

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

MISC NO. 112/2010

[AITUTAKI]

IN THE MATTER of the election of the Members of
Parliament of the Cook Islands held on the
17th November 2010

AND

IN THE MATTER of Section 92 of the Electoral Act 2004

AND

IN THE MATTER of Sections 7(4) and 20(4) of the Electoral
Act 2004

BETWEEN **KETE IOANE**

Petitioner

AND **MONA IOANE KAKE**

First Respondent

AND **TAGGY TANGIMETUA**

Second Respondent

AND **MARK TEREI SHORT**

Third Respondent

Hearing: 2 and 3 February 2011
(Held in Aitutaki)

Counsel: Mrs T Browne for Petitioner
Mr P Lynch for First Respondent
Mr H Matysik for Second and Third Respondents

Judgment: 3 February 2011

ORAL JUDGMENT OF THE HON. WESTON CJ

T Browne, Browne Harvey & Associates, Avarua, Rarotonga (law@browneharvey.co.ck)
P Lynch, Paul Lynch Consulting Ltd, Ngatangia Rarotonga (blvilla1@oyster.net.ck)
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[1] The General Election was held on 17 November 2010. On 24 November the First Respondent, Mr Mona loane Kake, was declared the winner in the Vaipae/Tautu constituency, having received 163 votes. The Petitioner, Mr Kete loane, received four votes less, that was a total of 159 votes.

[2] A Petition was lodged on 1 December 2010, and an Amended Petition on 10 December 2010. The Amended Petition raised seven qualification issues under s 7 of the Electoral Act 2004 ("the Act"), and two bribery allegations in terms of s 88(a).

Strike out application

[3] Mr Lynch for the First Respondent had filed an application to strike out the Petition for lack of particulars in relation to the allegations of bribery. He based this on s 92(4) which requires the "*specific grounds*" of the challenge to be set out in the Petition. Mrs Browne for the Petitioner met the strike out application with a Second Amended Petition on 21 December 2010, and this set out more details of the complaint of bribery. In a Minute of the Court dated 22 December 2010 I adjourned the strike out application to the date of hearing of the Petition in Aitutaki.

[4] At the commencement of the hearing yesterday I heard argument in relation to the strike out application, and dismissed it. I did, however, indicate that I was not unsympathetic to Mr Lynch's concerns but I thought that such deficiency as there might be in the Petition could be overcome during the course of the hearing. I am satisfied that that has occurred and that Mr loane was not prejudiced by such deficiencies as there might have been in the Petition.

[5] Mr Lynch had also raised an issue concerning an affidavit which had been filed in quite recent times. He submitted that it raised new issues of bribery and that paragraphs 8 and 9 should be struck out. I reserved my final decision on the point until the Petitioner proposed calling the relevant witness. This happened yesterday afternoon. I then ruled that not only paragraphs 8 and 9, but also paragraph 11,

would not be read for reasons I explained in my Ruling (No. 2). In short, I concluded that the Petitioner was attempting to raise new bribery issues without a proper particularisation of them.

Some procedural issues

[6] At the commencement of the hearing yesterday Mrs Browne withdrew a number of the qualification challenges so that four remained. Two of these four were a couple who effectively stood or fell together. Towards the end of the hearing, the allegation of bribery concerning sunglasses was also withdrawn, leaving only one of the original two bribery allegations to be decided.

[7] The evidence was given in a slightly unorthodox manner, but it made it much easier for the Court to address the issues. The evidence was given by reference to each of the electors under challenge, with Mrs Browne going first and Mr Lynch then replying. Following that process, the bribery allegations were addressed with Mrs Browne calling all of her witnesses first, and Mr Lynch calling his witnesses second. Following that I heard argument and delivered this decision.

[8] All the evidence was given orally to the Court except for one affidavit which was admitted by Mr Lynch without the need to call the witness for cross-examination. The evidence given before me was marked by many direct conflicts as between the two sides of the dispute. As I will say shortly, I need to resolve the disputes on traditional credibility grounds.

[9] This decision is given at the end of hearing the Petition and before having heard argument on the Counter-Petition. Counsel have requested that I proceed in this way and I have.

Qualification issues – the law

[10] This issue turns on what it means to reside in a constituency. Section 7, and particularly s 7(2), uses the expression "*actually resides*" (or variations of it). There is, however, no definition in the Act of '*resides*' and there is no definition in the

Constitution, although there was previously but this has been removed. Section 7 recognises that the concept of "continuous residence" is not without difficulty. For example, s 7(3) recognises that if one cannot show actual residency in a constituency then that place at which one spends the greater amount of time is to be regarded as the place of residence. Section 7(6)(c) speaks of occasional absences without breaking the continuity.

[11] I am troubled by that reference to "occasional", absences because I do not think that this reflects the reality of life in the Cook Islands. In my view, s 7(2) needs to be interpreted in a sensible and pragmatic way that reflects the reality of life in the Cook Islands. The reality is that people do not live and work within the straight-jackets of their constituency. Constituencies are small and people come and go from these constituencies very regularly. The word "occasional" does not appear to be entirely apt to deal with that sort of circumstance.

[12] Mr Lynch referred me to a decision I had made in the last Election: *Tekaotika Matapo v Robert Wigmore & Ors.*¹ I noted in that Judgment:²

Continuous residency does not prevent an elector from moving outside the relevant constituency to undertake work. If it did, no one would afford to leave the constituency to work at some other place. The fact that an elector may then spend nights living in a hotel does not necessarily mean that a person has ceased to reside at what is otherwise their place of residence.

[13] In my assessment, 'residence' is a matter of fact to be assessed in each case. Where a person resides is not, in the usual course, to be a simple exercise of adding up how many hours or days they have spent at a particular place. That sort of exercise might need to be undertaken under s 7(3), but it is not the general test to be undertaken in a test of residence under s 7(2). That would recognise the fact that people do work outside their constituencies, travel frequently to other Islands within the Cook Islands and also travel to New Zealand and Australia.

¹ *Tekaotika Matapo v Robert Wigmore & Ors* Misc No. 88/06, 1 December 2006, Weston J.

² At [77].

[14] There is a particular problem in the Cook Islands because many people have multiple house-ownership or family homes, and families themselves have quite fluid dimensions with children, even adult children, living with different family members from time to time. Constituencies are very small and relatively small movements result in an elector crossing the constituency boundary. I do not want to interpret the Act so strictly that I would disenfranchise virtually every elector from ever voting in an Election. Plainly, Parliament could not have intended that. Having said that, I am equally careful to assess that where a person thinks they reside is not to be determinative. It may be a relevant factor, but an emotional attachment to a particular house does not mean that is where one resides. Ultimately, it comes down to an assessment of what the facts show. If the elector's choice of residence happens to coincide with the facts then that means we can identify where the person resides for the purposes of the Act. I now make that assessment in relation to the four challenged electors.

Rima Mata

[15] It was alleged that Ms Mata lived with her boyfriend at Amuri and so should not have voted in Vaipae/Tautu. The Petitioner called evidence from her former partner Mr Ruarangi. He asserted that Ms Mata lived in Amuri. He also referred to a recent conversation with a person he described as Ms Mata's current partner to support his evidence.

[16] Ms Mata gave evidence in rebuttal. I prefer her evidence to that of her former partner. In the case of conflict I accept her evidence rather than his. She gave her evidence in a frank and straightforward way. Some of the questions asked of her were invasive of her privacy but she tended to answer them directly. She accepted that currently she had a relationship with a man at Amuri, but she denied that he was her partner in the sense that lived with him at Amuri. In fact, she said she lived with Ms Tumangi Kamoe at the house at Vaipeka.

[17] There was evidence supporting her from Ms Kamoe. I accept that both she and Ms Mata primarily live in the house at Vaipeka, which is in the Vaipae/Tautu constituency.

[18] In reaching this conclusion I have taken account of the arguments raised by Mrs Browne that both of these two witnesses – that is Ms Mata and Ms Kamoe – have reasons to give partial evidence. She submitted that they were both beholden to give the evidence that they did. I do not accept that. Indeed a similar sort of allegation could be made in relation to her own witness. What I have done is to stand back and assess the evidence given by these three people, and my conclusion reflects my assessment of that evidence.

[19] Therefore the Petition in relation to Ms Mata is dismissed.

Avatea Tuoa

[20] There is no evidence before me as to when this elector came onto the Roll, but I am advised from the Bar that it was in 2006. He has been on the Roll since that time in the constituency of Vaipae/Tautu. The focus of the evidence before me was whether he became disqualified to appear on that Roll in 2010. The allegation was that this elector lived with his girlfriend at her parents' house or in temporary accommodation of his girlfriend's family. It was said this house (or temporary accommodation) was outside the relevant electorate.

[21] Mrs Strickland, the girl's mother, gave evidence for the Petitioner. As she gave her evidence, however, it became clear that the black and white picture initially painted by her was perhaps not so clear. I then heard evidence from the elector's father, Mr Messine. I found him to be an impressive witness. He answered questions simply and quickly without prevarication. He said that his son Avatea's belongings – what he called *'everything'* – were in the house with him and his wife. I also heard evidence from the voter. He accepted that he travelled between his girlfriend's house and that of his parents. He regarded his parents' house as being the place where he actually resided, but he accepted that he split his time between the two. I think it is fair to say he was very nervous in giving his evidence. He appeared anxious to avoid creating offence either on the part of his girlfriend's family or of his own.

[22] It was clear to me that Avatea Tuoa and his girlfriend do not always live together as a couple, and do not always live together with their child as a group of three. Sometimes they live individually either in the elector's parents' property or sometimes in that of his girlfriend's. It is also clear that Mr Tuoa regards his parents' house as the place where he actually lives, and he gave evidence that in 2010 he spent quite a bit of time there.

[23] I gained the clear impression that this elector was caught in a tug-of-war between the two families. I believe that Mrs Strickland holds strong feelings that he should vote in her electorate and I find that this thinking coloured her evidence. In the case of conflict I prefer Mr Messine's evidence to that of Mrs Strickland. I am very sorry that I have had to reach such a view because I think both families are acting out of the best of intentions. But the contest was put before me in those terms and I need to resolve it, and I have resolved it as I have said.

[24] I conclude that this elector resides at his parents' home for the purposes of s 7 of the Act, and I reject the challenge in the Petition.

Mr and Mrs Ngatae

[25] I then come to the third and fourth objections, Mr and Mrs Ngatae. Mrs Ngatae is listed in the Electoral Roll as Veia James, but it is common ground that she is to be regarded as Mrs Ngatae, the wife of Mr Ngatae. I deal with these two electors together because they are husband and wife and run the hotel business jointly between them.

[26] Mrs Browne called two witnesses: Ms Leon, a former employee at the hotel; and a representative of the Power Company to give evidence about the amount of power consumed at their house in Vaipae.

[27] Ms Leon asserted that these electors lived at their hotel in Amuri. She gave evidence of waking them up in the morning there. She said she did this on a regular basis. As I listened to her evidence in cross-examination I gained the impression that some of her answers were the produce of coaching. They seemed to me to be

too rehearsed and pat to be credible. The Power Company representative gave useful evidence showing low power usage over the four month period leading up to the Election. In each of the three months the total monthly power bill was \$1.55, and in the other month there was a nil charge. I understand that \$1.55 represents two units of power.

[28] Mr Ngatae gave evidence on behalf of his wife and himself. As I said during the course of argument, I found him to be a good and honest witness. He explained he worked long hours at Amuri and so did his wife. They divided their time between the house at Vaipae and their place of work at Amuri. He was candid that he and his wife made a decision to spend more time sleeping in their house at Vaipae in the period leading up to the Election because he believed that would qualify him as an elector in that constituency. He wanted to make sure that no one would argue that they were disqualified. Unfortunately his hope has not come to pass. There has been a challenge to both him and his wife.

[29] Mr Ngatae explained that his plantation and pigs are at his house in Vaipae. He said that he frequently returned to his house at Vaipae in the afternoon to work in his plantation or with his pigs. He and his wife would then return to the hotel in the evening to cook food and to make sure that the place was secure later in the evening before guests went to sleep. His evidence was that Mr and Mrs Ngatae eat, wash, cook and perform other normal daily domestic duties at their hotel. They keep their clothes there. While they have a fridge, freezer and television in their house at Vaipae, these are not used. Their family photos can be found at Vaipae. Mr Ngatae explained that he built the Vaipae house in the early 1990s and that both he and his wife regarded it as their house and where they resided.

[30] I heard evidence from some corroborative witnesses supporting what Mr Ngatae said. I also heard evidence from another employee of the hotel, Ms Hewitt, who gave evidence inconsistent with that of Ms Leon. I prefer the evidence of Ms Hewitt whose evidence to me seemed to be more credible.

[31] Notwithstanding the conflict in the evidence, the real issue was whether Mr and Mrs Ngatae resided in their house at Vaipae in the terms set out in the Act. As I

said during the course of argument, I have found this to be a very difficult issue. Many of the functions that one normally associate with a place of residence did not occur at Vaipae. Yet Mr Ngatae has provided a perfectly good explanation for why that is. I gained a very powerful sense that Mr and Mrs Ngatae regard their house at Vaipae as their residence. It is where their plantation is and where Mrs Ngatae has a garden.

[32] I am also troubled by the fact that if I find they did not reside at Vaipae then the only other alternative is that they resided at Amuri. It would seem contrary to commonsense to reach such a view. Nevertheless, I am bound to reach the conclusion that the two electors did not reside at Vaipae. I reach that conclusion with great regret. The Act requires me to act in accordance with the law, and as best I can assess its terms, I have reached the conclusion that the votes of Mr and Mrs Ngatae should not be counted.

[33] Therefore, the Petition in that respect is upheld.

Bribery allegations: the law

[34] The allegations are brought in terms of s 88(a). Initially they concerned two particular incidents but, as I have mentioned, we are now only addressing allegations concerning a water tank and two particular electors, Mr and Mrs Tangi.

[35] Mrs Browne provided me with references to a number of paragraphs in the decision of the former Chief Justice, David Williams J, in *Pitt v Ioane*.³ In particular, she referred to paragraphs 4.11, 4.15 and 4.16 of that decision. She emphasised that in order to prove bribery there needs to be a '*giving or offer of consideration*'; it needs to be a valuable consideration; it needs to have been given to induce the voter to vote for the candidate; and, finally, the intent behind it has to have been corrupt in terms of how the Act expresses it. She accepts that the standard of proof is relatively high, commensurate with the seriousness of the allegation. She

³ *Pitt v Ioane* Misc No. 82/2006.

emphasised, however, that the burden of proof is not so high as to amount to the criminal standard.

[36] Mr Lynch provided useful submissions in relation to bribery, but in large measure these are to the same effect as Mrs Browne. Mrs Browne did emphasise a passage in the earlier decision of *Pitt v loane* in relation to corrupt intention. The significance of this may become more apparent as I deal with the facts shortly. Mrs Browne emphasised that at the time that Mr loane, the First Respondent, undertook the survey he had political aspirations and that a corrupt intention could be inferred from that.

The allegations in the Petition

[37] The allegations were as follows:

- b) That the First Respondent committed the following acts of bribery within the meaning of Section 88 of the Act in connection with the said Election in that:
 - (i) He directly or indirectly gave or offered to [two] electors valuable consideration in order to induce the electors to vote for him; or
 - (ii) He directly or indirectly made gifts or offers to these electors in order to induce them to procure or endeavour to procure his return or the vote of any elector;
 - (iii) In consequence of such gift or offer, procured or endeavoured to procure his return as Candidate or the vote of any elector. The particulars are as follows:
 1. The First Respondent is a member of the Aitutaki Cyclone Appeal Committee. He was tasked with the job of carrying out a survey of the households in Aitutaki that were affected by the Cyclone who were left without water tanks. At the time he was tasked with this responsibility the Committee was unaware that the First Respondent was putting his name forward as a Candidate for the Constituency of Vaipae/Tautu nor did the First Respondent disclose this to the Committee.
 2. The First Respondent represented himself to Tangi Metuakore (page 15 Line 20) and Tangi Mouari Metuakore (Page 20 line 21) being electors of the Vaipae/Tautu Constituency as a person who had authority to provide materials, in particular water tanks to the said electors in order to induce the

electors to vote for him. He offered to provide the water tanks to the said electors in return for their votes or alternatively to induce them to vote for him.

3. Tangi Metuakore is the same person as Apu (No. 42) on the list for the Vaipae District. The First Respondent allegedly visited this elector twice during the last week of October between 2pm-4pm. During the First Respondent's first visit Tangi Metuakore was at home on his own. On the second visit however his wife Tangi Mouari Metuakore was with him. The wife told the First Respondent to go away.
4. The offer to provide the said water tanks to the said electors was also to induce them to procure or endeavour to procure the return of the First Respondent or the vote of any elector.

Bribery - the Petitioner's case

[38] The Petitioner called three witnesses. The first two of these were Mr and Mrs Tangi. They gave their evidence in a mix of Maori and English. Mr Tangi in particular seemed to have some difficulty giving evidence. He tended to settle down as time went on. However, I wish to stress that while I have formed adverse views of his evidence, which I will describe shortly, that did not arise because of the communication difficulties he encountered.

[39] Each of Mr and Mrs Tangi had sworn an affidavit in English. Mrs Tangi had deposed that her husband's affidavit had been read out to her and she agreed with it. I must say I have some reservations as to this process. I believe that the English rendition of what was an account apparently given in Maori was not entirely accurate. For example, Mr Tangi changed one key aspect of his written evidence in relation to whether Mr Ioane was on his motorbike or not. Mr Tangi also added a large chunk of extra evidence into what was referred to as the second visit involving Mr Ioane.

[40] Both Mr and Mrs Tangi strongly asserted that Mr Ioane visited them twice in October and spoke to them both on each occasion. I observe that the Petition itself at paragraph 3 says that Mrs Tangi was only there on one of the two occasions, so there is an inconsistency, as I see it, between the Petition and the evidence. I am

bound to say that I found the evidence given by Mr and Mrs Tangi unsatisfactory in a number of ways. It simply did not have a ring of credibility about some key aspects. Mr Tangi's evidence can be more criticised in that regard than his wife's. As I say shortly, I do not accept there were two visits in October. I accept there was one only. On that occasion I find that the First Respondent was given a brush-off. The question of water tanks was not discussed on that second occasion. Indeed, Mrs Tangi said as much when she gave evidence.

[41] The evidence of Mr and Mrs Tangi as to the alleged offer of a water tank was imprecise and variable. For example, at one point Mr Tangi said that he would get a water tank only if the CIP would "stand" at the Election. It was only when counsel clearly prompted him that he would say that the First Respondent was wanting to exchange a vote for a water tank.

[42] I also have some trouble accepting that it is credible that Mr loane would offer to give a water tank to someone who already had one. There was no suggestion that the existing water tank of Mr and Mrs Tangi was in any way unsatisfactory or needed to be replaced.

[43] In my view, the most telling comment was made by Mrs Tangi when she said, in relation to the second of the two visits in October, that Mr and Mrs Tangi did not wish to hear what Mr loane was saying. Plainly they were not interested in voting for him and they were not interested in hearing him say anything about his campaign. Mrs Tangi said there was no discussion of water tanks on that second occasion, and in that respect I do accept her evidence.

[44] In addition to the evidence given by Mr and Mrs Tangi there was evidence from a third witness on behalf of the Petitioner giving evidence in relation to tanks supplied by a Church organisation. I did not find any of that evidence useful in addressing the bribery issues.

Bribery – the First Respondent's case

[45] The First Respondent gave his evidence by reading a detailed and comprehensive affidavit. One aspect of his evidence was unsatisfactory. I find that he prevaricated in relation to the topic of when he was appointed a candidate. He seemed very reluctant to accept that he had had political aspirations for some time. After some persistent cross-examination by Mrs Browne, it became clear that he had had an interest in holding a political position from 2009, and that he actively became a candidate – even if it was not publicly announced – in or about August 2010.

[46] Mr loane was criticised by Mrs Browne in undertaking the survey in June on the basis that he had a clear intention at that point of becoming a candidate. She said that that gave him an opportunity to politicise the issue and to advance his political interests. Mr loane steadfastly rejected these allegations. He said that he was acting out of the best interests of the people of Aitutaki and that the question of politics was only at the back of his mind. Mrs Browne also put some calculations to Mr loane in relation to what she said was a particular high percentage of 'yesses' in the list of people to get tanks out of the constituency of Vaipae/Tautu. I am not able to reach any conclusion in relation to those assertions because there is simply not enough evidence before me to do so.

[47] In the course of his evidence Mr loane emphasised that in June he was undertaking the survey for the benefit of the whole Island and not just the electorate for which he eventually stood. He did so as part of his general denial that in June he was acting in any sense in a political way. I accept that evidence.

[48] In relation to when the first meeting occurred, which Mr and Mrs Tangi say was in October, Mr loane said that the first meeting occurred in June and the second meeting in October. He agrees (with Mr and Mrs Tangi) there were only two meetings. I accept his evidence. If the first meeting occurred in June, which I have found it did, it seems highly unlikely that there would have been an active canvassing for votes at that point because, although it was known there would be a General Election, no date had been set and Mr loane's nomination as a candidate certainly had not been approved by the Committee of the CIP, or even announced. The

General Election when it was eventually called in November was some five months after the survey was undertaken in June. Mr loane denied the allegation concerning the first meeting and I accept his evidence.

[49] As to the second meeting between Mr loane and Mr and Mrs Tangi, I accept this occurred in October during the course of Mr loane's campaign. I accept what he has to say about that meeting, that there was no discussion of water tanks and I have already mentioned that Mrs Tangi said the same.

Bribery - conclusion

[50] So my conclusion in relation to bribery is this. While Mr loane may have been unwise to conduct the survey in June (because that raised the possibility of the sort of allegations that have now been made against him), I do not find that there was any act of bribery that took place either in June or October 2010, or indeed on any other occasion so far as Mr and Mrs Tangi are concerned.

[51] Therefore, I reject the Petition in relation to the allegations of bribery made against Mr loane.


Outcome of Petition

[52] I have upheld two challenges in relation to Mr and Mrs Ngatae. Because there are four votes between the electors that means that the result of the Election has not altered. For it to have been altered I would have had to uphold the bribery allegations as well, and I have rejected those. In light of the fact that I have rejected, in essence, the Petition, I need to check where we are at with the Counter-Petition.

[53] Following my decision in relation to the Petition, Mr Lynch confirms he withdraws the Counter-Petition on behalf of the First Respondent.

Costs

[54] The question of costs is reserved.



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Weston CJ