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

O.A. 18/00

IN THE MATTER	of the Declaratory Judgments Act 1994
A N D	
IN THE MATTER	of the Constitution of the Cook Islands ("the Constitution")
A N D	
IN THE MATTER	of an Application for Declaratory Orders by Teina Bishop, Member of Parliament for Arutanga/Reureu/Nikaupara
	Applicant
A N D	The Attorney-General of the Cook Islands
	Respondent

Counsel:	Mr B J Gibson for Applicant Mr M C Mitchell for Attorney-General
Hearing:	8 February 2001
Supplementary Written Submissions:	13 February 2001
Judgment:	16 February 2001

JUDGMENT OF DAVID WILLIAMS J

Nature of the Case – Orders Sought

[1] These proceedings were commenced on 20 December 2000 and raise important constitutional questions concerning the person presently entitled to occupy the office of Speaker in the Cook Islands Parliament.

[2] The Applicant, Teina Bishop, Member of Parliament for Arutanga/Reureu/Nikaupara, seeks the following declaratory orders:

"1 (a) That the Deputy Speaker, Mr Mapu Taia, MP, the Honourable Member for the Constituency of Mauke, was not entitled to vote on a motion put to the Parliament on 30 November 2000 [the Court refers to this motion hereafter as "the motion of no confidence"] declaring no confidence in Mr Ngereteina Puna, O.B.E., as Speaker of Parliament; or in the alternative:

(b) The passage of the motion of no confidence in the Speaker did not have the effect of removing the Speaker as the Speaker of Parliament.

2. That Parliament had and has no power to amend the Constitution other than through the procedure laid down in Article 41 of the Constitution.

3. That the vote cast on the motion by the Deputy Speaker was and is invalid and in breach of Article 32(c) of the Constitution.

4. That the Clerk of the House should not have included the vote of the Deputy Speaker in determining the total votes for and against the motion.

5. That the motion was lost.

6. That Mr Ngereteina Puna, O.B.E., is, and remains, the lawfully appointed Speaker of Parliament."

[3] When the case came on for hearing on Thursday 8 February in Rarotonga, the Attorney-General was joined as Respondent by consent.

[4] Several provisions of the Cook Islands Constitution are relevant in this case, but the two which lie at the heart of the claim are Article 32(e), which provides that "The Speaker ... shall vacate his office ... if Parliament passes a resolution supported by the votes of not less than two-thirds of all members thereof ... requiring his removal from office" and Article 34(3) which provides that "The person presiding over any sitting of Parliament shall not have a deliberative vote, but in the case of inequality of votes, he shall have a casting vote".

Factual Background

[5] The following agreed facts emerge from the pleadings:

- Mr Ngereteina Puna, O.B.E. ("the Speaker") was appointed the Speaker of Parliament on a motion passed by Parliament on 29 July 2000 pursuant to Article 31(2) of the Constitution and Part III of the Standing Orders of Parliament ("Standing Orders"). Mr Mapu Taia, M.P., the Member for Mauke, ("the Deputy Speaker") was appointed the Deputy Speaker of Parliament on a motion passed by Parliament on 16 December 1999 pursuant to Article 33(1) and Part IV of Standing Orders. (The Attorney-General in his statement of defence disputed these dates of appointment, claiming that Mr Puna and Mr Taia were appointed on 18 November 1999, but the dates are immaterial to the issues falling for decision.)

- Dr Pupuke Robati, the Member for Rakahanga, on 30 November 2000 moved in Parliament that the relevant Standing Orders be suspended ("the motion to suspend Standing Orders") to the extent necessary to allow a motion of no confidence in the Speaker to be dealt with immediately by Parliament.

- The motion to suspend Standing Orders was seconded by the Hon. Norman George, Deputy Prime Minister and Member for Tengatangi/Areora/Ngatiarua.

- The motion to suspend Standing Orders was carried

- The Speaker ceased presiding over Parliament and vacated the Chair.

- When the Speaker vacated the Chair the Deputy Speaker took the Chair and became the person presiding over that sitting of Parliament.

- The Deputy Prime Minister then moved the motion of no confidence.

- The motion of no confidence was seconded by Mr Robert Wigmore, the Member for Titikaveka.

- The Deputy Prime Minister moved a motion that the Deputy Speaker, as the elected Member of Mauke, "be allowed to exercise [his] voting right in the House by going back to [his] seat and exercising [his] vote when it is called and to immediately return to the Chair when that is done" ("the motion to allow the Deputy Speaker to vote from his seat").

- The motion to allow the Deputy Speaker to vote from his seat was seconded by the Hon. Dr Robert Woonton, the Member for Manihiki.

- The Clerk of the House then advised the Deputy Speaker that if he vacated the Chair, the House would have no presiding officer to conduct the voting.

- The Deputy Prime Minister then amended his motion to one to allow the Deputy Speaker to vote from the Chair ("the motion to allow the Deputy Speaker to vote from the Chair").

- The motion to allow the Deputy Speaker to vote from the Chair was seconded by the Hon. Tapi Taio, the Member for Akaoa.

- The motion to allow the Deputy Speaker to vote from the Chair was carried.
- The Deputy Speaker put the motion of no confidence.
- The Deputy Speaker voted on and in favour of the motion.
- The Deputy Speaker declared 17 votes in favour of the motion and the motion was carried.

[6] Counsel produced by consent the relevant Hansard record of the debates accompanying the various motions which were debated on 30 November 2000. It is unwise and unnecessary for the Court to enter the political thicket by referring to all of the contentious statements made in those debates. But certain undisputed matters need to be recorded which are relevant to the arguments advanced by counsel. They are the following:

(i) The motion of no confidence had been printed in the Standing Orders for the day. The Hon. N George requested that the Speaker remain to preside over the motion of confidence since it was to be put to a vote without any further discussion as a "no fault on your part motion" and because "your departure ... from the Chair will also create a slight technical hitch in that the Deputy Speaker will be required to fill your Chair. And because the Constitution has ruled that the Speaker of the House cannot pass a vote on any matter before it, it would handicap the Deputy Speaker who is the Member of Parliament for Mauke if he is compelled to take the Chair".

(ii) Although this was not explicitly stated by the Hon. N George, it was apparently understood by all concerned that the requisite two-thirds majority for passing the motion under Article 32(e) would not be present if the Speaker vacated the Chair and the Deputy Speaker had to fill the Chair in his place.

(iii) The Hon. N George said that the motion involved "a matter of very high principle that the Government ought to be granted the right to appoint the Speaker of their choice".

(iv) It is apparent from the debate that, to quote the Hon. Sir G A Henry, previously "the two sides of the House agreed that we should bring an amendment to the Constitution, governing the whole question of the appointment and the dismissal and retirement of the Speaker. We agreed with the Government that we would support such an arrangement".

(v) The Speaker, in spite of the entreaties of the Hon. N George and others, decided to vacate the Chair. He stated:

> "Honourable Members, this House is the highest Court of the land and we know that. We respect the honour of the House and for that reason, knowing that a presiding officer in any Court doesn't preside over a matter where the presiding officer is the accused, that is the only reason why I will have to absent myself from the debate on the motion ... It has been alleged that I have no right under the Standing Orders to vacate the Chair. Well, I think Honourable Members, you need to study Standing Order 18 very carefully and there you will see that the Speaker has every right to move out of the Chair and for the Deputy Speaker to take the Chair. This prerogative to vacate the Chair is entirely at the discretion of the Speaker. So it is not true to say that it would be illegal for the Speaker to vacate the Chair while the House is sitting. Honourable Members, you would remember that that is exactly what I did when the first motion of no confidence in me as a Speaker was brought in. I vacated the Chair. And so, I have decided that when it comes to the motion before the House, I will vacate the Chair in accordance with the principles that I believe in. ... When we first addressed the matter of confidence in me as a Speaker, as you have said, we made an agreement between the leaders of Government and the leaders of Opposition. In addition, I have been waiting for that agreement to be fulfilled and, well, we have come to the end of the year and there is no fulfillment of that agreement. ... And as I have said that I was prepared to abide by the proposed Constitution amendment on its passing and step down so that I would abide by the highest law of our country, that is the Constitution. I want to inform Honourable Members that I am still prepared to stand by my commitments if you will do your part. So if, with those few words, I am going to vacate the Chair and I will ask the Deputy Speaker to come and preside over Motion No 8. Whatever your decision is going to be, Honourable Members, I will gladly accept it."

(vi) In later debate the Speaker was strongly criticised by Government Members for his decision to vacate the Chair. For example, the

Hon. N George said "He had a shocking political motive to do so. His motive, Mr Deputy Speaker, is to stop you from making the 17th man to vote on the motion. So I am afraid that while the Speaker tried to maintain a high moral ground, he demolished it immediately by absconding from the Chair, by using a cheap political trick to sabotage the vote. So whatever dignity he pretended to have was completely destroyed by his mean action."

(vii) Following the debate, and as noted above, the Deputy Speaker voted from the Chair on and in favour of the motion.

Jurisdiction of the Court – Parliamentary Privilege

[7] The limitations upon the powers of the Court to intervene in the proceedings of Parliament is the first issue of importance in this case. The Attorney-General in his first affirmative defence relied upon Article 36 of the Cook Islands Constitution:

> **"Privileges of Parliament and of its members**
>
> (1) The validity of any proceedings in Parliament or in any committee thereof shall not be questioned in any Court.
>
> (2) No officer or member or Speaker of Parliament in whom powers are vested for the regulation of procedure or the conduct of business or the maintenance of order shall in relation to the exercise by him of any of those powers be subject to the jurisdiction of any Court.
>
> (3) No member or Speaker of Parliament and no person entitled to speak therein shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in Parliament or in any committee thereof.
>
> (4) No person shall be liable to any proceedings in any Court in respect of the publication by or under the authority of Parliament of any report, paper, vote or proceeding.
>
> (5) Subject to the provisions of this Article, the privileges of Parliament and of the committees thereof, and the privileges of members and the Speaker of Parliament and of the persons entitled to speak therein may be determined by Act:
>
> Provided that no such privilege of Parliament or of any committee thereof may extend to the imposition of a fine or to committal to prison for contempt or otherwise, unless provision is made by enactment for the trial and punishment of the person concerned by the High Court."

[8] The Attorney-General also placed reliance on Article 9 of the Bill of Rights 1688 (UK) which is in force in the Cook Islands:

> **"Freedom of Speech** - that the freedom of speech in debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament."

[9] Article 9 encapsulates one of the conventions applying to the relationship between the Courts and Parliament whereby the legislative, executive and judicial arms of the State do not intrude into the spheres of one another except when it is essential to the proper performance of a constitutional role. The long-established principle is that whatever is done within the walls of a House of Parliament must pass without question in the courts: *Stockdale v Hansard* (1839) 9 Ad and El 1; *Bradlaugh v Gossett* (1884) 12 QBD 271.

[10] The New Zealand approach to Article 9 was discussed in *Prebble v Television New Zealand Limited* (1994) 3 NZLR 1 (PC). In that case the plaintiff sued the defendant for alleged defamation. The defendant's defence included reliance upon speeches made by the plaintiff in the House of Representatives, and other parliamentary proceedings. The High Court struck out the relevant pleadings in the statement of defence as being in breach of parliamentary privilege and contrary to Article 9, which is in force in New Zealand by virtue of section 242 of the Legislature Act 1908 and the Imperial Laws Act 1988. The Court of Appeal upheld this decision, but went further in considering the justice of allowing the plaintiff to continue his action in view of the inability of the defendant to use the parliamentary evidence. The Court held it would be unjust and ordered a stay of proceedings, unless and until privilege was waived by the House of Representatives. The Privileges Committee held that the House had no power to waive the privilege protected by Article 9. On appeal to the Privy Council, Lord Browne-Wilkinson at page 7 cited Blackstone, who said "the whole of the law and custom of parliament has its origin from this one maxim, 'that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not

elsewhere'." (*Commentaries on the Laws of England* (17th ed, 1830), vol 1, p 163.)

[11] In rejecting the defendant's submission that the principle was of limited scope, Lord Browne-Wilkinson went on to say:

> "The privilege protected by Article 9 is the privilege of Parliament itself. The actions of an individual member of Parliament, even if he has an individual privilege of his own, cannot determine whether or not the privilege of Parliament is to apply. The wider principle encapsulated in Blackstone's words quoted above prevents the courts from adjudicating on issues arising in or concerning the House viz whether or not a member has misled the House or acted from improper motives. The decision of an individual member cannot override the collective privilege of the House to be the sole judge of such matters".

The Privy Council decided that the relevant pleadings had been rightly struck out as they infringed Article 9, thereby affirming that part of the Court of Appeal's decision. However, on the question of the stay of proceedings, their Lordships held that the plaintiff was entitled to have his case heard, with the result that the order for a stay was quashed.

[12] The context of the *Prebble* decision sets it apart from the present facts. In *Prebble*, the Court was required to balance the need to protect parliamentary proceedings with first, the right of the public to comment on the actions of those elected to power in a democratic society and secondly, the interests of justice in ensuring that all relevant evidence is available to the courts. The relevance of the *Prebble* case to the present application must also be qualified by the fact that the weighing of competing public interests did not include constitutional provision for parliamentary procedure.

Article 36 of the Constitution

[13] Article 36 can therefore be seen as an elevation of the Parliamentary privilege principle to the status of a basic constitutional law. However, it is also an established principle that proceedings in Parliament may be subject to the scrutiny of the courts where Parliament acts unlawfully and contrary to its

Constitution. In *Smith v Mutasa* (1990) 1 LRC (Const.) 87, the Supreme Court of Zimbabwe defended the right of Parliament to regulate its own proceedings free of judicial scrutiny but noted that while Parliament is supreme in the legislative field assigned to it by the Constitution, it cannot step outside the bounds of the authority prescribed to it by the Constitution. *Smith* was approved by the Court of Appeal of the Cook Islands in *Robati v The Privileges Standing Committee* (1994) CA 156/93.

[14] In that case the facts were that in July 1993 the Privileges Standing Committee, (the first defendant), made recommendations before Parliament concerning disciplinary offences in relation to parliamentary conduct, referred to as Parliamentary Paper No 9. On 27 September 1993 Parliament resolved to adopt Paper 9, effective from the date it was tabled on 24 August 1993. On 29 September, the Speaker (the second defendant), issued a summons to the plaintiff, Dr Robati, Member for Rakahanga, alleging that on 23 August 1993 he had made a willfully misleading statement in the House, and that pursuant to Paper 9, he attend a hearing of the Committee. At the hearing Dr Robati's request to be represented by counsel was denied, and notwithstanding the Committee's finding that the charge was unsubstantiated, Dr Robati was suspended from Parliament pending a formal apology and retraction. Dr Robati claimed that in so acting, the defendants had breached the requirements of natural justice, and were acting ultra vires their constitutionally defined powers, in particular with regard to the retrospective effect of Paper 9. The defendants applied to have the action struck out on the ground, inter alia, that the High Court lacked jurisdiction pursuant to Article 36 of the Constitution.

[15] The central question was identified as whether the conduct of the defendants fell within the nature of the "proceedings" contemplated by Article 36. In answering this question in the negative, the Court of Appeal referred to the case *Cormack v Cope* (1974) 131 CLR 432 at 453, in which Barwick CJ stated "whilst it may be true the Court will not interfere in what I would call the intra-mural deliberative activities of the Parliament, it has both a right and a duty to interfere if the

constitutionally required process of law making is not properly carried out". The Defendants' application to strike out was dismissed.

[16] The Privileges Committee of the Parliament of the Cook Islands and the Speaker applied to the Privy Council for special leave to appeal the decision of the Cook Islands Court of Appeal on the grounds that the Court of Appeal had ignored or misconstrued Article 36(1) and in effect held that Courts may monitor proceedings in Parliament to ensure that they are valid. It was argued that this effectively subordinated Parliament to the Judiciary and eroded the privilege of Parliament to be the exclusive judge of its own debates or proceedings. Leave was refused.

[17] The principles laid down in the *Robati* decision, although the case focused on issues of natural justice and fundamental human rights, are sufficiently applicable to the present facts for the Court to resolve the issue of jurisdiction in favour of review. The matters in issue relate not to intra-mural deliberative activities, but to Parliamentary procedures which are enshrined in the Constitution. The Court has a duty to see whether or not Parliament followed the relevant constitutional procedures. The Attorney-General's challenge to this Court's jurisdiction is accordingly rejected.

Substantive Issues – Deliberative Voting by the Deputy Speaker

[18] The critical substantive issue is whether the Deputy Speaker was entitled under the Constitution to cast a vote on the motion declaring no confidence in the Speaker. Article 34(1) states:

> "The Speaker, or in his absence the Deputy Speaker, shall preside over sittings of Parliament. In the absence from any sitting of both the Speaker and Deputy Speaker, the members present shall choose one of their number (not being a Minister) to preside over that sitting."

Article 34(3) provides:

> "The person presiding over any sitting of Parliament shall not have a deliberative vote, but in case of an equality of votes, he shall have a casting vote."

[19] It is clear that the Deputy Speaker was authorised by the Constitution to preside over the sitting in question.

[20] The Deputy Speaker put the motion and he was entitled of course to take this step. However, the Deputy Speaker then proceeded to vote on and in favour of the motion. As noted above, the Presiding Officer may not have a deliberative vote. The Deputy Speaker declared 17 votes in favour of the motion and the number of seats in Parliament is 25. The vote cast by the Deputy Speaker was clearly not a casting vote in the case of an equality of votes. The vote was therefore invalid and unconstitutional within Article 34(3). It cannot be counted and thus only 16 valid votes were cast in favour of the motion - less than the two-thirds required to remove the Speaker under Article 32(e). The obvious result is that Mr N Puna, O.B.E,. remains to this day the Speaker of the Cook Islands Parliament, unless any of the alternative defences advanced by the Attorney-General can be substantiated. These are now addressed.

First Defence - Conduct of Speaker

[21] The Attorney-General argued strongly that the action of the Speaker in vacating the Chair, thereby necessitating the filling of the Chair by the Deputy Speaker, was a deliberate act motivated by the improper desire to frustrate the lawful and constitutional will of two-thirds of the members. It therefore amounted to a manipulation of Parliament for an improper purpose. However, as already noted, *Prebble v Television New Zealand Limited* is authority for the proposition that the courts are prevented from adjudicating on issues arising in the House with regard to whether or not a member has misled the House or acted from improper motives.

[22] Moreover, Article 36(2) of the Constitution specifically excludes the jurisdiction of the Court to investigate this matter. Article 36(2) provides:

> "No ... Speaker of Parliament in whom powers are vested for the regulation of procedure or the conduct of business or the maintenance of order shall in relation to the exercise by him of any of those powers be subject to the jurisdiction of any Court."

[23] Counsel for the Attorney-General relied strongly on the Mauritius case of *Attorney-General of Mauritius and Ramgoolan* (1993) 3 LRC 82 in support of the proposition that the Speaker's motives could be investigated. In that case the respondent was a Member of Parliament and Leader of the Opposition who had requested leave of absence in July 1992 from sittings of Parliament for a period exceeding three months in order to perform various missions abroad. Parliament was adjourned on 8 December 1992 to 23 March 1993. In December 1992 the Prime Minister was reported as saying that the respondent's seat in Parliament would be vacated on 27 January 1993 due to the respondent's unauthorised extended absence. On 25 January 1993 the Prime Minister and the Minister of Agriculture met the Speaker to request him to recall Parliament on a matter of public interest, namely to present a Bill relating to the sugar industry. The Speaker accepted the representations as to the public interest and recalled Parliament for 9:00 am the next day. The Speaker knew that the respondent would not be able to return to Mauritius by 9:00 am on 26 January 1993 to attend Parliament. On 26 January 1993 the Bill relating to the sugar industry was given its first reading and the day's business completed in about 15 minutes.

[24] In the Court proceedings the Attorney-General moved the Court for a determination as to whether the seat of the respondent was vacated under Section 35(1)(e) of the Constitution on the ground that the respondent had absented himself from the sittings of Parliament for a continuous period of three months during the same Parliamentary session without first having obtained the leave of the Speaker.

[25] There were a number of issues in the case, but for present purposes the critical point was whether the sitting of Parliament on 26 January 1993 could be

properly taken into account when computing the three months disqualifying period under Section 35(1)(e) of the Constitution. The applicant contended to the Court that it would not be proper for the Court to hear evidence which might breach the privileges of Parliament and so infringe the constitutional principle of the separation of powers. The applicant also submitted that the Speaker's assessment of the public interest could not be questioned. The respondent contended that the 26 January 1993 sitting of Parliament was irregular in that it was clearly engineered to ensure that he would be obliged to vacate his seat and that the Speaker had therefore unreasonably exercised his powers by recalling Parliament at such short notice.

[26] The Supreme Court held that although it was for the Speaker to decide whether Parliament should be recalled, it was for the Court to decide whether Parliament had been recalled in circumstances which were constitutionally valid. The Courts had evolved the doctrine of colourable legislation to impugn an enactment which was prima facie valid. An analogous approach applied to the exercise of constitutional and statutory powers. The right of a Member of Parliament to a seat was a constitutional one and could only be removed in accordance with the strict limits provided by Section 35(1)(e) of the Constitution in the case of disqualification through absence.

[27] Where the act or a decision of any person of authority had the consequence that a Court would automatically act on the result, then that act or decision had to satisfy the minimum standards of reasonableness which the Courts set for themselves. In the present matter it did not appear that any case had been made out by the Prime Minister or the Minister of Agriculture to the Speaker or in Court for the adoption of urgent legislative measures in the public interest so as to require the recall of Parliament for the next day at an exceptionally early time. The fact that the Bill in question was only given a first reading and had not been taken through all its stages indicated that a situation of real urgency had not existed. The Speaker had also failed to explain why the sitting was scheduled for 9:00 am instead of the normal time of 11:00 am. The recall of Parliament on 25 January 1993 for a sitting at 9:00 am was at such short notice and the claim

that such recall was in the public interest was so contrived that the only result which was achieved was the bringing about of a situation which automatically caused the respondent to be disqualified. The device used was so colourable and unreasonable, in view of the short notice given, that the sitting on 26 January 1993 did not count for the purpose of computing the length of the respondent's absence from Parliament. Accordingly, the Attorney-General's application was dismissed and the Leader of the Opposition held his seat.

[28] On the face of it, this case does support the Attorney-General's invitation to the Court in this case to investigate the motives of the Speaker. However, on closer analysis the case is clearly distinguishable. First, the provisions of the Mauritius Constitution are markedly different. As the Court itself noted at page 88, unlike Constitutions elsewhere, in Mauritius the period and the circumstances governing leave of absence of a member from sittings of the House are prescribed in the Constitution itself and not in the Standing Orders. Secondly, Article 37 of the Mauritius Constitution specifically gives the Supreme Court of Mauritius jurisdiction to hear and determine any question whether:

(a) Any person has been validly elected as a member of the Assembly.

(b) Any person who has been elected as Speaker or Deputy Speaker was qualified to be so elected or has vacated the office of Speaker or Deputy Speaker.

Article 37 provides in detail for the kind of application which may be made to the Supreme Court for the determination of any such questions. Apart from the provisions of Article 37(5) provides that "Parliament may make provision with respect to the circumstances and manner in which the imposition of conditions upon which any such application may be made to the Supreme Court for the determination of any question under this Section".

[29] There is no equivalent to Article 36(2) of the Cook Islands Constitution in the Mauritius Constitution. On the contrary, Article 119 of the Mauritius Constitution provides:

> "No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a Court of law from exercising jurisdiction in relation to any question, whether that person or authority has performed those functions in accordance with this Constitution or any other law or should not perform those functions."

That provision coupled with Article 37 are the exact reverse of Article 36(2) of the Cook Islands Constitution.

[30] Doubtless, because of this constitutional background, the Court in *Ramgoolan* said that "Because the applicant had invoked its jurisdiction under Section 37(1) of the Constitution any evidence which was relevant to determine the issue that was put before the Court would necessarily be admissible even if it might otherwise have fallen within the realms of the sovereignty or privileges of the National Assembly".

[31] In short, the Mauritius Constitution is very different from the Cook Islands Constitution, as is the role of the Courts in the respective countries in relation to it. The Court itself said at page 87:

> "We have tried to seek guidance from a number of Commonwealth Constitutions. This has proved to be a fruitless exercise as the provisions therein contained are not similar to those in our own Constitution."

The submission of counsel for the Attorney-General in this case, that the provisions of the two Constitutions are dissimilar in key respects, is respectfully rejected.

[32] Quite apart from these formidable, if not insurmountable, objections to the Court enquiring into the motives of the Speaker and going behind his stated reasons for vacating the Chair, there is the real practical difficulty, which counsel for the Attorney-General could not satisfactorily answer in the course of oral argument, as to how the Court would be able to investigate and adjudicate on the Speaker's

motives and what precise relief would be granted even if the matter could be investigated and it was found that there were improper motives."

[33] In his supplementary written submissions on the *Story* case, (High Court of the Cook Islands, 13 February 1980, Plaint No 147/79), discussed in more detail below, counsel for the Attorney-General tried to deal with the problem of an appropriate remedy if the Speaker's alleged misconduct was found to exist. It was submitted as follows:

> "**Remedy** – If the declarations sought were denied, then the status quo remains with the new Speaker having being installed. If it was the Court's view however that there was non-compliance with Article 34(3), and that that was within the purview of the Court, then the Court is invited to, by way a **declaration**, answer the question,
>
> "Is the Speaker required to remain in the Chair when his absence necessarily means a vote of two-thirds of the House cannot be achieved, due to the Deputy Speaker (a sitting member) being then the officer presiding?"
>
> It is submitted that an answer in the negative would mean that when the Constitution calls for two-thirds support, it means, in fact, two-thirds, plus one. It would mean also government of the country by one person (the Speaker), in this and similar circumstances.
>
> The passage of a Bill, eliminating the two-thirds requirement for instance; - or any other Bill requiring compliance with Act 41 – could be similarly frustrated by a Speaker who, for any reason, chose to vacate the Chair."

[34] I have carefully considered these submissions but they are unpersuasive. The idea that a plain breach of constitutional provisions could somehow be excused or overlooked on the basis of alleged misconduct in respect of the intra-mural deliberative activities of the Parliament has only to be stated to be seen as fundamentally unsound. The Court has a solemn duty to uphold the Constitution which is "the supreme law of the Cook Islands". To sanction or excuse constitutional breaches on such a flimsy basis would be unacceptable, especially since, as Brandeis J of the United States Supreme Court once said:

> "Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example ... If the Government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself; it invites anarchy."

[35] A related defence asserted by counsel for the Attorney-General was that whether the Speaker, in vacating the Chair, frustrated the constitutional will of two-thirds of the Members of Parliament. Article 32(e) was relied upon. It states:

> "Tenure of office of Speaker
>
> The Speaker may at any time resign his office by writing under his hand addressed to the Clerk of Parliament, and shall vacate his office ...
>
> (e) If Parliament passes a resolution supported by the votes of not less than two-thirds of all the members thereof' (including vacancies) requiring his removal from office."

This provision appears simply to provide for those circumstances wherein the Speaker's tenure of office comes to an end. There is nothing in this Article or elsewhere in the Constitution that compels the Speaker to remain in his seat for the duration of a parliamentary session. On the contrary, Article 34(1), providing for a presiding officer chosen by the members present, suggests that the absence of the Speaker at various times was in the contemplation of the drafters of the Constitution. The Standing Orders give the Speaker an absolute discretion as to whether and when he or she will vacate the Chair. Therefore the Court finds that there is nothing in the argument that the Speaker was frustrating the constitutional will of two-thirds of the members by vacating the Speaker's Chair. For this argument to succeed the Constitution or the Standing Orders would have to provide that in cases of resolutions requiring, for their Constitution validity, a two-thirds majority, the Speaker must remain in the Chair. No such constitutional provision or Standing Order exists.

Second Defence - Effect of Article 34(6)

[36] From the foregoing it is clear that the Deputy Speaker as Presiding Officer cast a deliberative vote contrary to Article 34(3) which invalidated the motion, since when his vote is removed there was not the necessary two-thirds majority. However counsel for the Attorney-General argued that his vote was nevertheless valid by virtue of Article 34(6). Article 34(6) provides:

> "Parliament shall not be disqualified for the transaction of business by reason of any vacancy among its members including any vacancy not filled at a

> general election, and any proceedings therein shall be valid notwithstanding that some person who was not entitled to do so sat or voted in Parliament or otherwise took part in the proceedings."

[37] The Court does not consider Article 34(6) can overcome the breach of Article 34(3). Article 34(6) is intended to prevent proceedings being rendered invalid by virtue of vacancies within Parliament. On such a reading, the provision is not remedial in the sense that it cannot validate a vote that has been invalidly taken. It covers problems such as voting by an MP who is later unseated on an electoral petition.

The *Story* Case

[38] At a late stage of the oral argument, reference was made to the case of *The Advocate General of the Cook Islands and Thomas Robert Alexander Harries Davis v Marguerite Story*. The parties filed supplementary submissions on this case.

[39] The *Story* case involved the refusal of the Speaker to sign a certificate pursuant to Article 41(1) of the Constitution to the effect that all requirements of Article 41(1) had been satisfied, a prerequisite prior to a Bill amending the Constitution being presented to the Queen's Representative for assent.

[40] In his decision Sir Gaven Donne CJ found that the Speaker's constitutional duty to certify a certificate to the effect that the provisions of Article 41(1) of the Constitution have been complied with was not "part of the proceedings of Parliament" but an administrative act outside the ambit of the proceedings of Parliament, and that this duty was entirely separate from Parliamentary proceedings.

[41] In his decision the Chief Justice stated:

> "The Speaker in certifying under Article 41 is not participating in that process just as the High Commissioner in assenting to the Bill is not so participating. Her part in certifying does not begin until the proposed amendment has been passed by the Assembly. Her certification is a duty imposed on her by statute, the Constitution for the purpose of showing that the relevant proceedings have

> been completed in proper form and according to the Constitutional requirements [for the passing of the Bill by Parliament]. It is a duty which is entirely separate from any parliamentary function and therefore I am satisfied that it can be questioned by this Court." (ibid, page 7)
>
> "Clearly, the Speaker cannot claim privilege on the ground that her act of certifying was "a proceeding in parliament". She, in certifying, is not discharging her parliamentary function of Speaker. The act is not done by her as the Chief representative of the Legislative Assembly or its presiding officer. She is performing a constitutional duty. The certificate is in no sense a certificate of the Legislative Assembly. It is entirely and absolutely the creature of the Constitution. It is not voted upon by the Assembly, nor is it within the order or disposition of the Assembly. It is an instrument having no parliamentary character. The Constitution could equally well have selected the Chief Justice or the Clerk of the Assembly to perform the function. Merely because the choice alighted on the Speaker does not transform a clearly extra-parliamentary function into a proceeding of the Assembly." (ibid, p8)
>
> "I can find no privilege available to the Defendant to justify her refusal to carry on this constitutional duty imposed upon her" (ibid, page 8)
>
> "The defendant had no lawful grounds whatever for refusing to certify. Provided the requirement of Article 41(1) had been complied with, her duty was clear [to give the Certificate]". (ibid, p9)

[42] Counsel for the Attorney-General submitted that there were strong similarities between the two cases. In *Story* mandamus was sought – and obtained – against the Speaker, requiring her to sign a certificate that was a requirement of the Constitution - Article 41(2)(d). The will of the majority (two-thirds) would have been frustrated had the Speaker not carried out that "mechanical" act. The analogy with the present case was that by not remaining in the Chair (a "mechanical act") the will of the majority (two-thirds) was frustrated – or would have been, had not the vote of the Deputy Speaker (a sitting member) been taken. Moreover, the Speaker in the *Story* case was not a Member of Parliament. The Speaker in the instant case was also not a Member of Parliament. The vacating or remaining in the Chair was not a part of the intra-mural deliberative procedures of Parliament. Therefore the Court had jurisdiction to investigate the property of the Speaker vacating the Chair and should find that, as in the *Story* case, the Speaker had wrongly frustrated the will of two-thirds of the members of Parliament.

[43] However, on behalf of the Applicant, it was submitted that the *Story* case was distinguishable from the present case as the Speaker's actions in the present case clearly formed part of the proceedings of Parliament and were unable to be

investigated whilst in the *Story* case the Speaker's actions were administrative in nature and did not form part of parliamentary proceedings. In the *Story* case the Speaker had a duty which was entirely separate and extraneous from her participation in parliamentary functions and therefore could be questioned by the Court. In the case now before the Court all the Speaker's actions were carried out during the proceedings of Parliament. The actions of the Speaker in the *Story* case should be equated with that of an executive act (*Cormack v Cope* (1974) 131 C.L.R. 432 at 454).

[44] Another distinction which counsel for the Applicant sought to draw between the two cases was that in the *Story* case the Speaker had been found in breach of her statutory duty to give the certificate. It was submitted that the Speaker in the present case has not breached any of the provisions of the Constitution, the Legislative Assembly Powers and Privileges Act 1967 or Standing Orders. The Constitution (at Article 34) contemplates the Speaker's absence from Parliament and the Standing Orders sets out the mechanics for doing this. None of the provisions of either the Constitution or the Standing Orders were breached as they were in the *Story* case.

[45] Counsel for the Applicant also referred to the Legislative Assembly Powers and Privileges Act at Section 31 (which is still in force today), and provides:

> "Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any Court in respect of the exercise of any power conferred on or vested in him by or under this Act or the Standing Orders of the Legislative Assembly."

The Standing Orders give the Speaker the ability to vacate the Chair. The Speaker has not acted in breach of such Standing Orders, therefore the Speaker can rely on the provisions of Section 31 of the Legislative Assembly Powers and Privileges Act. In such circumstances the Court has no jurisdiction over the Speaker.

[46] Counsel for the Applicant relied upon the comments of the Tongan Privy Council in *Sanft and Another v Fotofili and Others* [1988] LRC (Const) 110 where it was stated:

> "As we said in the *Fotofili vs Siale* appeal, provided the constitutional requirements are met, the court has no jurisdiction to inquire into the "internal proceedings" of the Assembly. The constitutional requirements of Article 56 were met – the Bill was read and voted by a majority three times:- the journal recorded the votes of each member for and against the Bill. Beyond that we are in the realm of "internal proceedings' of the House, and the Court does not venture there." (ibid, p 113)

[47] Counsel for the Applicant summed up by submitting that in the *Story* case it was decided that the Speaker's actions were not part of the internal proceedings of the House and therefore the Courts could interfere. In the case now before the Court the Speaker did not breach the Constitution (or indeed the Standing Orders or any other legislation) and quite clearly it is a matter solely concerning the internal proceedings of the House and therefore the Courts cannot interfere and determine issues of motive.

[48] I have carefully considered these competing arguments and I find that the arguments of the Applicant are correct. The *Story* case cannot assist the Attorney-General because there the Speaker was violating her constitutional obligation to sign the certificate. There is no such constitutional requirement on the Speaker to remain in the Chair. On the contrary, the Speaker was entitled to withdraw from the Chair whenever he felt it appropriate to do so.

Other Arguments for Applicant

[49] For completeness it is noted that a number of other arguments were raised on behalf of the Applicant, including whether the procedure laid down in Article 41 of the Constitution had been followed when Parliament purported by motion to have grant of the authority of the Deputy Speaker to vote contrary to Article 34(3) and also whether the wording of the motion was adequate for the purpose since it did not specially require the Speaker's removal from office and was thus not in the form stipulated by Article 33. Neither of these arguments

need to be considered in view of the Court's finding of a clear breach of Article 34(3).

Judgment

[50] It follows from the foregoing that the Applicant succeeds and is entitled to the following declarations:

1. That the vote cast on the motion by the Deputy Speaker was and is invalid and in breach of Article 34(3) of the Constitution.

2. That the Clerk of the House should not have included the vote of the Deputy Speaker in determining the total votes for and against the motion.

3. Excluding the vote of the Deputy Speaker there was not a two-thirds majority in favour of the motion and accordingly the motion was lost.

4. That Mr Ngereteina Puna, OBE, is, and remains, the lawfully appointed Speaker of Parliament.

Costs

[51] The Applicant is entitled to costs. If the parties cannot agree costs the Applicant shall file a memorandum claiming costs within 14 days of the date of this judgment, and the Respondent shall file a memorandum in reply no later than 21 days from the date of this judgment. Thereafter, the Court will make a ruling on costs.

David Williams J

Signed at Auckland at 4.30 pm on 16 February 2001

Solicitors
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Crown Law Office Rarotonga for the Respondent