s grandparents who told her Ms Livingstone lived with Mr van Eijk and that her son now attends pre-school near his address. The grandmother’s statement – she did not give evidence – refuted that conversation and confirmed Ms Livingstone’s initial evidence that Ms Livingstone “lives with me in Murienua and this is her home since she was a baby” though she acknowledged that “she does visit her boyfriend and sometimes spends the weekend there” A Mr Heather said that he also saw Ms Livingstone at Mr van Eijk’s place “now and again”.

[65] The Court’s view was that, at best for Ms Livingstone’s entitlement to vote in the Murienua constituency, she was in the process of transition from living at her grandparents’ home to living with her boyfriend but that the evidence, more properly construed, firmly suggested that her principal residence was now with Mr van Eijk and that she returned to her grandparents’ home only when duty to her grandfather requires. The evidence also suggests that Ms Livingstone’s son now resides more with Mr van Eijk and his mother than with his great-grandparents.

[66] The Court’s conclusion was accordingly that it could not be demonstrated that Ms Livingstone “actually resided continuously for 3 months or more” in the Murienua constituency prior to the February by-election and that she was accordingly not qualified to vote on that occasion.

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[67] The issue in relation to these electors’ was whether they qualified as electors in Murienua under s.7(1)(b) namely whether they had “at some period actually resided continuously in the Cook Islands for not less than 12 months”.

[68] The agreed facts were that the Roussows were New Zealand citizens but travelled to and from the Cook Islands on the dates set out in a schedule provided by Immigration.

[69] The schedule covered the period from August 2010 in respect of both of the Roussows and showed that, in each case, the longest period either had spent in the Cook Islands was from 15 April 2012 to 9 April 2013, a period just six days short of the qualifying 12 months period.

[70] Counsel made various submissions to suggest that the terms of s.7(1)(b) should not be strictly construed given the Roussows' frequent arrivals and departures from the Cook Islands but, in the Court's view, such arguments are unsustainable. Section 7 (1)(b) plainly applies to discrete periods – 'at some period' – and requires actual continuous residence in the Cook Islands in at least one of those periods for an uninterrupted term of not less than 12 months.

[71] Though the Roussows came close to qualifying as electors in the period between 15 April 2012 and 9 April 2013, that period was less than 12 months and accordingly they were not qualified to be electors in the Murienua constituency.
Shaun Tauei Kofoed Solomon (also known as Solomon Solomon)

[72] The situation concerning Mr Solomon's qualification or disqualification as an elector in the Murienua constituency was a little more complicated.

[73] The evidence showed Mr Solomon completed – or at least, partially completed – a Form 1 application for registration as an elector on 22 June 2013. The observation that the form was only partially completed is derived from the fact that the four questions in Section A concerning qualification for enrolment were left completely blank (although it was possible to deduce his age from the fact that he wrote "21/6/93" in the space reserved for his date of birth). Importantly, however, the question in Section B as to the length of Mr Solomon's residence in Kavera Arorangi was left blank.

[74] The relevant Immigration records showed that Mr Solomon left the Cook Islands on 17 December 2009 and, oddly given the date entered on the Form 1

under discussion, that he did not return to the country until 26 July 2013. He left again on 8 December and was absent until 6 February 2014.

[75] His name was not on the Murienua electoral roll for either the September 2013 or the February 2014 by-election and he voted by declaration in the latter after completing – or, again, partially completing – a further Form 1.

[76] Mr Solomon's second Form 1 was dated 19 February 2014 and this occasion he at least ticked the box in Section A saying he was "18 years or older". However, on the second occasion, he gave his date of birth as "22/07/93" and left both his residential address and the length of his residence blank. There were other questionable aspects of Mr Solomon's second Form 1 namely that his signature appears nothing like the signature on the earlier form and he changed his occupation from "labourer" to "sign writer". Counsel said that in fact Mr Solomon's father is a sign writer.

[77] In those circumstances the Court ruled that Mr Solomon could not qualify as a Murienua elector under s.7(1)(d) as the Immigration records showed he had not been resident in the Cook Islands for the three months immediately preceding his second enrolment application and he could not qualify under s.7(2) because, even in combination, Mr Solomon's two Form 1's did not disclose that he was entitled to be enrolled in Murienua as the last constituency in which he had actually resided continuously for three months or more. Both forms were silent on the duration of his residence in Kavera Arorangi, even if the entry to that effect on the earlier Form 1 is regarded as transferable to the later.

[78] The conclusion was accordingly that Mr Solomon was not qualified to be an elector in Murienua for the February by-election.

Bribery and Undue Influence

[79] The remaining allegations By Mr Tuariki against Mr Beer were that he committed the corrupt practices and electoral offences of bribery, undue influence or both.

[80] As Prof. Andrew Geddis puts it in his book “Electoral Law in New Zealand: Practice and Policy”⁸ the distinctions between proper and improper actions on behalf of candidates and their supporters are designed to “ensure that electors do not cast their vote under some improper form of influence, thereby jeopardising the overall ‘integrity’ of the election process”.

[81] The learned author notes that corrupt practices are those “deliberate acts deemed to pose a serious threat to the election’s function as a means of determining the true preferences of the electors and which thereby undermine the basic integrity of the electoral system” and, discussing bribery,⁹ the author observes¹⁰

A final area of interest is the potentially fine line separating an attempt to bribe individual voters and the ordinary “hip-pocket” policies and promises advanced by the electoral participants during every election campaign. After all, it is hard to see the difference between a candidate’s promise to pay an individual voter \$20 if elected and a promise to create a new social programme to distribute public resources to some class of voter. Yet the former is a corrupt practice, while the latter is deemed a legitimate way of persuading the electorate to cast their ballots for some particular party or candidate. This distinction perhaps reflects blunt political reality rather than any coherent principle. A wide range of public policy proposals will have consequences in terms of financially benefitting one or another social group, yet those contesting an election must be able to advance such proposals if the electorate is going to be able to evaluate their merits before voting. Nevertheless, it remains possible that some ostensibly public policy-oriented move taken by the government before the election could amount to bribery. Where the distribution of public resources to some group of electors in the near vicinity to polling day is motivated to a significant degree by the desire to induce those electors (or others) to vote in a particular way, then that programme’s introduction might very well amount to a corrupt practice.

[82] The seriousness of the threat to the integrity of elections posed by corrupt practices – including bribery and undue influence – is underlined by the fact that they are criminal offences under s.87 punishable by imprisonment for up to 5 years and that, under ss 87(2) and 100, if any inquiry into a disputed election concludes that any corrupt practice has been established, the matter must be referred to the

⁸ 2007 Chapter 7 p115ff

⁹ Electoral Act 1993(NZ) s 216

¹⁰ P120-1

Commissioner of Police. In addition, s.98 requires the Court to void a candidates election if a corrupt practice is established or disallow the votes of electors found to have been bribed or unduly influenced.

Bribery

[83] Mr Tuariki's amended petition alleged bribery by Mr Beer in the following way:

- a) *The first respondent committed an act of bribery within the meaning of s88 in connection with the election in that he gave or offered to electors money and valuable consideration in order –*
 - i) *To induce the electors to vote for him and refrain from voting for the petitioner; and/or*
 - ii) *To procure or endeavour to procure his return or the vote or electors;*

Particulars

On Wednesday 12 February 2014 the first respondent attended a Grey Power General Meeting being a meeting of pensioners actively opposed to the taxation of New Zealand paid pensions and held at the Sinai hall and at which meeting the first respondent –

- a) *Declared that the Democratic Party's policy would not be to impose back taxes on such pensions;*
- b) *Gave \$50.00 to the Grey Power Group*

[84] Pressed, Mr Manarangi ultimately accepted that the allegations were solely brought under s.88(b)(c) which reads –

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

- 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*

[85] Mr Manarangi said the agreed facts relating to the bribery allegation included:

That there was a meeting on Thursday 13 February 2014 at the Sinai Hall in Avarua of the Grey Power an organisation actively campaigning either not to have their pensions back taxed or alternatively not to have their pension paid in the past or in the future taxed. Grey Power was actively campaigning for the Government to legislate an exemption from liability in that regard .It was at the meeting Grey power held on 12 February 2014 to which Mr Beer had been invited where he gave \$50 and that was reported on 13 February 2014 in the "Cook Islands News"

[86] The agreed statement of facts was amplified by evidence given at the hearing and by the production of the article in the "Cook Islands News" of 13 February 2014 which is attached as Annexe 1 to these Reasons for Judgment.

[87] The meeting was called by the Cook Islands Grey Power Commission Inc, the secretary of which said that it is not an electorally political organisation. None of its members reside in the Murienua constituency, so, according to the commission's officers, none of their registered members would have voted in the February by-election.

[88] Both Murienua candidates were invited to the meeting to discuss their parties' tax policies but Mr Tuariki did not accept the invitation having been advised by the CIP not to do so. It seems that advice and his apology did not get through to the meeting.

[89] Mr Beer said about 40-50 people attended the meeting (including a number from the DP) and that there was a delay before he spoke whilst Grey Power awaited Mr Tuariki's arrival and attended to general business.

[90] When he was invited to speak he commenced his address by giving Grey Power the \$50 note shown in the photograph.

[91] Mr Samoglou, the employee of Cook Islands News who took the photograph, said he did so openly and without objection from Mr Beer. Mr Beer confirmed that and said he had every expectation that the photo would prove newsworthy and be published in next day's Cook Islands News, as in fact occurred. The fact of the donation appears only as a tailpiece to the article.

[92] It appears that the president of Grey Power publicly thanked Mr Beer for the \$50 and spoke of it as having come from the DP candidate in the Murienua by-election. Those present applauded.

[93] Mr Beer then spoke to the meeting in the terms appearing in the report. He said he had campaigned "aggressively" on tax issues since before the September by-election.

[94] Asked his reason for making the donation he said he knew of Grey Power's campaign concerning taxability of their pensions and in particular the "raid" by Government on the bank accounts of a number and also knew they were intending to obtain an opinion as to their rights from Queen's Counsel in Auckland New Zealand. His donation was towards that end. The Grey Power secretary confirmed the commission intended to seek legal advice concerning its campaign against the Government and was soliciting donations to that end but also said the organisation depends on donations to meet its operational costs. It used the donation for the latter.

[95] Asked whether the organisation went to the Murienua constituency after the meeting to procure votes as a result of Mr Beers donation, the secretary said he "strongly objected" to that suggestion and that it was "absolute rubbish": the organisation had in fact decided not to hold a meeting in the Murienua constituency prior to the by-election.

[96] Cross-examined by Ms Evans, counsel for the second – fifth respondents, Mr Beer said he never considered the appropriateness of making such a donation six days out from the February by-election.

[97] Called by Mrs Browne, Mr Tuariki acknowledged the stance already recorded by himself and the CIP but accepted that tax was an issue on which Mr Beer had campaigned through both by-elections.

[98] In relation to the elements of bribery, Mrs Browne relied on *Matapo v. Wigmore*¹¹ were the following appears –

[80] *The elements of bribery have been discussed in a number of decisions. For convenience I refer to the Chief Justice's decision in relation to the Mauke constituency in Cowan v Taia (Misc 80/06; 23 November 2006). The elements of bribery are:*

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

[81] *The motives of the person giving the consideration can be mixed, so long as one significant purpose was political. That then may be regarded as a corrupt purpose.*

[82] *The burden of proof is on the balance of probabilities.*

[99] It is to be noted that that in *Wigmore v. Matapo*¹² the Court of Appeal adopted counsel's submission that "conferring a benefit on someone (whether an elector or not) in order to enlist his or her efforts or services to procure the candidate's return or the vote of some other elector, is what is covered by s.88(b)".

[100] In terms of what amounts to a corrupt purpose, counsel relied on the decision of the Full Court of the High Court of New Zealand in *Re Wairau Election Petition*¹³ where the following appears –

¹¹ Misc No.88/06 Judgment 8 December 2006 (NZ time)

Weston J paras [80-82]

¹² [2005] CKCA 1 para[63,64]

¹³ (1912)31NZLR 321,326 dealing with the electoral offence of treating

In order, therefore, to amount to treating, a corrupt intention must be proved. A corrupt intention is an intention on the part of the person treating to influence the votes of the persons treated. The question of intention is an inference of fact which the Court has to draw.

[101] The statement in *Matapo v. Wigmore* that the standard of proof is on the burden of probability needs to be tempered with the observation that the seriousness of the allegation enhances that standard¹⁴.

[102] It needs to be added that it is unnecessary for the petitioner to prove that electors carried out their part of the bargain by voting for the candidate. It is not an element of bribery that it be successful but the inducement must be coupled with an express or implied condition that the voter will vote for the respondent, even if they do not do so¹⁵.

[103] Given the Grey Power meeting was only six days before the February by-election, Mr Manarangi emphasised that the timing of the Mr Beer's actions might be regarded as crucial. He relied on the following passages from the Court of Appeal decision in *Wigmore v. Matapo*¹⁶ as adopted in *Pitt v. Ioane* where the following appears.

4.11 *The Court of Appeal considered that the timing of the decision was crucial. It referred to Halsbury's Laws of England "Elections" (4th ed REI) 15 at paragraph 689, dealing with elections where the following appears:*

"The imminence of an election is an important factor to be taken into consideration in deciding whether a particular act of charity amounts to bribery. A charitable design may be unobjectionable so long as no election is in prospect, but if an election becomes imminent the danger of the gift being regarded as bribery is increased. It has been said that charity at election times ought to be kept in the background by politicians. The question is one of degree. An isolated small donation on the occasion of a birth or death may not be bribery, although such gifts on an extensive scale would lead to the inference that they were given to influence voters."

In paragraph 41, the Court continued:

¹⁴ *Re Mitiaro Election Petition* [1979] 1 NZLR s1 at s7 cited in *Pitt v. Ioane* s1 at s7 HCCI Misc 82/2006 31 October 2006, Williams CJ para 4.16

¹⁵ *Pukapuka/Nassau petition* HTCI Misc 134/2000 p10-12 cited in *Pitt v. Ioane* HTCI Misc82/2006 para 4.15

¹⁶ *Ibid* paras 1441 reviewed in *Pitt v. Ioane*, *Ibid* para 4.11

“ To the same effect is the statement of Ridley J in Kingston-Upon-Hull Central Division Case, (1911), 6 O’M & H 372 at 374, where the Judge said:

... You assume for the moment that a man forms a design which at the time is unobjectionable because no election is in prospect, for that is the point; yet, if circumstances alter, and an election becomes imminent, he will go on with the design at his risk, and if he does so he will be liable to be proved guilty of corrupt practices; that is to say that he has done a thing which must produce an effect on the election contrary to the intention of the Act of Parliament.”

[104] Dealing first with the bribery allegation with reference to s.88(b) – making gifts to persons to induce “that person” to procure or endeavour to procure a candidate’s return or an elector’s vote - in essence under that limb of the allegation, the factual circumstances of this matter require proof that Mr Beer made a gift to Grey Power Commission in order to induce the Commission to procure or endeavour to procure Mr Beer’s success in the February by-election or to procure or endeavour to procure the votes of any elector in Murienua.

[105] Posed in that way, it is immediately apparent that the allegation faced insurmountable hurdles under s 88(b) in that the Grey Power Commission is not an electorally political organisation. Its purpose may include advocating for changes in Government policy but it did not, in accepting Mr Beer’s donation, make any effort to procure or endeavour to procure Murienua electors to vote*for him. Influencing votes of electors in a particular way was shown by the evidence not to be an action Grey Power undertakes and it did not do so following the 12 February 2014 meeting.

[106] Under s 88(b) it was necessary for there to be proof that as a result of it receiving Mr Beer’s \$50, Grey Power would be induced to vote for him – an impossible proposition – or that Grey Power would, as a result of the donation, be induced to procure or endeavour to procure Murienua voters to vote for him, an allegation that flew in the face of the evidence. The allegation under s.88(b) accordingly failed.

[107] In turning to s.88(c) it is factually to be recalled that Mr Beer, in allowing himself to be photographed giving his \$50 to Grey Power and hoping the photograph would be published in the Cook Islands News, is to be taken as knowing that, even if Grey Power had no members who are Murienua electors, the circulation of Cook

Islands News was such that some Murienua electors would be likely both to see the photograph and read the accompanying article.

[108] Put in terms of s.88(c) therefore the allegation is the Mr Beer committed bribery in connection with the February by-election in that, in consequence of some Murienua electors becoming aware of his \$50 gift, he was procuring or endeavouring to procure his success in the by-election.

[109] While seen in that light, the allegation under s.88(c) is marginally of more weight than that under s.88(a), it still failed when seen in context.:

(a) The allegation boils down to the proposition that it amounts to bribery when A gives money to B in the sight of C – over whom A has no control – who is employed by D – over whom A also has no control – in the hope (without power to compel its occurrence) - that D will publicise the donation in and to voters in E and that, in consequence, the voters of E will thereby be induced to vote for A. When so analysed, the tenuousness of the allegation is plainly exposed.

(b) Mr Beer's donation was to an organisation which is not for political purposes

(c) Mr Beer's donation was made in the context of the Cook Islands' society, a society where donations of money or in kind are frequently made,

(d) If it influenced them at all, the amount of Mr Beer's donation was as likely to influence Murienua electors against him as for him.

- (e) Finally, his reason for giving the donation could not be said to have an electoral purpose because he was not challenged as to the veracity of that part of his evidence in which he gave his reason for the donation.

[110] True, Mr Beer may have been unwise to make a public donation of any amount as close to the by-election as he did – particularly when the result was expected by both parties to be close – but the Court's view is that it was not proved that his intention was corrupt in the sense of amounting to endeavouring to appeal to wavering Murienua voters to vote for him or that it has been shown that a significant purpose of the donation was political.

[111] The allegation of bribery under s.88(c) accordingly also failed.

Undue Influence

[112] The allegation of undue influence in the amended petition was in the following terms:

The first respondent committed the offence of undue influence within the meaning of s.90 of the Electoral Act in that he directly or indirectly or by other persons on his behalf by duress, fraudulent device or contrivance –

- a) Impeded or prevented the free exercise of the franchise by electors; and/or*
- b) Induced and prevailed upon electors to vote for the first respondent and to refrain from voting for the petitioner.*

Particulars

On several occasions the first respondent and the Leader of the Opposition Democratic Party Wilkie Rasmussen caused to be published in the Cook Islands News and the Cook Islands Herald accusations that the petitioner was guilty of corrupt practices knowing the same to be false and untrue but with the intention that such falsehoods should and would affect the outcome of the election in a way prohibited by s.90.

[113] Those allegations need to be seen against the statutory context of s 90 which reads:

Undue influence – Every person commits the offence of undue influence who-

- a) *Directly or indirectly, by himself or herself or by any other person on his or her behalf, uses or threatens to use any force, violence, or restraint, or inflicts any damage, harm, or loss upon or against any person, in order to induce or compel that person to vote for or against a particular candidate or party or to vote or refrain from voting or on account of that person having voted for or against a particular candidate or having voted or refrained from voting; or*
- b) *By abduction, duress, or any fraudulent device or contrivance, impedes or prevents the free exercise of the franchise or an elector, or thereby compels, induces, or prevails upon an elector either to vote or to refrain from voting.*

[114] Though pleaded under the entirety of s.90, under direct questioning at the conclusion of the hearing, Mr Manarangi accepted that Mr Tuariki was not relying on s 90(a) and, although reliance had initially been placed on the whole of s90(b), the allegations of duress or fraudulent device had no evidential foundation and were to be withdrawn. Mr Tuariki therefore relied wholly on a “contrivance” for the allegation of undue influence.

[115] Mr Manarangi submitted that undue influence was proved in this case by what he said was a “plan” undertaken by Mr Beer and the DP through its leader, Mr Rasmussen, to influence voters against voting for Mr Tuariki by the publications to which reference will be made.

[116] Even so, as Geddis remarks¹⁷ what amounts to a “contrivance” to prevent the exercise of the franchise of an elector is an “unsettled question” and that rather than broadly applying only to the making of false and misleading statements during an election campaign – much too wide-ranging a formulation – the author comments that the scope of the phrase should be limited to:

“The phrase rather ought to be read to cover the more limited use of trickery designed to prevent electors from being able to cast valid votes (for example, by setting up a fake polling place, posing signs that declare a polling place is closed, or similar stratagems)

¹⁷ Op.Cit para 7.3.4p123

[117] The author also comments that such a restricted interpretation would fit with the physical restraint on the ability to cast a vote implied by the words “abduction” and “duress”.

[118] Counsel not having contended the Court should adopt any particular definition of “contrivance”, the appropriate interpretation for electoral purposes –or at least for the purposes of this case – would appear to be the dictionary one of “a plan or scheme for attaining some end; an ingenious device or expedient; an artifice, a trick”¹⁸, but, seen through the lens of the terms of s90, the electoral definition to be adopted should require proof of an element of trickery designed to impede or prevent voters’ exercising their franchise.

[119] The facts relevant to this aspect of the inquiry are that, in the petition filed after the September by-election, Mr Beer alleged Mr Tuariki had been guilty of the electoral offences of both bribery under s.88 and treating under s.89. The former was alleged to arise out of the giving of free massages, free food and a \$50 donation to an elector and the latter arose out of Mr Tuariki providing breakfast for a number of electors on the morning of the by-election. In his notice of opposition Mr Tuariki made similar allegations of treating against Mr Beer and added an allegation of undue influence. It is of importance to the determination of the allegation of undue influence in relation to the February by-election to make the points that whether any of the allegations in the petition and counter-petition were capable of proof to the required standard was forestalled by Mr Tuariki’s resignation as Murienua MP and that, as lawyers know but as is commonly not appreciated by the press and public, there is frequently a gulf between what is alleged to have happened and what can be proved to have happened.

[120] The agreed facts in relation to this allegation as recited by Mr Manarangi were that:

The background is that the Leader of the Opposition and the Democratic Party laid a complaint with the Police concerning allegations of bribery and treating alleged against Mr Tuariki in the by-election of 19 September 2013. The leader of the opposition and the Democratic Party is Mr Wilkie Rasmussen and his complaint was

¹⁸¹⁸ Oxford English Dictionary op cit Vol III p 850

made known to the public by an article published in the Cook Islands News on 21 December 2013. In the Cook Islands News edition of 23 January 2014 Mr Rasmussen made known that he was displeased with the Police pursuing their investigation on his earlier complaint and on 12 February 2014 in the publication of the weekly "Cook Islands Herald" Mr Rasmussen in his regular weekly comment referred to the upcoming by-election.

[121] Transcripts of the publications are attached as Annexe 2.

[122] Mr Rasmussen, called by Mr Manarangi, said he made his initial complaint to the Police following discussions with the DP caucus and executive and after taking advice from two lawyers. He was speaking on behalf of the Party when he did so. Mr Beer was not present when the issue was discussed but, though he himself had intended to complain, he was dissuaded by Mr Rasmussen because it was a party, not an individual, matter.

[123] He made the 23 January 2014 statement because the only response he received from the Police to the complaint was a request to furnish evidence and re-word the document. He was concerned at what he saw as slowness by Police. He said the Police did not approach him again before he wrote his "Herald" column on 12 February 2014.

[124] Asked whether it crossed his mind whether the publications might affect voters he said that all the letters and statements were made by him on the Party's behalf with intention of "informing people the Democratic Party would be a better alternative to the current Government". Promotion of the DP was at the "forefront of his mind", not the promotion of Mr Beer.

[125] Then, asked if it was not unreasonable to suggest someone might have thought badly of Mr Tuariki as a result of the 23 January article, he said "Mr Tuariki's resignation - for a number of people who contacted me - put a negative shine on him and therefore it was reasonable for any person to assume what [Mr Rasmussen] said as Leader was a statement in relation to the Democratic Party position".

[126] The “Herald” article was to “enable us to get our message across to voters” and to achieve popularity for the DP by “highlighting Government truth behind issues”.^[sic]

[127] In relation to the “Herald” article and his comments on the likelihood of conviction, Mr Rasmussen said that his advice was that if “Mr Tuariki was charged the chances of conviction were very high”. He accepted that, if that resulted, Mr Tuariki would be “eliminated” from the electorate.

[128] He was asked whether the comments in the Herald article meant “don’t vote for Mr Tuariki because you’re wasting your vote as he is going to be convicted so refrain from voting for him”. Mr Rasmussen said everything he wrote was subject to certain interpretations: that was possibly one.

[129] The issue on the first part of s 90(b) is whether the reports and columns dealing with the complaint by Mr Rasmussen/DP amount to a “contrivance” which would, by trickery, have impeded or prevented the free exercise of the franchise by Murienua electors.

[130] Perusal of the publications makes plain there was nothing about them which impeded or prevented Murienua electors casting their vote. They were as free to cast their votes after publication as they were before. So the allegation based on the initial portion of s 90(b) failed.

[129] As far as the allegation under the latter portion of s 90(b) is concerned, it is important to note that the allegation is that it was Mr Beer, not Mr Rasmussen/DP, who committed the offence of undue influence. So the allegation of undue influence essentially is that Mr Rasmussen’s publications were a contrivance as earlier defined to induce or prevail upon Murienua electors to vote for Mr Beer and refrain from voting for Mr Tuariki, and that, in acting as he did, Mr Rasmussen on behalf of the Democratic Party was acting as Mr Beer’s agent, and that Mr Beer accepted what Mr Rasmussen/DP was doing on his behalf

[131] Seen against that background, there are several reasons why this aspect of the petition required to be dismissed

[132] The first observation to be made is that the allegation under s 90(b) demonstrated an incorrect approach to the section which, wrongly, personalised the issue.

[133] Section 90(b) criminalises conduct (which otherwise qualifies under the section) which “ induces or prevails upon an elector either to vote or to refrain from voting”. The pleading was that Mr Beer’s conduct induced and prevailed upon electors to vote for him and refrain from voting for Mr Tuariki. The focus of the section is on debarring actions restricting electors’ exercising their vote, not on actions leaving the capacity to exercise the franchise unaffected but intended to bear on voter choice. The section has nothing to do with the way electors’ vote but with actions to prevent that vote being cast. The pleading was accordingly misdirected and failed as the evidence dealt with the wrong issue.

[134] In the second place it is plain from the reports of 21 December 2013 and 23 January 2014¹⁹ that Mr Rasmussen’s/DP’s Police complaint related both to the allegation against Mr Tuariki of bribery and of treating in the September by-election coupled with a complaint that Mr Tuariki’s resignation “ left the whole process floating in the air”. The complaint was also tied to what Mr Rasmussen says is the Democratic Party’s campaign against electoral corruption. The second article is also critical of the Police and Crown Law.

[135] Apart from the fact that the same candidates were contesting the February by-election, there is nothing in those two articles which could be said to induce or prevail on a Murienua elector to vote a particular way or refrain from voting, especially when, as Mrs Browne pointed out, the public presumably would know that there were similar allegations in the September by-election counter-petition.

[136] Then, although the 12 February 2014 “Herald” article is replete with strongly worded political comment - as might be expected from the Leader of the Opposition

¹⁹ Erroneously said to be “January 23,2013”

in commenting on Government action - the only passage which might arguably have impacted on the by-election held a week later is the suggestion that the “chances that he might get convicted were extremely high” a result which would result in a further by-election plus the further suggestion that Mr Tuariki “knew he had committed the electoral and criminal offences of treating and bribery”.

[137] Statements such as those need to be seen in the context of being made in the course of a second hard-fought electoral campaign, expected by both contestants to be close, and also seen in the context that the making of allegations is frequently a long way from proving them.

[138] The Court’s view is that Mr Rasmussen’s reported comments would be seen by readers as simply another shot in the unceasing warfare between rival political parties, particularly those facing an imminent by-election and that thoughtful electors in the constituency where the by-election was being contested were unlikely to be influenced in their choice by reading one political leader’s trenchant comments.

[139] There is the further question whether Mr Rasmussen/DP was shown to be Mr Beer’s agent in making the statements under scrutiny.

[140] In that regard, in *Pitt v. Ioane*²⁰ Williams CJ said;

In this respect reference may be made to the observations of the Chief Electoral Officer which I endorsed in the Pukapuka/Nassau Petition Misc 134/2004, 14-15:

There was no evidence that the respondent himself made offers of employment to insert [certain named persons]. There was however evidence of a “plan” to employ persons as Crown servants at Pukapuka who were supporters of the Respondent.

If that plan ‘was implemented’ then this raises the question of whether those who devised and implemented the plan were the electoral agents of the Respondents. It is submitted that it is sufficient if either the author or the implementer were the electoral agent of the Respondent. It is not necessary to show that both acted in that capacity... [I]t is not necessary to show in the electoral context that the principal knew or condoned the

²⁰ Ibid para 4.13 P23-26

corrupt practice of the agent. It is sufficient that the agent was in the employment or service paid or unpaid of the Respondent or that there was recognition and acceptance of the agent by the principal."

Halsbury's Laws of England "Elections" (4th ed REI) 15 at paras 616 – 618, states inter alia:

"616. Candidates Liability. 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 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. In this respect the relationship between candidate and agent resembles that of employer and employee...

An agent may be employed to act generally or in some particular transaction. Similarly a canvasser may be employed to canvass only particular votes. A candidate's liability for corrupt or illegal practices committed by such an agent is limited to acts within the agent's authority, and thus if a canvasser is employed to canvass particular voters, his illegal acts in respect of other voters will not affect the candidate...

617. Evidence of agency. In order to prove agency it is not necessary to show that the person was actually appointed by the candidate or that he was paid. The crucial test is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of its work when done. The candidate, however, is liable not only for the acts for the agents whom he has himself appointed or authorised, but also for the acts of agents employed by his election agent or by any other agent having authority to employ others. He may be liable even though his election agent refused to employ the agent.

In the absence of authorisation or ratification the candidate must be proved either by himself or by his acknowledged agents to have employed the agent to act on his behalf, or to have some extent put himself in the agent's hands, or to have made common measure with him for the purpose of promoting the candidate's election. The candidate must have entrusted the

alleged agent with some material part of the business of the election. Mere non-interference on the candidate's part with persons who, feeling interested in the candidate's success may act in support of his canvass is not sufficient to saddle the candidate with any unlawful acts of theirs of which the candidate and his election agent are ignorant. Employment in the business of the election is a question of degree, but it has never yet been distinctly and precisely defined what degree of evidence is required to establish such a relationship between the candidate and the person guilty of corruption as should constitute agency. No one yet has been able to go further than to say that, as to some cases, enough has been established, but as to others, enough has not been established, to vacate the seat. All the circumstances of the case must be taken into consideration, and the evidence may be regarded cumulatively as establishing the agency...(Underlining in original)

[141] The situation as described in the Halsbury passage differs from the position in the Cook Islands in that, in the UK, MPs and Parties regularly employ paid agents in their constituencies but the essential point is that agency in electoral circumstances is limited to liability for acts within the agent's authority and that the "candidate must have entrusted the alleged agent with some material part of the business of the election" or the agent must be shown to have "fully accepted" what was done by the agent. Mere non-interference by the candidate in the agent's actions is insufficient.

[142] In this case, although Mr Beer felt sufficiently strongly about the allegations in the September by-election petition that Mr Tuariki was guilty of bribery and treating to have contemplated lodging a complaint with the Police himself, that matter was taken out of his hands and he was not shown to have participated, condoned or even been aware of the way in which the matter proceeded from that point onwards. Certainly there is no evidence he was involved in the re-wording of the complaint, the collection of the affidavits mentioned or any other aspect of the complaint. Further, Mr Rasmussen's comments in the "Herald" article were plainly influenced by his training as a lawyer and further influenced by the electorate advantage the DP hoped to enjoy should charges be brought against Mr Tuariki and should they be found proved. What then followed would have been an automatic result under the Electoral Act 2004.

[143] In light of all of that, the Court's conclusion was that it had not been demonstrated that Mr Rasmussen or the Democratic Party was Mr Beer's agent in making the publications in the sense required by the law. The allegation of undue influence under the concluding section of s 90(b) accordingly failed on that ground as well.

Result

[144] The Parties and the public were advised on 10 April 2014 at 2pm that all the allegations of bribery and undue influence brought against Mr Beer were dismissed, the petition accordingly failed and Mr Beer was declared to be duly elected as the MP for Murienua for the balance of the Parliamentary term.

[145] It followed, in terms of s.104, that the Court certified to the Chief Electoral Officer that James Vini Beer was duly elected as the MP for Murienua on 19 February 2014 and left it, in terms of s.104(2), to the Chief Electoral Officer to notify Madam Speaker of that result.

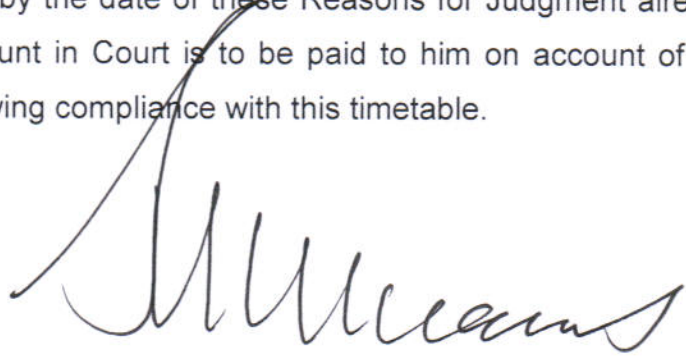
Costs

[146] Mr Beer having being successful in his defence of all aspects of Mr Tuariki's electoral petition, he is entitled to costs and, in the event the parties are unable to agree on quantum, there will be a timetable for the filing of submissions as follows:

- a) Within 14 days of Mr Beer's receipt of these Reasons for Judgment he is to file a memorandum (maximum 5 pages) on issues of costs certifying, if he considers it appropriate so to do, that all issues as to costs can be determined by the Court without a further hearing.
- b) Within 14 days of the receipt of Mr Beer's memorandum Mr Tuariki is to file his memorandum as to costs (maximum 5 pages) containing the same certification if he considers it appropriate.

- c) Unless there are issues arising from the memoranda from which the Court considers further input is required, the Court will then determine all issues as to costs.

[147] As the award for costs in Mr Beer's favour will exceed the amount lodged for security for costs, unless it has by the date of these Reasons for Judgment already been paid to Mr Beer, the amount in Court is to be paid to him on account of the order for costs to be made following compliance with this timetable.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style.

Hugh Williams, J.