

**PRAVEEN BALA and 9 Ors v ATTORNEY-GENERAL and Anor  
(HBC0045 of 2002L)**

5 HIGH COURT — CIVIL JURISDICTION

CONNORS J

10 January, 17 February 2005

10 **Statutes — interpretation — Plaintiffs duly elected councillors — qualified and  
nominated as candidate for election to House of Representatives — Plaintiffs sought  
declarations — whether councillors pursuant to Local Government Act persons  
holding public office — application dismissed — not persons holding public office —  
position as councillor not vacated upon nomination — 1990 Constitution s 150 —**  
15 **Constitution ss 3, 6, 7(2), 67(1), 67(4), 156, 194(1).**

The 10 Plaintiffs were duly elected and held position as councillors under the Local  
Government Act (Cap 125) (the LG Act) and were qualified and nominated as candidates  
for election to the House of Representatives in the 2001 General Elections (general  
20 elections) pursuant to the Constitution. The 10 Plaintiffs sought declarations from the  
court to determine whether each of them, upon nomination as candidates for the election  
to the House of Representative at the general elections, ceased to hold office as duly  
elected councillors. The Defendants submitted that a councillor, elected pursuant to the  
provisions of the LG Act, was a person holding an office in, or was a member of, a  
25 statutory authority and was a person holding an office established by a written law. A  
councillor elected pursuant to the LG Act clearly would not be a public officer as defined  
in the Interpretation Act. The Defendants also submitted that in interpreting ss 67 and 194  
of the Constitution, it was necessary to look at s 156 as there would be a conflict of interest  
for a person to hold the positions of councillor and member of parliament.

30 **Held** — The principles as expressed in ss 3, 6 and 7 of the Constitution together with  
the canons of statutory interpretation, inferred that the word “an office”, which appeared  
in clauses (g) and (h) of the definition of public office and in s 194 of the Constitution  
referred to an office of profit and did not include a member of any council established  
pursuant to the LG Act. The proper interpretation of ss 67(1) and 194 of the Constitution  
35 was that the Plaintiffs, as duly elected councillors under the LG Act, were not public  
officers. Thus, the Plaintiffs did not vacate their position of councillors when they  
delivered their nominations as candidates for election to the House of Representatives.  
Application granted.

**Cases referred to**

40 *Re Heydon's case* (1584) 3 Co Rep 7a; 76 ER 637, cited.

*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' case)*  
(1920) 28 CLR 129; 26 ALR 337; *Pambula District Hospital v Herriman* (1988) 14  
NSWLR 387; *Re the Constitution, Reference by His Excellency the President*  
[2002] FJSC 1, considered.

45 *R. Gordon and D. Gordon* for the Plaintiffs

*S. Tabaiwalu* for the Defendant

50 **Connors J.** By originating summons dated 21 February 2002, the 10 Plaintiffs  
seek declarations from the court. The central issue raised by the Plaintiffs is  
whether each of them upon nominating as candidates for election to the House of

Representatives at the 2001 General Elections ceased to hold office as councillors under the Local Government Act (Cap 125) (the LG Act).

It is not in dispute that:

- 5 (i) Each of the 10 Plaintiffs was duly elected a councillor under s 9 of the LG Act.
- (ii) Each of the 10 Plaintiffs nominated as a candidate for election to the House of Representatives in the 2001 General Elections.
- (iii) Each of the 10 Plaintiffs was qualified to be nominated as a candidate for election to the House of Representatives under s 58 of the Constitution.
- 10 (iv) Each of the 10 Plaintiffs held the position of councillor at the time of nominating as a candidate for election to the House of Representatives in the 2001 General Elections.

### The statutory provisions

15 Section 67(1) of the Constitution of the Republic of the Fiji Islands (the Constitution) provides:

67(1) — A person who holds a public office is deemed to have vacated that office immediately before the time at which his or her signed nomination as a candidate for election to the House of Representatives is delivered to the relevant returning officer.

20 The critical issue for determination is whether or not a councillor pursuant to the LG Act is a person holding a public office under the Constitution.

Section 67(4) provides some specific exclusions in that regard and provides:

In this section:

25 public office does not include:

- (a) the office of a Minister;
- (b) the office of Leader of the Opposition; or
- (c) an office held by a Minister by virtue of his or her appointment as a

Apart from these specific exclusions contained in s 67, one needs to look at the definition of public office in s 194 of the Constitution.

30 Section 194(1) states:

In this Constitution, unless the contrary intention appears:

public office means:

- 35 (a) an office created by, or continued in existence under, this Constitution;
- (b) an office in respect of which this Constitution makes provision;
- (c) the office of a member of a commission;
- (d) an office in a state service;
- (e) an office of judge;
- (f) an office of magistrate or an office in a court created by the Parliament;
- (g) an office in, or as a member of, a statutory authority; or
- 40 (h) an office established by a written law.

It is submitted on behalf of the Defendants that a councillor elected pursuant to the provisions of the LG Act is a person holding an office in or is a member of, a statutory authority and further that such a person is holding an office established by a written law.

45 Section 194(1) also contains a definition of Local Authority and local government officer. Local authority is defined as meaning:

a council of a city, town or district or any other similar body prescribed by the Parliament, and includes the Council of Rotuma under the Rotuma Act and the Council of Leaders under the Banaban Settlement Act.

50 A local government officer is defined as meaning:

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15 **Constitution ss 3, 6, 7(2), 67(1), 67(4), 156, 194(1).**

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30 **Held** — The principles as expressed in ss 3, 6 and 7 of the Constitution together with  
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in clauses (g) and (h) of the definition of public office and in s 194 of the Constitution  
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It is submitted on behalf of the Defendants that a councillor elected pursuant to the provisions of the LG Act is a person holding an office in or is a member of, a statutory authority and further that such a person is holding an office established by a written law.

45 Section 194(1) also contains a definition of Local Authority and local government officer. Local authority is defined as meaning:

a council of a city, town or district or any other similar body prescribed by the Parliament, and includes the Council of Rotuma under the Rotuma Act and the Council of Leaders under the Banaban Settlement Act.

50 A local government officer is defined as meaning:

a person holding or acting in any office of emolument in the service of a local authority but does not include a person holding or acting in the office of a member of any such authority.

Section 8 of the LG Act provides:

- 5 (1) For the government of each municipality there shall be constituted a council, which shall—
- (a) in the case of a city, be known by the name of the city followed by the words “City Councils”;
  - 10 (b) in the case of a town, be known by the name of the town followed by the words “Town Council”;
  - (c) in the case of a district, be known by the name of the district followed by the words “District Council”.
- (2) Every Council shall be a body corporate with perpetual succession and a common seal and shall for the purposes and subject to the provisions of this Act be capable of purchasing, holding, disposing of and alienating and of accepting dedications of real and personal property and of doing and suffering all such acts and things as bodies corporate may by law do and suffer.
- 15

Section 9 of the LG Act provides:

- (1) — The council of every municipality shall consist of such number of elected councillors as the Electoral Commission may from time to time by order determine.
- 20

Section 10 of the LG Act deals with the qualification and disqualification for councillors and relevantly provides:

- (2) — A person is disqualified from being elected or being a councillor if he—
- 25 ...
- (f) holds or is acting in any public office.

The Constitution contains sections which must be taken into account in interpreting the Constitution. Section 3 provides:

- (3) — In the interpretation of a provision of this Constitution:
- 30 (a) a construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object; and
  - (b) regard must be had to the context in which this Constitution was drafted and to the intention that constitutional interpretation taken into account social and cultural developments, especially:
    - 35 (i) developments in the understanding of the content of particular human rights; and
    - (ii) developments in the promotion of particular human rights.

40 Section 6 is titled, “Compact”, which is a recognition of the principles upon which the government is based, subject to the Constitution.

Section 7(2) provides:

In the interpretation of this Constitution or a law made under this Constitution, consideration must be given to those principles, when relevant.

45 The section, when referring to “those principles” is referring to the principles enumerated in s 6.

In *Re the Constitution, Reference by His Excellency the President* [2002] FJSC 1, the court after acknowledging the provisions of ss 6 and 7(2) of the Constitution together with s 3 thereof said:

50 Subject to the provisions of the Constitution relating to interpretation, we have to apply the normal canons of statutory interpretation. The first consideration is the natural

and ordinary sense, in their context, of the words used. Classically, that is how the intention of the legislature is ascertained and if the provision is unambiguous, except in rare and extreme cases of absurd consequences that is the end of the matter.

5 In that same case, counsel for Mr Chaudhry submitted that the meaning of a provision in the Constitution could not be controlled by an extraneous Act of Parliament such as the Interpretation Act 1967 (Cap 7). The court did not rule on the submission and made its determination without reference to the Interpretation Act.

10 The Interpretation Act contains a definition in s 2 of “officer” or “public officer”. That section provides:

15 (1) In this Act and in every other written law and in all public documents enacted, made or issued before or after the commencement of this Act the following words and expression shall have the meanings hereby assigned to them respectively unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided.  
“Officer” or “public officer” means a person in the permanent or temporary employment of the Government of Fiji including a person appointed under the Fijian Affairs Act.

20 A councillor elected pursuant to the LG Act clearly would not be a public officer as that term is defined in the Interpretation Act.

It is submitted on behalf of the Defendant that in interpreting ss 67 and 194 of the Constitution, it is necessary to look at s 156 as there would be a conflict of interest for a person to hold the positions of councillor and member of parliament.

25 Section 156 sets forth a code of conduct relevantly for members of parliament. I have difficulty in seeing that the provisions of s 156, would be breached by a person being simultaneously a councillor elected under the LG Act and a member of parliament. It is noted that in other Commonwealth countries and states, there is no bar to a person being both an elected councillor of the local government area and a member of a state or federal parliament.

30 Section 150 of the 1990 Constitution of the Sovereign Democratic Republic of Fiji specifically excluded “the office of member of any council” from the construction of “public office”.

35 When one considers the meanings of “public office” in s 194, it is necessary to look at the list (a)–(h) applying the *ejusdem generis* rule. When so doing, items (g) and (h) might then be read as being limited to a position of profit in or as a member of a statutory authority or similarly, an office of profit established by a written law. Those matters detailed in (a)–(f) would certainly be suggestive of such an interpretation.

40 There can be no doubt that the position of councillor under the LG Act is a position established by a written law but that then begs the question as to whether the position of councillor is in fact “an office”. Similarly, there can be no doubt that a council established under the LG Act is a statutory authority however once again, that begs the question as to whether a councillor is a person holding “an office” in that statutory authority.

45 I don’t think that it can be said that the provision is unambiguous and therefore it is necessary to apply the normal canons of statutory interpretation.

50 The literal approach to statutory interpretation was defined and explained by Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*Engineers’ case*) (1920) 28 CLR 129 at 161–2; 26 ALR 337 as follows:

The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.

The other general approach to the interpretation of legislation is the purposive approach. This approach had its origins in the so called “mischief rule” which was set out in *Re Heydon’s case* (1584) 3 Co Rep 7a at 7b; 76 ER 637. The purposive approach was applied by determining the purpose of the Act or the particular provision in question (“the mischief” with which it was intended to deal) and by adopting an interpretation of the words that was consistent with that purpose. It was generally accepted that the purposive approach applied only when an attempt to apply the literal approach produced an ambiguity or an inconsistency. However, in more recent times in Australia, the purposive approach has been applied as being preferable to the literal approach.

When the purposive approach was applied, the purpose was usually deduced by looking at the statute as a whole. The history of the statute also sometimes assisted. In *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 410 Samuel JA commented that:

It has always been open to the court to have regard to the historical setting of the statute and by that means to ascertain what the object of the legislature was.

Sources such as reports of parliamentary debates and of commissions and international agreements have also been relied upon by the High Court of Australia and the courts of the various States of Australia.

This then leads to a consideration of the report of the Fiji Constitution Review Commission (the Reeves report), which preceded the 1997 Constitution.

What was the mischief sought to be overcome by ss 67 and 194 of the Constitution? Was it to stop citizens being simultaneously a member of a local council established under the LG Act and a member of parliament or was it to stop people holding a position of profit from the government (using that term in its broadest sense to include statutory authorities) from simultaneously being a member of parliament or was it to do both?

There is a common thread throughout Commonwealth countries that a person cannot hold a position of profit from the government while being a member of parliament but there is no such common thread with respect to a person being elected simultaneously to a council and to parliament.

The report of the Fiji Constitution Review Commission deals with the eligibility to be a candidate for election at p 346.

10.160 — The Commission has carefully considered the grounds on which a person should be disqualified from being a candidate. In particular, it examined closely section 42(1)(f) of the 1990 Constitution which disqualifies a person who, “subject to any exceptions prescribed by Parliament, holds or is acting in any public office”. The principle behind the provision is a sound one. People who wish to stand for Parliament have to be prepared to give up any other office in the service of the state.

10.161 — However, the provision has given rise to considerable practical difficulties. The Constitution does not make it clear whether the disqualification applies at the time of nomination, or only at the date of election. In addition, it may sometimes be difficult to determine on the facts whether a person “holds or is acting” in a public office. It is also wrong in principle to allow Parliament to

make exceptions to the rule. The rule itself should be drafted so as to exclude persons who should not be caught by it. In this connection, it should be noted that the drafting device of defining “public office” widely enough to include judicial office for the purposes of this particular provision, among others, has led to confusion in other contexts because it seems to equate members of the judiciary with other servants of the state.

10.162 — The Commission therefore proposes a different approach. All persons holding an office in the service of the state coming within the terms of the present definition of “public office” (including the office of the Commander of the Fiji Military Forces, contrary to the provision in section 150(b)(ii), should be treated as having vacated that office immediately before the time their signed nomination as a candidate for election as a member of the Bose Lawa or the Bose e Cake is filed. Officer holders appointed to the Bose e Cake by the President should be treated as having vacated office immediately before being so appointed.

15 The commission made Recommendation No 300 that is set out at p 348 of the report as follows:

300 — The Constitution should provide that all persons holding an office in the service of the state coming within the terms of the present definition of “public office” (which should include the office of the Commander of the Fiji Military Forces) should be treated as having vacated that office immediately before the time at which their signed nomination as a candidate for election as a member of the Bose Lawa or the Bose e Cake is filed. It should also provide that office-holders appointed to the Bose e Cake by the President will be treated as having vacated office immediately before being so appointed.

25 The “present definition” of “public office” is that contained in the 1990 Constitution of the Sovereign Democratic Republic of Fiji. That definition is as follows:

150 — In this Constitution the expression “public office” shall be construed—

(a) as including the office of any judge of the High Court, the Fiji Court of Appeal or the Supreme Court, and the office of member of any other court of law in Fiji, unless the context otherwise requires;

(b) as not including—

(i) the office of any Minister or Assistant Minister, Leader of the Opposition, Speaker, Deputy Speaker or member of the House of Representatives or President, Vice President or Member of the Senate;

(ii) the office of the Commander of the Fiji Military Forces;

(iii) the office of member of any Commission established by this Constitution; or

(iv) except insofar as may be otherwise prescribed, the office of member of any council, board, panel, committee or other similar body (whether incorporated or not) established by or under any law.

(2) For the purposes of this Constitution a person shall not be considered as holding a public office or a local government office, as the case may be, by reason only that he is in receipt of a pension or other like allowance in respect of service under the State or under a local authority.

45 The report of the commission was considered by a joint parliamentary select committee prior to the Constitution Amendment Bill 1997 being debated in parliament. The consideration of the joint parliamentary select committee has been reduced to a document titled “Report of the Joint Parliamentary Select Committee on the Report of the Fiji Constitution Review Commission”.

50 That report adopted Recommendation 300 of the Review Commission and said at para J.15:



The Constitution would provide that all persons holding an office in the service of the state coming within the terms of the present definition of “public office” (which should include the office of the Commander of the Fiji Military Forces) should be treated as having vacated that office immediately before the time at which their signed nomination as a candidate for election as a member of the House of Representatives.

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Clause 66(1) and the definition of “public office” as appearing in cl 193 of the Bill are in terms identical to that contained in the Act following its passing by parliament.

The parliamentary debates (Hansard) of the House of Representatives from 10 June — July 1997 when the Bill was debated in parliament indicate that the clauses were not amended in the course of the debate.

### Conclusion

Applying the principles as expressed in ss 3, 6 and 7 of the Constitution together with the canons of statutory interpretation to which I have referred leads to the conclusion that the words “an office” where appearing in cl (g) and (h) of the definition of “public office” and in s 194 of the Constitution refer to an office of profit and do not include a member of any Council established pursuant to the LG Act.

### 20 Orders

[1] I declare that on a proper interpretation of ss 67(1) and 194 of the Constitution of the Republic of the Fiji Islands, the Plaintiffs as duly elected councillors under the LG Act are not “public officers” and accordingly, the Plaintiffs are not deemed to have vacated their position of councillor upon delivering a nomination as a candidate for election to the House of Representatives to the relevant Returning Officer.

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[2] The Defendants are to pay the Plaintiffs’ costs.

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*Application granted.*

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