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

MISC. 85/06

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, 26 September 2006
BETWEEN	**HENRY PUNA** of Manihiki, Candidate **Petitioner**
AND	**TEREAPII PIHO** of Manihiki, Pearl Farmer **First Respondent**
AND	**NOOAPII TEAREA** Deputy Chief Electoral Officer **Second Respondent**
AND	**BRIAN TERRENCE HAGAN** Chief Registrar of Electors **Third Respondent**

Counsel: Mr George for Petitioner
Mrs Browne and Mr Hood for First Respondent

Date of Judgment: 29 March 2007 (New Zealand time)

COSTS JUDGMENT OF NICHOLSON J

Introduction

[1] In the general election on 26 September 2006, Tereapii Piho (first respondent) was declared the successful candidate for the constituency of Manihiki. An unsuccessful candidate, Henry Puna (petitioner) filed an election petition challenging

that result. The first respondent cross-petitioned. Before the petition was heard, the petitioner withdrew it and the cross-petition thereupon lapsed.

[2] The first respondent seeks indemnity costs and disbursements totalling $27,221.97 or alternatively "at the very least" 80% of his costs.

[3] The petitioner submits that costs and disbursements should be capped at the $8000 which was fixed as security.

[4] The Deputy Chief Electoral Officer (second respondent) and the Chief Registrar of Electors (third respondent) have not sought costs.

[5] I decide costs on the basis of the petition documents and written costs submissions by the first respondent and the petitioner.

Pertinent facts

[6] At the general election held on 26 September 2006, the first respondent was declared the successful candidate for the constituency of Manihiki. Manihiki is one of the outer Cook Islands and the only regular transport with Rarotonga is a once weekly flight.

[7] In early October 2006, the petitioner filed an election petition alleging that:

a) The votes of four people were allowed which ought not to have been allowed;

b) The verbal vote of a special care elector should have been awarded to the petitioner;

c) The first respondent was guilty of the electoral offence of bribery of 12 named electors; and

d) the first respondent was guilty of the electoral offence of undue influence in respect of two tenants of a rental property.

[8] The petition stated the alleged bribery as:

(i) Money in the sum of $200 was given or offered to an elector Glen Poiri Charlie in Manihiki on or about the 21st August 2006 before he boarded a flight to Rarotonga in order to induce the elector to vote for Tereapii Piho or to procure his return;

(ii) Money in the sum of $200 was given or offered to an elector Jessie Kaitara Williams at his home in Tuahuna during the campaign period in order to induce the elector to vote for Tereapii Piho or to procure his return;

(iii) Money in the sum of about $300 was given or offered to an elector Matemoana Matangaro in Tuahuna on or about the 21st day of September 2006 in order to induce the elector to vote for Tereapii Piho or to procure his return;

(iv) Money and other valuable consideration including assorted kitchenware items such as plates, cups, table mats and other items were given and or offered to electors Teokotai Teama and his wife Teremoana Teama during the campaign period in order to induce those electors to vote for Tereapii Piho or procure his return;

(v) Money and other valuable consideration including assorted kitchenware items such as plates, cups, table mats and other items were given and or offered to electors Kairenga Simiona and or her partner Uea Rongo during the campaign period in order to induce the electors to vote for Tereapii Piho or procure his return;

(vi) Money and other valuable consideration including assorted kitchenware items such as plates, cups, table mats and other items were given and or offered to electors Tipia Tepaano William and or her husband Ricaldo Tekake William during the campaign period in order to induce the electors to vote for Tereapii Piho or procure his return;

(vii) Money and other valuable consideration including assorted kitchenware items such as plates, cups, table mats and other items were given and or offered to an elector Simiona Maihia during the campaign period in order to induce the elector to vote for Tereapii Piho or procure his return;

(viii) Valuable consideration including a bag of half pearls, a new toilet building with amenities, a new grinding machine and assorted kitchenware items such as plates, cups, table mats and other items were given and or offered to an elector Jessie Kaitara Williams at his home in Tauhuna during the campaign period in order to induce the elector to vote for Tereapii Piho or procure his return;

(ix) Valuable consideration namely a new toilet building with amenities was offered to 2 elderly electors William Tahenga Marsters and his wife Teinaki Morara Marsters during the campaign period in order to induce the electors to vote for Tereapii Piho or procure his return;

(x) Valuable consideration including free freight to Rarotonga from Manihiki on Air Rarotonga was given or offered to certain electors including Matemoana Matangaro during the campaign period in order to induce the electors to vote for Tereapii Piho or procure his return.

[9] The petition stated the alleged undue influence was:

(i) The said Tereapii Piho was by himself and or others on his behalf including Matemoana Matangaro and her husband Terepai Haupini Matangaro guilty of the electoral offence of undue influence under section 90 of the Electoral Act 2004 in that the 2 tenants in a rental property belonging to Mr and Mrs Matangaro, Tou Miro Tearea and his partner Ruth Makakea, both visiting workers on the island of Manihiki, were told to vote for Tereapii Piho or risk being evicted or removed from the property.

[10] The petitioner sought orders that the first respondent was not duly elected; and/or the election was void; and/or the petitioner was duly elected and ought to have been so declared.

[11] The first respondent filed a cross-petition alleging that:

a) the votes of four named advance voters, five named postal voters and four named main roll voters should have been disallowed;

b) the votes of two named people that were disallowed as not being qualified electors should have been allowed;

c) the petitioner committed 12 acts of bribery; and

d) the petitioner committed acts of undue influence in respect of two named voters.

[12] The cross petition stated the alleged bribery as:

(i) The sum of $3,000.00 was deposited into the "Tukao School Committee" Bank of the Cook Islands account on the 18 September 2006. This amount was deposited by Tepaki Holdings Limited in Rarotonga in order to induce the Committee and parents of the students of that school to vote for

the Petitioner or to procure the vote of the Committee and parents of the students of that school for the Petitioner.

(ii) The sum of $100.00 was placed in Teremoana Teama's hand on or about the second week of September during Henry Puna's campaign visit in order to induce the said Teremoana Teama to vote for the Petitioner.

(iii) On or about 22 September 2006 Nimeti Nimeti for and on behalf of the Petitioner offered the sum of $1,000.00 to Haumata Tepania, his partner in order to induce Haumata Tepania to vote for the Petitioner.

(iv) The sum of $600.00 was given to Glen Poiri Charlie on or about the second week of September just before he left for Rarotonga by Papa Pia Taraeka Kaisara for and on behalf of the Petitioner in order to induce Glen Poiri Charlie to vote for the Petitioner.

(v) The sum of $470.00 was given to Jessie Kaitara Williams on or about the second week of September during the campaign visit by the Petitioner in order to induce Jessie Kaitara Williams to vote for the Petitioner.

(vi) The Petitioner bought three haruharu lines from Vavia Dean on or about 2nd week of September just before the election in order to induce Vavia Dean to vote for the Petitioner or to procure her vote for the Petitioner.

(vii) The Petitioner and/or Robert Woonton on behalf of the Petitioner on or about the second week of September offered the position of Island Secretary in Manihiki to Solomona Toroma in order to induce the said Solomona Toroma to vote for the Petitioner.

(viii) The Petitioner was by himself and/or others on his behalf including Robert Woonton offered Margaret Ioaba a motorbike and a house in Manihiki, in order to induce the said Margaret Ioaba to vote for the Petitioner.

(ix) The Petitioner was by himself and/or others on his behalf including Matarii Donnelly gave a baby knapsack to Ruth Makakea to influence Ruth Makakea's vote for the Petitioner. After the election and upon realizing that Ruth Makakea did not vote for the Petitioner, Matarii Donnelly reclaimed the knapsack.

(x) The Petitioner was by himself or by others influenced or induced the vote of Navakatini Greig by telling him that his charge of "threatening to kill""and "assault on a police officer" would not be taken to Court.

(xi) The Petitioner and/or Robert Woonton on behalf of the Petitioner on or about the second week of September offered the position of Government Representative in Manihiki toTangi Toka in order to induce the said Tangi Toka to vote for the Petitioner.

(xii) The Petitioner by himself gave the sum of approximately $100.00 to Tipia Tepaano William during his campaign visit to Tauhunu in order to induce the said Tipia Tepaano William to vote for the Petitioner.

[13] The cross-petition stated that the alleged undue influence was:

(i) The Petitioner was by himself and/or others on his behalf including Papa Pia Taraeka Kaisara, a prominent shop owner in Manihiki was guilty of the electoral offence of undue influence in that he threatened the voters Tero Tepaano and Tepaano Taverio in order that they voted for the Petitioner.

[14] The first respondent sought orders that he was duly elected and/or in the event of the petition being successful, and the petitioner claiming the seat, that the election was void.

[15] The petition and cross-petition were set down for a two day hearing in Manihiki to start Tuesday, 14 November 2006. Security for costs was fixed by Weston J at $8000. As a result of discussions between them, the petitioner and first respondent agreed that certain grounds in the petition and cross petition would not be pursued and they were withdrawn.

[16] On Friday, 10 November, Mr Hood flew to Manihiki. Just after he left Rarotonga, the Court advised that the hearing had to be adjourned because of inability to get sufficient fuel to Manihiki in time for the return of the charter flight. The petitioner was in Manihiki then and returned to Rarotonga that day but Mr Hood stayed there to interview witnesses, returning to Rarotonga eight days later.

[17] Further fixtures were made for the hearing of evidence of two people in Rarotonga on Wednesday, 29 November and a two day hearing on Manihiki to start Tuesday, 12 December. However, on 28 November, the petitioner applied for the taking of the evidence of one of the witnesses, Mr Glen Charlie, to be adjourned to Monday, 11 December, on the grounds Mr Charlie was in New Zealand and could not be in Rarotonga before 8 December and could not be present in Manihiki on 12 or 13 December.

[18] On Wednesday, 29 November, Weston J heard the evidence of Mr Kaitara and adjourned the hearing of the evidence of Mr Charlie in Rarotonga to Monday, 11 December 2006.

[19] In granting the adjournment, Weston J said:

> 7. I should also record that a compelling factor behind my direction that Nicholson J hear Mr Charlie's evidence is that there is likely to be a contest between the parties about his evidence. Mrs Browne has told the Court that she has a tape recording made by Mr Charlie which casts doubt on what his primary evidence will be.
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> 8. I direct that Mrs Browne make the tape recording, and an unsigned statement by Mr Charlie, available to the Petitioner. Counsel should endeavour to reach agreement on a single transcript which should be made available to the Court.
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> ....
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> 9. The ultimate consequences of my directions will sound in costs. It is impossible, at this stage, to make orders about costs on an interim basis. I recognize there is little I can do about that at the moment. Each party would be well advised, however, to conduct itself with a view to minimizing the cost and burden on the other party.

[20] At the 29 November hearing, Mrs Browne, senior counsel for the first respondent, objected to the affidavit evidence of two people tendered by Mr George, counsel for the petitioner. Weston J adjourned consideration of this for me. Weston J also noted that various allegations in both the petition and cross-petition had been withdrawn or conceded. He then heard the evidence of Mr Kaitara.

[21] On Friday, 1 December, a draft transcript of the tape recorded statement of Mr Charlie was sent to the petitioner. On Monday 4 December, counsel and the petitioner listened to the tape recording and a corrected version of the transcript was made.

[22] On Wednesday, 6 December, there was a breakfast meeting between the petitioner and the first respondent and the petitioner advised that there was a possibility of the petition being withdrawn. Later that day, he publicly withdrew the petition. On Monday 11 December, the petition was withdrawn in Court and dismissed, the Court noting that the counter-petition lapsed and determining that the

first respondent was duly elected as the Member of Parliament for the Manihiki electorate.

Submissions

[23] In her written submissions, Mrs Browne submitted that in determining the level of costs payable, regard must be given to the Electoral Act 2004 (the Act) and its policy considerations and the Judicature Act 1980-81 (the Judicature Act). She referred in particular to s 93 of the Act which provided that in fixing security for costs, the Court shall have regard to the costs which the respondent will *probably* incur, and the words of s 101 of the Act. [Mrs Browne's emphasis.]

[24] Mrs Browne submitted that the policy behind the Act was to prevent and discourage frivolous petitions by fixing security in line with what will probably be incurred (on an indemnity basis) in circumstances where, if petitions have been filed frivolously and without sufficient evidence to substantiate the allegations, then there would be sufficient funds to cover the respondent's costs. The idea was to discourage the filing of frivolous and groundless petitions. More importantly however if costs were not done in this manner then candidates would be reluctant to come forward and be nominated as they could be subject to large legal costs in defending a petition. She submitted that the policy and intent of the legislation was to discourage the filing of petitions unless there were good or reasonable grounds for doing so and that the policy of the Act should be complied with and a clear message sent by the Court that the filing of petitions on groundless allegations would not be tolerated. She submitted that this was one such occasion.

[25] Mrs Browne submitted that the circumstances of this petition were such that it should have been apparent from the outset that there were no grounds to support the allegations. That there were initially 11 allegations which were reduced to eight on 10 November and then to five on 29 November. She pointed out that the petitioner took almost nine weeks to reach a decision to withdraw the petition. She stated that the first respondent had to incur the cost of refuting the allegations and for this purpose Mr Hood interviewed 18 witnesses on Manihiki. She submitted that it was irrelevant that the petitioner had withdrawn the petition. She said that it appeared that

when the petition was filed it was based on grounds which the petitioner hoped to substantiate at a later stage, and, as it turned out, these grounds could not be supported. She submitted that the nature of the petition was a "fishing expedition" and that the petition was clearly within the ambit of s 101 of the Act for full indemnity costs.

[26] In the alternative, Mrs Browne submitted that the Court should apply its discretion and award costs to the first respondent on the basis of the "two-third" rule. In this regard, she referred to the provisions of s 92 of the Judicature Act and the judgment of Hardie Boys J in *Morton v Douglas Homes Ltd (No. 2)* [1984] 2 NZLR 620.

[27] Mrs Browne submitted that aggravating features in this case were that it should have been apparent from the outset that there were no grounds to support the allegations, the "fishing expedition" nature of the petition, the response to disclosure of the Glen Charlie tape, the factor that it related to one allegation only, and the failure to check that Glen Charlie was under the time restriction for giving evidence, as put forward by him.

[28] In his written submissions in response, the petitioner conceded that the first respondent was entitled to costs and said that the only issue was the quantum of those costs. He submitted that costs should be capped by the security for costs of $8,000 currently held by the Court. He referred to and relied upon three Court decisions relating to election petition costs. First, in *Re Matavera Petition*, High Court of the Cook Islands, Misc. No. 83/06, *Turepu v Eggleton & Others*, Weston J, 27 October 2006, where the petition was withdrawn on the morning of the scheduled hearing. Weston J awarded costs to the first respondent of $2000, together with disbursements of $80, and $500 to the second and third respondents. That petition challenged the validity of 19 votes and contained one allegation of bribery. Second, *Wigmore v Matapo* (CA No. 14/2004) Misc. No. 74/2004. Queen's counsel appeared for both parties and the appeal hearing spanned two full days in Auckland. The Court of Appeal awarded costs to the successful first respondent of $3000, plus disbursements as fixed by the Registrar. The appeal was by the first respondent against the determination of the High Court. Third, in *Akaruru v Wuatai* (CA 3/2001), the Court

of Appeal awarded appeal costs of $3000 to the first respondent and $2000 to the second respondent, together with disbursements to be determined by the Registrar if necessary.

[29] The petitioner submitted that not only does the Act discourage the filing of frivolous petitions, it also encourages, where necessary and proper, a review of the electoral process, including the conduct of the election or of any candidate. Petitions are the only vehicle, post-election, whereby irregularities can be brought to light and dealt with. He went on to submit that in a system such as that of the Cook Islands, where most of the constituencies are relatively small, and winning margins even smaller, confidence in the integrity of the election result is of extreme importance and that petitions helped enormously in this process.

[30] The petitioner pointed out the time restriction of seven days after the declaration of the results for the filing of an electoral petition. He outlined the steps which had been taken to ensure the petition was soundly based and the difficulties which the isolation of Manihiki caused in this process. He submitted that only information with a reasonable degree of credibility and capable of being corroborated was accepted and acted upon as the basis for the petition and that contrary to the assertion of counsel for the first respondent, the evidence from the outset was that there were strong grounds to support the allegations. He said, however, that the evidence tended to "shift" or "drift" with the passage of time, either through the movement of some witnesses away from Manihiki, because of family or peer pressure, or apprehension of appearing in Court, or, as in the case of one of the key witnesses, Mr Glen Charlie, with the production of compromising evidence. He submitted that it was to his credit that allegations were withdrawn progressively as the evidentiary basis became suspect or compromised until the final withdrawal in December.

[31] Regarding the almost nine weeks from filing to withdrawal of the petition, he pointed out that the petition would have been heard in mid-November had it not been necessary, through no fault of the petitioner, to postpone the hearing until December. He said that the most important critical development which ultimately led to the withdrawal of the petition was the production in Court on 29 November by counsel

for the first respondent of the tape recording of the key witness, Mr Glen Charlie, and that before that neither he nor his counsel were aware that a tape recording of Mr Charlie had been made. He said that Mr Charlie had been questioned vigorously on this matter but had denied ever making a tape recording. He said that it transpired that counsel for the first respondent had such tape recording since about 19 or 20 October but had chosen to keep such evidence away from the petitioner and his counsel. He said that at the breakfast meeting on 6 December, the first respondent told him that he had asked his counsel to advise the petitioner and his counsel of the existence of the tape as far back as 20 October and had assumed that this had been done.

[32] The petitioner submitted that Mr Hood's involvement for eight days on Manihiki was unnecessary as Mr Hood could have returned to Rarotonga on 10 November on the same plane that he had and he submitted that it was arguable whether Mr Hood required all of the eight days to interview the witnesses or to be there at all, given that counsel for the first respondent had a tape recording of all their witnesses and others.

[33] The petitioner queried how much of the first respondent's claimed costs related to the cross-petition.

[34] The petitioner submitted that the Manihiki petition was not in the nature of a fishing expedition, that sincere and earnest efforts were made by counsel and the petitioner to verify and strengthen the evidence available to them. When this was deficient or did not measure up to the requisite standard after further enquiry, withdrawals were made without hesitation. He asked the Court to note the fact that, as lead counsel in the Akaoa and Matavera petitions, he had set the standard in withdrawing those petitions once he had formed a view that it would have been "unsafe" to proceed with them because of the evidentiary "weaknesses".

[35] Regarding the amount of costs sought, the petitioner submitted that it appeared that the first respondent's counsel regarded this case "as a gold mine" and that there were the aggravating features:

a) The engagement of 2 counsel where one would have been sufficient;

b) The apparent charging of full rates on an indemnity basis by both counsel;

c) The striking differences between their costs and those of counsel in the petition cases referred to.

[36] The petitioner made detailed submissions in response to Mrs Browne's submissions about the Glen Charlie aspect and stated categorically that he would have withdrawn the petition much earlier had the tape been produced after receipt by counsel for the first respondent on or about 20 October. He then made submissions concerning developments with other potential witnesses. He submitted that he and his counsel made the only sensible decision and withdrew the petition and that it would be unfair if he was penalised with excessive costs for doing the right thing at the right time and being reasonable.

Relevant law

[37] The legislation relating to disputed elections is in Part 8 of the Act. Sections 93 and 101 prescribe the base law relating to election petition costs. The pertinent provisions of those sections are:

> 93. Security for costs – (1) Notwithstanding anything contained in any other Act in any proceedings where an election petition is filed ... the Court shall order security to be given by the petitioner personally for the costs of the hearing of the petition ...
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> (3) In fixing the amount of security for costs the Court shall have regard to the costs, which the respondent or any other party to the petition will probably incur, provided that any amount so fixed shall not be less than $5,000.
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> ....
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> 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.

[38] The words of s 93 mirror the words of its predecessor, s 97 of the Electoral Act 1998 (the prior Act), but the provisions of s 101 are very different from those of its predecessor, s 104 of the prior Act. Therefore any election petition costs decisions based on the prior Act will be of limited, if any, assistance in deciding election petition costs under the Act.

[39] Because of the scheme and words of the Act, I am of the view that the costs provisions of Part 8 constitute a specific regime for costs relating to electoral petitions and they should be determined according to those provisions and not according to the provisions of any other legislation, in particular s 92 of the Judicature Act and the provisions of the High Court Fees Costs & Allowances Regulations 1997. The main reason for this view is that Part 8 relates to petitions for inquiry into and adjudication on the conduct of an election or any candidate or other person thereat and provides a special and distinct jurisdiction and process from that of the Court in civil and criminal proceedings.

[40] The base provision on which the Court is to determine electoral petition costs is s 101 of the Act.

[41] In construing that section, the Court is to apply the direction contained in s 65(2) of the Constitution of the Cook Islands, which states:

> Every enactment, and every provision thereof shall be deemed remedial, whether its immediate purpose is to direct the doing of anything that the enacting authority deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment [of the object] of the enactment or provision thereof according to its true intent, meaning and spirit.

[42] The fundamental principle of interpretation of statutes is that the meaning of an enactment is to be ascertained from its words and in the light of its purpose.

Decision

[43] The core provision of s 101 is in its words:

> **All costs** of and incidental to the presentation of an election petition, and to the proceedings consequent thereon, ... **shall be defrayed by the parties** to the petition **in such manner and in such proportions as the Court may determine** ... [My emphasis.]

[44] I consider that the word "defrayed" has its normal and ordinary meaning of "paid for or reimbursed". This coincides with the dictionary meaning of the verb "defray" - "Pay the expenses of (a person), reimburse". [The New Shorter Oxford English Dictionary.]

[45] It is important to note that the core words of s 101 provide for "all costs" to be defrayed and not just "costs" or "some costs". Further, that all the costs are to be defrayed by the parties to the petition in such manner and in such proportions as the Court may determine.

[46] Section 101 does not prescribe criteria that the Court is to apply in determining manner and proportion but specifies some unmeritorious conduct for which the Court may order that a transgressing party bear the cost of his or her transgression irrespective of success. By using the word "may" and not the word "shall" or "must", s 101 gives the Court a discretion but by specifying particular unmeritorious conduct it indicates that the Court should make the transgressor liable for the cost consequences of that conduct unless there is special reason to the contrary.

[47] From its provisions, I consider that the underlying purpose of the Act is to ensure that the Cook Islands has a democratic system of Government. To ensure this, s 6 of the Act provides that Parliament shall consist of 24 members to be elected by secret ballot under a system of universal suffrage by electors, as stated in that section. It then prescribes the law for constituencies, qualifications of electors and candidates, tenure of office of members, registration of electors, nomination of candidates, voting, counting of votes, offences at elections, disputed elections, by-elections and accountability for campaign receipts and expenditure.

[48] I believe that in a democratic nation such as the Cook Islands, where most of the constituencies have a relatively small number of electors, compared with other democratic parliamentary nations such as the United Kingdom, Australia and New Zealand, and where success margins may be small, and where it is likely that there is mutual personal knowledge and normal occupational and social contact between candidates and the majority of constituent electors, confidence in the integrity of the democratic process and election results is very important. The right to challenge an election provided by Part 8 of the Act plays a major part in ensuring democratic election in accordance with the Act and maintenance of confidence in the validity of election results. The right to challenge or defend an election result should not be restricted in practice to the rich and/or powerful by potential cost consequences. The fear of having to pay high costs to other parties if the petition is unsuccessful should not deter the filing and pursuit of a genuine petition on grounds which are, with good reason, believed to be soundly based. Similarly, the fear of having to pay high costs to other parties if opposition or cross-petition is unsuccessful should not deter the filing and pursuit of genuine opposition or cross-petition on grounds which are, with good reason, believed to be soundly based.

[49] Section 93(3) of the Act requires that in fixing the amount of security for costs, the Court shall have regard to the costs which the respondent, or any other party to the petition, **will probably incur**. [My emphasis.] Each petitioner and each respondent has the opportunity of advising the Court of the amount of costs that he or she will probably incur before the Court fixes security. In so advising each party needs to make a careful and realistic assessment of the costs which will probably be incurred.

[50] I understand that Mrs Browne when arguing the question of security for costs before Weston J, did say that $5,000 might not be enough in all cases. At the same time, there was no suggestion that security should be fixed at a level anywhere near the amount now claimed.

[51] In light of this provision and process, I consider that the amount fixed as security should be taken as a benchmark by the Court in later deciding who should defray the election petition costs actually incurred. Each party should bear this

benchmark figure in mind in deciding the expense that he or she will incur in the part they take and realise that if they incur more expense, by for example, considerable investigation and interviewing, or instructing very senior, foreign domiciled, or multiple counsel, they run the high risk of not being reimbursed for the extra expense, even if they succeed.

[52] The conduct of each party after security is fixed may also be a costs proportionment factor and withdrawal of a petition at an appropriate stage should be taken into account. As Weston J said in the *Matavera* costs judgment:

> 12. I accept that Mr Puna acted responsibly (in withdrawing the petition allegations). I think he is entitled to a credit for that and indeed it is a matter of good policy to encourage petitions to withdraw petitions when they appreciate that they may not be successful if the matter goes to a hearing.
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> 13. It seems to me that simply ordering costs without recognition of that is likely to encourage parties to go on to unnecessary hearings because they have nothing to lose. The Court in its approach to costs should encourage petitioners to recognize the desirability of bringing proceedings to an end as soon as they are able to do so.

[53] Bearing in mind that a cross-petition would not be filed if the petition had not been filed, I believe that a party's costs in pursuing or opposing a cross-petition can be taken into account in deciding the ultimate proportionment of all costs.

[54] A factor to be taken into account with relation to the costs of the Chief Electoral Officer and the Chief Registrar of Electors is that it is in the interests of the Cook Islands nation that there be elections in accordance with the Act and that the Cook Islands Government should consequently pay the cost of conducting elections, including the costs of the Chief Electoral Officer and the Chief Registrar of Electors. Section 112 of the Act specifically provides for their costs to be paid out of the Cook Islands Government Account without further appropriation than that section. In my view it follows that as a general rule another party to an election petition should only be required to defray some costs of the Chief Electoral Officer and the Chief Registrar of Electors if he or she caused such costs by unmeritorious conduct as specified in s 101 of the Act or perhaps by raising untenable legal arguments to which these officials are obliged at their cost to respond.

[55] Having regard to the provisions of the Act, I find that the discretion to determine the defrayal of election petition costs is to be exercised judicially by considering and applying the following criteria:

a) The amount of security for costs fixed by the Court; and

b) The amount and composition of all costs of all parties to the petition of and incidental to the presentation of the petition and the proceedings consequent thereon; and

c) The success of each party; and

d) Any costs, which in the opinion of the Court have been caused by vexatious conduct, unfounded allegations, or unfounded objections on the part of either the petitioner or of the respondent, and any needless expenses incurred or caused on the part of the petitioner or respondent; and

e) The conduct of each party and the events after security for costs was fixed.

[56] I apply these criteria to this inquiry.

[57] After hearing counsel, Weston J fixed the amount of $8,000 as security for costs.

[58] The petitioner and the second and third respondents did not advise the Court of the amount of their costs. They did not seek defrayal of their costs from another party. I therefore consider that each should bear their own costs.

[59] The first respondent claims that costs and disbursements totalling $27,221.97 were incurred by him. These are considerable. The petitioner's concern that they are excessive may be justified.

[60] The petitioner was not successful on any ground.

[61] As the inquiry did not get to the stage of a Court hearing where the grounds of the petition and cross-petition were investigated by the Court, it is handicapped in deciding whether any costs were caused by vexatious conduct, unfounded allegations, or unfounded objections, or any needless expenses were incurred or caused on the part of either the petitioner or the first respondent. I therefore decide these aspects on the basis of the documents filed, the steps taken in the inquiry, and the submissions on costs.

[62] I take into account the detail of the grounds given in the petition and cross-petition, which indicate that there was considered and genuine belief by each party in the validity of each of his grounds. Also the limited time of 7 days that the petitioner had to prepare and file his petition, and the difficulties of doing so within that time because of the remoteness of Manihiki. Also that both the petitioner and the first respondent withdrew some grounds as the inquiry developed when they became aware that such grounds were not as soundly based as they believed when the petition or cross-petition was filed. I also take into account that both parties were apparently willing to proceed with the then remaining grounds at a hearing in mid-November. Further, that the petitioner sought to have the evidence of four people who could not attend the December hearing in Manihiki either taken in Rarotonga or presented in affidavit form. He filed two affidavits, had the evidence of Mr Kaitara heard and was pursuing the hearing of the evidence of Mr Charlie when he was advised of Mr Charlie's tape recorded statement. It was after this that he withdrew the remaining grounds of the petition.

[63] This leads me to the opinion that costs were not caused by vexatious conduct, unfounded allegations, or unfounded objections on the part of the petitioner, or needless expenses incurred or caused on his part, so as to lead the Court to apply the transgression indication of s 101.

[64] With relation to the costs incurred by the first respondent in connection with the grounds in his cross-petition, I do not consider that he should, as a matter of principle, be required to defray all these himself and not receive a proportion from the petitioner, because he would not have incurred these costs if the petitioner had not demanded an inquiry and thereby put the first respondent's successful election in

jeopardy. I do not have any information about the amount of the first respondent's costs that were incurred in connection with grounds in his cross-petition. I do not fix an arbitrary amount for this, but take it into account.

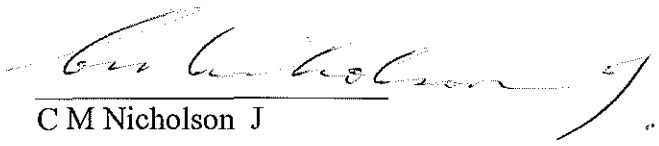
[65] The conduct of each party and the events after security for costs was fixed as known to the Court are stated in the pertinent facts section of this judgment. From the information which I have, I believe that the petitioner acted genuinely, reasonably and responsibly in the filing and pursuit of his petition. I do not consider that it was a frivolous and groundless petition. I consider that the petitioner continued to act reasonably and responsibly by withdrawing grounds when it became apparent to him that the evidentiary basis for a ground became suspect or compromised and that this culminated in the withdrawal of the total petition when the petitioner and his counsel became aware of the tape recordings.

[66] I think that a significant amount of the first respondent's claimed costs and disbursements would not have been incurred, and indeed the petitioner and other respondents would have been saved expense, if the existence and content of the tape recordings of potential witnesses had been disclosed at an earlier stage.

[67] After considering and applying all these factors, I am not satisfied that this is an exceptional instance where the benchmark amount fixed as security for costs should be exceeded. Indeed, as the $8,000 security was fixed to include a hearing on Manihiki and public notice of the withdrawal of the petition was given some days before the Court, counsel and parties were to go to Manihiki, I consider that in all the circumstances, costs of a significantly lesser amount, namely $6,000, should be ordered.

[68] I accordingly order that all costs, which include the disbursements of each party, be defrayed by the party who incurred them, except that $6,000 of the first respondent's costs (which includes his disbursements) are to be defrayed by the petitioner. The manner in which this is to be done is for $6,000 of the $8,000 which the petitioner paid into Court as security for costs, to be paid by the Court to the

solicitor acting for the first respondent. The balance of $2,000 is to be refunded by the Court to the petitioner.



C M Nicholson J