IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND CA5/99

IN THE MATTER	of an election of Members of Parliament of the Cook Islands (Constituency of Pukapuka/Nassau) held on the 16th day of June 1999
AND	
IN THE MATTER	of the Electoral Act 1998, section 96(4)
BETWEEN	TIAKI WUATAI
	Applicant/Appellant
AND	INATIO AKARURU
	First Respondent
AND	THE CHIEF ELECTORAL OFFICER of Rarotonga
	Second Respondent

Hearing: 11 August 1999

Coram: The Hon Sir Graham Speight JA (Presiding)
The Hon Sir Ian Barker JA
His Honour Justice AG McHugh

Counsel: Dr Rodney Harrison & M Mitchell for Applicant/Appellant;
GB Chapman and Mrs TB Browne for First Respondent
AM Manarangi for Second Respondent

Judgment: 11 August 1999

(ORAL) JUDGMENT OF THE COURT DELIVERED BY
THE HON SIR GRAHAM SPEIGHT JA

Solicitors:
Stevenson Nelson & Mitchell, Rarotonga, for Applicant/Appellant;
Mrs TB Browne, Solicitor, Rarotonga, for First Respondent;
AM Manarangi, Solicitor, PO Box 514, Rarotonga, for Second Respondent.

This appeal is a very live issue because one of the discretions or powers which is left to the Court is to determine whether it will confirm, modify or reverse a decision appealed from which declared a candidate as having been elected. So that the matter is still a live one.

We have reached certain conclusions but we wish to take time to have the reasons for those conclusions recorded in a more formal way. However, because it is desirable, in view of the conclusions that we have come to, that the electoral processes move forward, we propose to announce the conclusions we have reached to this stage and issue our reasons at a later date.

Put briefly, we have concluded, pursuant to s 105(3) that we reverse the decision appealed against and we determine the result of the election as declared to be void. Consequently the matter will have to move into the hands of the Registrar of Electors to order a by-election.

We think it would be helpful to counsel and as a courtesy to them at this stage, and without prejudice to what may subsequently be recorded in a more formal way, that we briefly indicate our reasoning. The issue as to whether this was a question of fact or law is resolved by our conclusion that the issue challenged was a question of fact. This might have been debated on the interpretation of the purported letter of resignation of the 27th but we are persuaded from the matters which were discussed during the hearing that this man remained as a servant of the Crown until the 30th. That was a determination of fact and on that point we concur with the learned Judge. Consequently, one was not obliged to examine the other issues as to irregularity and the like had one been considering the resignation question as

involving a point of law. It is recognised, however, that it was of a minor nature as a breach of electoral procedure and we have noted that there is the ability for a person who, as here, has been nominated, to withdraw and could have indeed been done so at any time within the two-three weeks following the end of April. He could indeed have then been renominated. Had he recognised the nature of his very minor slip, that may well have happened. His was at the lowest level of error in such matters. Although the resignation point was determined against the appellant, in determining the appeal the Court may also consider whether or not there were other aspects of the learned Judge's conclusions which qualify as a question of law. In our view, the power or discretion which rests with the Court of Appeal of confirming, modifying or reversing the decision is a decision in law. The learned Judge merely announced this was in effect a one-man election and he declared the other candidate to be elected. That determination is a determination in law but it was made without reasons being given. The modern practice is, of course, to give reasons for a decision of this nature and failure to do so, in our view, constituted an error of law when one takes into account that no reasons in a case where there appears to us to have been very powerful reasons for voiding the election and allowing a further by-election to take place. Nor was any mention made of matters which were taken into account. It was, as has already been mentioned, a venal error which could have been corrected had it been drawn to attention at the relevant time. Indeed there are suggestions that the disqualified candidate had taken advice and was wrongly advised as to the situation and as to the peril he faced. Against that background, we accept the submissions that were made that this was a very drastic determination to disenfranchise half of the electors and one would be surprised if consideration is given to that aspect it would not have led to the conclusion that it was erroneous to reach

a conclusion contrary to the public interest taking into account the purposes of democratic election as an expression of electorate choice.

For that reason, therefore, we have come to the conclusion there was an error of law, so it must appear to us, in failing to give consideration to and effect to, if necessary, the overwhelming preference in favour of determining how a properly held election would have resulted given the presence of bona fide candidates. This outline is given by me now informally as a courtesy to counsel, but a more measured written decision will be issued in due course.