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

Misc No: 88/06

IN THE MATTER	of section 92 of the Electoral Act 2004
AND	
IN THE MATTER	of an election of members of Parliament of the Cook Islands held on Tuesday the 26th September 2006
BETWEEN	**TEKAOTIKI MATAPO** of Titikaveka, Candidate
	Petitioner
AND	**ROBERT WIGMORE** of Titikaveka, Planter
	First Respondent
AND	**NOOAPII TEAREA** Deputy Chief Electoral Officer
	Second Respondent
AND	**BRIAN TERRENCE HAGAN** Chief Electoral Officer
	Third Respondent

Hearing: 1 December 2006

Counsel: Mr George and Mr Vakalalabure for the Petitioner together with Sir Geoffrey Henry (appearing by leave)

Mrs Browne and Mr Hood for the First Respondent

Mr Elikana for the Second and Third Respondents

Judgment: 8 December 2006 (New Zealand Time)

JUDGMENT OF WESTON J

Solicitors: *Henry Puna, the offices of the Cook Islands Party*
Browne Gibson Harvey PC, Avarua
Crown Law Office

[1] This judgment concerns an election petition brought under Part 8, Electoral Act 2004 (the Act). It is one of a number of such petitions that arose out of the General Election held in the Cook Islands on 26 September 2006. There is also a cross-petition brought in terms of the proviso to section 92(4) of the Act.

The allegations

[2] The petition makes two allegations. First, that the First Respondent, who was the successful candidate at the election, had not resigned from the Board of the Cook Islands Investment Corporation ("CIIC"), an entity established under the Cook Islands Investment Corporation Act 1998. As a consequence, he remained a Crown Servant as defined in the Act and, the Petitioner alleged, was therefore not qualified to be a candidate in terms of section 8 of the Act. As a result, the Petitioner should be declared the winner of the Titikaveka seat.

[3] There is a second allegation in the petition alleging bribery under section 88 of the Act in that the First Respondent was said to have made a promise to Mr Travis Moore to seal the access road to his home from the public road in order to induce Mr Moore to vote for the First Respondent. In submissions, Mr George said the allegation relied solely on section 88(a) of the Act.

[4] The Petitioner argued that although this was just one act of bribery it should nevertheless void the election in the Titikaveka constituency in terms of section 98(1) with the result that the Petitioner should be declared the successful candidate.

[5] The cross-petition raised a number of matters, most of which were withdrawn, leaving only one for consideration. In paragraph 1(c) it was alleged that Mr Travis Moore did not qualify to be a voter in the Titikaveka constituency and that his vote should be disallowed. This allegation has some relevance to the bribery allegation referred to above in that section 88(a) speaks in terms of inducement to an elector. If Mr Moore was not properly qualified to vote in the Titikaveka constituency then the issue of bribery would more readily fall to be considered in terms of section 88(b) of the Act. For that reason, I will need to address Mr Moore's qualification as an elector prior to considering the bribery allegation.

Qualification to be a candidate: an overview

[6] The Constitution was amended in 1995 to add a further qualification requirement for an election candidate. As a result of that amendment Article 28B was amended so that it now reads:

> *"Notwithstanding anything in subclause (2) of this Article, a person shall not be qualified to be a candidate at an election of Members of Parliament if:*
>
> *....(e) he is a Crown Servant or judicial officer."*

[7] The expression *"Crown Servant"* is defined in such a way as to include persons who are directors of the CIIC. There was no contest on this point during the hearing. It was accepted that the First Respondent was a Crown Servant.

[8] In addition to this qualification requirement, the Petitioner emphasised section 31(1)(a) of the Act which is in the following terms:

> *"Every nomination paper nominating a person as a candidate for election for a constituency shall be signed by –*
>
> *(a) the nominee, who shall be a person qualified pursuant to this Act to be so nominated ..."*

[9] The Petitioner argues that the First Respondent, in order to be qualified under the Constitution and the Act, was required to have effected his resignation from CIIC before signing his nomination form. The nomination form is described as "Form 5" and is provided for in section 31(2) of the Act. It seems that this form is not compulsory for nomination (see section 32) but I am advised that usual practice is that a candidate will use Form 5 to be nominated. There is only one place provided on Form 5 for the candidate to sign and that is alongside section B, described as the consent to nomination. Thus the requirement in section 31(1)(a) for the nominee to sign the nomination paper is satisfied at the same time as signing to signify consent (section 32(2)).

[10] The First Respondent emphasised certain parts of Article 28B, in particular the words "at an election". On that basis, arguably it would be sufficient for any resignation to have been effected by polling day at the latest. The First

Respondent recognised, however, that was to draw too long a bow. For example, section 39 of the Act provides that if there is only one candidate nominated for a constituency then that candidate is deemed to have been elected. This brings the focus back to the close of nominations as being the critical date. Consequently, the First Respondent argued that the resignation needed to be effected by the close of nominations at noon on 10 August 2006. He argued that his resignation was complete by that time and thus he was qualified to be a candidate in terms of the Act.

[11] From this short summary it is apparent that a number of areas need to be more fully considered. They are:

(a) the legislative history;

(b) the chronology of facts;

(c) whether the First Respondent resigned and, if so, when.

[12] Once those issues are addressed I will then turn to my decision on the first topic.

The legislative history

[13] The Court's function in interpreting the Electoral Act 2004 is to discern the intention of the Legislature. The legislative history can be an aid to ascertaining that intention.

[14] Prior to 1969 neither the Constitution nor the (then) Electoral Act contained any limitation upon candidates who were also Crown Servants. However, in 1969 the Electoral Act 1966 was amended by inserting new provisions, sections 6A and 6B. In essence, these sections provided that a Crown Servant who was seeking candidacy for Parliament would be placed on leave. If elected, the Crown Servant was deemed to have vacated their position as a Crown Servant. These provisions placed no onus on the Crown Servant actively to resign. They were more in the nature of deeming provisions.

[15] As at 1969 the Constitution contained no limitation on candidates who were Crown Servants. The Constitution was amended in 1980/1981 but continued to make no reference to Crown Servants notwithstanding the amendments to the Electoral Act in 1969.

[16] In 1993 the Electoral Act 1966 was amended by repealing sections 6A and 6B and inserting new provisions in their place. The new scheme was to require Crown Servants, before consenting to be nominated, to resign. The amendment further provided that as from the date of resignation, the Crown Servant ceased to be a Crown Servant.

[17] These amendments precisely signalled the time at which resignation should occur – that is, before consenting to be nominated. Furthermore, the amendments provided that the resignation would be effective on the date of the resignation. This overcame any difficulties as to when a resignation might become effective.

[18] A year later these amendments were struck down for want of constitutionality in *Goodwin v Cook Islands Public Service Association* [1994] CKCKA 5; (CA 2/94; 10 March 1994). In that decision the Court reviewed the legislative history also discussed above.

[19] The Legislature promptly responded to that decision by amending the Constitution in 1995 by means of the Constitution Amendment (No. 17). Article 28B was amended to add the words set out in paragraph [6] above.

[20] At the same time, the Constitution was amended by adding a new subclause (3) to Article 28B providing that any Act might *"provide for further qualifications or disqualifications of candidates"*. This latter provision is potentially important because it anticipates that any relevant Electoral Act might lawfully contain further qualification requirements in addition to those set out in the Constitution.

[21] Following those amendments to the Constitution the Legislature enacted the Electoral Act 1998, largely carrying forward the amendments made in 1993 in relation to Crown Servants which had been struck down by the Court as unconstitutional.

[22] The Electoral Act 2004 then changed the qualification requirements. No longer was there an express requirement that a candidate should resign before consenting to nomination. Rather, section 8(2)(e) provided:

> *"(2) Notwithstanding anything in subsection (1), a person shall not be qualified to be a candidate at an election of Members of Parliament if that person –*

....(e) is a Crown Servant or judicial officer."

[23] It will be noted that section 8(2)(e) largely mirrors the constitutional reference to Crown Servants referred to in paragraph [6] above. The new Act did not repeat the earlier provisions requiring resignation as a Crown Servant prior to signing the consent. If there is any such requirement in the Electoral Act 2004, it is to be found in section 31(1)(a). I have already set this out above but repeat it for convenience:

> *"Every nomination paper nominating a person as a candidate for election for a constituency shall be signed by –*
>
> *(a) the nominee, who shall be a person qualified pursuant to this Act to be so nominated ..."*

[24] The Petitioner relied on this provision to argue that the legislative intent was the same as that appearing in the 1993 and 1998 legislation. That is, the nominee needed to be properly qualified at the time of consenting to the nomination. By contrast, the First Respondent argued that section 31(1)(a) simply referred back to the qualification requirements in section 8(2)(e). Consequently, there was no proper basis to argue that qualification must precede consent. Rather, qualification must be achieved at the point that nominations closed in terms of section 31(1) of the Act. I return to this issue below.

Chronology

[25] The general election was called on 24 July 2006. On that day, as it happened, the First Respondent was in hospital in Auckland undergoing surgery. He was discharged three days later on 27 July 2006. He came under some pressure from interested persons to stand as a candidate in the Titikaveka election.

[26] On 3 August 2006 Mr John Short telephoned the First Respondent at the house in which he was recuperating in Auckland. By this time the First Respondent, somewhat reluctantly it seems, had agreed to be the candidate. Mr Short advised him that he needed to resign from the CIIC Board. The First Respondent said he was not previously aware of this requirement (which seems a little surprising considering his previous role as a Minister)

and was not aware of the actual legislative provisions. He says he instructed Mr Short to effect his resignation.

[27] Mr Short spoke with the First Respondent by telephone on two occasions on 7 August 2006. Again, the question of resignation was discussed. The First Respondent, having learnt that his resignation had not been effected, asked Mr Short to get on with the resignation.

[28] On 8 August 2006 a partially completed nomination form was faxed to the First Respondent. He signed it and returned it. He was asked under cross examination, why he did not sign a resignation letter at the same time. He said he did not do so because he thought Mr Short was attending to that independently of his nomination. He said he did not think there was any requirement that his resignation be in writing and be signed by him.

[29] The nomination form was lodged with the Deputy Chief Electoral Officer ("DCEO") on 9 August 2006. On that day the First Respondent had telephoned his daughter in Rarotonga to arrange for the deposit of $500 to be taken from his account and paid to the DCEO at the time of nomination. There was some suggestion in the evidence that the DCEO then held the nomination paper pending receipt of evidence of resignation from the CIIC. The evidence on that was unsatisfactory and uncertain. I do not place any weight on it. Rather, I find that the form was lodged with the DCEO at approximately 3.15pm on 9 August 2006 and accepted by him at the time (section 34(3)). That finding is consistent with the notation of the DCEO on Form 5. I note, too, that the First Respondent's written submissions argue that the nomination was accepted on 9 August 2006.

[30] Nominations closed at noon on 10 August 2006. Early in the morning of 10 August Mr Short delivered a letter to the relevant Minister in the following terms:

> *"Further to our telephone conversation this morning, I confirm that Mr Wigmore has asked me to inform you that he has resigned from the Board of CIIC effective yesterday 9th August 2006.*
>
> *Mr Wigmore is in New Zealand recovering from an operation last week and would be having operation (sic) this coming week and he felt resigning from the Board is necessary for his speedy recovery.*

He will be meeting with you as soon as possible after his return."

[31] Mrs Browne quite properly accepted that the resignation could not be backdated in this way. At the earliest, the resignation could have occurred on 10 August 2006.

[32] The Petitioner criticised the second paragraph of the above letter as making no reference to the nomination as a candidate for the forthcoming election. Under cross examination Mr Short said that the purpose of the letter was to effect the First Respondent's resignation from the CIIC Board because of the forthcoming election.

[33] At 9.30am the Minister called the First Respondent in Auckland and spoke to him for 2½ minutes. The Minister gave evidence explaining that he wished to satisfy himself that the First Respondent was resigning for the purposes of the election. He said he was so satisfied.

[34] The Minister then prepared a short letter to the Registrar of Electors in the following terms:

> *"At 10.00am this morning, Thursday 10th August 2006, I received a verbal request from Robert Wigmore of Titikaveka that he wishes to resign from the Board of Directors of the Cook Islands Investment Board. I, Tangata Vavia as Minister of CIIC accept Mr Wigmore's resignation."*

[35] Some comment was made of the expression *"wishes to resign"* contained in the above letter. The Minister said, however, that he had understood Mr Wigmore to have resigned and the purpose of his letter was to advise the Registrar of Electors of that and the fact that he had accepted the resignation.

[36] Evidence was given that the Minister's letter was delivered to the DCEO prior to noon on 10 August 2006 and I accept that evidence.

Did the First Respondent resign?

[37] Sir Geoffrey, on behalf of the Petitioner, accepted that the First Respondent intended to resign but argued that he did not manage to implement that intention. For the reasons that follow, I reject that argument.

[38] There is nothing in the Cook Islands Investment Corporation Act that provides how a board member is to resign from that corporation. Section 9 provides that any appointments are to be made by the Minister with the concurrence of Cabinet. There is no mention, however, of resignation.

[39] It seems there is a practice that appointments to the Board are marked by way of a formal Warrant of Appointment and, equally, upon a resignation it would be usual practice to prepare a Revocation of Warrant. No-one was able to point me to any legislative requirement for such warrants.

[40] It seems, therefore, there is no statutory or other formal process describing how a resignation should occur. There appears to be nothing preventing a director resigning immediately. Equally, there appears to be nothing that requires a director to give formal written notice of resignation based upon his or her own signature.

[41] The Petitioner strongly argued that any resignation, in order to be effective, needed to be in writing and signed by the First Respondent. It was said that this was the usual practice. Reference was made to one authority in support of this proposition and statutory analogies were also given. The Petitioner argued that a resignation could not be effected by an agent on behalf of a principal.

[42] I am reluctant to introduce any unnecessary complexity if the Legislature, itself, has not required a formal process for resignations. Consequently, I conclude that a director can resign immediately from the Board of the CIIC. I also conclude that such resignation can be effected orally or in writing by way of an agent. Of course, an oral resignation may be an ill-advised course because of uncertainty as to what was said or done on a particular day. Putting the matter in writing puts it beyond doubt. Conceivably, however, it seems possible that a director could resign orally. In the present case I accept that the First Respondent told the Minister on 10 August that he was resigning with immediate effect.

[43] The written letter from Mr Short is not entirely satisfactory for the reasons already identified above. Nevertheless, viewed in the overall context it plainly indicates an intention to resign.

[44] The First Respondent argued that the Minister's acceptance was not a necessary requirement for a resignation. I prefer to express no final view on

this. I note that the Minister's letter stating his acceptance of the resignation was prepared and delivered prior to noon on 10 August 2006. Nothing turns on the Minister's acceptance of the resignation in this case.

[45] For the reasons above (including as set out in the chronology) I find that the First Respondent resigned as a member of the Board of the Cook Islands Investment Corporation on 10 August 2006, at an exact time uncertain, but prior to noon on that day.

Was the First Respondent a qualified candidate?

[46] The Petitioner's argument, as noted above, is that the resignation should have been effected prior to the First Respondent signing his consent to Form 5 on 8 August 2006. The First Respondent's argument, as also noted, is that so long as the resignation had been effected by the close of nominations at noon on 10 August 2006, the First Respondent was properly qualified.

[47] There is a third option to be considered. That is, that the resignation from CIIC should have been effected prior to lodging the nomination form on 9 August 2006. At that point, the various requirements of section 31(1), as well as payment of the deposit (sections 33 and 34(1)(c)), were met. That this may be relevant threshold is illustrated by section 35 which provides that, from this point onwards, a nominee has the formal status of a candidate. That emerges from the fact that the candidate must take formal steps to withdraw the nomination if wishing to withdraw.

[48] I can immediately dispose of the Petitioner's argument in the form it was put to me. In essence, the Petitioner argues for an interpretation consistent with the law as it was in 1993 and then 1998. I do not believe such an interpretation is consistent with the scheme of the Electoral Act 2004. If the signing of consent was to be the key date that would mean that a person is to be regarded as a candidate even prior to lodging the nomination form. Indeed, Sir Geoffrey argued that that was so. I believe it to be the wrong interpretation. There is nothing in the Act that compels such a conclusion. If that was correct, it would mean that a nominee, having signed the form, was thereafter required to take the formal steps set out in section 35 if wishing to withdraw the nomination. That could not be correct.

[49] For these reasons, I reject the Petitioner's interpretation. That, however, does not fully dispose of section 31(1)(a). On one view of it, it would be have been enough for the Legislature to provide for the nominee to sign the form. The fact that section 31(1)(a) then continues with a further qualification (*"who shall be a person qualified pursuant to this Act to be so nominated"*) must have been intended by the Legislature to have some purpose. That is because section 8(2)(e) already provides for the qualification requirements (as presently relevant). The Act did not need to repeat them in section 31(1)(a) unless there was another purpose in doing so.

[50] The First Respondent's argument effectively ignores those further words. He says that it is enough that the candidate has resigned by noon on the nomination date (ie 10 August 2006). In the present case that occurred a day after the nomination was completed and accepted in terms of section 31(1). That element of futurity has the potential to cause unnecessary confusion. Surely the most sensible course is for the candidate to have resigned at the point of lodging the nomination form? That properly recognises that the onus is on the candidate to complete that resignation rather than leaving it, untidily, as something yet to be addressed. It appears to me to be a more natural reading of the section, viewed in the context of the Act and the Constitution, to require the resignation to have been completed by the time the nomination is itself complete.

[51] The inevitable consequence of the First Respondent's argument is that there would be two categories of nominations. First, those that are complete (because the resignation has been effected) and, secondly, those that are in some kind of limbo (because the resignation is not yet complete). Yet section 35 treats both nominations in the same way. Once the nomination has been completed in terms of section 31(1), the nominee is regarded as a candidate. Presumably that is why section 35 is included in the Act. Section 35(1) specifically governs the period between the lodging of the nomination and noon on nomination day.

[52] As a consequence of the above reasoning I believe that a proper interpretation of the Act required the First Respondent to have resigned from CIIC by 9 August 2006 when his Nomination Form was completed and accepted by the DCEO. As I have already found, his resignation did not occur until the next day. His nomination breached the Act. He was not

qualified to be a candidate. As a consequence of that finding I must now address section 97, Electoral Act 2004.

Section 97, Electoral Act 2004

[53] Both parties referred to section 97 of the Act which is in the following terms:

> *"97. Certain irregularities to be disregarded – No election shall be declared void by reason of any irregularity in any of the proceedings preliminary to the polling or by reason of any failure to hold a poll at any place appointed for holding a poll, or to comply with the directions provided under this Act as to the taking of the poll, or to comply with the directions provided under this Act as to the taking of the poll or the counting of the votes or by reason of any mistake, in the use of the forms provided under this Act, or failure to comply with the times prescribed for doing any act, if it appears to the Court that the election was conducted in accordance with the principles laid down in and by this Act and that the irregularity, failure or mistake did not affect the result of the poll."*

[54] In addition, the First Respondent argued that section 97 was to be read in terms of section 99 which is in the following terms:

> *"99. Real justice to be observed – At the hearing of the 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 opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the Court."*

[55] The parties had divergent positions in relation to section 97. The Petitioner said it could not apply because what had occurred here was not an irregularity. By contrast, the First Respondent argued that section 97 could apply in the present case effectively to cure any failure found by the Court. Mrs Browne argued that the irregularity was *"capable of being excused under section 97".*

[56] Sir Geoffrey, for the Petitioner, expressly relied on the decision of Donne CJ in *re Mitiaro Election Petition* [1979] 1NZLR S1. At page S22 the Court dealt

with section 78 (in the same form as present section 97), concluding that the expression *"irregularity"* does not cover corrupt practices. I will return to this decision shortly. There is force, however, in Mrs Browne's submission in reply that this decision does not assist in the present context.

[57] Both counsel referred to the decision of the Court of Appeal, concerning the Pukapuka constituency, in *Wuatai v Akaruru* (CA5/99; 17 August 1999). In the High Court, the Judge had concluded that as at the date of the Appellant's nomination (29 April 1999), he was a Crown Servant and, by virtue of Article 28B(1)(e), ineligible to stand as a candidate. The facts showed that the candidate had endeavoured to resign as a Crown Servant. Importantly, the correct position was known to some officials prior to the nomination date at which point nominations closed (20 May 1999). Had officials reached the correct conclusions prior to then (and, indeed, afterwards as well), when the candidate's status as a Crown Servant was well known, steps could have been taken to mitigate the situation. A number of different avenues were open. A by-election was highly likely.

[58] In the final result, the High Court's conclusion that the next highest polling candidate should be declared the winner was set aside by the Court of Appeal and a by-election resulted.

[59] Sir Geoffrey argued that counsel for the Appellant (in the Pukapuka petition) had relied upon section 101 (now section 97) but that the Court did not regard the failure to resign as an *"irregularity"*. Moreover, he argued that section 97 focuses on electoral officers rather than the candidate. In the present case, the failure to resign was the fault of the candidate (or his agents) rather than of officials.

[60] Mrs Browne argued that section 97 could apply in the present case. She pointed out that in the Pukapuka petition there is an inconsistency between the two judgments (one oral and a second written judgment) issued by the Court of Appeal. In the first, the failure to resign is referred to as a minor matter whereas in the second set of reasons it is viewed differently. She is right that there is this inconsistency. As I say below, however, I do not believe this is material.

[61] I now return to *re Mitiaro Election Petition* (supra). The Court upheld an allegation of treating made against the successful candidate, that being a

corrupt practice. Having reached that conclusion, the Court was required to consider sections 78 and 79 of the Electoral Act 1966. Section 78 appears to be in similar terms to present section 97. There is no exact counterpart with section 79 in the present Act although it roughly corresponds with section 98 in the present Act.

[62] At page S17 the Court noted that there was no definition of *"irregularity"* in the Act. The Court concluded, however, that the electoral offence of treating could not be said to be an irregularity in terms of section 78 (now section 97). With respect, that decision is entirely sensible. It does not, however, assist in resolving the present case.

[63] I now return to the Pukapuka decision, *Wuatai v Akaruru* (supra). The High Court decision was a short one given orally at the conclusion of argument. The High Court concluded that the candidate remained a Crown Servant at the date of nomination and was thus not properly qualified to be a candidate. The High Court did not make a formal finding as to when the candidate resigned as a Crown Servant. His intention was to do so on 30 April 1999 and it seems entirely likely that he had actually resigned prior the close of nominations on 20 May 1999. Nevertheless, there was no finding on whether, or when, he resigned. Indeed, the High Court expressly avoided such a finding (see page 3).

[64] Both the High Court, and the Court of Appeal subsequently, dealt with the notion of *"irregularity"* in section 101 of the Act (corresponding with present section 97). At page 3 of the High Court decision, the Court concluded that the failure in that case could not be described as an irregularity. There is no reasoning in support of that conclusion.

[65] The Court of Appeal heard the matter on 11 August 1999 and immediately issued an oral judgment intended to be a brief indication only of the Court's reasoning. It is, with respect, an odd practice for a Court to issue two sets of reasons. The oral judgment, it seems, should be accorded considerably less weight than the subsequent written decision. I note that at page 3 of the oral decision the Court described the candidate's breach as being of a minor nature. The Court said *"his was at the lowest level of error in such matters"*.

[66] In the subsequent written decision the Court addressed section 101 of the then Act at pages 7 and 8. At page 7 the Court said:

> *"Insofar, therefore, as this appeal is against the declaration by the learned Judge of the sole candidature and declaration of the Respondent as elected, the events leading up to the election and the mismanagement thereof were, in our view, substantial irregularities "in the proceedings preliminary to the polling" as a result of which the election was not conducted in accordance with the principles laid down in the Act (S101)."*

[67] By this time, the breach was being described by the Court of Appeal as a substantial irregularity. While that apparent inconsistency with the oral judgment is, with respect, unhelpful, I think the real focus of the Court of Appeal was upon the issue of whether the election was conducted in accordance with the principles of the Act (which was a requirement of section 101 (now section 97)). The Court found that it was not because, if the breach had been properly addressed at the time, a by-election would have resulted. Upholding the decision of the High Court would disenfranchise half of the electorate.

[68] The First Respondent here argued that the effect of section 97 was to cure the defect in the present case. On a preliminary reading of section 97 it appears to be directed at just that end. However, a closer study, including of the two English decisions referred to by the Court of Appeal (see below), shows that approach to be wrong. Section 97 is not about curing defects. Rather, it assumes the defect (in this case an improperly qualified candidate) and asks whether that defect made any difference. As the Court of Appeal in the Pukapuka petition identified, it would make a huge difference.

[69] The two English decisions are *Gunn v Sharpe* [1974] 1 QB 808 and *Morgan v Simpson* [1975] 1 QB 151. Both concerned the same provision, being section 37(1), Representation of the People Act 1949, a provision similar in effect to section 97, Electoral Act 2004. Both cases concerned voting papers that were invalid as a result of minor administrative errors by officials (and not the voters). In both cases, counting the invalid votes would have affected the election outcome. Section 37(1) was not available to cure the defects. Rather, it was available to ask whether the defects would have made any difference to the ultimate outcome (which they would have). In both cases the election was declared void.

[70] This point can be illustrated by the early decision of *Woodward v Sarsons* (1875) LR 10 CP 733. In that case, there were errors which invalidated the voting papers and effectively disenfranchised those who had exercised their vote on those papers. Yet the Court was able to ascertain that it would have made no difference to the outcome of the election if they had been counted. It was to this situation that section 97 is most obviously directed.

[71] Against that background, I return to the Court of Appeal decision in the Pukapuka petition. The Court proceeded on the basis that the election of the otherwise successful candidate was void. Through no fault of the voters who had placed their votes for that candidate they were disenfranchised. By no stretch of the imagination could that be described as an outcome that *"did not affect the result of the poll"*. If the poll had been conducted in accordance with the Act there would have been a properly qualified candidate standing in place of the disqualified candidate.

[72] The same result applies here. Having found that the First Respondent was not properly qualified I declare the election in the Titikaveka constituency void and direct the calling of a by-election. I will attend upon counsel to finalise the wording of any formal judgment should that be necessary.

Mr Moore's residency

[73] Mr Moore gave evidence that he had been on the Titikaveka roll for about 20 years. He accepted that for a period he had lived in Aitutaki but that from either 30 or 31 May 2006 he moved his family back to Rarotonga. The family had two houses. They lived, up until very recently, in a house in Tikioki. This is in the Titikaveka constituency. Approximately a week prior to Mr Moore giving evidence, the family had shifted to a second house at Vaimaanga, also in Titikaveka.

[74] While his family were now living in Titikaveka, Mr Moore continued to commute to Aitutaki to finish off work that he had underway there. The evidence showed that in the June/July period he was in Aitutaki for a total of 31 days. However, from 26 July 2006 he remained in Rarotonga up to the election on 26 September 2006.

[75] He said in evidence that he considered his residence was in Titikaveka because that was where his family was based. This is not a valid basis, at law, for determining residency.

[76] Mrs Browne argued that Mr Moore did not qualify to be an elector in the Titikaveka constituency. Notwithstanding that he was registered on the Titikaveka roll, he had ceased to be qualified for that because of living in Aitutaki (up to the end of May 2006). In terms of section 7(4) Mr Moore was said to be disqualified from being an elector in Titikaveka.

[77] I believe that Mr Moore was properly qualified to be an elector in Titikaveka because that was where he resided. I find this notwithstanding the fact that he travelled to and worked in Aitutaki for a total period of 31 days in June/July. Continuous residency does not prevent an elector from moving outside the relevant constituency to undertake work. If it did, no one could afford to leave their constituency to work at some other place. The fact that an elector may then spend nights living in a hotel does not necessarily mean that a person has ceased to reside at what is otherwise their place of residence.

[78] While Section 7 contains its own fair share of interpretive difficulties, I conclude that in the three month period prior to 26 September 2006 (which I believe is the relevant date against which to measure the period of his residence), Mr Moore was resident in the Titikaveka constituency. I find he was properly qualified to vote there.

Bribery

[79] This claim is brought under section 88(a), Electoral Act 2004. This provides:

> *"Every person commits the offence of bribery who, in connection with any election –*
>
> *(a) directly or indirectly gives or offers to any elector any money or valuable consideration or any office of employment in order to induce the elector to vote or refrain from voting ..."*

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

(a) the giving of the consideration;

(b) that the consideration was valuable;

(c) that it was given to induce the voter to vote for the respondent candidate and that it was on the express or implied condition that the voter would vote for that candidate;

(d) that the intent to do this was corrupt.

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

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

[83] The allegations arise out a meeting between Mr Moore and the First Respondence at some time prior to polling day. There are a number of disputed facts which I will address shortly. The following matters are not in dispute:

(a) the discussion occurred some time early in the morning at the Wigmore Superstore;

(b) the discussion occurred outside the store;

(c) Mr Moore's wife, who had been in the car with him, was not present during the course of the discussion because she was inside the store;

(d) during the course of the discussion, which did not last very long, the First Respondent said that if elected he would endeavour to ensure that certain roads in his constituency were sealed which would include the driveway to Mr Moore's house.

[84] Mr Moore says that during this discussion the First Respondence asked Mr Moore to support him in the election. Mr Moore took this to mean that the First Respondent was asking him to vote for him in exchange for sealing the driveway. The First Respondent denied this, saying that he was speaking in the context of various election pledges that had been made to the constituency as a whole. I return to the detail of this shortly.

[85] Mr Moore said that the discussion occurred about a week prior to the election. The First Respondent did not directly challenge this. He said, however, that at the outset of the conversation, Mr Moore said he had just

returned from Aitutaki. This seems most unlikely because, assuming the conversation occurred when Mr Moore said it did, he had not been to Aitutaki for some time. When understood in context, the difference between the two is more apparent than real. The discussion occurred in the context that the First Respondent had visited the Vaimaanga property which looked as it was not lived in. I can well understand how, in that context, Mr Moore might have said that the family had recently returned from Aitutaki (which it had). The First Respondent might have understood this as having occurred in the last few days, whereas Mr Moore had a longer timeframe in mind.

[86] Mr Moore was quite clear that the First Respondent referred to sealing the driveway to the second of the two family properties – at Vaimaanga. The First Respondent did not deny this. It appears to be a private road. This Court, in 2004, did not see any significance as between sealing public and private roads. The First Respondent said that he was not concerned with private driveways that might service only one house. Rather, he was concerned with roads or driveways where two or more households were on such a road.

[87] Mr Moore said that he was so surprised by what was said to him by the First Respondent he ultimately took legal advice. Then, when there was some press publicity about the Petitioner's intentions, he spoke to the Cook Islands Party about the discussion between him and the First Respondent. He said he had no motive by way of ill-will against the First Respondent and the First Respondent, in evidence, said he knew of no reason for Mr Moore to make unfounded allegations against him.

[88] The First Respondent gave evidence that on several earlier occasions in or about 2003/2004, Mr Moore had asked him to make arrangements to seal the driveway. Mr Moore could not recall such requests but I find they occurred. The First Respondent gave evidence that in response to one such call, the Ministry of Works visited the road and then undertook some work to repair it (but not to seal it).

[89] Despite the areas of agreement, there is an apparent conflict in two important respects:

(a) as to whether the First Respondent asked Mr Moore to support him in the sense of voting for him;

(b) as to whether there was discussion about the candidate's wider election pledges (to seal roads generally) or whether the conversation was limited to a discussion of Mr Moore's driveway.

[90] Both witnesses were equally clear in their recollection of events. On the face of it, there is an absolute conflict of evidence. Attempts were made to impugn the credibility of both witnesses but I do not find such attempts helpful in the present case. I find that both witnesses gave their evidence honestly as they recalled events. I believe the apparent conflict is more a matter of perception than reality. Mr Moore, unsurprisingly, focused on the reference to his driveway. The First Respondent, by contrast, was acting consistently with the election pledges made by him as part of his campaign. This meant that what the First Respondent said, and what Mr Moore heard, were two different things. Having said that, I believe that the First Respondent was unwise specifically to mention Mr Moore's driveway.

[91] I accept that the First Respondent had made general election pledges to seal certain roads in his constituency. While there was some imprecision about the identity of those roads, I find that he had made such pledges. I do not believe such pledges fall within the definition of "bribery". If they did, any promise by a candidate (or party) to implement policies if elected would expose the candidate to bribery allegations. That is not the intention of the statute. Mrs Browne referred me to a useful article by Hughes, Electoral Bribery (1998) Griffith Law Review 209, where the distinction between election promises and electoral bribery is discussed and analysed. The difference between an instance that is bribery, and one that is not, may sometimes be relatively slight. In the present case, the First Respondent's specific reference to Mr Moore's drive brought him close to that border line but did not take it over it.

[92] In concluding that this was not an act of bribery I have been influenced, to a small degree, by the fact that the First Respondent, in 2004, unsuccessfully defended a petition where allegations of this nature were ventilated. It seems scarcely credible that he would make the same mistakes again in 2006. Of course, the Petitioner has alleged that he did just that. But having seen the First Respondent, and heard his evidence, I think it unlikely that he would have fallen into the same error again. While I have concluded that he acted unwisely, I do not think that he acted in a way that amounts to bribery.

[93] Mr George asked me to assess the allegations in what he called their proper cultural context. I do not think this is a case where I need to do that. While Mr Moore has resided in the Cook Islands for many years, I did not understand him to be of Polynesian descent, inculcated in Polynesian customs and practices. Frankly, I do not think that even if the First Respondent had promised to seal his driveway that this would have induced Mr Moore to vote for the First Respondent if he was not otherwise inclined to do so. So the cultural context does not need to be addressed.

[94] For the above reasons I reject the allegation of bribery.

[95] Even if I had upheld the finding of bribery, I think it unlikely that I would have made an order in terms of section 98(1) of the Act. I believe that section 98(3) would have been the more appropriate section to rely upon.

Costs

[96] On the first ground of the Petition, the Petitioner's challenge has been upheld.

[97] The Petitioner failed in his bribery allegations. The First Respondent failed in his challenge to the residency qualifications. I believe these balance each other out in terms of costs.

[98] Prima facie, the Petitioner is entitled to costs in relation to the first ground in the petition. If the parties cannot agree upon these they are to supply memoranda as follows. The Petitioner is to lodge his within 14 days and the First Respondent 14 days thereafter. Adjustments will need to be made for the Christmas vacation.

[99] I do not believe that costs should be payable to or by the Second and Third Respondents but I am willing to receive memoranda if necessary. Counsel should agree upon an appropriate timetable consistent with the exchange of memoranda set out above.

Weston J