

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

MISC NO. 6/2014

IN THE MATTER of Section 92 of the Electoral Act 2004
AND
IN THE MATTER of an election of Members of Parliament of
the Cook Islands held on 19 February 2014
BETWEEN **Kaota TUARIKI**
Candidate
Petitioner
AND **James Vini BEER**
Candidate
First Respondent
AND **Chief Electoral Officer**
Second Respondent
AND **Returning Officer of the Murienua
Constituency**
Third Respondent
AND **Registrar for the Murienua Constituency**
Fourth Respondent
AND **Chief Registrar of Electors**
Fifth Respondent

Hearing: 7 - 10 April 2014

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

Judgment: 10 April 2014

ORAL JUDGMENT OF HUGH WILLIAMS, J

[1] There are three general matters that need to be dealt with before dealing with the facts of this matter.

[2] The first of those is that this is an oral Judgment, and like any oral Judgment, the Court reserves the right to change the way in which it is expressed but not, of course, the conclusions. The detailed Reasons for Judgment will be delivered at a later date.

[3] The second is that I would like to thank counsel for their assistance during the week. It has certainly made the task of deciding the case much easier.

[4] The third is that although it is a sure-fire device to ensure that all parties listen intently to every word that a Judge says, I can tell you now that the result will be that all the remaining allegations in the petition are dismissed and Mr Beer is confirmed by a majority of two votes as the MP for Murienua for the rest of the present Parliamentary term.

[5] Turning to the individual allegations and dealing first with that of undue influence.

[6] The allegation as pared down by Mr Manarangi at the end of the case was that it was a contrivance on the part of Mr Rasmussen and the Democratic Party to wage a campaign - evidenced in the three publications referred to -, and that that impeded or prevented the free exercise of the franchise by voters or induced and prevailed upon them to vote, as pleaded. "for the first respondent and or refrain from voting for the petitioner".

[7] The first comment that needs to be made in relation to that is that the allegation is over-pleaded. Section s.90(b) says that it is undue influence for somebody to undertake a "*contrivance*" to induce or prevail on an elector "either to

vote or to refrain from voting. It is not part of the section that the undue influence should be aimed towards inducing people to vote for 'A' or not to vote for 'B'.

[8] That may sound like a sophistry but in fact it is important because undue influence is aimed at actions taken by persons to influence electors not to vote at all, or to vote, but not necessarily for a particular candidate, and there is evidence in this case that anything done by Mr Rasmussen and the Democratic Party, let alone by Mr Beer, was that they were not endeavouring to induce electors not to vote, but to vote, though in one particular way. So the allegation of undue influence is over-pleaded and the allegation fails on that account in this case for lack of the evidence just referred to.

[9] The second reason why undue influence cannot be made up is that it is clear on the facts that although Mr Beer may have intended, after Mr Tuariki's resignation on 5 December, to lodge a complaint, the matter was taken out of Mr Beer's hands by his leader and by the Party and that, thereafter, he had, on the evidence, no participation in the issue and certainly no control over what they did and the way in which they did it.

[10] The third reason why the allegation of undue influence cannot stand is that there is no sufficient proof of agency. The law of agency as it applies to Mr Rasmussen / DP as agents for Mr Beer, requires proof that the agent was entrusted by the principal with what the law calls a "material part of the business". There is no proof that that was done by Mr Beer, still less that he did what the law requires, namely, full acceptance of the actions taken by his agents on his behalf.

[11] On each of those three grounds accordingly the allegation of undue influence is not made out and the petition in that respect is dismissed.

[12] As far as bribery is concerned, when the facts of this matter are carefully assessed, the matter falls into two sections.

[13] The first is that Mr Beer, in giving the \$50.00 to Grey Power at the meeting on 12 February, was endeavouring to induce them, that is to say members of Grey

Power, to vote for him. There is no evidence to support that view of the matter. Indeed Grey Power regards itself as a non-political organisation with as it turns out, no members in the Murienua constituency.

[14] The report of the Grey Power meeting contains almost nothing relating to Mr Beer's donation. Virtually the whole of the report relates to the Democratic Party's campaign through him in relation to its tax policy. So although the report reflects aspects of that campaign, a campaign which had persisted on that ground since before the September 2013 by-election, there is no suggestion that the donation influenced members of Grey Power to vote for Mr Beer. So the amount and the donation gave no added force to the arguments he was putting forward as part of the Democratic Party's tax policy.

[15] Therefore there was, in relation to Grey Power members, no inducement for them to vote for the candidate. As it turns out, there were no Murienua electors at the meeting but Mr Beer, in all probability, did not know that.

[16] The other aspect of the bribery allegation is that the publication of the photograph (and the tailpiece mention of the donation) in some way amounted to bribery.

[17] On due analysis, that allegation is that 'A' gave money to 'B' in the presence of 'C' in the hope or expectation that 'C' or his employer "D" would publish the fact of the donation to 'E' and that 'E' would thereby be induced to vote for 'A'.

[18] When the transaction is analysed in that way, it immediately becomes obvious how tenuous the assertion is. The law requires an express or implied condition that, in the case of a donation to one person, it was on condition that another person would vote for the candidate. That simply does not stand up on the facts. In particular there was no condition imposed by Mr Beer on the use of the photograph and it is clear from the evidence of Mr Samoglou, the reporter, that whether or not to publish that photograph was an editorial decision, one over which Mr Beer had no control.

[19] So accordingly, even if Mr Beer had endeavoured to impose a condition that the photograph would be published, that imposition would have been to no account. He simply could not control that aspect of the matter. True, he had a hope that such would occur and, in the context, the photograph was obviously newsworthy, but a hope, even perhaps an expectation, falls far short of proof of a condition.

[20] There are a number of other reasons why that aspect of the bribery allegation fails.

[21] They are, principally, that the donation was unconditional and although Mr Beer may have intended that the donation contribute to Grey Power's obtaining a legal opinion, there was no condition imposed to that effect and his explanation that that was the motivation for his donation, was not challenged in cross-examination. Accordingly it stands as a charitable motive, not a political motive, in the circumstances of the meeting.

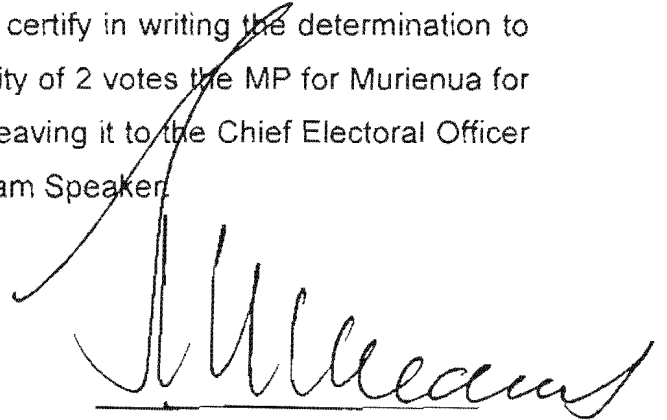
[22] Secondly, the donation was only of \$50.00 which is a small amount unlikely to play any strong part in influencing, wavering voters to vote one way or another.

[23] Thirdly, it was made in the context of the Cook Islands' society where donations are a regular feature of life and indeed it is noteworthy that donations by each of the parties were the subject of critical allegations in the pleadings relating to the September 2013 election. When that background is seen against the law, the allegation under s.88(b) is that Mr Beer made a gift to Grey Power in order to induce Grey Power to procure or endeavour to procure his return or the vote of a Murienua elector. There is simply no evidence that such was or could have been the case and in context, the s.88(b) allegation is accordingly dismissed.

[24] In relation to s.88(c) Mr Beer may have arguably imprudent to make a monetary donation a week before a by-election given that in the political arena, money changing hands always excites suspicion on the part of opponents. That might particularly have been the case coming towards the culmination of two hard fought by-elections where the result was expected by both parties to be close but even in that context it is not shown that Mr Beer committed the offence of bribery

because the assertion is that, in consequence of his gift to Grey Power, he was procuring or endeavouring to procure his electoral success or the vote of any elector. The chain of evidence is simply insufficient when viewed against the terms of the statute.

[25] That being the case, all the remaining allegations in the petition are dismissed and pursuant to s.104 the Court will certify in writing the determination to Chief Electoral Officer that Mr Beer is by majority of 2 votes the MP for Murienua for the balance of the current Parliamentary term leaving it to the Chief Electoral Officer pursuant to s.104(2) to notify that result to Madam Speaker.

A handwritten signature in black ink, appearing to read 'H Williams', written over a horizontal line. The signature is fluid and cursive.

Hugh Williams, J