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

CR NO's 308-315/20

PAUL RAUI ALLSWORTH

v

HENRY TUAKEU PUNA
&
MARK STEPHEN BROWN

Hearing date: 15 to 19 March 2021

Counsel: Mr N George for Informant Allsworth
Messrs K Raftery QC & B Marshall for defendant Puna
Messrs K Raftery QC & T Arnold for defendant Brown

Oral Judgment: 19 March 2021

Date of Summary of Judgment: 1 April 2021

Date of Issue of Transcript of Judgment: 6 April 2021

(ORAL) JUDGMENT OF HUGH WILLIAMS, CJ

[1:10:45]

Introductory and Preliminary Matters

[1] Before beginning this judgment there are one or two housekeeping matters that need to be addressed. The first of those is that, as with any oral judgment, the right is reserved to edit it, change part and add to it on editing. There are some necessary additions – e.g. dictating footnotes disturbs the narrative of a judgment but they need to be included afterwards – and there are always infelicitous choices of words which need to be corrected and expansions needed for clarity. So there may be different routes to the terminus but the terminus will certainly be the same.

[2] The two accused, Messrs Puna and Brown, respectively the former Prime Minister and Prime Minister of the Cook Islands, face essentially two sets of private prosecutions brought by Mr Paul Raui Allsworth. They are brought under the Ministry of Finance and Economic Management Act 1995-6, s 64(2)(d)(i) and under the Crimes Act 1989, s 280.

[3] At the commencement of the hearing, in accordance with established practice, the informant was put to an election as to which charges under which of the statutes it was desired to proceed with. That arose because, when conspiracy charges are brought in association with more specific charges relating to the same facts, it is established practice that the prosecutor must make an election on which of those it is intended to proceed[1]. Mr George, counsel for Mr Allsworth, elected to proceed with the Crimes Act charges. Accordingly, the charges under the Ministry of Finance and Economic Management Act 1995-6 need to be dealt with at the conclusion of the judgment, but they were not the subject of any of the evidence or submissions during the hearing.

[4] It needs to be noted that the trial had reached the point where the prosecution had adduced all the evidence on which it intended to rely and had closed its case when Mr Raftery QC, senior counsel for the defendants, applied for the dismissal of the remaining informations on which the informant had elected to proceed on the ground that they presented no case to answer.

[5] The test in those circumstances is not precisely the same as the test for the bringing in of verdicts on the charges. The standard of proof for a verdict of guilty on any charge in our criminal law is that the evidence must satisfy the trier of fact beyond reasonable doubt. The trier of fact must be sure of the guilt of any accused before a verdict of guilty can be delivered. The point which this trial reached involves a slightly lesser standard of proof, namely is there a prima facie case which, on the law and the evidence, is sufficient to say that the defendants have a case to answer? In practical terms in this case there is essentially no difference between the two but it means that

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1 United Kingdom Criminal Practice Directions, para 10A.4; *Adams on Criminal Law* (1992) para 310.14; *R v Humphries* [1982] 2 NZLR 353, 355.

if there is a prima facie shown by the evidence then the remaining informations can proceed in whatever way the law of criminal procedure provides.

[6] In evaluating the evidence and reaching what, in that restricted sense, are tentative conclusions however the Court may take inferences and judge issues of credibility and the like in the same way as a jury does when asked to consider its verdict.

[7] Since this is a matter which has attracted widespread attention, including many members of the public, some of the issues to be discussed need to be elaborated upon in greater detail than might be the case in a jury trial where the jury is not required to give reasons for its verdict and where, if this were simply an issue of law argued as these matters normally are in the absence of the jury and the public, there would be no need for the result to be supported by detailed consideration of questions of law and the like.

[8] However, the approach to this application for dismissal on the grounds of no case to answer, still comes within the ordinary rubric of the criminal law in that it is for the prosecution to present evidence in an attempt to satisfy the Court to the required standard that it has shown that there is a prima facie case for the accused to answer and the onus is on the prosecution in this trial as in any other. Essentially the test at this stage of this trial is whether convictions on the Crimes Act charges could be open to be entered on the evidence and whether such would be justified on the evidence to date.

Charges and Elements

[9] The remaining operative charges, those under the Crimes Act 1989, are brought under s 280 of that Act which reads, (though not all is relevant):

> Everyone is liable to imprisonment for a term not exceeding 5 years who conspires with any other person by deceit or falsehood or other fraudulent means to defraud the public or any person ascertained or unascertained or to affect the public market price of stocks, funds, shares, merchandise, or anything else publicly sold, whether the deceit or falsehood or other fraudulent means would or would not amount to a false pretence as hereinbefore defined.

[10] That recital of s 280 makes clear that it is a somewhat clumsily-drafted section. For the purposes of this trial the references to market price of stocks, merchandise and associated words can be completely disregarded.

[11] The two offences with which the defendants are charged fall into two pairs. CRN 311/20 & 315/20 allege that between 14 June and 3 July 2018 Mr Puna with Mr Brown, or in the other one of the pair, Mr Brown with Mr Puna,

> (a) did conspire with each other by deceit or other fraudulent means to defraud Her Majesty The Queen by participating in a scheme whereby money which belong to Her Majesty The Queen was fraudulently used for private purposes, namely the charter of an aircraft, paid for under the Civil List Act 2005, with cash, for the purpose of transporting the newly elected Member of Parliament for Pukapuka, Mr Tingika Elikana, in order to create political unity and stability in the Cook Islands Party when Mr Elikana needed to be pacified and consoled for missing out on a Cabinet post, together with the former MP for Pukapuka, Mr Tekii Lazaro, and their wives, all of them being residents of Rarotonga, and not entitled to free air transport under the Civil List Order 2009/04, s 6(a) and 7, in breach of s 280 of the Crimes Act 1969[2].

[12] The other pair of remaining operative informations, CRN 310/20 & 314/20, allege that between 14 and 30 June 2018, Mr Puna with Mr Brown, or in the other half of the pair, Mr Brown with Mr Puna,

> (a) did conspire with each other by deceit or other fraudulent means to defraud Her Majesty The Queen by participating in a scheme whereby money which belonged to Her Majesty The Queen was fraudulently used for private purposes, namely the charter of an aircraft, with cash, from the Ministry of Health Medivac Scheme, under the false pretence of a sick patient evacuation, the alleged patient being Mr Willie John, former MP for Penhryn, when the real purpose was to uplift Mr Robert Tapaitau, the newly elected Member of Parliament for Penrhyn, and his

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2 "The Pukapuka Flight"

> wife, to Rarotonga on 30 June 2018 to secure his support for the Cook Islands Party and the personal benefit of the defendants as Prime Minister and Deputy Prime Minister respectively[3].

[13] The mere recital of the text of the informations shows that they include a significant amount of material not encompassed in s 280 of the Crimes Act, namely of course, the information about the persons for whom the offences were said to, be committed, the purposes for which they were said to be committed and other detail.

[14] All criminal offences have a number of what are called components or elements, that is to say certain sections of the crime, each of which has to be proved by the prosecution beyond reasonable doubt before a verdict of guilty can be entered. Material in informations which goes beyond the terms of the section under which an accused person is charged are superfluous in that respect and are not elements or components of the offence. But it is established law that defendants facing charges such as these, particularly conspiracy charges, are entitled to such additional information as will inform them fully and fairly of the real nature of the charges brought against them. So, to that extent, the descriptive material in the two pairs of informations is superfluous, but necessary so that the defendants have been fully informed of the charges. However, the descriptive material is not an element of the offence and is merely part of the narrative.

[15] In relation to the Pukapuka flight charges, Mr Elikana said he had been offered a place in Cabinet but declined, preferring, as a first term MP, to represent his constituents' interests without the distractions of Cabinet rank. He was therefore forthright in denying there was any need to pacify or console him for missing out on a Cabinet portfolio[4]. His evidence was persuasive and unchallenged. The narrative assertions to that effect in CRNs 311/20 & 315/20 were therefore unproved, but, since, as noted, they did not deal with any element of the charges under s 280, their incorrectness is not fatal to those informations

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3 "The Penrhyn Flight"

4 E 193.

[16] The first element of all the offences charged is that the prosecution must prove a conspiracy between the defendants and with each other. They must prove deceit or they must prove other fraudulent means. There is no allegation in this case of falsehood, although that appears in s 280. They must prove an intention to defraud the public in the sense that Her Majesty The Queen is clearly the public and Her Majesty's Government administers public funds. And, to the extent they bear on proof of the elements, they must prove the remaining issues pleaded in the two pairs of informations and show that the money has been fraudulently used for private purposes, for the charters, for the personal benefit of the Prime Minister and Deputy Prime Minister and that money was paid under the Civil List Act 2005 when the persons mentioned were not entitled to recourse to that Act.

[17] A criminal conspiracy in law[5] consists in proving an intention which is common to the minds of the conspirators and the manifestation of that intention by mutual consultation and agreement between them. It is of the essence of a conspiratorial agreement that there must not only be an intention to agree but also a common design to commit some offence, that is to say to put the design into effect.

[18] A conspiracy is frequently stated to be "complete" on the making of the agreement to commit an offence, with "complete" in that sense meaning simply that all that is necessary for the offence has occurred and any subsequent withdrawal cannot affect the liability of the parties. Withdrawal is not an issue here.

[19] As the authorities say, a conspiracy does not end with the making of the agreement. A conspiratorial agreement continues in operation, and therefore in existence, until it has ended by completion of its performance or abandonment or in any other manner by which agreements are discharged.

[20] A conspiracy to commit an offence requires intention or knowledge in relation to every legally material element of the offence, although the conspirators need not know the agreed conduct amounts to an offence.

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5 *R v Gemmell* [1985] 2 NZLR 740; *R v Johnston* (1986) 2 CRNZ 289; *Adams on Criminal Law* (1992) CA 310.01. 310.04, 310.07.

[21] So in terms of the fact that both pairs of Crimes Act informations allege a conspiracy, those are the details of one of the issues the prosecution must prove to at least a prima facie sense in order to satisfy that element.

[22] It is also established criminal procedure that, where a conspiracy is alleged, the prosecution is required to serve the defence with what is called a Notice of Overt Acts said to amount to the conspiracy, in other words a statement of the actions on which the prosecution relies and which it says constitute the conspiracy.

[23] In this case it is noteworthy that the Statement of Overt Acts furnished on behalf of the informant, all relate to text messages between participants in this matter, and all relate to the Penrhyn charter. None relate to Pukapuka. And it also noteworthy that the prosecution relied on a large number of text messages passing between the defendants and between the defendants and other persons. But those text messages speak of conversations between the various parties, either online or in person, and no attempt was made to adduce evidence of the content of those conversations. So the overt acts alleged to constitute the conspiracies in this case were confined to text messages and their content, but to no other matter and only to the Penrhyn charter. Put another way, while evidence of matters beyond the text messages relating to the Penrhyn charter was relevant to other issues in the case, it could not be relevant to proof of the conspiracies alleged. This severely limited the informant's capacity to prove the conspiracies, especially relating to the Pukapuka flight, where, since no conspiracy was pleaded as an Overt Act, it essentially made it impossible for the informant to prove a conspiracy relating to that matter despite proof of a conspiracy being an element of charges under s 280.

[24] The next element the prosecution must satisfy, as pleaded, is that of deceit. That concept can be sufficiently regarded for the purposes of whether there is a prima facie case by referring to ordinary dictionary definitions: "deceit is the action or practice of deceiving, concealment of the truth in order to mislead, deception, fraud, cheating or false dealing"[6].

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6 OED 2nd Ed. Vol IV, p 324.

[25] The prosecution also alleges that the conspiracy in this case was to defraud the Queen i.e. to defraud the public. The authorities[7] say that use of the word "fraudulently" emphasises that the omission to account for, or the misapplication of, another's property must be deliberate and dishonest. In order to act fraudulently accused persons must act deliberately and with knowledge they are acting in breach of their legal obligations. If accused persons set up a claim that in all the circumstances they honestly believed they were justified in departing from their strict obligations, even if for some purpose of their own, that defence should be left to the jury for consideration. Accused persons cannot be convicted unless shown to have acted dishonestly.

[26] In deciding whether the accused was acting dishonestly at the material time, the trier of fact is entitled to look at all the facts and statements disclosed in the evidence from which inferences as to the honesty or otherwise of their belief may be drawn. In other words, in deciding on an accused's state of mind or belief – honest or otherwise, a subjective state – the trier of fact is entitled to ask themselves whether on the evidence it was reasonably possible the accused was acting honestly – however mistakenly, a subjective test – and, if this is reasonably possible, acquittal must follow.

[27] So those are the details of the element of fraud on which the Crimes Act informations depend.

[28] The other issues arising out of s 280 are essentially factual matters and the judgment therefore turns to those.

2010, 2014 and 2018 General Elections

[29] As to the background in this matter, as is obvious from the description of the informations, essentially what they allege is that the accused conspired together to act fraudulently in the aftermath of the 14 June 2018 General Election.

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7 *R v Williams* [1985] 1 NZLR 294, 305.308 (NZCA) as endorsed in *R v Hayes* [2008] 2 NZLR 321, 334ff (NZSC).

[30] There was evidence concerning earlier General Elections and because aspects of the running of General Elections are issues which need to be canvassed later in this judgment, it is helpful to detail those matters.

[31] In 2010, the General Election was held on 17 October 2010. We do not have the date of dissolution of Parliament which preceded it[8] but the Section 78 Declarations were given between 24 and 26 November 2010[9]. For the enlightenment of those present, a Section 78 Declaration is a declaration under the Electoral Act 2004 by the Chief Electoral Officer in which she declares who are the candidates who have won the 24 seats in the Cook Islands Parliament and the number of votes each received. So the Section 78 Declarations are the official certification of the result of the election.

[32] Because of matters which will be adverted to later it is necessary to note that, inevitably, under the Constitution there is a lapse of time between the making of the Section 78 Declaration by the Chief Electoral Officer and the convening of Parliament. In 2010 the summons by the Queen's Representative to convene Parliament named 17 or 18 February 2011, the following year, as the first date of the first sitting of the new Parliament, the 47th. As will be dealt with later, Parliament in the Cook Islands recommences or sits again when His Excellency, the Queen's Representative, issues a summons to each of the 24 MPs to attend Parliament on such and such a day for parliamentary purposes.

[33] In 2014 the dissolution of Parliament was on 16 April 2014. The dissolution of Parliament is effected, again by His Excellency The Queen's Representative. On the advice of the Prime Minister, His Excellency issues a notification that Parliament is dissolved as from a particular date and that the General Election will be held on another certain date, the lapse between those two dates being governed partly by the Constitution and partly by the Electoral Act 2004. The 2014 General Election was held on 9 July 2014 and the Section 78 Declarations – there were several that year – were given between 15 and 18 July 2014. His Excellency's summons to the Members of Parliament was issued on 29 September 2014 for the first sitting of the 48th

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8 Probably 28 September 2010: Ex C.
9 Ex O.

Parliament on 8 October 2014. More pertinently, in view of the wording of informations 311/20 & 315/20, in the notice of dissolution for the 2014 election, His Excellency expressed the wish that there would be a "peaceful and respectful" election[10].

[34] For the 2018 General Election the dissolution of Parliament occurred on 11 April 2018 under Article 37 of the Constitution. The General Election itself was held on 14 June 2018 and the Section 78 Declaration was issued on 28 June 2018[11]. The Members who became the Government and the Members of the Opposition were all sworn in as MPs by His Excellency on 5 July 2018. And as is customary, the Members of the Parliament attended on His Excellency on that occasion.

[35] His Excellency's summons to the Members for the commencement of the next parliamentary sitting, that of the 49th session, was issued on 12 September 2018 for sittings on 19 and 20 September 2018[12].

[36] It is pertinent to pause at that point to note for persons present that part of the reason for there being a significant interval between the making of the Section 78 Declarations and the calling of Parliament together is that every General Election in the Cook Islands is followed by election petitions and applications for recounts of the votes. The Cook Islands has 24 electorates. Most are small by comparison with electorates in other countries overseas, some are tiny, majorities therefore are often also tiny, and there is a frequent recourse to the Courts to resolve issues involving the campaigning in elections and the number of votes. Those issues take time to wind their way through the Courts. And if, as a result of a petition or a recount, a seat changes hands then obviously the Chief Electoral Officer is required to issue a further Section 78 Declaration confirming that the winner of that seat is in fact the MP for that constituency.

[37] As many present will recall, on the making of the Section 78 Declaration in the 2018 General Election the position was that the Cook Islands Party, the party to which Messrs Puna and Brown belong, held 10 seats out of the 24. The Democratic Party,

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10 Ex B & G.
11 Ex D.
12 Ex I.

the other main political party, held 11 seats. The One Cook Islands Party held one seat, that of Tupapa-Maraerenga, held by Mr George Maggie Angene. And there were two members who were elected as Independents, Mrs Vainetutai Rose Toki-Brown in Atiu and Mr Robert Tapaitau for the seat of Penhryn. Clearly, neither of the main political parties had a majority of the 24 seats in Parliament and thus neither was able to form a Government on its own, and, to achieve their ambition of being in Government, they needed to win the allegiance of either or both of the independents and Mr Maggie.

[38] Mr Maggie and Mrs Brown were sitting MPs. They had been in Parliament for some time. Their political stance was relatively well-known and accordingly the negotiations between the two main political parties and those two MPs would seem to have been relatively straightforward. Indeed, Mrs Brown had been a CIP Member of Parliament, apart from a brief defection to the Democratic Party, in the 2014/2018 Parliament. From both main political parties' point of view, if they wished to become the Government they clearly had to secure the allegiance of some or all of Mr Maggie, Mrs Brown and Mr Tapaitau. With the CIP having 10 seats, to attain the majority they needed to secure the allegiance of all three. And, in practical terms, so did the Democratic Party. As mentioned, the general position of Mr Maggie and Mrs Brown were relatively well-known but Mr Tapaitau was a first term MP, he was a tyro politician, he was representing the most northerly of the electorates and little was known about his stance or his policies. But either of the two main parties effectively had to secure his allegiance in order to have a chance to form the Government.

[39] So turning then to the charges, those relating to the Pukapuka flight essentially centre around whether the payment, the use of public funds, for flying a charter aircraft to Pukapuka and back with the passengers on the return trip listed in the information, was a justified use of public funds, a use authorised by the relevant statutes and regulations, or whether in fact it was a ploy on the part of Messrs Puna and Brown for purposes outside any statute or regulation, part of the activation of their conspiracy and was therefore unauthorised expenditure.

[40] As far as the Penrhyn flight is concerned, the essential question is whether the expenditure of public funds involved in chartering an Air Rarotonga flight to fly

Rarotonga-Penhryn and to return with Mr Tapaitau aboard was an unauthorised use of public funds under the guise of a medical evacuation and was, in reality, to secure or help secure Mr Tapaitau's allegiance to the Cook Islands Party, or whether it was actually a legitimate "Medivac" or medical evacuation flight which is authorised in the Cook Islands under a different statute and a different set of criteria.

[41] The sums involved are not inconsiderable. Although the net cost to the public purse of the flights, on the evidence in this case, remained a little uncertain, the gross cost was of significant sums of money. The Penrhyn flight cost $24,886 it seems. The Pukapuka flight $22,700[13]. A total of $47,586. The Penrhyn flight took place on 30 June 2018 and the Pukapuka flight on 3 July that year. The net cost and the actual charge by Air Rarotonga is a little uncertain but the variations are reasonably slight and are of no importance so far as the determination of the present application is concerned.

[42] It also needs to be noted that, initially, there was only to be one charter flight which was to fly Rarotonga-Pukapuka-Penhryn-Rarotonga on 30 June 2018. But, in the critical period, for mechanical and administrative reasons, that plan had to be changed and in fact there were two separate flights, one to Pukapuka, one to Penrhyn.

Evidence: General

[43] The evidence on which the prosecution principally relied in this case, especially for the Pukapuka flight[14], began with a email from Mr Brown sent on 27 June 2018 at 10.57am to, amongst others, a Ms Maunga who was then the Acting Clerk of Parliament[15], the Clerk then being extremely ill. The email was sent to a number of persons, including senior financial and other officials in Government and included Mr Puna, and reads;

> "I'm giving you a heads up depending on final counts today. If things remain as election night then the Government will request a jet charter to bring to Rarotonga the successful MPs Tingika Elikana and wife and also retiring MP

13 Ex 9.
14 Ex 5.
15 And, from early 2021, the Secretary of Citizens against Corruption Inc, the organisation Mr Allsworth chairs and the group behind this prosecution: E 69.

> Tekii Lazaro and wife. I understand that the Civil List allocation for the Northern Group members has hardly been used and there remains sufficient to bring Tekii and his wife back on the return fare. In addition, the flight will need to continue to Penhryn to collect Robert Tapaitau and wife. I understand that there is also a medical referral patient from Penrhyn that will make up the total of 7 returning passengers. Air Raro may have paying passengers for the first leg to Pukapuka and Penrhyn to offset the charter cost. Helen, can you please liaise with Teu in Finance (and also with Bubs Numanga of Air Raro. I have already spoken to him about the possible charter) on using the remaining civil list funds to cover the flight cost which will be either this Friday or Saturday latest. It is important that these members in particular can get to Rarotonga to take place in government discussions aimed at maintaining national stability during the outcome of the final count."

[44] That, of course, was the day before the Section 78 Declaration.

[45] Ms Maunga replied, the same day at 11.08am, to Mr Brown and all the previous recipients plus additional Government officials;

> "Your email is noted and discussed with Head of Finance, [Ina Pierre], this morning to follow through after the confirmation of the Final Counts to be released tomorrow.
>
> With regards to former MP Tekii Lazaro's entitlement after the dissolution of parliament, provisions of the Civil List Act 2005 and Remuneration Tribunal Order 2009/04[16] shall apply. Ina will be on top of this today.
>
> Meanwhile once the release of the final counts, this will be Gazetted as soon as the formalities and notifications to MFEM of all Members of Parliament for 2018."

[46] Mr Brown replied to that email on 27 June at 11.17am, saying;

> "Thx Helen, I'm aware that we'll wait for the Gazette for final results. But please do not let this delay you from making administrative arrangements with Air Raro now in anticipation of the results staying the same for both Pukapuka and Penrhyn after the final counts. If results do change then obviously the arrangements will change in terms of passenger names. Let us be proactive on this and not reactive."
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> "In terms of Tekii Lazaro return fare. Can you please clarify whether he is entitled to the civil list covering his return to his home on Rarotonga. Especially as he has not drawn on his travel entitlements at all this year. The new individual allocation of travel to each MP under the civil should clearly

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16 "The 2009/04 Order", the full title of which is the Remuneration Tribunal (Queen's Representative and Members of Parliament Salaries and Allowances) Order 2009/04.

> show that he has enough to cover the fares for both him and his wife to return home."

[47] Ms Maunga replied on 27 June at 11.25 saying: "Our office is in contact with Air Rarotonga and waiting for their feedback and invoice. We will keep you informed on MP Tekii Lazaro in a moment".

[48] And then Mr Brown, on 28 June, the day of the Section 78 Declaration – though we do not know at what time of the day it was made – emailed Ms Maunga and the other previous addressees at 10.21am; "Just spoke to Bubs. The charter will be for Saturday. Returning passengers are as originally advised. There are seats for sale on the leg going north to help recover costs."

[49] In evidence Ms Maunga spoke of Mr Brown phoning her on the morning of 27 June asking her to make a booking for the charter flight to Pukapuka and Penrhyn – then still the combined flight – to pick up the successful MPs. She said that, after the call, she picked up a copy of the 2009/04 Order to check the validity of the request, "knowing that Lazaro is not entitled under the Civil List, but before that I did mention to the Deputy Prime Minister that retired MP Lazaro wasn't entitled to any funds under the Civil List 2009/04"[17].

[50] Ms Maunga went on to say that she was "pressured": "It's difficult to make a decision knowing that this is not covered in the Civil List Order 2009/4". Ina Pierre worked on the Cabinet submission to be considered shortly and Mrs Maunga said of it that "it's actually quite difficult when you have to do something that is not within the law." So she prepared a Cabinet submission and forwarded it to Cabinet to approve because her understanding of the effect of the 2009/04 Order was that "all Members of Parliament are aware of their entitlement under the Order 2009/04. They all know when Parliament dissolves all their entitlement ceases"[18]. The overall correctness of that proposition will require later consideration.

[51] The Cabinet submission, dated 28 June 2018[19], was on the letterhead of the Minister of Parliamentary Services, and was over the signature of the then Clerk –

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17 E 31.
18 E 42-3.
19 Ex 6.

though Mrs Maunga signed it as Acting Clerk, the Clerk being too ill – with the recommendations appearing over what purported to be the signature of the Hon. Nandi Glassie. He had been Minister for Parliamentary Services in the 2014-18 Government but lost his re-election bid in the 14 June 2018 poll.

[52] The Cabinet submission itself was the subject of a deal of evidence in the case. It is directed to Cabinet, and says the proposal is:

> This memorandum seeks Cabinet approval for the Civil List to fund the Northern Group charter flight to uplift the two members of parliament from Pukapuka and Penrhyn, and their spouses, including the former Member of Parliament for Pukapuka and his spouse on Saturday 30 June 2018.

[53] The Executive Summary recites what happened in the General Election and the Section 78 Declaration, notes that a charter flight had been arranged, and says;

> "included on this charter flight is the Hon. Tekiii Lazaro, former Member of Parliament for Pukapuka and Mrs Lazaro. Due to the early dissolution of parliament, MP Lazaro is not able to fulfil his full entitlement for constituency travel as a Member of Parliament in the current financial year, although he had already made travel plans to his home island Pukapuka later on in the year Former MP Lazaro is entitled to 4 Constituency Travel to his island Pukapuka and Mrs Lazaro is entitled to 2 visits and these travels were not taken although there were plans in place to take them".

[54] The Cabinet submission follows a template followed by all Cabinet submissions and was typed by Mrs Maunga on her computer using that template. As these types of documents do, the submission then deals with consistency with national priorities, legislative implications, costing, social impacts and the like and concludes with the Parliamentary Services' comment: "Chartered Flight to be funded by the Civil List is supported including relocating former MP Tekii Lazaro and Mrs Lazaro to Rarotonga."

[55] The copy of the document put in evidence has the comments of the Cabinet Agencies Committee deleted. The Cabinet Agencies Committee is a committee comprising some of the senior members of the administration including the Financial Secretary, the Chief of Staff, the Solicitor-General and the like. Under "Legislative Implications", Mr James, the then Solicitor-General, has, in the typed passage "There

are no legal implications in respect of the submission," deleted the word "legal" and substituted "legislative". His comments are not in evidence, so whether that alteration arose from pedantry or principle cannot be ascertained.

[56] The recommendation at the end of the submission was for Cabinet to approve;

> "1. The Northern Group chartered flight of $31,050 to be drawn down from the civil list to cover the travels of the successful MPs Robert Tapaitau and Tingika Elikana and their spouses to Rarotonga after the final results of the General Election was gazetted on Thursday, 28 June 2018.
>
> 2. The former Member of Parliament Tekii Lazaro and Mrs Lazaro to be included in this flight."

[57] At the end of the document, below what purports to be the signature of the Hon. Nandi Glassie, are the signatures of Messrs Puna and Brown each with the word "approved 29.6.18" written alongside.

[58] Ms Maunga detailed the efforts made by Mrs Pierre to obtain Mr Glassie's signature to this memorandum. She said she never saw it in its signed form but saw a Cabinet minute on it. All those documents were prepared on 28 June 2018 or soon afterwards as a matter of urgency given the proximity of the flight.[20]

[59] As mentioned, there was a significant amount of evidence as to the validity of this document and as to whether it was not, as on the face of it appears to be, a fairly normal Cabinet submission requesting expenditure of public funds but was, in fact, an intrinsic element in the conspiracy of the defendants to secure public funding for the purposes set out in the informations.

[60] Mrs Maunga explained her preparation of the document by saying; "I don't think you can say no to the Minister. You have to be respectful." Asked, "you say with all due respect that you're entitled to express yourself freely as a civil servant if you don't agree with the course a minister is proposing, you can say well there may

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[20] E 61-3.

be problems with this, minister", and Mrs Maunga said; "I don't think I've ever had that freedom in my 32 years of working in government to say that or speak openly like that to a minister[21]." She said she would defer to Crown Law's advice on that.

[61] Mr Rakanui, a former Clerk of Parliament for two years from August 2013, said in evidence that his understanding of the effect of the 2009/04 Order was that Members of Parliament who had been elected had to fund their own way to their electorate between the dissolution of Parliament and the election in order to campaign for election and also had to fund their own way back from their electorate to Rarotonga between the Section 78 Declaration and the Queen's Representative's summons[22]. Asked whether there were ways to get around the rules in the 2009/04 Order, Mr Rakanui said; "when we're at Parliament we had to understand that the institution is always under pressure from the politicians and we had to expect that politicians always try and push the boundaries of the law to get privileges, especially when as provided by Rule 6(a) of the Order, the privileges are ceased". He gave it as his understanding when Parliament arises after dissolution, "it's the prerogative of the Queen's Representative to send a notice on the advice of the Prime Minister to resume Parliament[23]". Thus his understanding of the interpretation of the relevant statutes and regulations mirrored that for which Mr George contended on behalf of the informant, but, for reasons which will appear, his interpretation is open to serious doubt.

[62] Reverting to the narrative, the signing of the Cabinet submission was almost immediately followed by a Cabinet Minute dated 29 June 2018, prepared by Mr Aukino Tairea, the Acting Secretary of Cabinet Services. Noting the submission was by Mr Nandi Glassie, "Minister of the Parliament", he minuted that the recommendations in the Cabinet submission had been approved[24].

[63] That was quickly followed by confirmation of the then one flight and a quote from Air Rarotonga of the cost at that stage of $31,050[25]. Also at much the same time, emails were circulated to "all users@cookislands.gov.ck" advising recipients – quite

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21 E 55.
22 E 143.
23 E 144.
24 Ex 7.
25 Ex 8.

a large number, across government and including the House of Ariki and the Chamber of Commerce – that:

> "Parliament has chartered a flight to fly back to Rarotonga the new Members of Parliament from Pukapuka and Penrhyn and their spouses, a civil list entitlement prescribed under the Remuneration Tribunal Order 2009/04 on Saturday 30 June 2018. Please be advised that there are seats available on Air Rarotonga for one way travel to Pukapuka and Penrhyn. Anyone interested or thinking of travelling to these two islands, please contact Air Rarotonga directly as soon as to book your seat[26]".

[64] Mrs Maunga sent a similar email on 2 July 2018 at 1321hrs, again to allusers@cookislands.gov.ck, saying; "Please be informed that Parliament has chartered a flight to Pukapuka on Tuesday 3rd July at 8.30am. Flight returns to Rarotonga from Pukapuka same day at 11am. Anyone interested or thinking of travelling to Pukapuka on this chartered flight to please contact Parliament on [number given] to confirm your seat now. Cost of one way fare" – and the cost is given – "below are the number of available seats on this chartered flight[27]" and their cost is set out.

[65] So, to that point, on the face of the documents, there had been a request from Mr Brown to Ms Maunga to arrange a charter for the purposes set out in the emails with the complement of passengers to be confirmed following the making of the Section 78 Declaration, the day after Mr Brown's approach. Questions had also been raised as to the entitlement of the former MP Mr Lazaro and his wife to fly at public expense on that flight[28]. That latter issue had been the subject of consideration by officials such as Ms Maunga and Mrs Pierre.

[66] Whether or not there was valid authorisation for the flight as a result of the Cabinet submission was a matter of contention. In particular, what was in contention was whether the document was ever signed by Mr Glassie and, if not, whether that invalidated it.

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26 Ex W.
27 Also Ex W.
28 Ex M.

[67] Mr Glassie has now, unfortunately, passed, but, before doing so, made a declaration on 3 March 2020 as to his recollection of the matter in which he was firm, even vehement, in saying that the signature on the Cabinet submission "is mine but I did not sign it" and that "the only way my signature appeared there was by electronically pasting or transplanting it there". He queried whether there was a valid majority of Cabinet who signed the document.

[68] A number of observations need to be made concerning that aspect of the matter. The first, and perhaps the most important, is that the authenticity of the signature of Mr Glassie appearing on the document is not an issue which needs direct decision in the circumstances of this case. The purpose of the evidence just reviewed was to consider whether the actions of the defendants, as proved in relation to the Cabinet submission and Minute, assist in reaching a decision as to whether the prosecution has proved that those actions were part of the alleged criminal conspiracy or were shown to be fraudulent in the sense defined in the authorities, and in particular whether their actions made may not have been as a result of honest belief, even though a mistaken belief, in the way in which the document came to be executed. The openness with which the Pukapuka flight was organised, the use of documents which were bound to become public, the wide notification of the flight and the soliciting of travellers other than Parliamentarians – a feature antithetical, as Mr Raftery submitted, to a conspiracy – and the fact it involved MPs whose position had been declared and whose entitlement had therefore accrued, all strongly militate against a finding of a conspiratorial agreement to commit a crime or to act fraudulently.

[69] The second issue is that it is clear that despite being described in the document as a "Minister of Parliament" and similarly in the Cabinet minute, Mr Glassie was not a Minister at the time of the submission. The document was prepared following the Section 78 Declaration and as will be demonstrated later in this judgment, any entitlement of Mr Glassie to be regarded as a Minister of Parliament ceased at midnight on 27 June 2018. Whether Ms Maunga and Mr Aukino described him as a "Minister" out of deference or courtesy is not known. But factually he was not a Minister at the time this document was prepared and signed. That affects consideration of Mr Glassie's deposition.

[70] Thirdly, during the course of the trial, known signatures of Mr Glassie were produced, both those known to have been personally signed by him and those which had been signed electronically by the e-signature held by his department, the Department of Parliamentary Services[29].

[71] Those who practise in the Courts know that matters of handwriting comparison, identification and forgeries and the like are matters covered in evidence, usually by experts of many years standing. It is an arcane art, almost a science, so that any observations made in this judgment concerning it are certainly not those of an expert, but somebody with the certain amount of experience as Judge and counsel in such matters. Of the coloured reproductions of Mr Glassie's signature put in evidence, the e-signature appears, to one's eye, as not blue or black but as tinged with a greenish-yellow tint which is absent from what purports to be his signature on the Cabinet submission. That goes some little way towards suggesting that Mr Glassie may have personally signed the submission despite the vehemence of his denial.

[72] There are really only three possibilities: that Mr Glassie signed the document personally, that the signature was forged, or that an e-signature was applied. As mentioned, the implication – but no more – is that the signature may have been personally applied despite what Mr Glassie said about it some time later when he was close to death. There is no evidence of forgery and, in any case, certainly not one generated by, or at the instigation of, the defendants which might bear on the issue of whether fraud has been proved but, to one's intuitive eye, his signature does not look like one which would be simple to forge as some are when they are simplified by use. And so, despite the apparent colour differences, it may be an e-signature on the document but it is impossible at this stage to make any definitive finding and, indeed, it is unnecessary.

[73] The next comment which needs to be made in that regard is that whether or not Mr Glassie personally signed the document or authorised the use of an e-signature for the document is irrelevant to the question of authority and use of the public funds approved in the Cabinet minute. There are three reasons also for that.

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29 Ex AA, BB, CC.

[74] The first is, that as mentioned he was not a Minister of Parliament at the time the document was produced and apparently signed.

[75] Secondly, Article 18(2) of the Constitution reads:

> Cabinet shall not be disqualified for the transaction of business by reason of any vacancy in the number of its members and any proceedings of Cabinet shall be valid notwithstanding that some person who was not entitled to do so, sat or voted in Cabinet or otherwise took part in the proceedings.

[76] On the face of that, as a question of validity of the Cabinet Minute, it does not matter how Mr Glassie's signature came to be applied and whether he was a Minister at the time or not: the Minute was validated by Art 18(2).

[77] That leads on to the additional question concerning the quorum of Cabinet at the time. Cabinet had six Ministers prior to the dissolution of Parliament in 2018. Three of those, including Mr Glassie, stood for re-election but were unsuccessful. So, of the Cabinet that remained in office between dissolution and the General Election, three were unsuccessful, they were therefore no longer MPs after the Section 78 Declaration and because Ministers must be MPs to be Ministers they were no longer Ministers. So the six person Cabinet which had been in office prior to the dissolution of Parliament for the 2018 election had narrowed by 28 and 29 June 2018 to three.

[78] Ms Maunga and Mr Rakanui and others expressed doubt as to whether there were the required number of members of Cabinet to form a quorum to make the authority granted by the Cabinet Minute sufficient. But in that regard, the Manual of Cabinet Procedure[30] says, amongst other things, "Fifty percent of the total number of Ministers must be present for there to be a quorum" of Cabinet.

[79] By 28 and 29 June 2018, Cabinet was down to three members. 50 percent of the total is two. Mr Brown and Mr Puna remained Members of Cabinet. They both signed the Cabinet submission. It therefore follows that 50 percent of the Ministers

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30 Ex 15, November 2018, cl 3.

were present. There was a quorum for the execution of the document and accordingly the authority granted by the Cabinet submission and the resolution was valid.

[80] So for all those reasons the conclusion on that point is that, irrespective of how Mr Glassie's signature came to be on the document, and irrespective of whether he was entitled to have his signature applied to the same, the authority granted by Messrs Brown and Puna by their approval of the Cabinet submission and the subsequent Cabinet Minute was in all the circumstances valid.

[81] That, however, is not directly the point because, as mentioned before this exercise needed to be undertaken, the point for present purposes is not whether the Cabinet submission and the resolution were valid – that is only of tangential interest – the point is whether all the circumstances relating to this aspect of the matter can be taken into account in deciding whether the prosecution has proved that the actions of the defendants were undertaken as part of their conspiracy and fraudulently and deceitfully in terms of s 280.

[82] The result of all of that as far as the Pukapuka flight is concerned, is that it has not been demonstrated by the prosecution that they can show that the defendants were acting fraudulently in any aspect of that matter, or that they were acting pursuant to a conspiracy, or that, if they thought they were entitled to act as they did, they were not acting pursuant to their honest though mistaken belief as to the effect of the provisions and the evidence.

[83] On that basis therefore, and irrespective that no Overt Act said to amount to a conspiracy was pleaded, the conclusion must be that the evidence fails to satisfy that there is a prima facie case in relation to the Pukapuka informations.

[84] It is next helpful to describe the various phases and offices held by persons at different stages of the period from just before the dissolution of Parliament to the convening of the first meeting of a new Parliament following the General Election.

[85] Those who were declared in a previous General Election to be duly elected Members of Parliament remain in that office at least up until the dissolution of Parliament prior to the next General Election. Between dissolution and either the

election or the Section 78 Declaration of the results of the election – the difference does not matter in this case – it is clear that pursuant to the Political Neutrality policy of the Government, the existing Government becomes a Caretaker Government with the limitations on their right of action appearing in the Policy[31]. Nothing is suggested here that would infringe that.

[86] It was Mr George's submission on behalf of the informant that, following either an election or, more probably, the Section 78 Declaration, the 24 persons who became MPs are MPs thereafter, but are not entitled to receive salary, allowances or expenses as MPs until the first sitting of the new Parliament.

[87] Mr Raftery QC, for the defendants, submitted that the entitlement of a duly elected MP to be paid salary and receive expenses and allowances commences immediately on the declaration of the 24 names in the Section 78 Declaration.

[88] The terms of the Electoral Act 2004 bearing on that question are explicit, carefully drafted and create an interlocking whole. Section 9(3) provides that:

> "The seat of a member, unless previously vacated, shall become vacant at the end of the day immediately preceding the day on which the members elected at the next ensuing general election take office."

and s 9(2) says:

> "every member who has been elected pursuant to the provisions of this Act shall take office on the day on which the warrant declaring his or her election is signed by the Chief Electoral Officer pursuant to s 78."

[89] Section 9(1) provides, under the heading "Tenure of Office," a number of circumstances in which the seat of a Member becomes vacant.

[90] In combination that means that in the 2018 General Election the seat of every member, Government or Opposition, became vacant at the end of the day immediately preceding the day on which the members elected in the election take place, that is to say that, in 2018, the seats of all the Members of the 2014/2018 Parliament were vacated by force of statute, s 9(3), at midnight on 27 June 2018 and the 24 persons

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31 Ex N, p3.

declared by the Chief Electoral Officer to be MPs under the Section 78 Declaration took office in terms of s 9(2) on the day on which the warrant declaring his or her election was declared, that is to say, on the day of the Section 78 Declaration, 28 June 2014.

[91] So up to and including 27 June 2018 the Members of the previous Parliament remained in office but on and from 28 June 2018 the 24 persons declared to be members by the Chief Electoral Officer took office for the purposes of the next parliamentary term.

[92] That is also by confirmed by the terms of s 9(1) which carefully sets out the various matters which can result in a vacancy of the seat.

[93] As noted, Mr George submitted either that a person does not become an MP until the first sitting of Parliament or, more precisely, that they are not entitled to the salary, expenses and allowances of an MP for the period between the date of the Section 78 Declaration and the convening of Parliament.

[94] That is a strained, unrealistic and incorrect submission to make as to the fulfilling of the office of an MP. MPs whose names appear in the Section 78 Declaration are MPs from that day onwards. As far as Parliament is concerned, Art 30 of the Constitution says that, "except for the purposes of enabling this article to be complied with and for the election of a Speaker, no Member of Parliament shall be permitted to sit or vote therein until he has taken and subscribed the following oath …".

[95] That is essentially the view offered in evidence by Mr Elikana, former Secretary of Justice and Solicitor-General namely that an MP's entitlement to payment of salary arises on the making of the Section 78 Declaration but the entitlement to represent one's constituency in Parliament by sitting in Parliament and voting on parliamentary business arises only after the Member, who has been a member since the Section 78 Declaration, takes the Oath of Allegiance[32].

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[32] E 197-8.

[96] That is also confirmed by s 9(1) of the Electoral Act 2004 which says that the seat of a Member "shall become vacant if he or she fails to subscribe to the Oath of Allegiance".

[97] So it is clear that an MP is an MP from the date of the Section 78 Declaration until he or she is asked to sign the Oath of Allegiance. If they do not do that, their seat becomes vacant. If they comply with it, they thereby, and additionally to their other rights and responsibilities as a constituency MP, become entitled to sit and vote in Parliament.

[98] All that however, is in Mr George's submissions, by the by, because even if the 24 members whose names appear in the Section 78 Declaration become MPs on the date of the declaration, he submits that does not entitle them to payment from that date onwards of the salary, allowances and expenses as an MP.

[99] That issue is governed by the Civil List Act 2005, the Long Title to which is that it is an "Act to provide for the salary allowances and expenses of the Queen's Representative and Members of Parliament".

[100] Section 8 of that Act deals with the remuneration of Members of Parliament and the Speaker. Section 8(1) says 'the Remuneration Tribunal shall from time to time … fix the salaries and allowances to be paid to an office holder" – defined as essentially the senior officers in Parliament – "and to other members of Parliament". Subsection 3 says "the salaries and allowances fixed pursuant to subsection (1) … shall be payable to each member … for each year he or she completes as a member or a proportionate payment for such part of a year completed". In this case, with Parliament being dissolved about three quarters of the way through the year, the proportionate payment provision kicked in for the Members of the 2014/18 Parliament.

[101] Section 8(4) says:

> "such salaries and allowances shall be payable in respect of the period commencing on the day on which the warrant declaring the member's election is signed by the Chief Electoral Officer pursuant to s 78 of the Electoral Act 2004 and ending with the earliest of the following days:

(a) The day upon which the member's seat becomes vacant pursuant to s 9(1) of the Electoral Act 2004 other than by resignation; or

(b) The day three months after the day that member's seat becomes vacant in accordance with s 9(3) of the Electoral Act 2004 and the member is,
(i) a member immediately before the dissolution of Parliament and

(ii) is an unsuccessful candidate at the next following General Election; or

(c) The day three months after the date the member resigns …

[102] The only interpretation which can be accorded to subs (4) is that those whose names appear in the Section 78 Declaration made following a General Election are entitled to salaries and allowances payable in respect of the period commencing on the day of the Section 78 Declaration.

[103] Those who were Members before dissolution, but were unsuccessful candidates at the next General Election, are entitled to salaries and allowances for three months after their seat becomes vacant. That is of some relevance to this case having regard to Mr Lazaro's position. Coming back, however, to the Members in the 28 June 2018 Section 78 Declaration, it is clear, contrary to what Mr George submits, that salaries and allowances were payable for the period commencing on the day of the Section 78 Declaration. There was no warrant in the Civil List for the withholding of salary, allowances and expenses after that date or between that date and the date on which Parliament is convened. In terms of s 8(4), their salaries and allowances commenced on the date of the Section 78 Declaration.

[104] Allowances in the Act are defined in s 3 as the "principal allowances" of which, for present purposes, it only needs to be noted that they include "transport allowances", and "travelling expenses" is also defined as including "payments for accommodation and incidentals incurred while traveling on official business or official duty". "Official business" is also carefully defined and it is clear from the components of that definition that it is not confined to parliamentary business. Certainly it includes attending a sitting of Parliament or a meeting of a select committee and the like, but official business also includes, as might be expected, "attending meetings for the purpose of representing electors or explaining policy, attending caucus meetings, attending meetings of the MP's party and attending ceremonies or official functions". So from

that it is clear that, from the day of the Section 78 Declaration, Members, who are defined as being Members of Parliament, are entitled to salary and allowances as such until the date on which their seat becomes vacant under s 9(1) or in any other way and that those allowances include "transport allowances" under "principal allowances' and travelling expenses when dealing with "Official Business" within the definition of that term in the Act.

[105] That notwithstanding, in Mr George's submission that interpretation is inaccurate having regard to the terms of the 2009/04 Order.

[106] In particular, Mr George, and witnesses, relied on Regulation 5(6) which reads:

> "A member's entitlement to funded constituency travel and accommodation allowances shall cease where:
>
> (a) Parliament has been dissolved for the purpose of holding a General Election."

[107] Mr George submitted that because, as witnesses said, the entitlement to constituency travel ceases on dissolution and there is no specific provision as to when they revive and become available again, then the interpretation should be adopted that they remain in abeyance until the next sitting of Parliament.

[108] With respect, that interpretation does not survive consideration of the 2009/04 Order, realism or logic.

[109] It is clear from s 3 of the Civil List Act 2005 that the term "Member means Member of Parliament". And indeed in Reg. 5 dealing with constituency travel and, Reg. 7 dealing with travel and accommodation within the Cook Islands on official business and other references in the Order, the entitlement to constituency travel allowances is only available to Members of Parliament. Reverting to the previous finding, Members of Parliament of one Parliament remain in office until either the following General Election or, more probably, the Section 78 Declaration and that thereafter, unless they are successful in winning their constituency election and having their names included in the Section 78 Declaration, they are no longer Members of Parliament, and if they are not Members of Parliament they are not entitled to

constituency travel and allowances. If they continue as Members of Parliament under Reg. 5(6)(a) they lose their entitlement as to constituency travel between the date of dissolution and the date at least of the Section 78 Declaration but if they are re-elected their entitlement to travel allowances revives at that point and there is nothing in the order which suggests that payment should be postponed but that, in the usual way, once accounts are incurred they should be paid in accordance with the Schedule to the 2009/04 Order.

[110] That situation is logical. To preserve electoral fairness and lessen the likelihood of electoral petitions and recount applications after a General Election, it is only right that – as Reg 5(6) says – existing MPs should have to meet the cost of returning to their electorates to campaign. But, once the Section 78 Declaration has named the successful candidates, there is no reason why the MPs comprising the new Parliament should not become entitled to be paid for fulfilling the duties of their new situation and reimbursed for the costs of their so doing.

[111] From all of that it appears that, in the Pukapuka, the case, the recourse to public funds for the payment of constituency travel for Mr and Mrs Elikana was justified in terms of the number of trips to which he, by the date of travel, an MP, was entitled and her entitlement as a consequence of that.

[112] There may be some doubt as to whether Mr Lazaro and his wife were entitled to have their fares paid from Pukapuka to Rarotonga. Regulation 5(7) of the 2009/04 Order says that, (leaving the RAPPA constituency provision aside), subs (6) is:

> "subject to the exception that where a member who resides in a constituency other than a constituency in the island of Rarotonga has previously been brought to Rarotonga for his swearing-in session at the commencement of his term in Parliament then he shall receive funded one-way travel and the appropriate allowances to return the member to his constituency when either of the events referred to subsection 6(a) occur".

[113] Mr Lazaro was not in receipt of one-way travel and allowances to return him to his previous constituency of Pukapuka-Nassau but in fact the reverse was the case as he was being brought from Pukapuka back to Rarotonga at public expense. It would appear that a payment for that purpose fell outside the enabling provisions of Reg.

5(2). However, for the purposes of this case, that is of little weight in determining whether the prosecution has proved the components of the s 280 offences to the requisite standard because it seems clear there was a mistaken belief amongst the Officers of Parliament and, probably, MPs going back several elections as to the correct interpretation of the 2004/04 Order.

[114] Mrs Maunga and Mr Rakanui both gave interpretations which paralleled that for which Mr George contended – as did the 28 June 2018 submission – but a selection of examples derived from earlier elections was put in evidence where it would appear that public funds had been used on occasion to pay for travel for persons not entitled to those payments. Examples included the payment of public funds for unsuccessful candidates which fell outside the 2009/04 Order and payment for travel undertaken prior to the Section 78 Declaration in some elections[33]. So it would appear that there was at least confusion, misapprehension or a mistaken belief as to the ambit and interpretation of the 2009/04 Order and the entitlements of Members and former Members to funded constituency travel under that Order. Mr Brown's concerns as to Mr Lazaro's Civil List budget, rather than whether he was entitled to free Pukapuka-Rarotonga travel, appear typical of the widespread misinterpretation of the 2009/04 Order.

[115] The legal position is now clear given the interpretation earlier in this judgment and it may well be that such mistakes or misapprehensions do not reoccur. But in terms of bearing on whether the prosecution has proved the questions of conspiracy, fraud and deceit in relation to the Pukapuka matter in this case, the fact is that Mr and Mrs Elikana were entitled to constituency travel after the Section 78 Declaration and while Mr and Mrs Lazaro may not have been entitled it was funded in accordance with the mistaken belief which had been in force since at least the 2010 General Election.

[116] All of that confirms the earlier findings that in relation to the Pukapuka informations for the reasons earlier summarised, the prosecution has not shown that there was fraud or deceit sufficient to raise a prima facie case, still less that the

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33 Ex's H-K, P, Q, R, T, U, V.

arranging and funding of the Pukapuka flight occurred as part of the unpleaded conspiracy to infringe s 280.

Evidence: The Penrhyn Flight

[117] Turning to the Penhryn flight, once the results of the election were known on 14 June 2018, and, more particularly, once they were confirmed by the Section 78 Declaration, for the reasons earlier mentioned Mr Tapaitau was a person whose allegiance both parties could be expected to have sought to assist them in their goal of achieving a majority in Parliament and thus forming a Government. For legitimate and understandable reasons he was concerned in the interests of Penhryn and its electors to maximise the leverage of his position[34].

[118] A large number of text messages were put in evidence[35], including a number between Messrs Puna and Brown and Mr Tapaitau. Initially those text messages between Messrs Puna and Brown give all the appearance of their reviewing the progress of the election as the results came in on 14 June 2018 and then, immediately after that, Mr Puna made the first contact with Mr Tapaitau on 15 June 2018 at 18.55 seeking an opportunity to chat with him. Then, later on 25 June 2018 at about 7pm, again Mr Puna was looking for the opportunity to talk to Mr Tapaitau about joining a Government. That process, in the ways about to be mentioned, continued for some days afterwards but, perfectly understandably, during the same period Mr Tapaitau was also being wooed by the Democratic Party, in the person of a friend of his, a Mr Willis who was a senior office-holder in the Democratic Party at that period. Mr Willis first approached him on 14 June 2018 between 20.49 and 21.02hrs offering his congratulations and seeking an opportunity to talk with him.

[119] On 21 June 2018 between 10.29 and 15.23, again there was an approach from Mr Willis saying amongst other things: "have you had a chance to talk to your committee and supporters as to what direction you can take?" with Mr Tapaitau

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34 E 176.
35 Ex 13.

replying: "our committee would like to see what the offer from the Democratic Party is for Penrhyn."

[120] Then on 23 June 2018, when Mr Tapaitau was still talking to Messrs Puna and Brown, Mr Willis texted him between 13.39 and 13.58hrs saying: "the Democratic Party is offering you at this stage a confirmed position of Associate Minister regardless of the MP numbers after petitions and appeals have been settled, keeping in mind we are in contact with Rose" – clearly Mrs Vainetutai Rose Toki-Brown.

[121] At that point, Mr Tapaitau was in receipt of an offer from the Cook Islands Party and the texts cover both that and the state of negotiations between that party and Mr Maggie and Mrs Brown. But, at the end of the exchanges, it is clear, as Mr Tapaitau confirmed in evidence, that he regarded the CIP offer as one better aligned with his interests and those of his constituents and decided to join and form an allegiance with the CIP[36]. Those negotiations began when he was still in Penrhyn, but continued after he flew to Rarotonga on the flight, the details of which are now to be considered.

[122] To recapitulate, the issue here is not that the flight was charged to public funds but whether the arrangements of the flight about to be detailed were, in the circumstances, part of the bringing into operation of the conspiracy alleged between Messrs Puna and Brown in breach of s 280.

[123] The contention by Mr Raftery QC, on the defendants' behalf, is that the flight from Penrhyn on 30 June was a perfectly orthodox Medivac flight.

[124] It should be observed that there are at least two different varieties of internal Medivac flights. There are Medivac flights organised in circumstances of urgency – heart attacks, serious injuries and the like – and there are Medivac flights organised for less urgent circumstances such as the evidence shows occurred in the Penrhyn flight case.

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[36] E 176.

[125] The flight gross cost it seems was about $24,886 and the evidence included the details of the referral process by which Medivac flights are funded, not by Parliamentary Services but by the Ministry of Health[37]. The first step in the referral process is there is a reference to a doctor (or dentist) in charge consulting with the accepting officer and presenting the medical history the clinical findings and the like. In the second step, based on the clinical picture presented and clarification, the accepting officer prepares for the referral of the patient. In the third step, the referring doctor in charge informs the patient of the proposed referral and processes the referral form and letter. In the fourth step, the accepting doctor consults with members of the Patient Referral Committee to inform them of the referral and the needs of the patient requiring transfer. Then, in the fifth step, the patient referral coordinator proceeds with the necessary logistics and documentation and continues to the sixth and final step, approval from the Secretary of Health.

[126] In this case, one of the two patients referred under the less urgent limb of the Medivac scheme was Mr Willie John. He had been the unsuccessful candidate for the CIP, for the Penrhyn seat in the 14 June 2018 election, but, a fortnight before the election, he had suffered an injury by way of a bird bite. It had grown septic. He had been given a version of penicillin to which it was thought he might be allergic. His foot had become discoloured and pus-filled and, according to Dr Teapa, when the matter was brought to his attention, because Mr John suffered from uncontrolled diabetes, there was a possibility that his foot might need amputation[38].

[127] It is easy to understand that political opponents and those so disposed may have been suspicious of the fact that it was the unsuccessful CIP candidate at the election for whom the patient referral flight was being sought. But the evidence shows that was pure coincidence. Mr John consulted Nurse Boaza on Penrhyn. Nurse Boaza did not recall the consultation – which is understandable in the nearly three years since his relocation – but it is clear from the Med-tech extracts concerning Mr John's case that there had been contact between Nurse Boaza and Dr Teapa before the question of referral crystallised[39].

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37 Ex 16.
38 E 239-245.
39 Ex Z.

[128] As a result, a referral document was prepared[40] which spoke of the flight not being a normal flight but a 'health charter". And the medical records for Mr John described the medical problems from which he suffered and the possible prognosis, given the claimed allergy and the consequences of his uncontrolled diabetes.

[129] As a result of that, in accordance with the patient referral process of Te Marae Ora, Dr Teapa on 29 June 2018 at 11.21 emailed Dr Yin Yin May, the doctor responsible for the administration of this aspect of the medivac scheme, saying: "this patient is Willie John former MP Penrhyn" with another patient, a pregnant woman, "needs to come to Raro, are we able to get him on the charter flight tomorrow morning?"[41] Dr May, on 29 June 2018 at 3.39, sought the approval of Dr Herman, the then Secretary of Health: "I discussed with Dr Teapa and a request charter to Penrhyn to retrieve Mr Willie John and another. Please find attached photos … seeking approval for Charter to Penrhyn". Dr Herman replied on 29 June at 3.51: "I agree this needs to come now rather than later. As discussed can you please follow up with Air Raro if we can charter for tomorrow."

[130] Mr Numanga at Air Rarotonga was contacted and he emailed Dr May and many others on 29 June 2018[42] at 4.52 saying: "I have put your charter in place for tomorrow morning given the schedule. I understand you have Willie John" and another health referral, "Mark Brown is also asking if Robert Tapaitau and his wife, Mrs Willie John and granddaughter can travel on this charter from Penrhyn." Dr May replied on 29 June 2018 at 16.56: "We can accommodate Minister Brown's request and please advise them for payment." Mr Numanga replied on 29 June 2018 at 5.15, sending the invoice for the charter cost and said: "I understand Minister Mark Brown will arrange payment from Parliament to MOH on Monday for Robert Tapaitau and his wife as well as Mrs Willie John. Willie John will pay MOH for their granddaughter". Pausing there, Mr John said in evidence that in fact he did pay for their granddaughter from his own pocket.

[131] Dr May on 30 June 2018 at 6.22 emailed a number of recipients saying: "Please kindly paid for the Penrhyn charter and collect money from Minister Brown's

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40 Ex 14.
41 Ex DD.
42 Ex

office"[43]. The manifest was sought on 4 July at 11.24. Then, on 4 July 2018 at 1.28, Mr Numanga emailed Dr May and others saying: "I emailed you the e-tickets of the passengers that travelled from Penrhyn 30 June. There was nil passengers/cargo to Penrhyn" and he detailed the return passengers including Mr and Mrs Tapaitau, "Parliament to pay MOH as per Min Mark Brown, 1 John/Willie" and one withheld, 1 John/Willie Mrs (Parliament to pay as per Min Mark Brown, 1 John/Child (Willie John to pay MOH" as in fact occurred.

[132] The sending of the manifest[44] resulted in Dr Herman, on 29 June 2018 at 4.14, advising a large number of recipients, being mainly senior officers in Government, that "Health will be chartering a flight to Penrhyn tomorrow Saturday 30 June. Financial implications for the Minister of Health is a concern and we trust you will consider this in the light of the new year ahead". The manifest itself describes the flight as a health flight.

[133] In those circumstances, while, as mentioned, it is not difficult to understand the suspicion those outside the email chain would muster assuming, though without evidence, that Mr John's ailment did not warrant a Medivac flight but was merely a convenient ruse to get Mr Tapaitau to Rarotonga at public expense, it is clear that the Penrhyn flight was in fact a true Medivac flight of the type requiring management and not urgent treatment with the cost being defrayed between the Ministry of Health for Mr John and as was by then appropriate, with the fares for the Tapaitaus being paid from Parliamentary Services. The granddaughter's flight was paid for privately.

[134] That falls precisely within the regime for the setting up Medivac flights of that type at MOH cost, defraying as much of the expense as possible to Parliamentary Services and the offering of any spare seats on the flight to other members of the wider Government to further reduce cost.

[135] So the conclusion must be, in the light of all of that, that the suggestion in the informations that the Penhryn flight was a false pretence of a sick patient evacuation for Mr John with the real purpose being to bring Mr Tapaitau to Rarotonga for CIP

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43 Ex 18.
44 Ex 12A.

purposes is unsubstantiated. The flight was irrefutably a Medivac flight with the cost to the MOH being laid off as far as possible in favour of persons who were by then entitled to free air travel pursuant to the 2009/04 Order.

Summary

[136] Rounding all that off, and dealing first with the Pukapuka flight, the finding is that it has not been shown to the required standard that the circumstances amounted to the furtherance of a criminal conspiracy between Messrs Brown and Puna to commit a crime within the meaning of the authorities. No conspiracy was alleged and no crime proved, whether under s 280 or otherwise. In part, their actions as proved may have been legally erroneous but no part has been shown to have been founded in deceit or in other fraudulent means or with the intention of defrauding the public, and accordingly it has not been shown that the defendants have any case to answer in relation to the Pukapuka flight. There being no case to answer, the consequence of that is that informations 311/20 and 315/20 must be dismissed as having no possible basis for success. The defendants are therefore acquitted on those informations and verdicts of "Not Guilty" are entered on the same.

[137] In terms of the Penrhyn flight, again it has not been shown to the required standards that Messrs Brown and Puna entered into a conspiracy to commit a crime within the terms of the authorities, either under s 280 or otherwise. It has not been shown that their actions in respect of that flight were motivated by deceit or other fraudulent means and it has not been shown that such actions of theirs as were proved to have occurred were intended to defraud the public.

[138] Accordingly the orders will be that those two informations must also be dismissed as being incapable of leading to a verdict of guilty. The defendants are therefore acquitted on informations 310/20 and 314/20 and verdicts of "Not Guilty" are entered on the same.

[139] The charges under the Ministry of Finance and Economic Management Act are to be marked "not to be proceeded with without the leave of the Court or the Court of Appeal". In light of all the findings of law and fact throughout this judgment the

possibility of leave being granted is not expected to excite any enthusiasm for leave to be sought.

[140] The overall result therefore is that the private prosecution is at an end with both defendants being acquitted on all charges.

Hugh Williams, CJ