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

CA No. 9/18
MISC No. 30/18

IN THE MATTER	of Section 102 of the Electoral Act 2004
AND	of the Constituency of Rakahanga
AND	of a General Election for Members of Parliament of the Cook Islands held on 14 June 2018
BETWEEN	**TINA PUPUKE BROWNE** of Rakahanga, Candidate Appellant
AND	**TOKA HAGAI** of Rakahanga, Candidate Respondent

Coram:	Williams P, Barker JA, White JA
Hearing:	31 October 2018 (Rarotonga) 1 November 2018 (Rarotonga) 2 November 2018 (Rarotonga) 7 November 2018 (Teleconference)
Appearances:	Mr I Hikaka and Mr B Marshall for the Appellant Mr B Mason for the Respondent Ms K Bell for the Chief Electoral Officer
Judgment:	14 December 2018

JUDGMENT OF THE COURT OF APPEAL

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Introduction

[1] This is an appeal by way of case stated made under s 102(2) of the Electoral Act 2004 (**the Act**). It is against a decision of Williams CJ delivered in the High Court of Rarotonga (Electoral Court) on 7 September 2018 which dismissed all claims of treating and bribery advanced by the Appellant in an electoral petition. Reasons were given on 19 September 2018. The Appellant was dissatisfied with the part of the Judgment which decided that the allegations of treating by Mr Hagai in respect of the meetings on 24 and 31 May and 7 June were not made out.[1]

General Election June 2018

[2] The background facts are that on 12 April 2018, the Queen's Representative, acting pursuant to Article 37 of the Cook Islands' Constitution, dissolved the Parliament of the Cook Islands and fixed 14 June 2018 as the date for the next General Election of the Members to form the 24-seat Parliament for the ensuing four-year term.

[3] In the 14 June 2018 General Election there were two candidates for the constituency of Rakahanga, the Appellant, Mrs Tina Browne (President of the Democratic Party), and the Respondent, Mr Toka Hagai (the sitting member of Parliament for Rakahanga and a member of the Cook Islands Party (**CIP**)). The main electoral roll for Rakahanga (dated 19 April 2018) contained 56 names and the supplementary roll (which closed on 10 May 2018) added 7 names and deleted 2. The declaration of the final vote count on 28 June 2018 showed the Respondent polling 39 votes and the Appellant polling 24 votes. Hence, there was on election day, a majority for the Respondent of 15 votes.

[4] In the course of the election, the CIP Planning Committee organised campaign meetings for the Respondent on Rakahanga at which free food and drink, including alcohol, was provided by the CIP as well as others attending the meetings. The claim of treating and bribery related to the provision by the CIP of the food and drink at these meetings.

[5] For the purpose of the appeal, it is noted at the outset that treating is proscribed by s 89 of the Act which provides:

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

[1] For completeness, it is noted that the Appellant's final ground of appeal, namely, that there was no evidence upon which the election petition could have been dismissed, was limited to the 24 May 2018 gathering only.

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

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

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

The Appellant's election petition and the resultant High Court proceedings

[6] Pursuant to s 92 of the Act, the Appellant filed a petition on 5 July 2018 (amended on 7 August 2018) requesting an inquiry into allegations of corrupt practices by the Respondent during the election (being allegations of treating and bribery under ss 89 and 88 of the Act respectively). The election petition was heard by Williams CJ in Rarotonga on 10, 11 and 13 August 2018.

[7] On 19 September 2018, Williams CJ delivered his reasons for the judgment and annexed a Certificate as to Result of Election for the constituency of Rakahanga pursuant to s 104 of the Electoral Act in the following terms (**the Certificate**):

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

[8] The Respondent was sworn in as a member of Parliament and took his seat in the Parliament despite the filing of the electoral petition.[2] This was justified by Article 29(2) of the Constitution under which Parliament may meet once all election petitions filed in the High Court in respect of the election have been finally determined "by the High Court at first instance". On the first day of meeting of the new Parliament after a general election, Standing Order 5 of the Standing Orders of the Parliament of the Cook Islands required that members take the Oath of Allegiance before the Speaker pursuant to Article 30 of the Constitution.[3]

[9] On 4 October 2018, the Appellant applied for leave to appeal by way of case stated to the Court of Appeal in terms of s 102(2) of the Act in respect of that part of the petition which alleged that the Respondent had engaged in treating in breach of s 89 of the Act. This Court made procedural orders

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2 As to the Respondent's participation in Parliamentary proceedings, in accordance with Article 34(6) of the Constitution, "Parliament shall not be disqualified for the transaction of business by reason of any vacancy among its members including any vacancy not filled at a general election, and any proceedings therein shall be valid notwithstanding that some person who was not entitled to do so sat or voted in Parliament or otherwise took part in the proceedings" (emphasis added).

3 Standing Order 31 of the Standing Orders of the Parliament of the Cook Islands provides that each member "shall take and subscribe the [Oath of Allegiance] at the first appropriate opportunity after the member's election to Parliament".

to ensure that the appeal was able to be heard during the week when the Court sat in Rarotonga (29 October to 2 November 2018) and leave to appeal was presumptively granted. Williams CJ stated the case on 25 October 2018 (**the Case Stated**).

[10] On 31 October and 1 November 2018, the Court heard the appeal and reserved its decision.

The Respondent's resignation and aftermath

[11] The Respondent on 1 November 2018, unexpectedly (and without prior notice to the Court), resigned his seat. The Speaker of the House accepted the resignation and published the Respondent's letter of resignation in the *Cook Islands Gazette* that afternoon. The Respondent's resignation letter read as follows:

> It is with regret that I tender my resignation as the Member of Parliament for the constituency of Rakahanga. This resignation is to take effect immediately as of this day 1 November 2018.

[12] The Gazette Notice did not meet the requirements of s 9(4) of the Act since the publication did not include the Speaker's declaration that the seat had become vacant. Section 9(4) provides:

> When it appears to the Speaker that the seat of any member has become vacant [pursuant] to subsection (1), the Speaker shall declare in writing that the seat has become vacant and the cause thereof, and shall forthwith notify the Chief Electoral Officer and cause that declaration to be published in the Cook Islands Gazette.

[13] On 2 November 2018, the Appellant sought an urgent order staying the effect of the Certificate issued by the High Court and suspending any obligation on the Chief Electoral Officer to call a by-election under s 105 of the Electoral Act. On the same day, after hearing counsel for the parties and the Chief Electoral Officer, two judges of this Court (Barker JA and White JA) issued interim orders to stay the by-election process. The orders were made under s 59(d) and (j) of the Judicature Act 1980-1981 (as inserted by the Judicature Amendment Act 2011) (**the Judicature Act**) and under s 102(4) of the Act and were as follows:

1. That the by-election process resultant from the resignation of the Respondent from his seat in Parliament and the time-frames under the Electoral Act thereunder are stayed until further order of this Court; and

2. That the effect of the Certificate issued by Williams CJ is also stayed under s 102(4) of the Electoral Act until further order of this Court.

[14] The Court convened a telephone conference to determine whether to continue the interim orders made on 2 November 2018. After hearing from counsel, on 9 November 2018, the Court ruled that the interim orders made on 2 November 2018 should continue, pending further order of the Court.

Judgment in the High Court

[15] The passages of the judgment under appeal which the appellant submitted contain the errors of law are paragraphs [56] and [57]. Those paragraphs read as follows:

> [56] In the mutually supportive community on Rakahanga, the Court's conclusion is that, accepting the guidance of the "substantial merits and justice of the case", and giving appropriate weight to the cited observations from *Hosking v Browne* as to the obligations of Polynesian hospitality,[4] the minimal proved contributions by members of the CIP Planning Committee on Mr Hagai's behalf to the sustenance at the three meetings comes within the New Zealand Supreme Court's finding in *Field* of a "de minimis defence in relation to gifts of token value which are just part of the usual courtesies of life". Acting in accordance with, and to no greater extent than is required by, custom – one of those usual courtesies – meant that it was not proved that Mr Hagai, through the members of the CIP Planning Committee, acted corruptly in the sense explained in the authorities, of doing something not dishonestly but which the law forbids as tending to corrupt voters: he and they were fulfilling the dictates of custom, no more. Their contributions were not a reward for voting in a particular way.
>
> [57] In light of that, the appropriate conclusion was that the allegations of treating by Mr Hagai in respect of the meetings organised by his electoral agents on 24 and 31 May and 7 June were not made out because a recognised defence was available to him and the allegations in the amended petition in that regard relating to those dates were accordingly dismissed.
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> (emphasis added)

[16] It is noted that although the *de minimis* defence appears to be identified as the successful "defence" in the High Court's judgment, the Appellant's counsel also submitted that the High Court applied another defence, namely a customary hospitality defence.

[17] When reflecting on the ratio of the High Court's judgment as set out in the two paragraphs above, it is important to note (a) what issues were not raised by the parties or otherwise addressed during the hearing; and (b) what are the positions of the parties in relation to the current appeal.

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[4] The official report of the case referred to by Williams CJ as "*Hosking v Browne*" is found in [1979] 1 NZLR S26. The case has also been cited as *Hosking v Browne* [1978] 1 CKHC 1 and is sometimes referred to as the "fly-in voters" case. The proper name of the case is *Re Te-Au-O-Tonga Election Petition*.

Issues not addressed before the High Court

[18] It is not disputed by the parties in their submissions on appeal, that the following issues were not raised by them or otherwise addressed during the High Court hearing notwithstanding that the matters listed below as (1) and (2) are now agreed to form part of the essence of the ratio of the judgment in paragraph [56] (as set out above in paragraph [15] above):

1. The application (or non-application) of s 99 (Real Justice to be Observed) of the Act concerning "the substantial merits and justice of the case";[5]

2. The existence and application of a *de minimis* defence in the context of s 89 (Treating);[6] and

3. The legislative history of s 89 (Treating) of the Act and, in particular, the effect of the 1998 amendment to the proviso which restricted the previously unqualified statutory exception permitting hospitality according to local custom or practice so that it is only permissible "at any time *after the close of the poll*".[7]

[19] Additionally, the Appellant asserted during the course of the appeal hearing that the existence of a customary defence (customary hospitality) was not raised or relied upon by the Respondent in the High Court. The Respondent, however, disagreed, and said that he had raised the relevance of custom in its submissions by means of a passing reference to *Re Te-Au-O-Tonga Election Petition* [1979] 1 NZLR S26 at S47–S48 (addressed in further detail below at paragraphs [47] to [74]).

Position of the parties on appeal

[20] The parties' different understandings of the *ratio decidendi* of the High Court's judgment (at paragraphs [56] and [57] of that judgment) may be noted as follows.

[21] The Appellant understood that Williams CJ had found:

1. The elements of s 89 (Treating) were established on the grounds that (i) the Respondent was a candidate at an election; (ii) the Respondent (either by himself or through any other person on his behalf) directly or indirectly provided food and drink to persons during the election; and (iii) the Respondent's actions were accompanied by the requisite intent (either for the purpose of corruptly influencing those persons to vote or for the purpose of procuring himself to be elected);

2. However, the Respondent's actions were excused because of (i) an established customary defence (Customary Hospitality) referred to in the *Re Te-Au-O-Tonga Election Petition* case; and (ii) an established *de minimis* defence recognised in *Field v R* [2011] NZSC 129, [2012] 3 NZLR 1.

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5 Addressed in paragraphs [31] to [46] below.
6 Addressed in paragraphs [78] to [108] below.
7 Addressed in paragraph [61] below.

[22] The Appellant also submitted that Williams CJ's decision on the substance of the case was guided (in the Appellant's view, incorrectly) by the "substantial merit[s] and justice of the case", notwithstanding the fact that s 99 of the Act was not raised by the parties and was legally irrelevant to a decision on the merits.

[23] The Respondent contended that Williams CJ found that the elements of s 89 (Treating) were not established because Williams CJ (in the Respondent's view, rightly) drew an inference that the Respondent did not have the requisite intent under that provision. The Respondent said that Williams CJ drew that inference based on factors including (i) the minimal food/drink provided (applying the *de minimis* principle); and (ii) the fact that the amount provided was no more than that justified by custom in the Cook Islands. It followed that the Respondent did not consider that Williams CJ relied on any "defence" to s 89 of the Act. Rather, Williams CJ found on the evidence that s 89 was not satisfied.

The Case Stated

[24] There is no dispute that the procedure governing an appeal by way of case stated is set out by this Court in *George v Tatuava* [2004] CKCA 7 at [9]–[10], following the New Zealand High Court decision in *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76 (HC) per Fisher J. Those passages are set out below:

> [9] Although we were informed by counsel that there is no provision regarding cases stated in the relevant rules of the Court, this particular mode of appeal is well known in English and New Zealand law. The whole area of law in this regard is well summarised by Fisher J in *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76.
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> [10] That case makes the following matters clear.
>
> (a) It is the responsibility of the Judge to record the facts as found by him and to articulate the questions of law for the opinion of the appellate Court.
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> (b) Normally it is for counsel to confer on the form of the case stated. If counsel cannot agree, it is the duty of the Judge to settle the case stated.
>
> (c) It is not sufficient for the Judge merely to annex the notes of evidence to the case stated and leave it to the appellate Court to try and resolve the matter.
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> (d) If there is a conflict of evidence or if some of the evidence has not been accepted by the tribunal determining the facts, such evidence is irrelevant to the appeal and should not be included: see *Conroy v Patterson* [1965] NZLR 790, 791.

[25] The learned Chief Justice recorded the following facts in the Case Stated:

> [1] Gatherings were held in Rakahanga on 24 May, 31 May and 7 June 2018.
>
> [2] All three of those gatherings were organised by the Cook Islands Party Planning Committee on Rakahanga. The committee consisted of Puapii Ngametua Greig, Trainee Maea, Papa Tuteru Taripo, Maggie Taripo, Enua Maea and Ngametua Tarau.
>
> [3] The gatherings were campaign meetings.
>
> [4] All three of the gatherings were convened by Mr Hagai's campaign manager and the CIP Planning committee and at least one of their significant purposes was political, namely, to support Mr Hagai's campaign for re-election. Each gathering had, as at least part of its aim, the shoring up of support for Mr Hagai's re-election among his known supporters and, possibly, waverers.
>
> [5] Mr Hagai gave a speech in Maori at the gathering on 24 May 2018. The contents of that speech were as set out in the agreed translation. He did not speak at the second or third gatherings.
>
> [6] Mr Hagai delivered a speech at the first meeting so its political purpose at that point was unmistakable, but the gathering went on for some hours by which time its purpose may have become less obvious. The overt political purpose of the other two functions would only have been discernible by Mr Hagai's presence and the fact they were organised by the CIP Planning Committee. The significance of the political motivation varied.
>
> [7] Anybody who wanted to attend the gatherings could attend and invitations were informal. While many attending may not have been voters (children were present) those attending represented a considerable proportion of those on the electoral roll of 61 names for the Rakahanga constituency.
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> [8] Prior to the second function almost all the islanders were present for the unveiling for Mrs Browne's late father in accordance with custom. A traditional kaikai followed the ceremony.
>
> [9] Free food and alcohol were provided at each of the functions. It was only contributions by the CIP Planning Committee of food and drink to electors at the gathering which were relevant to the allegation of treating.
>
> [10] Almost without exception those who attended the gatherings brought food of various types as set out in the evidence of Mr Greig and many also brought alcohol, either Coopers (a local homebrew) or beer or spirits. Mr Taripo and his wife (Maggie Taripo) contributed alcohol to all three functions.

[11] Nobody paid for the food or alcohol at the functions, (even though alcohol is expensive on Rakahanga).

[12] The free food and drink was available to any person, elector or not, known CIP supporter or not, who attended the gatherings.

[13] The CIP Planning Committee also contributed fish, meat and poultry. The contribution by attendees other than the CIP Planning Committee should be contrasted with the contributions from that Committee. Mr Hagai, mindful of guidance given by the Chief Electoral Officer as to permissible actions during an election campaign, contributed nothing to the food or drink.

[14] Mr Hagai sought to curry favour at all the functions, and capitalised on and must be taken to have adopted the organising actions of the CIP Planning Committee. In attending and participating in meetings which the committee organised, which any elector on Rakahanga might attend and which were to boost his chances of re-election clearly amounted to Mr Hagai entrusting the committee with a material part of his election bid. This amounts to other persons directly or indirectly giving or providing food and drink on his behalf.

[15] The gatherings were held on a remote island with a tiny population where all the inhabitants, not just the electors, know one another, where many are related to one another and where they socialise together and where many work together.

[16] All collaborate in producing food on the island which sustains them. Outside deliveries are spasmodic so a degree of mutual support, sharing and self-sufficiency is to be expected and may be vital.

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

[18] The contribution of food and drink by the Committee set alongside the contributions by virtually everyone else who was there should properly be regarded as minimal and no more than custom requires.

[19] The contributions by the CIP Planning Committee acting in accordance with, and to no greater extent than required by, custom (a usual courtesy of life) were fulfilling the dictates of custom and their contributions were not a reward for voting in a particular way.

Case stated procedure

[26] In *Wigmore v Matapo & Ors* [2005] CKCA 1 at [18], this Court cited with approval a passage from Fisher J in *Auckland City Council v Wotherspoon* who referred with approval to the dictum of Henry J in *Conroy v Patterson* [1965] NZLR 790 at 791. That passage read as follows:

> On an appeal by way of case stated on a point of law only the Court is concerned with the relevant facts as found and the grounds for determining the particular question of law, which question itself must be properly stated. The … Court is not further or otherwise concerned with the evidence or the other findings which were made. … The evidence as a whole is not material except in rare cases where the question is whether or not the finding was supported by the evidence.

[27] As to the possible types of questions of law which may be heard and determined in an appeal by way of case stated, Fisher J in *Wotherspoon* noted at 85:

> Whether there is the right to an appeal on a question of law is simple enough where the facts are not challenged on appeal and the argument is limited to the legal consequences of those facts in the conventional sense. The intelligent layman might reasonably expect that the matter would end there. In fact, under the label "question of law" the Courts have allowed a limited incursion into the factual area – but only in two special situations. One concerns the question whether a positive factual finding made by the Court below was unsupported by any evidence. The other concerns the question whether any inference other than that contended for by the appellant could reasonably have been drawn from those primary facts actually found by the Court below.

The terms of the Case Stated in this case

[28] The Case Stated set out of the following questions on which the opinion of this Court was sought:

1. Did the High Court err in accepting the guidance of s 99 of the Electoral Act 2004 in addressing the substantive questions to be decided?

2. Did the Court err in "giving appropriate weight" to the observations from *Hosking v Browne* as to the obligations of Polynesian hospitality?

3. Is there a *de minimis* defence in relation to gifts of token value which are just part of the usual courtesies of life in relation to treating, and if so, was it satisfied?

4. Was there evidence upon which the Court could properly find that a custom existed that could act as a defence to the treating allegation and that if it is such a defence existed the complained of conduct was in satisfaction of that custom?

5. Was there evidence upon which the Court could properly find that the treating allegation could be dismissed?

[29] Whilst mindful of the significant time pressure involved at the time when the case was stated, the Court has reservations about the framing of the questions of law (above). The Court does not consider it desirable to attempt to answer the questions as framed and, accordingly, has re-framed what it sees are the issues determining the appeal as follows:[8]

1. Did the Chief Justice err in accepting the guidance of s 99 of the Act in addressing a substantive question to be decided in the election petition?

2. Did the Chief Justice err in finding that a custom existed that could act as a defence to the treating allegation?

3. Did the Chief Justice err in finding that a *de minimis* defence existed in relation to treating?

4. On the basis of the primary facts as found, did the Chief Justice fail to draw the only reasonably possible inference as to the purpose of the alleged treating?

[30] The first three questions above constitute what Fisher J labelled "conventional legal question[s]" (at 86). The final question comprises the most critical question in this appeal and falls within one of the rare circumstances in which a factual inference drawn by the court at first instance can be challenged.

First Issue – Section 99 of the Electoral Act 2004

[31] In determining a substantive question to be decided in the election petition, namely, whether the Respondent through members of the CIP Planning Committee acted "corruptly" for the purposes of s 89, the Chief Justice accepted the guidance of the "substantial merits and justice of the case" under s 99 of the Act. That step has been challenged by the Appellant as an error of law.

[32] The Court must consider whether his Honour erred in accepting such guidance in addressing a substantive question to be decided.

[33] The starting point is to set out s 99 of the Act, which provides:

> 99. Real justice to be observed – At the hearing of any election petition the Court shall be guided by the substantial merits and justice of the case and the Court may admit such evidence as in its

[8] Exercising its powers under Rule 42 of the Court of Appeal Rules 2012 and in accordance with s 96(1) of the Act which provides that "the Court shall have jurisdiction to inquire into and adjudicate on any matter relating to the petition in such manner as the Court thinks fit".

> opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the Court.

The Appellant's position

[34] According to the Appellant, s 99 of the Act was applicable *only* to procedural aspects of electoral petitions. Counsel for the appellant emphasised that the wording of the provision specially stated "[a]t the hearing of any election petition". Counsel for the Appellant noted that the provision does not refer to the making of the substantive decision (the legal analysis required to establish whether or not treating has occurred) but rather relates to the manner in which an election petition is to be heard.

[35] During the hearing, counsel for the Appellant argued that the provision was intended to have the effect of a warning against letting rules of evidence get in the way of providing the Court with the information required to determine the substantive question in the petition. In the Appellant's view, this interpretation was confirmed by this Court in *Wigmore v Matapo* [2005] CKCA 1 which considered the operation of s 99 at paragraph [96]. That passage is set out below:

> We doubt whether the section was designed to equate the equity and good conscience provisions often found governing the jurisdiction of inferior courts. The section appears to be directed, as Mr Harrison submitted, rather to the hearing process and the reception of evidence. That apart, the Court is bound to give effect to the dictates of the Act itself. If s 22 applied, then Mrs Ringia was deemed to be properly on the roll and entitled to vote. … There is simply no room for s 99 to operate. The decision to invalidate her vote was therefore wrong in law.

[36] According to the Appellant, the election rules around treating are strict and based on sound principle so as to ensure that elections are free and fair. Counsel for the Appellant submitted that the substantial merits and justice assessment mandated by s 99 of the Act was, by way of contrast, highly discretionary and dependent on the subjective outlook of the judge in each case. In the context of election petitions where certainty is fundamental, the Appellant contended that it would undermine the general public faith in the system for electoral petitions to be decided on a particular judge's view of the substantial merits and justice of the case.

The Respondent's position

[37] Counsel for the Respondent submitted that the issue of whether s 99 of the Act permits the court to be guided by the substantial justice and merits of the case in making a substantive decision as well as conducting the hearing is not yet settled (and remains open for interpretation). In the Respondent's view, the words "guided by the substantial merits and justice of the case" suggested that s 99 of the Act goes beyond merely the hearing of evidence.

[38] In any case, the Respondent submitted that the guidance taken from s 99 of the Act by the Chief Justice did not materially add anything to the reasoning behind the decision and the result would have been the same without it. In the Respondent's view, the Chief Justice did not rely on s 99 to overrule, modify or interpret any other provision in the Act. Instead, the Chief Justice deployed drew upon s 99 for "reinforcement for the other conclusions he reached".

The Court's analysis

[39] The Court accepts the submissions of the Appellant. Section 99 of the Act empowers the Court with a discretion to avoid the applicability of the strict rules of evidence during a hearing. It is limited to evidentiary or procedural matters only. Indeed, the provision expressly starts with the phrase "[a]t the hearing of any election petition".

[40] As stated by this Court in *Wigmore v Matapo* at paragraph [96] when considering the application of s 99 of the Act (already set out in paragraphs [35] and [33] above respectively):

> We doubt whether the section was designed to equate the equity and good conscience provisions often found governing the jurisdiction of the inferior courts. The section appears to be directed, as Mr Harrison submitted, rather to the hearing process and the reception of evidence.

[41] We agree with the Court's interpretation of the scope of s 99 in *Wigmore v Matapo* at [96]. Section 99 of the Act is directed to the hearing process and the reception of evidence only.

[42] A similar provision can be found in s 240 of the New Zealand equivalent of s 99 of the Act – the Electoral Act 1993 (NZ). Section 240 of that Act provides:

> **240 Real justice to be observed**
>
> On the trial of any election petition,–
>
> (a) The court shall be guided by the substantial merits and justice of the case without regard to legal formalities or technicalities:
>
> (b) The court may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the High Court.

[43] The intended operation of s 240 of the Electoral Act 1993 (NZ) is described in Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at paragraph 12.2.1 as follows:

> When investigating any issues raised by the election petition, the court has an extremely wide jurisdiction. It may "inquire into and adjudicate on any matter relating to the petition in such manner as the Court thinks fit". In conducting its hearing of the petition, the court is to be guided by "the substantial merits and justice of the case" rather than legal technicalities, and may admit any evidence it believes may assist it in dealing effectively with the case.

(emphasis added)

[44] The description above of the intended effect of the equivalent New Zealand provision reinforces the Court's interpretation of s 99 of the Act. There is no room for the operation of s 99 of the Act when deciding substantive questions in an electoral petition.

[45] As to the Respondent's submission that s 99 of the Act did not materially influence the Chief Justice's decision, the language used in paragraph [56] of His Honour's judgment is inconsistent with that assertion. On the contrary, the learned Chief Justice deployed the guidance of the "substantial merits and justice of the case" as a central factor in his determination. Accordingly, the Chief Justice has misapplied a legal principle which formed part of the *ratio* of the judgment.

[46] In summary, the Court finds that the Chief Justice erred in accepting the guidance of s 99 of the Act in addressing a substantive question to be decided in the election petition.

Second Issue – Custom as a defence to treating

[47] This Court has been asked to determine whether a custom existed that could act as a defence to the treating allegation.

[48] The background to this part of the appeal is set out in the High Court's judgment at paragraph [56] (which has already been set out in full at paragraph [15]):

> [56] In the mutually supportive community on Rakahanga, the Court's conclusion is that, … giving appropriate weight to the cited observations from *Hosking v Browne* as to the obligations of Polynesian hospitality, the minimal proved contributions by members of the CIP Planning Committee on Mr Hagai's behalf … meant that it was not proved that Mr Hagai, through the members of the CIP Planning Committee, acted corruptly in the sense explained in the authorities, of doing something not dishonestly but which the law forbids as tending to corrupt voters: he and they were fulfilling the dictates of custom, no more.
>
> (Emphasis added)

[49] The "observations" referred to in that passage of the Chief Justice's judgment above were derived from *Re Te-Au-O-Tonga Election Petition* [1979] 1 NZLR S26 at S47–S48. In addressing the allegation that the electoral candidates were guilty of treating, Donne CJ stated:

> … [S]ince they provided the "fly in voters" with meat, drink, entertainment or other provision … I accept Mr Brown's submission that what was done here was consistent with traditional Polynesian hospitality. It would have been considered by the travelling voters as their due and I am satisfied that it would not be regarded as a "Treat" in the sense of s 70 of the Electoral Act. No should those providing the feast have imputed to them a corrupt intent in doing so, since every

> Polynesian knows what according to custom is required to be done for visitors: the most important obligation is to provide customary hospitality.

[50] As to the relevance of that passage to the present circumstances, the Court notes in passing that the citizens of Rakahanga, unlike the fly-in-voters in the *Re Te-Au-O-Tonga* case, were not "travellers" or guests visiting from another country (see S47 of that judgment), but rather local residents of the electorate of Rakahanga.

[51] Quite aside from the question of the existence (or otherwise) of a customary practice regarding Polynesian hospitality, there is a preliminary and important separate question as to whether it was even permissible for the High Court to rely upon the passage regarding Polynesian hospitality from the 1978 judgment in view of the legislative history of the treating provision of the Act (and, in particular, the 1998 amendment, addressed further below). It is this question which the Court now turns to address.

Appellant's position

[52] Counsel for the Appellant submitted that, as a matter of law, there was no scope for a customary defence to a treating claim except in the "very limited" circumstance expressly provided for in the proviso to s 89 of the Act (**the proviso**), which reads:

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

[53] According to the Appellant, the legislative history of the treating provision in s 89 of the Act demonstrates that the current state of treating in the Cook Islands is in a unique position where Parliament has "rolled back" the previously unrestricted exception available in relation to local custom and practice so that it may only be engaged "after the close of the poll". Counsel for the Appellant submitted that the effect of that legislative amendment was such that the provision of hospitality according to local custom or practice was no longer a recognised statutory exception to treating as it had been under the 1993 amendment (to the then s 70), unless the act took place after the close of the poll.

[54] In the Appellant's view, the approach taken by the High Court to allow customary hospitality before the close of the poll to act as a defence to treating would effectively leave the scope of the proviso to s 89 of the Act unchanged from the 1993 amendment despite Parliament's deliberate steps to limit the proviso in 1998.

Respondent's position

[55] The Respondent accepted that custom was not "*per se*" a defence to treating. The Respondent asserted, however, that the removal in 1998 of the absolute defence in the 1993 amendment to the treating provision did not prevent the Court from considering whether the custom "negates the intent".

[56] According to the Respondent, the Chief Justice merely recognised the existence of a custom whereby the host was expected not to be "empty handed" in the midst of guests. The Respondent submitted that, in light of that custom and the circumstances of the case, the Court then drew an inference that the Respondent did not provide food and drink for one of the purposes listed in s 89, but rather to satisfy the dictates of custom.

[57] In that regard, the Respondent submitted that there was ample evidence for the Court to determine that the CIP Planning Committee was only ever furnishing food to the extent expected of them pursuant to custom.

The Court's analysis

[58] As noted above, it was acknowledged in this Court by both counsel that neither party had referred the Chief Justice to the legislative history of the treating provision in s 89 of the Act. In the Court's view, the legislative history surrounding the treating provision (and in particular the proviso in relation to hospitality according to custom) is decisive in relation to this appeal. It is a matter of regret that the Chief Justice was not taken by either counsel to the legislative history of the treating section which, as can be seen from this Court's judgment, is of central importance especially in view of the change to the proviso in the treating provision in the 1998 amendment. As is made clear below, that particular change represented a deliberate decision by Parliament to avoid any risk of treating, especially in small electorates (of which Rakahanga is one). The Chief Justice did not appear to be aware of those amendments.

[59] In the Court's view, the lack of guidance to assist the Chief Justice is apparent in paragraph [136] (Schedule 2) of the judgment, where the Chief Justice recommended legislative amendment as follows:

> Further, experience shows that petitions based on the alleged commission of electoral offences very often involve the provision of hospitality by way of food or drink to electors. But, given that meetings of almost any type in the Cook Islands are followed by a kaikai, if the offences of bribery and treating are to remain corrupt practices and electoral offences, to align them with the way of life in the Cook Islands, consideration might perhaps be given to amending the Act to extend the exemption of "hospitality according to local custom or practice" in s 89 to the giving of ordinary

Cook Islands hospitality by candidates during the period between the close of nominations and the closing of the poll on Election Day.

[60] The passage above is, of course, consistent with the now outdated law in relation to treating following the 1993 amendment which continued until the 1998 amendment (addressed in the section immediately below). Had the Chief Justice's attention been drawn to the legislative history, His Honour would have understood that Parliament made a conscious decision to shift the balance in electoral law away from seeking to accommodate traditional practices and, instead, in favour of accepting the strict principles of electoral law in a modern democracy.

Legislative history of the treating provision in the Cook Islands

[61] The Court now turns to analyse the legislative history of s 89 of the Act. During the teleconference of 7 November 2018, counsel were requested to provide a detailed analysis of the legislative history surrounding treating in the Cook Islands. With the assistance of a helpful joint memorandum of counsel dated 14 November 2018, the Court is able to record that history as follows:

1. The Electoral Act 1966 was passed approximately one year after the Cook Islands achieved legislative independence. Section 70 of that Act provided as follows:

> 70. Treating – Every person commits the offence of treating who, being a candidate at any election, by himself or any other person on his behalf, corruptly gives or provides any meat, drink, entertainment, or other provision to or for any person for the purpose of procuring his own election or on account of his having been elected or for any other purpose calculated to influence the vote of that person.

2. Relevantly, the provision concerning treating in 1966 did not include the proviso allowing a candidate to provide "hospitality according to local custom or practice" (**customary hospitality**).

3. In the Electoral Amendment Act 1993, s 9 repealed s 70 of the Electoral Act 1996 (set out above) and substituted a new s 70 which provided (**the 1993 amendment**):

> 70. Treating – Every person commits the offence of treating who, being a candidate at any election, by himself or any other person on his behalf, corruptly gives or provides any meat, drink, entertainment, or other provision to or for any person for the purpose of procuring his own election or on account of his having been elected or for any other purpose calculated to influence the vote of that person:
>
> Provided that it shall not be an offence against this section for a candidate to provide at any time, hospitality according to local custom or practice.
>
> (emphasis added)

4. Even though this amendment was enacted, strong concerns were expressed by some members of Parliament at the time that the proposed proviso would be open to abuse by candidates. For example, Mr N David said during the Committee stage ((23 September 1993) 5 CIPD 578):

> …[D]o we have customs and traditions relating to the electing of a Member of Parliament? What is our practice as it relates to our local traditions and customs, Mr Chairman. It is not written anywhere in our law, Mr Chairman, that this practice is our local customs and traditions. That means Mr Chairman, that we can hold any function and say, as an excuse, that it was held as part of our local traditions and customs. I am afraid Mr Chairman, that through this amendment before the House, it will aid the potential for corruption during the time of an election.

5. Thus, it was that, by the 1993 amendment, a proviso was deliberately added to allow candidates to provide customary hospitality at any time (whether *before or after* the closing of the poll).

6. The treating provision as amended by the 1993 amendment was then replaced by s 84 of the Electoral Act 1998 following Parliamentary debates (**the 1998 amendment**). Section 84 provided:

> 84. Treating – Every person commits the offence of treating who, being a candidate at any election, by himself or herself or by any other person on his or her behalf, either before or during an election, directly or indirectly gives or provides or pays wholly or in part the expense of giving or providing any food, drink, entertainment, or other provision to or for any person –
>
> (a) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or
>
> (b) for the purpose of procuring himself or herself to be elected:
>
> Provided that it shall not be an offence against this section for a candidate to provide at any time after the close of the poll, hospitality according to local custom or practice.
>
> (emphasis added)

7. The important change in the 1998 amendment to the treating provision was the deliberate addition of a temporal limit on permissible customary hospitality. Parliament incorporated a time limit to the otherwise unrestricted proviso set out in the 1993 amendment so that customary hospitality was permissible only "after the close of the poll".

8. The 1998 amendment was then carried over into s 89 of the current Act in 2004 in identical terms, which is set out in full at paragraph [5] above.

[62] The inference to be drawn from the legislative history is obvious. It is to forbid any provision of customary hospitality until after the closing of the poll. The Court agrees with the Appellant that this was a deliberate decision by Parliament to restrict the formerly wide ambit of the proviso introduced via the 1993 amendment.

[63] Further guidance may be found in the Parliamentary debates relating to the 1998 amendment. The Hansard transcript of the debates was helpfully supplied by the parties on 14 November 2018 along with helpful submissions on the relevance of the transcript on 23 and 25 November 2018 from the Appellant and the Respondent respectively. Unfortunately, most of the discussion of the proposed amendment to the treating provision occurred *in camera*.

[64] Section 5(j) of the Acts Interpretation Act 1924 (NZ), which applies in the Cook Islands, states:

> Every Act, and every provision or enactment thereof, shall … receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

[65] It is now a commonplace in New Zealand for courts to refer to Parliamentary debates when construing legislation. Reference may be made to R I Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) which states at page 282:

> Particularly since 1984 our Courts, most notably the Court of Appeal … accept they have a discretion to admit and use parliamentary history, even parliamentary debates. They do so often.

[66] Additionally, the author notes at page 282 that "*[c]hanges to a Bill in the course of its passage are one of the most helpful aids, and there are several examples of Courts gaining assistance from them*".

[67] The approach of the New Zealand Courts of referring to the Parliamentary debates has been followed in the Cook Islands. In *Minister of Cook Islands National Superannuation Fund v Arorangi Timberland Ltd* [2014] CKCA 4 at [125], this Court examined the legislative history which led to the enacting of the Cook Islands National Superannuation Fund Act 2000. On appeal to the Privy Council, Lord Neuberger and Lord Mance referred to statements by the then Deputy Prime Minister during Parliamentary debates (see *Arorangi Timberland Ltd & Ors v Minister of the Cook Islands National Superannuation Fund* [2016] UKPC 32 at [6]).

[68] In the present case, in the course of discussing the proposed 1998 amendment, the (then) Prime Minister, Sir Geoffrey Henry stated:[9]

> We will always, Mr Speaker, find ourselves in the situation where on the one hand we have the modern principles of Democracy to accept and indeed to nurture, while at the same time we have our own traditional culture which does not always sit well with the new methods, ideas and practices. One was made reference to by the Leader of the Opposition when we traditionally regard a practice as *aro'a* but the electoral law will regard it as bribery. In most cases our people do not understand the legal technicalities or the legal differences between what is a natural, traditional, practice to them and what the Electoral Act describes fairly forcefully as bribery.
>
> (Emphasis added)

[69] He went on to say:[10]

> There is no law against it until he or she is a voter and you are a Candidate. These are the areas, Mr Speaker, where the law is often different from the traditional practices … But today we have accepted the practice – the principles of Democracy brought to us – and, Mr Speaker, I have been impressed by the comments of many who have been to this country who have said that this small Nation is a model of Democracy among the Island Territories.

[70] These excerpts reinforce the conclusion that the formerly permissive approach following the 1993 amendment of the treating provision was deliberately departed from in favour of prohibiting customary hospitality at all times up to the closing of the poll.

[71] In defining electoral offences, the words that Parliament chooses are critical. In New Zealand, for example, there is an express exception permitting the provision of a "light supper" to ameliorate the harshness of the otherwise strict prohibition against refreshments at pre-election events. The position is noted in Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at paragraph 8.3.3 as follows:

> [Treating] involves a candidate corruptly purchasing or providing food, drink or entertainment, before, during or after an election, for the purpose of:
>
> - Corruptly influencing a person to vote (or not to vote); or
> - Procuring himself or herself to be elected; or
> - Rewarding a person for having voted (or not voted).

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9 (17 September 1998) 12 CIPD 1102.
10 (17 September 1998) 12 CIPD 1103.

> However, because of the breadth of the prohibition on providing food and drink to electors technically precludes providing any refreshments at all pre-election events, an exception permits the offer of "a light supper after any election meeting". What constitutes "a light supper" is a little uncertain, but candidates and their agents should stick to sandwiches, cakes and hot beverages at any public, election-related proceedings and especially avoid providing alcoholic beverages.

[72] The New Zealand provision is found at s 217 of the Electoral Act 1993 which provides in part:

> **217 Treating**
>
> (1) Every person is guilty of a corrupt practice who commits the offence of treating.
>
> (2) Every person commits the offence of treating who corruptly, by himself or herself or by any other person on his or her behalf, either before, during, or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing, any food, drink, entertainment, or provision to or for any person–
>
> (a) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or
>
> (b) for the purpose of procuring himself or herself to be elected; or
>
> (c) on account of that person or any other person having voted or refrained from voting, or being about to vote or refrain from voting.
>
> …
>
> (5) Notwithstanding anything in this section, the provision of a light supper after any election meeting shall be deemed not to constitute the offence of treating.
>
> (Emphasis added)

[73] There is no equivalent exception for a "light supper" in the Cook Islands provision. Additionally, the Court also observes that it is not an offence in the Cook Islands if the act constituting the alleged treating occurs "after an election" (in other words, after the polls have closed). Parliament must be taken to have consciously and carefully selected the wording of the provision to apply in the Cook Islands. It follows that the Court must therefore give effect to the specific wording chosen by Parliament in s 89 of the Act.

[74] For the foregoing reasons, and especially in light of the legislative history, the Court finds that hospitality according to local custom or practice may serve as a defence to an allegation of treating under s 89 of the Act only where the provision of food and drink (which is claimed to be in accordance with such custom) takes place after the close of the poll. Thus, it is not possible to rely

on the defence of custom at any time before the close of the poll. As Parliament decided to adopt the strict principles of electoral law in a modern democracy, it would be contrary to the purpose of s 89 of the Act to permit the defence.

[75] That makes it unnecessary for the Court to explore the question of whether the existence of a local custom in relation to customary hospitality was supported by evidence.

Third Issue – A *de minimis* defence to treating

[76] The Court has been asked to determine whether the *de minimis* defence recognised by the Supreme Court of New Zealand in *Field v R* [2011] NZSC 129, [2012] 3 NZLR 1 at [65] could operate as a defence in the context of a treating allegation under s 89 of the Act. In the context of the crime of corruption and bribery by a member of Parliament under s 103(1) of the Crimes Act 1961 (NZ), the Supreme Court noted at [65]:

> This particular problem cannot be solved by simply treating an antecedent promise as a touchstone for criminality. In the example given of the Member of Parliament who accepts a rugby jersey when opening a rugby club, the Member would still not be corrupt even if he or she knew in advance of the opening that there would be a gift (perhaps because of a question as to what size rugby jersey would be suitable). So if there is an exception, it must address the extent of the gift and the particular context in which it occurs. We consider, therefore, that there must be a de minimis defence in relation to gifts of token value which are just part of the usual courtesies of life.
>
> (Emphasis added)

[77] The Court begins its analysis of this issue by setting out the parties' respective positions.

Appellant's position

[78] The Appellant submitted that the High Court erred in finding that a candidate could rely on a *de minimis* defence in relation to treating under s 89 of the Act.

[79] The Appellant submitted that the authority referred to by the High Court in support of the *de minimis* defence, *Field v R*, could provide no proper assistance in relation to s 89 of the Act for the following reasons set out below:

1. It concerned a criminal offence under s 103(1) of the Crimes Act 1961 (NZ), not a question of electoral law;

2. It related to conduct carried out by a member of Parliament in that capacity, not by a candidate seeking election;

3. It concerned bribery, not treating; and

4. It was from New Zealand and had little relation to s 89 of the Cook Islands Electoral Act.

[80] Section 103(1) of the Crimes Act 1961 (NZ) is set out below and provides:

> **103 Corruption and bribery of member of Parliament**
>
> (1) Every member of Parliament is liable to imprisonment for a term not exceeding 7 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her capacity as a member of Parliament.
>
> (Emphasis added)

[81] According to the Appellant, a *de minimis* defence is inappropriate in the context of treating because it removes the examination of intention completely. The Appellant submitted that the consideration of the extent of the alleged treating is but one relevant factor to assess in the examination of a candidate's intention when providing food, drink or entertainment.

Respondent's position

[82] The Respondent accepted that the *de minimis* defence appeared in *obiter* comments made by the New Zealand Supreme Court in *Field v R*. According to the Respondent, the courts have historically applied the principle for years (albeit without express reference to the words "*de minimis*").

[83] The Respondent submitted that the defence applied to petitions under s 88 (Bribery) of the Act and there was no reason in principle why it should not be equally available in treating cases.

[84] By way of an example where the *de minimis* defence had been applied, the Respondent cited the recent decision of Williams CJ in *Teina Rongo v Albert Nicholas* and *Tukaka Ama v Tamaiva Tuavera* CKHC Misc 33/2018. At paragraph [12] of that decision, Williams CJ observed:

> …[A]n established defence to an electoral petition can be that the gifts were merely of token value and part of what the law calls the "usual courtesies of life". That is a description taken from a New Zealand Supreme Court decision in a case of *Field* involving bribery of a Minister.

[85] Counsel for the Respondent referred to three other cases which, in his view, demonstrated that courts often took into account the size and scale of the giving in the context of bribery allegations.

[86] In *Wilkie Olaf Rasmussen v Willie John* CKHC Misc 40/2014, the High Court dismissed allegations of bribery in relation to a loan of $600 given to a voter as well as two birthday gifts of $50. The

Respondent highlighted the passage of the judgment where the High Court noted that it was "important to look at whether the loan could be regard as out of the ordinary".[11] Additionally, the High Court dismissed allegations of bribery in relation to the giving of two $50 gifts by the candidate at birthdays. The Respondent took the Court to the passage of the judgment where the High Court emphasised that the money was given on behalf of the candidate's family as a matter of tradition.[12]

[87] In *Norman George v Vainetutai Rose Toki-Brown* [2014] CKHC Misc 33/2014, the Court dismissed an allegation of bribery in relation to the provision of labour to assist in fixing a roof immediately before an election. The Respondent highlighted the passage of the judgment where the High Court noted that "the policy by which labour was provided was of long-standing and not in any way related to the 9 July election …".[13]

[88] The Respondent also sought to rely on the High Court's decision of *In the Matter of a Petition by Norman George* CKHC Misc 73/2004. In that case, the candidate's wife took cakes to one home and a tray of food to another on the Sunday preceding the elections (which also happened to be Father's Day). The Respondent drew the Court's attention to page 7 of the judgment where the High Court stated:

> I believe Mrs Tatuava's explanation as to both incidents and in considering these visits and the quantity of food involved I take on board what Speight J. had to say in the re Cowan Petition Case in 1983;
>
> > "…this trifling incident has been over-blown by the hot house atmosphere of political intrigue and recrimination…".
>
> It is noted that in the Cowan case the Petitioners also established that Mr Cowan had sometime after giving the electors twisties said he would be pleased if they voted for him.
>
> I find that nowhere does the evidence given point to an intention by Mrs Tatuava to corruptly treat any one of the voters in the homes she visited.
>
> (Emphasis added)

[89] The Respondent submitted that the cases cited above showed that the Courts have consistently applied a *de minimis* defence without articulating those words.

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11 At [49].
12 At [53].
13 At [69].

[90] The Respondent submitted that a balance must be struck between the need to preserve the democratic process and the need to ensure that persons are not tainted with criminality for actions that do not warrant it. In that regard, counsel for the Respondent emphasised the possible consequences for the candidate could be that he or she could lose his or her seat, forfeit to an opposing candidate or possibly face prosecution.

The Court's analysis

[91] The Court again recalls that the existence or otherwise of a *de minimis* defence in the context of treating was not raised by either party in the High Court. In the context of the present case, it was first raised by Williams CJ in his judgment at paragraph [28] where he stated:

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

[92] His Honour then went on to find at paragraph [56]:

> … [T]he minimal proved contributions by members of the CIP Planning Committee on Mr Hagai's behalf to the sustenance at the three meetings comes within the New Zealand Supreme Court's finding in *Field* of a "de minimis defence in relation to gifts of token value which are just part of the usual courtesies of life". Acting in accordance with, and to no greater extent than is required by, custom – one of those usual courtesies – meant that it was not proved that Mr Hagai … acted corruptly".
>
> (Emphasis added)

[93] As a preliminary observation, that statement from the New Zealand Supreme Court was made in relation to corrupt practices under s 103(1) of the Crimes Act 1961 (NZ) (Corruption and bribery of member of Parliament). That provision is replicated in s 114(1) of the Cook Islands Crimes Act 1969, which provides:

> **114. Corruption and bribery of member of Legislative Assembly** – (1) Every member of the Legislative Assembly is liable to imprisonment for a term not exceeding seven years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his capacity as a member of the Legislative Assembly.

[94] In the Court's view, it is clear that the Supreme Court of New Zealand intended to recognise a *de minimis* defence in relation to the crime of bribery by a member of Parliament, as was made clear in [66] of the same judgment:

> While we are satisfied that the acceptance of gifts which are de minimis (as just explained) should not be considered corrupt under s 103(1), the acceptance of other benefits in connection with official actions is rightly regarded as corrupt irrespective of whether there was an antecedent promise or bargain. … [I]t is the presence in s 103(1) (and like provisions) of the word "corruptly" which permits the de minimis exception to liability which we accept exists.

[95] The Court finds the Appellant's submissions on the distinguishing features of *Field v R* (above at paragraph [79]) compelling. The application of the *de minimis* defence cannot be extended to treating under s 89 of the Act in the Cook Islands.

[96] During the hearing, the Appellant emphasized the "clear distinction" between bribery and treating cases noted in *Cornwall, Bodmin Division Case, Tom and Duff v Agar-Robartes* (1906) 225 where at 231, Lawrence J stated:

> There is a clear distinction between bribery and treating. In cases of bribery there is always something in the nature of a contract. 'If you give me a sovereign I will give you a vote', or some such understanding, but treating is an entirely different matter. In treating it is not necessary that the person treated should belong to the opposite party, whereas it is of no use to give money to a man who is going to vote for you already, the money must be given to the other side in order to draw another vote. But if you give drink to a man with the intention of confirming his vote and of keeping up the party zeal of those believed to be already supporting your candidate, then that is corrupt treating …

[97] As to the decision of *Tukaka Ama v Tamaiva Tuavera* (cited by the Respondent), the *de minimis* principle from *Field v R* was applied in determining the question of whether the consideration provided was "valuable" for the purpose of s 88(a) of the Act (the bribery provision). The relevant passage is found in paragraph [42] of that decision, where Williams CJ stated:

> If there were "valuable consideration", it could only have been either because Mr Tuavera did not charge them for the hire of the generator or did not charge them for the fuel it consumed overnight but, if this was what the petitioner intended might have amounted to "valuable consideration" in the circumstances it must, at the very most, have amounted to no more than a few dollars and <u>not deserving of being regarded as "valuable consideration" having regard to the citation from *Field* which appears earlier in this judgment</u>.

[98] There is, of course, no equivalent element required to make out the offence of treating under s 89 of the Act.

[99] With respect to the decision of *Wilkie Olaf Rasmussen v Willie John*, the Court does not consider the judgment to be particularly relevant to the present appeal. The bribery allegation surrounding the $600 loan was dismissed because it was not proved that the candidate intended to induce the

vote of Mr Tonitara. The allegation was not dismissed on the basis of a *de minimis* defence. Indeed, the High Court remarked that "[t]he making of the loan and the size of the loan at first blush do appear very suspicious".[14] The allegations regarding the birthday gifts were not dismissed on the basis of a *de minimis* defence either. The High Court considered that, in the circumstances of a birthday where the gifts were given on behalf of the candidate's family (as opposed to by the candidate in their personal capacity), the bribery allegations could not stand.[15]

[100] Similarly, it is difficult to draw a link between the High Court's reasoning and the *de minimis* defence in relation to *Norman George v Vainetutai Rose Toki-Brown*. In that case, the High Court accepted that it was "obvious" that "provision of free labour … the day before the election was valuable consideration".[16] The point of contention was the purpose behind the reroofing and the supply of free labour.[17] In the circumstances, the recipient of the free labour was an 85 year old pensioner whose roof leaked and was in desperate need of replacement.[18] His son had returned to the Cook Islands for a limited period of time only and had himself supplied the roofing materials. He had also applied to the Atiu Island Government for access to its policy of assisting pensioner's by providing free labour. The High Court accepted that the provision of labour pursuant to a long-standing policy was approved out of humanitarian concerns for the pensioner.[19] At paragraph [72], the High Court stated (without any reference to the *de minimis* principle):

> The appropriate conclusion in all those circumstances is that, although the approval and provision of free labour by the Island Government employees was a matter bound to raise eyebrows once Mrs Brown won the Teenui-Mapumai election, there was no proof that the giving of that free assistance involved her or her agent with her authority. There is similarly no proof the free labour was provided by the First Respondent on the condition that Papa Akai would vote for her, still less that his household would. There is also no proof that the decision to approve the provision of the free labour was corrupt in the sense discussed in the authorities or that its purpose was political: any possible political motive was considered but rejected. The actions undertaken were not done with the object and intention of doing something s88 is intended to forbid.

[101] In the Court's view, the cases cited above by the Respondent do not support its submission that the Courts have "consistently applied a *de minimis* defence" without articulating the words (especially when the Court is faced with an allegation of treating under s 89 of the Act).

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14 At [51].
15 See [52].
16 See [66].
17 See [54].
18 See [57].
19 See [68] and [69].

[102] As to the High Court's ruling *In the Matter of a Petition by Norman George* (also relied on by the Respondent), the Court accepts that the "quantity of food involved" was considered a relevant factor in determining whether Mrs Tatuava intended to corruptly treat voters. However, it cannot be suggested that the quantity factor alone was decisive. The High Court also stated that it believed Mrs Tatuava's innocent explanation as to both incidents, which was confirmed in evidence given by the recipients.[20] In any case, the Court does not consider a passing reference by the High Court to the "quantity of food" in one case as demonstrative of a consistent practice of applying a *de minimis* defence in the context of an allegation of treating under s 89 of the Act.

[103] The Appellant cited what it described as the "classic statement" as to the meaning of "corruptly" and the means of determining that intention in the words of Blackburn J in *Staleybridge Case, Ogden, Woolley and Buckley v Sidebottom, Gilbert's Case* (1869) 1 O'M & H 66 at 73:

> I think there can be little doubt that the whole is governed by the word 'corruptly', which means with the object and intention of doing that which the Act of Parliament intended not be done for the object and purpose of influencing the election by the giving of meat and drink. The question whether or not there is 'corrupt' giving of meat and drink must, like every other question of intention, depend upon what was done, and, to a great extent, the extent to which it was done, the manner and way. And therefore is a question which must always be more or less a question of fact.
>
> (Emphasis added)

[104] Justice Blackburn also observed in *Wallingford Case* (1869) 1 O'M & H 57 at 58–59:

> I think that what the legislature means by the word 'corruptly' for the purpose of influencing a vote is this : that whenever a candidate is, either by himself or by his agents, in any way accessory to providing meat, drink, or entertainment for the purpose of being elected, with an intention to produce an effect upon the election, that amounts to corrupt treating. … But everything is involved in the question of intention, and it becomes important to see what is the amount of the treating. The statute does not say or mean that it shall depend upon the amount of drink. The smallest quantity given with the intention will avoid the election. But when we are considering, as a matter of fact, the evidence, to see whether a sign of that intention does exist, we must, as a matter of common sense, see on what scale and to what extent it was done. No one would think it reasonable to draw the conclusion from the mere giving of a thimbleful of drink (to use a strong expression), that it was done with any intent to influence the election as to bring it within the statute.

[105] In the Court's view, there is no stand-alone *de minimis* defence to treating under s 89 of the Act. Rather, the extent and likely effect of the alleged treating in the circumstances is only relevant

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20 At 7.

insofar as it assists the decision-maker in assessing whether it is reasonable to draw an inference that the act was done with intent to influence the election. If, for example, what was done was so insignificant that the reasonable and probable effect would have no bearing on the election result or on the votes of individual voters, it would be open for a decision-maker to draw an inference that the action lacked the requisite intent for the purposes of s 89 of the Act.

[106] This approach is consistent with that in the leading case of *In Re Wairau Election Petition* (1912) 31 NZLR 321 where the Court said:

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

[107] This Court's approach is also consistent with the wording of s 89 of the Act which uses the phrase "providing any food, drink, entertainment, or other provision to or for any person (emphasis added)". The wording of s 89 is such that it might even encapsulate a situation where food, drink, entertainment or some other provision is given to a single person only.

[108] It follows from the reasoning above that the Court finds that the *de minimis* defence is not a recognised defence available where the elements of s 89 have been established.

Fourth Issue – Inference as to the purpose

[109] The critical issue in this appeal concerns whether the Chief Justice failed to draw the only reasonably possible inference in relation to the purpose of the provision of food and drink.

[110] Under s 89 of the Act, the giving of food and drink alone is itself not enough to be treating. It must be accompanied by the necessary intent, namely, the giving must have been for the purpose of influencing voters to vote (or refrain from voting) or for procuring a candidate to be elected. As has already been mentioned, neither custom nor a *de minimis* defence may serve as a defence where the elements of s 89 of the Act are otherwise satisfied.

[111] In the High Court, the Chief Justice acknowledged that one of the significant purposes of the campaign meetings was political. However, the Chief Justice viewed the provision of food and drink in isolation and drew an inference that the sole purpose was to provide the minimum hospitality necessary to satisfy the dictates of custom in Rakahanga.

[112] Before turning to examine the validity or otherwise of the inference drawn, the Court first sets out the respective views of the parties.

Appellant's position

[113] The Appellant submitted that, if a significant purpose of the act was political, then that was sufficient to establish the necessary intention. According to the Appellant, there was no evidence upon which the High Court could have properly dismissed the petition.

Respondent's position

[114] The Respondent submitted that, although a "significant purpose for the function was political", that would not "*ipso facto*" translate to the provision of food having a political purpose. According to the Respondent, the meetings were organised to influence voters, the food and drink was not.

[115] The Respondent submitted that the Chief Justice was entitled to draw an inference that the contributions of the CIP Planning Committee were minimal and no more than what custom demanded such that there was no significant political purpose in supplying food and drink at the functions.

The Court's analysis

[116] As the authorities on Case Stated appeals point out, the fact that the appellate court might have drawn a different inference does not matter if it was reasonably possible based on the primary facts for the lower court to draw a particular inference. In *Wotherpoon*, Fisher J noted (at 90):

> [T]his ground of appeal must not be confused with the question whether, among a number of possible inferences, the Court at first instance has drawn the inference which would have been favoured by the appellate Court.

[117] Indeed, the threshold successfully to challenge an inference drawn from primary facts is high. This Court in *Wigmore v Matapo* referred to guidance from the Supreme Court of New Zealand in *Bryson v Three Foot Six & Ors* [2005] NZSC 34, [2005] 3 NZLR 721 where it was stated at [27]–[28]:

> [27] It must be emphasised that an intending appellant seeking to assert that …"the true and only reasonable conclusion contradicts the determination", faces a very high hurdle. It is important that appellate Judges keep this firmly in mind. Lord Donaldson MR has pointed out in *Piggott Brothers & Co Ltd v Jackson* the danger that an appellate Court can very easily persuade itself that, as it would certainly not have reached the same conclusion, the tribunal which did so was certainly wrong:

> "It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. To answer that question in the negative in the context of employment law, the appeal tribunal will almost always have to be able to identify a finding of fact which was unsupported by *any* evidence or a clear self-misdirection in law by the Industrial Tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option …"
>
> [28] It should also be noted that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on "no evidence". It could nonetheless lead or contribute to an outcome which is insupportable.

[118] More recent decisions of the New Zealand Court of Appeal have echoed the New Zealand Supreme Court's remarks regarding the "very high hurdle" that must be met when asserting that the true and only reasonable conclusion contradicts the determination.[21] In dismissing an application for leave to appeal in *Mayne v Nuplex Specialties NZ Ltd* [2013] NZCA 400, the Court of Appeal noted:

> [5] As the Supreme Court held in *Bryson v Three Foot Six Ltd*, determining the terms of a contract of employment will normally be a question of fact. At the same time, as the Supreme Court recognised, appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion if the Court has overlooked a relevant matter or taken account of some matter which is irrelevant to the proper application of the law or reached an ultimate conclusion that is unsupportable – so clearly untenable – as to amount to an error of law. An appellant seeking to assert that there was no evidence to support a finding … or that the true and only reasonable conclusion contradicts the determination faces "a very high hurdle".
>
> (Emphasis added)

[119] Although the threshold is very high in such circumstances, the analysis which follows compels the Court to find that the Chief Justice had self-misdirected himself in law, such that the only reasonable conclusion contradicted the determination made by him.

[120] In order to justify the inference drawn that the provision of food and drink (including alcohol) was motivated by customary hospitality considerations, the Chief Justice considered those acts in isolation from the campaign meetings which he accepted were politically motivated. In doing so, this Court considers that the Chief Justice misdirected himself in law.

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21 For example, see *Clifford Lamar Ltd v Gyenge* [2011] NZCA 208 at [4].

[121] In *obiter* statements of Donne CJ in *Mitiaro Election Petition* [1979] 1 NZLR S1 at S12:

> …[I]t may be that the "governing motive" approach outlined in *Rogers* puts the matter too favourably to the first respondent since there are recent decisions of high authority holding, in comparable fields of electoral law, that it is sufficient in case of mixed motives if one of the purposes of the scheme was the designated illegal purpose: see, for example, *Director of Public Prosecutions v Luft* [1976] 3 WLR 32; [1976] 2 All ER 569 and the note thereon in (1976) 39 MLR 730, 731-732. In *Director of Public Prosecutions v Luft*, a criminal case under the Representation of the People Act 1949 involving allegedly illegal campaign expenditure, the House of Lords held that in assessing the liability of the person incurring the disputed expenditure, it was sufficient if *one of the reasons which played a part* in inducing the person to incur the expenditure was his desire to promote or procure the election of a candidate. Earlier cases involving the "dominant intention" test were rejected. Lord Diplock said:
>
> > "To speak of a dominant intention suggests that a desire to achieve one particular purpose can alone be causative of human action; whereas so many human actions are promoted by a desire to kill two birds with one stone" (ibid, 41; 5744).
>
> I have no doubt, as stated earlier, that the dominant purpose of the venture was to gain political support: but on the authority of *Director of Public Prosecutions v Luft* it appears that so long as the "political" purpose was one of the objectives, that, in terms of s 70, would be enough and that this existed here is something of which I am certain.
>
> (Emphasis added)

[122] In *Luft*, it was argued by counsel that "for the purpose of" referred to the dominant intention of the accused in doing the act complained of. In addressing the 'dominant intention' approach, Lord Hoffman noted ([1976] 3 WLR 32 at 41–42):

> To speak of a dominant intention suggests that a desire to achieve one particular purpose can alone be causative of human actions; whereas so many human actions are prompted by a desire to kill two birds with one stone. For my part I prefer to omit the adjective "dominant". In my view the offence under section 63(1) to (5) is committed by the accused if his desire to promote or procure the election of a candidate was one of the reasons which played a part in inducing him to incur the expense.

[123] Lord Fraser of Tulleybelton went further in remarking that the test would even be satisfied where the illegal purpose was "but an insignificant part of a person's motives in persuading electors not to vote for that candidate" (at 44).

[124] In light of both of the authorities mentioned above, this Court in *Wigmore v Matapo* stated at [37]:

> We are persuaded, however, by the logic of Lord Diplock's approach in the *Luft* case, and by a parity of reasoning hold it to be the law of the Cook Islands, that in a case such as this where there may well have been mixed motives … it is sufficient if one significant purpose was political.
>
> (Emphasis added)

[125] In *Ah Him v Amosa*, the Supreme Court of Samoa dealt with a similar question of whether the alleged treating (presentation of money) was made with corrupt intent. The Court said:

> It would not be realistic to view the presentations in isolation, divorced from the context in which they were made. The purpose of the meeting in which the presentations were made was clearly in relation to the respondent's proposed candidacy. The discussion that took place at the meeting was focused exclusively on the respondent's proposed candidacy and the election. The total amount of money, $1,200 in all, that was given out is not insignificant. The persons to whom the money was given were electors. And the general elections were imminent.
>
> … [W]e are of the view, for the reasons already given, that in the circumstances of what took place, compliance with Samoan custom was not the only motive, or the dominant motive, behind the presentations. It would be sufficient for the purpose of establishing the intent required for bribery and treating in terms of the Act, if one of the motives which accompanied the presentation of money or food was to induce electors to vote for the respondent: see judgment of Donne CJ in the High Court of [the] Cook Islands in *Re Mitiaro Election Petition* [1979] 1 NZLR S1 at S12.

[126] The Court also said later in the judgment in relation to the argument that what the candidate did was entirely in accordance with the requirements of Samoan custom:

> We think that when the respondent met with the 'faletua ma tausi' and the 'aualuma' of Tuanai, he was there principally as an election candidate and not as the holder of the title Maulolo. He was actually out campaigning for his candidacy. The meeting that was held was solely for the purpose of promoting his candidacy. What was said by him at the meeting was all about his candidacy and the up-coming general elections. The money that was given out was not insignificant and it was given to electors. At the time, the general elections were imminent. … From these circumstances, the inference is irresistible that the real intent of the respondent behind giving the money to the 'faletua ma tausi' and the 'aualuma' of Tuanai was to induce those electors to vote for him at the general elections.
>
> … But even if some people may think that the respondent was complying with Samoan custom, if one of his motives in giving out money was to induce the electors at the meeting to vote for him in the general elections, that is sufficient for the purpose of establishing the corrupt practice of bribery.

[127] For the sake of certainty, this Court rules that under Cook Islands law, it is sufficient in cases of mixed motives (or purposes) if *one* of the purposes was the designated illegal purpose.

[128] The Court now returns to consider whether there was any basis upon which the Chief Justice could have drawn the inference that the purpose of the alleged treating did not offend one of the provision of s 89.

[129] The following facts recorded in the Case Stated are particularly relevant:

> [3] The gatherings were campaign meetings. …
>
> [4] All three of the gatherings were convened by Mr Hagai's campaign manager and the CIP Planning committee and at least one of their significant purposes was political, namely, to support Mr Hagai's campaign for re-election. Each gathering had, as at least part of its aim, the shoring up of support for Mr Hagai's re-election among his known supporters and, possibly, waverers …
>
> [6] Mr Hagai delivered a speech at the first meeting so its political purpose at that point was unmistakable, but the gathering went on for some hours by which time its purpose may have become less obvious. The overt political purpose of the other two functions would only have been discernible by Mr Hagai's presence and the fact they were organised by the CIP Planning Committee. … The significance of the political motivation varied. …
>
> [14] Mr Hagai sought to curry favour at all the functions, and capitalised on and must be taken to have adopted the organising actions of the CIP Planning Committee. In attending and participating in meetings which the committee organised, which any elector on Rakahanga might attend and which were to boost his chances of re-election clearly amounted to Mr Hagai entrusting the committee with a material part of his election bid. This amounts to other persons directly or indirectly giving or providing food and drink on his behalf.

[130] Additionally, the Court notes the following findings of the Chief Justice in his judgment:

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

> "…I am of [the] opinion that there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election. I think the word 'corruptly' in this statute means not 'dishonestly', but in purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any particular manner. Both the giver and the receiver in such a case may be said to act 'corruptly'. The word 'corruptly' seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence. I agree with what was said by the learned Judge at the trial, that if the moving cause of giving the money is the voter having voted for the particular candidate, such gift is contrary to the statute, as being given by way of reward for the vote, and therefore corrupt. [Emphasis in *Field*.]"

…

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

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

[32] In light of that, the conclusion must be that all three gatherings were convened by Mr Hagai's campaign manager and the CIP Planning Committee and that at least one of their significant purposes was political, namely, to support Mr Hagai's campaign for re-election. The gatherings had, as at least part of their aim, the shoring up of support for Mr Hagai's re-election among his known supporters and, possibly, waverers. That was an object with which he agreed. He regarded the speech as one of the best he had made. It was a message intended to encourage

people to think about the good things he had done for Rakahanga with the aim that they voted for him if they wished.

…

[54] Any possibility that the actions of the CIP Planning Committee might therefore have breached s 89 comes down to their contribution of food and drink at the three functions. And the evidence on that is Mr Greig's acknowledgment that the committee contributed an unspecified amount of fish, meat and poultry generally while the more specific evidence is that Mr Greig contributed nu to each, Mr Taripo and his wife contributed alcohol to all three functions and Mr Maea contributed ika mata to the second and chicken to the third.

(Emphasis added)

[131] Bearing in mind the authorities cited and given Williams CJ's factual findings, we accept the Appellant's contention that the inference drawn by Williams CJ was insupportable. We are of the view that the only reasonably possible inference that could have been drawn by the Chief Justice was that the purpose of the provision of food and drink (including alcohol) was (at least in part) motivated by political considerations. In the Court's view, it is not possible to view the purpose of the campaign meeting (and speech) on the one hand, and the purpose of providing food and drink on the other, in isolation from each other.

[132] The Court's finding is reinforced by the fact that the treating was not insignificant in the context of such a small electorate as Rakahanga (as suggested by the Chief Justice). Further, as noted above, the Court is of the view that s 89 of the Act is strict in its terms and only permits the provision of food and drink in accordance with custom where the act takes place after the close of the polls.

Relief

[133] Accordingly, the findings of the Court of Appeal on the questions of law properly identified as necessary for the determination of this appeal can be summarised as follows:

1. The Chief Justice erred in accepting the guidance of s 99 of the Act in addressing the substantive question to be decided in the election petition;

2. The Chief Justice erred in finding that a custom existed that could act as a defence to the treating allegation prior to the close of the poll;

3. The Chief Justice erred in finding that a *de minimis* defence existed in relation to treating; and

4. On the basis of the primary facts as found, the Chief Justice failed to draw the only reasonably possible inference as to the purpose of the treating, namely to procure the election of the Respondent.

[134] On the basis of the above conclusions, the Appellant's appeal therefore succeeds and the Court, exercising its power (pursuant to s 102(3) of the Act) to reverse part of the Chief Justice's judgment, hereby finds that the Respondent has engaged in treating under s 89 of the Act.

[135] The consequences of a finding of treating have been set out in s 98 of the Act, which provides:

> 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.
>
> (2) Where it is found by the Court at the hearing of an election petition that corrupt or illegal practices committed in relation to the election for the purpose of promoting or procuring the election of any candidates thereat have so extensively prevailed that they may be reasonably supposed to have affected the result, the 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 provided to have been so bribed, treated or unduly influenced.

Appellant's position as to relief

[136] The Appellant submitted that the Respondent's election was void under s 98(1) of the Act. Further, the Appellant submitted that, in accordance with s 98(3) of the Act, the Court should (i) determine, on a scrutiny, which of the abovenamed persons cast a vote; and (ii) remove from the vote received by the Respondent the number of votes equal to the number of abovenamed persons the Court determines cast a vote. If that number exceeds 15, the Appellant submitted that the Respondent's election should be declared void and the Appellant should be declared to have won the seat. Alternatively, if that number is less than or equal to 15, the Respondent's election should be declared void and a by-election directed.

[137] The Appellant submitted that the following electors attended the first gathering on 24 May 2018 (where the Respondent made a speech), and were provided with food and/or drink at that gathering by the Respondent's agents (the CIP Planning Committee):[22]

1. Tiata Tupou (Main Roll, pg 3);

2. Sema Aratangi (Supplementary Roll, pg 4);

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[22] According to the Appellant, the list of attendees came from the brief of evidence of the Respondent's campaign manager, Mr Grieg, cross-referenced with the evidence from other witnesses.

3. Lal Narayan (Supplementary Roll, pg 4);
4. Noa Hagai Teanini (Main Roll, pg 2);
5. Tupou Vakai (voted by declaration);
6. Frances Tupunangaro (Main Roll, pg 3);
7. Tamaro Thorpe (Main Roll, pg 2);
8. Tutero Taripo (Main Roll, pg 2);
9. Maggie Yvette Purea (Main Roll, pg 1);
10. Sharon Marsters (Main Roll, pg 1);
11. Edward Patterson (Main Roll, pg 1);
12. Exham Kareroa-Uriaere (Main Roll, pg 1);
13. Tarau Parua (voted by declaration);
14. Kavana Kavana (Mail Roll, pg 1);
15. Priscilla Kavana (Main Roll, pg 1);
16. Ayvon Takai (Main Roll, pg 2);
17. Bordlan Takai (Main Roll, pg 2);
18. Munokoa Takai (voted by declaration);
19. Matangaro Takai (Main Roll, pg 2);
20. Neti Tarau (Main Roll, pg 2);
21. Mata Dean-Tarau (Main Roll, pg 2);
22. Ngatokoa Elikana (Main Roll, pg 1);
23. Temu Hagai (Main Roll, pg 1);
24. Takai Hagai (Main Roll, pg 1);
25. Tokateru Tarau (voted by declaration);
26. Trainee Maea (Main Roll, pg 1);

27. Tangaroa Rongo (Main Roll, pg 2);

28. Marahua Rongo (Main Roll, pg 2); and

29. Puapii Ngametua Greig (Main Roll, pg 1).

[138] Although the Appellant's submissions identified further possible attendees at the first and the second gathering (on 24 and 31 May 2018), the Appellant's submissions on appeal were limited to the 24 May 2018 gathering on the basis that it was the only gathering where the High Court conclusively determined that there was a speech made by the Respondent.

Respondent's position as to relief

[139] The Respondent conceded that, if the treating allegation was made out, the consequences that could follow are set out in s 98 of the Act. The Respondent also raised the possibility of referral of the matter back to the Chief Justice for consideration under s 103 of the Act.

[140] During the hearing, the Respondent noted that the list of attendees identified by the Appellant above included "agents" of the Respondent who provided the food and drink. Accordingly, the Respondent submitted that those attendees could not be found to have treated themselves.

The Court's analysis

[141] As to the Respondent's submission that some of the attendees identified by the Appellant included those "agents" of the Respondent who assisted in providing the food and drink, the Court has identified a total of three such "agents" from the Appellant's list of attendees above (being Puapii Ngametua Greig, Trainee Maea and Tuteru Taripo).[23] The Court agrees with the Respondent that those attendees could not be found to have treated themselves. However, the Court finds that the remaining list of attendees were treated by the Respondent.

[142] For all the foregoing reasons, the Court makes the following determinations and directions:

1. Having found treating under s 89, the Court determines under s 98(1) of the Act that the Respondent was not duly elected and that his election is void.

[23] Puapii Ngametua Greig, Trainee Maea and Tuteru Taripo were members of the CIP Planning Committee on Rakahanga (as recorded in paragraph [2] of the Case Stated). The Appellant's list of attendees does not include the other members of the CIP Planning Committee, namely, Enua Maea, Ngametua Tarau and Maggie Taripo.

2. In accordance with s 98(3) of the Act, there shall, on a scrutiny of the Rakahanga rolls (to be conducted in accordance with s 76 of the Act),[24] be struck off from the number of votes appearing to have been received by the Respondent in the final vote count on 28 June 2018, the vote of every person who voted at the election and was proved to have been so treated in attending the campaign meeting on 24 May 2018. For the sake of clarity, the list of persons who have been treated in attending the campaign meeting on 24 May 2018 is set out above at paragraph [137] but shall not include Puapii Ngametua Greig, Trainee Maea or Tuteru Taripo.

3. In accordance with s 100 of the Act, the Registrar is directed to refer the whole of the evidence and the exhibits to the Commissioner of Police for further consideration. It will, as always, be a matter solely for the Police, in consultation with their legal advisers, to decide whether to launch a prosecution. In such proceedings a different standard of proof will, of course, apply and the determination made by this Court on the petition is not to be interpreted in any way as foreclosing the independent evaluation and consideration of the matter by the Police.

Costs

[143] As to the issue of costs, s 101 of the Act provides:

> 101. Costs of petition – All costs of and incidental to the presentation of an election petition, and to the proceedings consequent thereon, except such as are by this Act otherwise provided for shall be defrayed by the parties to the petition in such manner and in such proportions as the Court may determine; and in particular, any costs which, in the opinion of the Court have been caused by vexatious conduct, unfounded allegations, or unfounded objections on the part either of the petitioner or of the respondent, and any needless expenses incurred or caused on the part of the petitioner or respondent, may be ordered to be defrayed by the parties by whom they were caused or incurred, whether those parties are or are not on the whole successful.

[144] The Court recalls paragraph [131] of the judgment of the Chief Justice which stated:

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

[24] Section 76 of the Act provides that no person other than the Returning Officer and his or her assistants, the Presiding Officer, the Chief Electoral Officer, and one person appointed as scrutineer by each candidate for the purpose, shall be authorised to attend, and may choose to be present at, the scrutiny.

[145] In light of the Court's findings in relation to this appeal, the Court finds that the Respondent should make a reasonable contribution to the costs of the Appellant in both the High Court and the Court of Appeal.

[146] Since this Court has not had the benefit of any submissions on the question of costs, the question of costs is reserved. The Appellant is directed to file in this Court submissions as to costs in both the High Court and Court of Appeal within 20 working days following the delivery of this judgment. The Respondent is directed to file submissions in reply within 10 working days of receipt of the Appellant's submissions.

Williams P

Barker JA

White JA