IN THE COURT OF APPEAL OF THE COOK ISLANDS
AUCKLAND REGISTRY

CA 7/04

IN THE MATTER of s102 of the Electoral Act 2004

BETWEEN **T TAPAITAU**
Appellant

AND **W RASMUSSEN**
First Respondent

AND **N TEAREA**
Second Respondent

AND **B T HAGAN**
Third Respondent

CA 8/04

BETWEEN **P ROBATI**
Appellant

AND **R RUA**
Respondent

Hearing date: 10 November 2004

Coram: Barker JA (Presiding)
Henry JA
Smellie JA

Date of judgment: November 2004

JUDGMENT OF THE COURT

Solicitors
T C Weston QC and C Little for Appellant in CA 7/04
First Respondent in person in CA 7/04
T Elikana for Second and Third Respondents in CA 7/04
T C Weston QC and C Little for Appellant in CA 8/04
N George for Respondent in CA 8/04

[1] With the consent of the parties, these two appeals were heard together. They are brought by way of case stated under s102(2) of the Electoral Act 2004 ("the Act") and arise from judgments of Hingston J delivered on 4 and 5 October 2004. Leave to appeal in both cases was granted under s54(1) of the Judicature Act 1980-81.

[2] The case stated is in the following form:

> 1 On 20 September 2004, the Appellant in what is now CA 7/04 filed an election petition pursuant to section 92, Electoral Act 2004, alleging (inter alia) the following:
>
> '(a) Your petitioner states that the said election was held on the 7th day of September 2004 and that Wilkie Rasmussen was declared to be elected as a representative for the Constituency of Penrhyn.
>
> (b) That the following electors who voted in the Constituency of Penrhyn were not qualified for registration as electors, not entitled to vote at the election and/or their vote should be deemed informal:
>
> a. Rasmussen, Wilkie
>
> b. Moerangi, Kirikava
>
> c. Nukore, Tauei
>
> d. Samatua, Sheryl Vera
>
> e. Long, Annemaree Sheryl
>
> f. Heria, Doreen
>
> g. Heria, Rutera Purua
>
> h. Ioaba, Margaret Leonie
>
> i. Matara, Christmas

j. Matara, Rakoroa

k. Nikau, Tononui Akamura

l. Long, Majawai Apna

(c) That Wilkie Rasmussen committed the offence of corrupt practices pursuant to section 87 of the Electoral Act 2004 ('The Act') by way of bribery, treating and/or undue influence pursuant to sections 88, 89 and/or 90 of the Act.'

(the Penrhyn Petition)

2 On 1 October 2004 the Petitioner, pursuant to a direction of the High Court, filed further particulars in support of the Penrhyn Petition and on the same day filed an amended petition citing various parties as respondents.

3 On 20 September 2004 the Applicant in what is now CA 8/04 filed an election petition pursuant to section 92, Electoral Act 2004, alleging (inter alia) the following:

'(a) Your petitioner states that the said election was held on the 7th day of September 2004 and Piho Rua was declared to be elected as a representative for the Constituency of Rakahanga.

(b) That Piho Rua committed the offence of corrupt practices pursuant to section 87 of the Electoral Act 2004 ('the Act') by way of bribery, treating and/or undue influence pursuant to sections 88, 89 and/or 90 of the Act.'

(the Rakahanga Petition)

4 On 1 October 2004 the Petitioner, pursuant to a direction of the High Court, filed further particulars in support of the Rakahanga Petition and on the same day filed an amended petition citing various parties as respondents.

5 On 5 October 2004 the High Court of the Cook Islands struck out the Penrhyn and Rakahanga Petitions on the basis of reasoning given by the Court on the same day in relation to three other election petitions (being those numbered Misc 73/04, 76/04 and 82/04). So far as is relevant to the two appeals, the reasoning of the Court can be summarised:

(a) The requirement in section 93(4) Electoral Act 2004, to state the specific grounds upon which the petition was brought, required the Applicant to make factual allegations;

(b) Merely to state that a section of the Act was breached, without more, stated a legal conclusion and did not amount to specific grounds in terms of section 92(4), Electoral Act 2004;

(c) The absence of specific grounds in either petition could not be cured by amendment outside the 7 day period stipulated for in section 92(1), Electoral Act 2004.

6 The questions of law for the opinion of this Court are:

(a) Did the High Court err in finding that the statutory requirement for *"specific grounds"* was not satisfied by the allegations made in the Penrhyn (as to paragraph (c)) and Rakahanga (as to paragraph (b)) Petitions as set out in paragraphs 1 and 3 above?

(b) Were the allegations contained in paragraph (b) of the Penrhyn Petition (without more) sufficient to avoid the strikeout in relation to that petition?

[3] At issue is the construction of s92 of the Act, which provides:

92. Election petitions – (1) Where any candidate or five electors are dissatisfied with the result of any election held in the constituency for which that candidate is nominated, or in which those electors are registered, they may, within seven days after the declaration of the results of the poll by the Chief Electoral Officer by petition filed in the Court demand an inquiry into the conduct of the election or any candidate or other person thereat.

(2) Every petition shall be accompanied by a filing fee of $1,000.

(3) The petition shall be in Form 14 and shall be heard and determined before a Judge of the Court.

(4) The petition shall allege the specific grounds on which the complaint is founded, and no grounds other than those stated shall be investigated except by leave of the Court and upon reasonable notice being given, which leave may be given on such terms and conditions as the Court deems just:

Provided that evidence may be given to prove that the election of any unsuccessful candidate would be invalid in the same manner as if the petition had complained of his or her election.

[4] Under paragraph 2 of form 14, the petitioner is required to state the facts and the grounds relied upon.

[5] For the appellants, Mr Weston QC submitted that the requirement for the petition to allege the specific grounds of complaint was met in each case. Statutory offences were identified, and in the Penrhyn petition a lack of appropriate qualification of named electors was alleged.

[6] Section 92(4) is expressed in terms identical to those contained in the repealed 1966 Act, and also to those in the earlier equivalent New Zealand legislation through until 1956 when the requirement was for the petition to be in such form and state such matters as are prescribed by rules of Court. The relevant form in those rules require both grounds and facts to be stated separately. Mr Weston argued that there is recognised a clear distinction between the two concepts. He also pointed to the short time limit of seven days stipulated by s92(1) without any provision for an extension of time. Mr Weston also noted the power of the Court to give leave to introduce grounds additional to those originally pleaded.

[7] For the respondent Mr Rua in CA 8/04, Mr George contended that a petitioner was required to allege facts being relied upon, otherwise the "grounds" were not specific. He also stressed the importance of resolving election petitions speedily, with the overall legislative intent being against the ability to allow a new and different case to be promoted out of time simply by amending or particularising an otherwise uninformative petition. Mr George placed reliance on the decision of

the High Court of Australia in *Re Berrill* (1978) 19 ALR 254. That was an electoral petition case where the relevant statute required the petition to "set out the facts relied on to invalidate the election". The statute further provided that no proceeding could be had on a petition unless those requirements were complied with. The petition pleaded only that a number of specified sections of the Act were not complied with or were wrongly applied, each being of sufficient magnitude to render it impossible for the conduct of the election to have been according to law.

[8] The Court held that the petition did not set out the facts relied upon, the allegations being in effect conclusions of law, not the facts from which those conclusions may be drawn.

[9] The Court further held it was not possible to amend the petition outside the 40 day limitation period as that would permit an evasion of the period required to allege facts.

[10] For the second and third respondents, Mr Elikana supported Mr Weston in distinguishing *Re Berrill*. Under s92(4) of the Act, there is no requirement to allege facts and it was submitted that the word "grounds" does not mean "facts in support of those grounds". Mr Elikana also stressed the potential difficulty in assessing all the facts to be relied upon in the short time frame allowed under the Act. He also referred to the ability to file further particulars.

[11] We agree that *Re Berrill* is distinguishable from the present case for the reasons put forward by Mr Weston and Mr Elikana. The decision does, however, emphasise the importance of strict compliance with the statutory requirements in such matters.

[12] In construing the words "specific grounds", it is necessary to look at the scope and object of s92. It provides a mechanism for the early identification of the grounds upon which an enquiry can be launched. Once nominated, those grounds can only be added to by leave of the Court. The use of the word "specific" is significant. Some colour can also be gained from reference to form 14 and its direction to include a recitation of facts, although that, of course, is by no means conclusive.

[13] The grounds upon which a challenge can be made are set out in the Act. Those include the commission of offences under the Act. To allege a named offence has been committed merely by reference to the relevant section and its heading is

singularly uninformative and almost meaningless. It is at best a general description and in that sense quite unspecific. As was held in *Re Berrill*, what is pleaded are really no more than conclusions of law resulting from unstated bases.

[14] In our view, the intention of the legislature is to ensure that, when instituted, the petition must provide a reasonable identification of the basis of the challenge. In the case of an alleged offence, for example, the substance of what is alleged must be reasonably discernible. This kind of approach was adopted in respect to similar words in *Re Net Book Agreement 1957* [1962] 3 All ER 751, a case under the Restrictive Trade Practices Act 1956, under which certain restraints were deemed restrictive unless their removal would deny specific benefits to the public. At p 774, Buckley J said:

> To satisfy the requirements of the subsection the alleged benefit must be 'specific'. We are content to adopt one of the interpretations of this word suggested by counsel for the registrar, and accepted by counsel for the respondents, that is to say that it means explicit and definable.

[15] And in *Davidson v Carlton Bank Ltd* [1893] 1 QB 82, Lopes J said, at p 86:

> I know of no better statement of what constitutes a specific description for this purpose [within the meaning of the Bills of Sale Act (1878) Amendment Act 1882, s 4] than that which we gave in *Carpenter v Deen* (1889) 23 QBD 566 CA]. In that case I said "The section requires that the chattels shall be 'specifically described'. According to my view, that means described with such particularity as is used in an ordinary business inventory of such chattels". Fry LJ said in that case "In considering the meaning of the words 'specifically described' we should look at the scope and object of the section. They are in my opinion plain. I think they are to facilitate the identification of the articles enumerated in the schedule with those found in the possession of the grantor – that is to say, to render the identification as easy as possible, and to render any dispute as to the intention of the parties as rare as possible, and to shut the door to fraud and controversy, which almost always arise when general descriptions are used. That is to be done as far as possible; by which I mean, as far as is reasonably possible – so far as a careful man of business trying to carry the object of the Act into execution could and would do without going into unreasonable particulars".

[16] It is unnecessary to list each and every fact being relied upon. What is required is the provision of reasonable information so that those concerned are aware of the nature of the challenge. If necessary, further particulars can always be sought.

[17] It is no answer for the appellants here to say that any prejudice is met by the provision of further particulars. Having regard to the very general nature of the grounds pleaded, it would be possible under that guise to allege a series of quite

unrelated and distinct offences under, for example, s88. In truth and in substance, each would then constitute a separate ground of challenge. It is that kind of result which is closed by s92(4).

[18] In respect of the Penrhyn petition, Mr Weston referred to rulings of Hingston J also made on 5 October 2004 relating to the eligibility of certain categories of voters. He then linked ten persons listed in the petition to categories which would affect the validity of their votes. The factual basis for doing that is not properly before the Court, as it is now contained in the case stated. That apart, we do not agree that the naming of these persons cures the defect. To be a specific ground, the petition must provide reasonable information disclosing in respect of each person the basis upon which the challenge to qualification for registration entitlement to vote, or the challenge of informal voting, is made. The reasons which we have earlier discussed are equally applicable. There is no basis for enquiring into the eligibility of voters unless the ground for so doing is disclosed.

[19] As we understand it, the appellant did not contend that if the petition as filed did not meet the requirements of s92(4), the defects could not be cured by any amendment after expiry of the statutory period. We agree that this is the position for the reasons set out in *Re Berrill*. To allow an amendment after the limitation period is effectively to permit an evasion of s92(4). It would not be adding new grounds by way of amendment, but elaborating on existing grounds which were neither specific nor particularised.

[20] For the above reasons, we answer the questions posed in the case stated as follows:

Question (a): No.

Question (b): No.

[21] It follows that the appeals must be dismissed. Although the first respondent in CA 7/04 appeared in person, he has incurred expenses in opposing the appeal. His costs are fixed in the sum of $1000. The other respondents effectively supported the appellant, so we make no order in their favour. On CA 8/04 the respondent is entitled to costs which we fix at $4000.

R. D. Barker, J.A.

Barker JA

Henry JA

Robert Smellie JA

Smellie JA