

**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

CV 90 of 2014

BETWEEN: VILIAMI UASIKE LATU

- **First Petitioner**

'AISEA SILIVENUSI

- **Second Petitioner**

AND: 'ETUATE SUNGALU LAVULAVU

- **Respondent**

BEFORE LORD CHIEF JUSTICE PAULSEN

**Date of Hearing: 25 and 30, November 2015, 1, 2, 3,
4, 8, 9, 14, 15, and 16 December
2015**

Date of Ruling: 29 January 2016

**Appearances: Mr. W. C. Edwards Snr SC for the
first petitioner**

**Mr. S. Tu'utafaiva for the
respondent**

R U L I N G

The petition

[1] On 30 September 2014, His Majesty the King issued the writs of election to hold elections of the Representatives of the Nobles and of the People to the Legislative Assembly on 27 November 2014. 'Etuete Sungalu Lavulavu (Mr. Lavulavu) won election as the Peoples' Representative for the Vava'u No. 16 Electoral District. The petitioners, Viliami Uasike Latu (Dr. Latu) and 'Aisea Silivenusi, had stood unsuccessfully for election in the same constituency. This is an election petition under section 25 of the Electoral Act 1989 (the Act) challenging Mr. Lavulavu's election. The petition alleges that Mr. Lavulavu committed bribery in breach of section 21(1)(a) of the Act and spent more than the permissible sum of TOP\$10,000 on his election campaign in breach of section 24(1) of the Act. The petition seeks to have the election of Mr. Lavulavu declared void under section 32 of the Act.

The second petitioner and the delayed start of the trial

- [2] On 23 October 2015, before the trial of the petition commenced, the second petitioner, 'Aisea Silivenusi, filed a notice of his intention to withdraw his petition. He made no appearance before the Court on that application or at the trial. Because the petition was filed jointly with Dr. Latu, I refused his application to withdraw it. The petition was advanced by Dr. Latu.
- [3] The trial was scheduled to commence on 25 November 2015. Two adjournments were granted to Mr. Lavulavu to allow his Counsel, who had only latterly been instructed, to prepare for the trial. By consent, the witness Uinifou Fili gave her evidence on 25 November 2015 as she was to travel overseas on 26 November 2015. The trial proper commenced on 1 December 2015. Over the course of 11 days I heard from a total of 26 witnesses with 11 witnesses being called to give evidence by Dr. Latu and 15 witnesses being called to give evidence by Mr. Lavulavu.

Amendment of the pleadings

- [4] Both parties applied to amend their pleadings during the trial.
- [5] In opening Dr. Latu's case Mr. Edwards applied to amend subparagraphs v, vi, vii, viii and ix of the third particulars of paragraph 5 of the petition and to add a new subparagraph x. The amendments related to the scope and value of road works that it is alleged Mr. Lavulavu undertook as part of his election campaign. The detail of those amendments is set out in paragraph 25 of Mr. Edward's opening submissions. The amendments were not opposed by Mr. Lavulavu and I allowed them accordingly.
- [6] Mr. Lavulavu sought to amend his defence during closing submissions. The amendments are set out in paragraphs 7(ii), 8(ii) and 10(ii) of Mr. Tu'utafaiva's closing submissions. The amendments reflect a significant change in Mr. Lavulavu's position, particularly in relation to the road works to which I have just referred. Specifically, in his statement of defence Mr. Lavulavu had admitted that he was the owner of a quarry at Ta'anea which supplied the coral rocks for the road works. He also admitted that he had since 2008 planned to pave roads in the Vava'u No. 16

Electoral District with the coral rocks and that he had given coral rocks to be used by the people for roading purposes. The proposed amendments, in effect, denied what was formerly admitted and added a pleading that the road works were undertaken by the Vava'u Road Works Council, Inc. After hearing from Counsel I reserved my decision on whether I would allow these amendments.

- [7] An amendment to pleadings should be allowed, even at a late stage, if it exposes the true issue to be resolved between the parties and will not cause any prejudice or injury to the opposing party that cannot be compensated in costs. Mr. Edwards did not argue that Dr. Latu would suffer prejudice should the amendments be allowed although I consider that undoubtedly there will be some prejudice as the line of Mr. Edward's questioning of some witnesses reflected the admissions Mr. Lavulavu now resiles from. However, I understood Mr. Edwards to be saying that Dr. Latu's ability to prove his case was not reliant upon those admissions. Mr. Edwards did not apply for an adjournment or to call any further evidence to respond to Mr. Lavulavu's changed position. On balance I have decided to allow the amendments.

The real justice and merits

[8] In my consideration of the evidence I have noted section 35 of the Act which provides:

On the trial of any election petition —

(a) the Court shall be guided by the substantial merits and justice of the case without regard to legal forms or technicalities;

(b) the Court may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the Supreme Court.

[9] I have also reflected upon the comments of Hampton CJ. in *Fusitu'a v Ta'ofi & 'Aho* [1996] Tonga LR 102, 104 – 105 that section 35 is a sensible provision in an area where “the smallest of actions tend to be, or can be, put under the most powerful magnification.”

[10] The briefs of evidence contained much hearsay and opinion, which would not otherwise be admissible, along with irrelevant material. This was particularly so with the briefs of Mr. Lavulavu's witnesses. A further issue was that Mr. Lavulavu failed to provide proper discovery and produced

and relied upon documents which were not disclosed before the trial and which were submitted to the Court in tranches as the trial progressed. He blamed his former lawyer for the inadequate discovery but also said that he had signed his affidavit of documents without reading it. In many cases the provenance of the documents that Mr. Lavulavu has produced is uncertain and their authenticity disputed.

[11] Notwithstanding all that, and consistent with section 35, I have considered all that was put before me.

Credibility

[12] I have had to make assessments as to the credibility of many of the witnesses before arriving at my conclusions. I have been very mindful that the concept of credibility encompasses the two principal notions of truthfulness and error and that a witness can be truthful but mistaken (New Zealand Law Commission 'Evidence Law: Character and Credibility' Preliminary Paper No. 27, 28 April 1997). I have been slow to conclude that any witness was intending to mislead the Court but I believe in some instances that this was the case.

[13] Of the parties I have formed very different impressions. Dr. Latu's evidence was within a relatively small compass. His credibility was never undermined and he impressed me as an intelligent, considered and honest witness. I am of the view that Mr. Lavulavu was not a credible witness. Whilst I do not reject all that he has said, I consider that his intention throughout this trial was to dissociate himself from his own conduct and to obfuscate rather than inform.

[14] Often Mr. Lavulavu's evidence was simply implausible. His assertion that he had stopped campaigning well before the election because he was certain he would win is an example. His answers to questions in cross examination were evasive. On occasions I had reason to consider that he was being untruthful. As an example, he denied having referred to himself using the title of Professor. In the course of the trial documents were produced showing that he had used that title. He denied knowledge of matters when his knowledge could not seriously be in doubt. For example, Mr. Lavulavu denied knowing whether he was a Minister and he denied knowing if he had been invited to visit the house of a witness, Mrs. Kika Melekiola, when it was plain from his own evidence that he had not been

invited. There are many other examples. Mr. Lavulavu offered explanations by reference to documents that were not discovered and not put before the Court and could not therefore be subject to any effective challenge. He asserted, for instance, that he had a photograph with Mrs. Kika Melekiola and others at a meeting of the Leimatu'a Growers and Women Development Association but it was never produced. He said that the records of the Vava'u Road Works Council, Inc were up to date and kept according to law but no such records were produced. Again, these are just examples. On a surprising number of occasions Mr. Lavulavu accused other witnesses of lying. Uinifou Fili, Mateaki Guttenbeil, Lolotonga Sekeni and Foaki Fanua were all said to be liars. Given the frequency of the accusation this left a very poor impression with me.

Some context

[15] In this section I will briefly identify three entities which feature in this case.

UTRI

[16] In 2003 Mr. Lavulavu founded the 'Unuaki 'o Tonga Royal University. It was incorporated in 2006. In 2010 he founded the 'Unuaki 'o Tonga Royal Institute which was incorporated that same year. Both are non-profit educational organisations and they go under the acronym UTRI. Mr Lavulavu's wife, 'Akosita Lavulavu, is the Dean of UTRI. Mr. Lavulavu says he has not been involved with UTRI since early 2014. UTRI is alleged to have put its resources behind Mr. Lavulavu's election campaign.

Leimatu'a Growers and Women Development Association

[17] In September 2014 the Leimatu'a Growers and Women Development Association (the Association) was formed by Lolotonga Sekeni, Mr. Lavulavu and others. The *raison d'être* of the Association was to find overseas markets for the crops of the local growers. At an early meeting a decision was made that the Association would also improve the roads in the district. From September 2014 until the evening of 26 November 2014 (the eve of the General Election) 47 roads (eight kilometres) were ploughed, rolled and paved in the eight villages of Feletoa, Ta'anea, Holeva, Koloa, Mataika, Houma, Leimatu'a and Tu'anekivale. Those

villages are within the Vava'u No. 16 Electoral District. Dr. Latu asserts that the road works were carried out by Mr. Lavulavu and that the Association was a vehicle for Mr. Lavulavu's election campaign

The Vava'u Road Works Council, Inc

[18] In September 2008 Mr. Lavulavu made an application to incorporate the Vava'u Road Works Council, Inc (the Council). It was incorporated on 10 November 2008. The object of the Council was stated in its Rules to be to "solely focus on work conducted on Public Roads". Mr. Lavulavu says that in October 2009 variations were passed to the Rules of the Council as a result of which there was a new Board and he took charge of the Council as its Chief Executive. Mr. Lavulavu also says that it was the Council, and not him personally, that carried out the road works to which I have referred.

Areas of controversy

[19] There are three broad areas of controversy which I describe below under the headings 'Cash payments', 'The Growers

Association' and the 'Coral rocks and spending on road works'.

Cash payments

[20] On the eve of the 2014 General Election, that is 26 November 2014, Mr. Lavulavu gave a cash payment of TOP\$50 to Kika Melekiola and Vai Lau'i and of TOP\$100 to the Sei 'o Lepuha Weavers Group. Dr. Latu says those gifts were bribes in breach of section 21(1)(a). In the alternative, he says those sums were election expenses under section 24 that Mr. Lavulavu failed to include in his return to the Supervisor of Elections. Mr. Lavulavu says that the gifts were for refreshments in accordance with Tongan custom and were not bribes.

The Growers Association

[21] On 26 November 2014 the Association held a social gathering and prize giving (the prize giving). 'Akosita Lavulavu gave TOP\$4,000 to be used that evening for cash prizes. In total eighty prizes of TOP\$50 were awarded. Dr. Latu argues that the money was a pretext for promoting

Mr. Lavulavu's election campaign and was a bribe in breach of section 21(1)(a). In the alternative, Dr. Latu says that the TOP\$4,000 was an undeclared expense spent on Mr. Lavulavu's election campaign. Mr. Lavulavu denies the money was given as part of his election campaign or on his behalf and says it was not a bribe.

Coral rocks and spending on road works

[22] Dr. Latu argues that the coral rocks used to pave the 47 roads was a valuable gift given by Mr. Lavulavu to the electors to induce them to vote and was therefore a bribe in breach of section 21(1)(a). Mr. Lavulavu denies that he donated the coral rocks as part of his election campaign (or at all) and says they were not a bribe. Dr. Latu also argues that money spent on the road works for the hire of a bulldozer, the purchase of fuel and for the wages of heavy machine operators (as well as the value of the coral rocks if they were not given as a bribe) were Mr. Lavulavu's undeclared election expenses which exceeded, by a considerable margin, the permitted sum of TOP\$10,000 under section 24(1). Mr. Lavulavu has adopted a scattergun approach in defence. Mr. Lavulavu says the

road works were undertaken by the Vava'u Road Works Council, Inc and were not part of his election campaign. He also denies paying any costs associated with the road works and says that they were paid from money gifted by Saia Moehau. He denies gifting the coral rocks and says they were gifted by Sione Tui. He disputes the value of the coral rocks and says that Dr. Latu's valuation of TOP\$68,160 is substantially wrong. In the alternative, Mr. Lavulavu argues that any sums expended were for charitable purposes and are not to be brought into account in calculating his election expenses.

[23] In this ruling I deal first with the allegations of bribery and then the allegation that Mr. Lavulavu overspent on his election campaign.

Bribery

[24] Dr. Latu relies upon section 21(1)(a) which provides:

- (1) Every person commits the offence of bribery who, directly or indirectly, by himself or by any other person on his behalf —
 - (a) gives any money or valuable gift to or for any elector, or to or for any other person on behalf of

any elector or to or for any other person, in order to induce any elector to vote or refrain from voting...

[25] Also relevant for present purposes are sections 21(2) and (3) which are in the following terms:

(2) In this section, a reference to giving money or valuable gift includes a reference to giving, lending, agreeing to give or lend, offering, promising or promising to procure or try to procure, any money or valuable gift.

(3) For the purposes of this section, any money or valuable gift given or offered or agreed to be given (in the absence of good consideration) to any person (except a person named in section 24(3)) within 3 months of any election by or on behalf of a candidate, shall be deemed to have been given or offered or agreed to be given for the purpose of influencing the vote, unless the contrary be proved.

[26] There are four allegations of bribery against Mr. Lavulavu. Under section 32(1) any one of the allegations of bribery, if proved, will result in the automatic avoidance of Mr. Lavulavu's election and the Court will not be concerned to weigh the relative importance of the conduct or allow any excuse (*Halsbury's*, 3rd Ed, Vol 15 paragraph 780).

[27] The words "in order to induce any elector to vote or refrain from voting" in section 21(1)(a) are directed to actions

taken to influence an elector or electors in the exercise of their voting rights. It is not necessary to prove that such actions did in fact produce any effect on the election (*Scott v Martin* (1988) 14 NSWLR 663, 670 and *Henslow v Fawcett* (1835) 3 Ad & El 51, 58).

[28] A candidate for election may make a payment or valuable gift for mixed motives. He may, for instance, make a gift for charitable purposes. There is nothing wrong with that. But he may also make a gift to buy votes. That is bribery. There is no requirement that a wrong motive must be the dominant one. It will be sufficient for the purposes of section 21(1)(a) if one significant motive was to influence the vote (*Director of Public Prosecutions v Luft* [1977] AC 962, 983, *Scott v Martin* at 672 and *Wigmore v Matapo* [2005] CKCA 1 at [37]).

[29] As to the burden and standard of proof, Mr. Tu'utafaiva relied upon *Fusitu'a* (supra) which is authority that the burden is upon the petitioner to prove what he alleges and given the gravity of allegations of bribery, and the very serious consequences that flow from such a finding, the proof required, although on the balance of probabilities, is to a higher level than in the ordinary civil case (*Fasi v Pohiva*

[1990] Tonga LR 79, 81 per Martin CJ). This does not mean that the standard of proof is any different than in other civil cases. The standard of proof does not fluctuate, rather the quality of the evidence required to meet what is a fixed standard may differ in cogency depending on what is at stake (*Kalsakau v Principal Electoral Officer* [2013] VUSC 99, *Z V Dental Complaints Assessment Committee* [2009] 1 NZLR 1 at [101] per McGrath J).

[30] There is an exception to the general burden of proof contained in section 21(3) that has an important role to play in this case. Where a candidate (or any person on their behalf) has given money or any valuable gift within three months of the election, that money or valuable gift shall be deemed to have been given to influence the vote, unless the contrary is proved. This is subject to some exceptions which are not relevant to this case. I again refer to the judgment of Martin CJ. in *Fasi* (supra) where he said, at page 81:

It is for the Respondent to prove that a gift made within 3 months of the election was innocent; any other gift is presumed innocent until the petitioner proves otherwise.

[31] The standard of proof in a case where section 21(3) applies is the ordinary civil standard of on the balance of probabilities (*Fusitu'a* (supra) at page 105).

[32] There will rarely be an acknowledgement from a candidate that some payment or valuable gift was given to buy votes and so it is in this case. Such intention, if established, will usually only be gathered from acts viewed against all the circumstances of the case. In *Launceston* (1874) 2 O'M & H 129, 133 Mellor. J said:

I cannot go into any intention of the respondent, I must be governed by what he said and what he did, and by inferences I ought to draw therefrom.

[33] I refer also to *Kingston-upon-Hull* (1911) 6 O'M & H 389 where Bucknill J. said:

You cannot allow a man to say 'I did not intend to do that which amounted to bribery' if when you look at all of the things which he did there is only one conclusion to draw and that is that he has done that which he said he did not intend to do.

First allegation of bribery - TOP\$50 to Kika Melekiola and Vai Lau'i

The facts

[34] Kika Melekiola and her mother, Vai Lau'i, are registered voters in the Vava'u No. 16 Electoral District. On Wednesday, 26 November 2014 at between 3pm and 4pm they were weaving on the veranda of their home at Leimatu'a. Mrs. Melekiola said she was surprised when she looked up and saw Mr. Lavulavu standing in front of her. She knew Mr. Lavulavu as he had formerly been the representative for Vava'u and had made visits to the village and she knew he was standing for election. He had not been invited to the house. Mr. Lavulavu threw TOP\$50 to them. He said that they should use the money for refreshments. They had not asked for any money. Mr. Lavulavu invited them to attend the prize giving. He then left.

[35] Under cross examination Mrs. Melekiola denied that she had grown up with Mr. Lavulavu in Leimatu'a. She denied also that there was any conversation with Mr. Lavulavu about

his family, her family or growing up together. She was clear, and I accept, that these events occurred on 26 November 2014 as she knew she was to vote the next day.

[36] It was put to Mrs. Melekiola that it was Tongan custom to take some refreshments or food if visiting a person that you had not seen for a long time. She did not accept that proposition and said that she did not randomly give out money to people and when visiting somebody she offered her prayers. She also said that she felt burdened by the gift from Mr. Lavulavu as the only reason he had given the money was because of the election and she did not want the money because she had not decided who to vote for. She did not take the money. It was left for some children who were playing in the backyard.

[37] In his evidence Mr. Lavulavu said that whilst driving he had seen Mrs. Melekiola and Mrs. Lau'i and had stopped to remind them to attend the prize giving. He said Mrs. Melekiola had attended a "great number" of meetings of the Association and that he had a photograph taken with her "where we are all sitting around after the meeting was held with all the members, Kika and I and several other women". Mr. Lavulavu's evidence was that he had been

neighbours with Mrs. Melekiola and Mrs. Lau'i when growing up and that they were well acquainted but he had not seen Mrs. Lau'i for over ten years. He also said that both women said that they would attend the prize giving but only Mrs. Melekiola went.

- [38] Mr. Lavulavu admits that Mrs. Melekiola and Mrs. Lau'i were registered electors in the Vava'u No. 16 Electoral District. He acknowledges that he gave them TOP\$50. The requirements in section 21(1)(a) that money or other valuable gift be given to or for any elector are proved. The only matter in issue is whether Mr. Lavulavu gave the money intending to influence the vote or for refreshments in accordance with Tongan custom.

Custom and elections in the Pacific

- [39] I have had regard to case law in other Pacific Island Countries which provide guidance as to the considerations that arise when there is tension at the interface between custom and modern electoral processes. I have reminded myself that I must approach such cases with a degree of caution. Electoral statutes vary between countries.

Customs vary between countries and even within countries. Furthermore, custom is given less recognition in the written laws of Tonga than elsewhere in the Pacific.

[40] *Posala v Su'a* [2006] WSSC 29 involved a challenge to an election result alleging bribery and treating. In relation to the observance of customary practices the Supreme Court of Samoa noted at [14]:

Samoan culture is steeped in ritual with gift giving or exchange, its return and the obligations created, central to that culture. Matai is a proud title of status and respect. But gifts made during and in the run-up to an election in the guise of culture and tradition and the payment of moneys during the same period, are capable of corrupting the election process and poisoning both culture and the nation.

[41] In Vanuatu the Supreme Court in *Salemalo v Tari* [1998] VUSC 46 recognised the risks of both ignoring custom and in upholding it for all actions in an electoral context. Lunabek ACJ said:

....A genuine intention to perform a custom ceremony is not an intention to induce electors to vote or procure the election of a candidate and is not contrary to election laws. There is no law in Vanuatu which requires custom to be suspended at election time. A custom either exists or it does not. If it exists then it ought to

be respected at all times. Any custom that can be ignored at will is meaningless

.....

It is clear from the lessons of history that the price to be paid for failure to cherish and uphold the customs and traditions of Vanuatu, is a heavy one: the loss forever of a national identity and way of life.

The Representation of the People's Act [CAP 146] does not present an obstacle to the showing of due respect for custom. The two are not inconsistent. A candidate in an election cannot be found guilty of a corrupt practice if his only intention was to perform custom ceremonies. No inference of a corrupt intention ought to be drawn solely because a candidate received or offers custom mat in a custom ceremony.

[42] In the Solomon Islands in *Ha'apio v Keniasina* [2011] SBHC 177 the High Court said:

What is said in general terms by the Respondent is the cash and other items were handed out in accordance with custom and/or to close family members or supporters. The implication seems to be if "gifts" are handed out for reasons of custom or to family members or supporters they cannot in any circumstances be said to be corruptly given. I do not accept that. The, admittedly

obiter, comments of Ward CJ in *Haomae v. Bartlett* [1988-1989] SILR 35, seem to have been forgotten.

"In an election, any candidate will be subject to customary pressures to make gifts which he will feel he is obliged to observe. However, the giving of money is always likely to be misconstrued. In this case the sum was not large but, in the context of an old village man who had little other access to cash, its effect could be substantial. No hard and fast rule can be read into the provisions of section 70 but any candidate would be wise to try and avoid any gifts of money during an election campaign and, in all cases where the circumstances of the giving themselves do not do so, he should make it clear that the gift is made in custom and ensure it is appropriate in scale to such gifts."

[43] And finally in the Cook Islands in *Electors of the Constituency of Matavera v Cowan* [1983] CKHC 5 Speight CJ said:

The imminence of political election does not require that, that man or any other candidate should modify his previous way of life by becoming a hermit. For example a man who is a political candidate may have been a prominent member of a sporting organisation. He may from year to year have made a generous donation such as the presentation of a competition trophy and it would not be expected of him that he was debarred from repeating such generosity because it is election year. At the same time of course, it would be expected that he should not

make extra capital of that occasion because he was hoping to encourage voters to take a friendly view of him. Similarly, a man may be a donator to his church and no improper conclusions could be made if he continued at the same level as previously; a vigorous social worker who goes and helps people for no reward should not be deterred from his ordinary behaviour by the imminence of the ballot box.

On the other hand any suggestion that extra exertion has been expended which would not otherwise have been present but for the need to court the favour of the voters if it is raised comes under close scrutiny in Electoral courts. So too, what might ordinarily be regarded as generosity and kindness typical of the nature of the individual becomes suspect if it is coupled with exhortations to vote for the particular person. Consequently, the gifts given or kindness offered may at such a time be scrutinised. Typical questions which will be asked are: "Is this typical of the man's way of life?" "Has he done it before?" or is this a sudden advent of generosity? Or again "Has he attempted to convert his usual kindness into a special occasion by drawing the attention of those to whom benefit is offered to the fact that he needs their vote?" It is a question of looking at all the circumstances with an understanding eye.

Was the gift made to influence the vote?

[44] Martin CJ. said in *Fasi* at page 106:

When a gift has been made by a candidate, the court has to determine why he made it – what his intention was. If it was made with the intention of persuading people to vote for him, it was a bribe. If it was made with some other intention, it was not a bribe.

[45] As the money was given to Mrs. Melekiola and Mrs. Lau'i within three months of the election it is presumed that Mr. Lavulavu intended to influence the vote, unless he can prove otherwise.

[46] Mr. Lavulavu says that Tongan custom requires a gift of refreshments to be offered on certain occasions which include when visiting a friend one has not seen for a long time or visiting a weaving house. He likened the offer of refreshments (or money in lieu) to the ma'u kava expected of men when taking part in a faikava. He said "I interpret it as my ma'u kava" and:

The spirit in which I made this offering was meant for just small refreshment liken to the ma'u kava for the men. For the women it is called refreshment. But they both refer to the same thing.

[47] He went on to say that:

There are some things that you take with you to the kava drinking or greeting a friend or family or a gathering and you do not just walk in without taking with you one of these things.

[48] Mr. Lavulavu also claimed that during the election Dr. Latu and 'Aisea Silivenusi had offered refreshments in the form of food, drinks and money on a number of occasions and he gave various examples where he understood this had occurred but he had not personally observed any of them.

[50] The existence of such a custom is not accepted by Dr. Latu. In his evidence Dr. Latu recognised the 'age-old social practise of ma'u kava' but stressed that the practice involved the presentation of kava, usually in the form of dried kava sticks or pieces or kava powder, at kava drinking 'gatherings' such as funerals, weddings and church meetings. He said that the presentation of ma'u kava was part of a gift giving and gift receiving practise where "people are expected as a group to collectively help each other by giving and receiving". He did not accept that the giving of a gift of money could be construed as Tongan custom and said that the gifting of money during election time would be understood to be an attempt to entice or influence the vote. This was because the gifting of money

could only mean that a favour was expected in return. There was support for that view in the evidence of Mrs. Melekiola that she felt burdened by Mr. Lavulavu's gift and in the evidence of Livingi Katoa, who refused to collect his prize at the prize giving because he thought it was wrong and had he done so he would have owed Mr. Lavulavu a favour.

[51] In cross examination Dr. Latu denied that during his election campaign he had visited weaving halls and left refreshments but did acknowledge that he had held a campaign meeting on 24 November 2014 at the Leimatu'a Town Hall where there had been speeches and free food and kava drinking. He said that the food had been provided because the attendees were there for a long time and that the cost of the gifts of food and kava had been declared to the Supervisor of Elections.

[52] Relevant to the existence of custom, there was also the evidence of Mrs Melekiola, to which I have already referred, and from Uinifou Fili and 'Alilia Talakai, who are weavers and had been present when on 26 November 2014 Mr. Lavulavu gifted TOP\$100 to the Sei 'o Lepuha weavers. Uinifou Fili and 'Alilia Talakai both said that they believed

that the gift was intended to influence their vote and not made by custom.

[53] Mr. Lavulavu called as witnesses Olivia 'Afu, Selai 'Afu, Tomitila Paea and Maumi Lau'i who are also weavers and gave evidence that candidates, including Dr. Latu, had visited their weaving houses during the election and had left refreshments of food and drink. The four witnesses were of the view that the giving of refreshments was the Tongan way and not an attempt to influence their votes.

[54] Dr. Latu's denial that he had offered refreshments at the weaving houses gained some support from the evidence of 'Alilia Talakai who is in the same weaving group as Olivia 'Afu and recalled Dr. Latu visiting the weaving house but said that he did not come with food and refreshments. I accept the evidence of Dr. Latu and 'Alilia Talakai. I found the evidence of the weavers unconvincing. I was concerned that they were prepared to unnecessarily accuse Dr. Latu of jealousy, hatred and malice. This suggested personal animosity. Their briefs of evidence contained an unacceptable number of errors and Olivia 'Afu, Selia 'Afu and Tomitila Paea all blamed those errors on the person who had prepared their briefs. Of particular note in this

regard was the brief of evidence of Olivia 'Afu. The most relevant paragraphs relating to Tongan custom (paragraphs 12, 13, 14 and 15) were shown to be substantially untrue.

[55] My assessment is that the evidence of the weavers sheds little light on the existence of a relevant Tongan custom.

[56] There was also evidence from Mr. Mapa Hafoka. He is 83 years old and a talking chief of Ha'alaufuli. He was called as a witness for Mr. Lavulavu on matters of fact but also expressed views on Tongan custom. He said that he had a large knowledge of Tongan values and culture but nothing was presented to establish his expertise or an evidential foundation for the views he expressed.

[57] Mr. Hafoka stated in his evidence in chief that presenting ma'u kava was the same as presenting refreshments (or fakamokomoko) when visiting a weaving house and that no one should go empty handed to a weaving house but should take a 'presentation' and that nowadays money was the best thing for a presentation. However, when answering questions from both Mr. Tu'utafaiva and Mr. Edwards he said that ma'u kava and refreshments were offered when attending a 'ceremony' and that the purpose of the offering is to "give you an opportunity to give a

speech or allow yourself to participate in the discussion” as well as providing assistance and promoting respect and good relations. When asked whether a candidate in an election should visit with ma’u kava Mr. Hafoka agreed with Mr. Edwards that there was no custom or “way of life” about that. He said that it is a matter where each person is free to do as they wanted. Mr. Hafoka said it would be wrong for a candidate to give money if an election was to be held the next day and that was influencing the vote.

[58] If the Court is to recognise custom it must be accurately and definitely established and the onus to do so is on the party who asserts its existence. In this case that is Mr. Lavulavu. Custom might be proved in a number of ways. It might be proved by calling evidence from an independent and impartial expert or from persons who could be expected to know that the custom is generally observed or was observed on particular instances in circumstances directly relevant to the facts of the case or by reference to authoritative texts or judicial decisions. In this case there was an absence of such evidence.

[59] The Supreme Court of Samoa noted in *Ah Him v Amosa* [2001] WSSC 16:

The Court will be particularly astute in scrutinizing evidence of custom to see that custom is not used as a veil to obscure what is in actual fact an intention to induce or influence an elector to vote for a candidate at an election time.

[60] An Election Court should be especially mindful of this when the custom advocated for is expressed in such wide terms that it could easily be abused. That is the case here. How mischievous and damaging to the electoral system of Tonga would it be if the wholesale distribution of cash payments by candidates to voters could be defensible as gifts to old friends? Bribery would very soon be justified upon the ground that it was the custom to "take a coin for a vote" (*Great Yarmouth Borough Case* (1906) 5 O'M & H 176, 193 per Channell J. referred to in *Halsbury's* (supra) at paragraph 782 fn 17).

[61] Tongan custom does recognise rituals involving gift giving and exchange. There does not seem to be any doubt that a ma'u kava is usually offered when participating in a kava drinking ceremony but, as Mr. Edwards submitted, it does not follow that the payment of cash can be equated with a ma'u kava. I accept also that there would be an expectation that one will give a gift or make an offering

when attending a wedding or funeral. However, the evidence presented goes nowhere near satisfying me that Tongan custom requires the offering of refreshments (or money) when one visits a friend one has not seen for some time.

[62] It was not proved either that there is an obligation arising from custom to make an offering of refreshments when visiting a weaving house. It may be the case that some candidates do offer refreshments when visiting a weaving house. It may also be the case that an offer of modest refreshments to be consumed immediately would not, depending on all the circumstances, be regarded as a bribe (*Halsbury's* (supra) at paragraph 769). I express no particular view on that. Certainly one can expect that a candidate for election who wishes to address a weaving house will be more favourably received if he offers some food or drink to the weavers. As Mr. Hafoka said, the offering of refreshments provides you with an opportunity to make a speech and also that:

...when you visit a weaving group, they do not care that you visited but if you bring with you lemonade then the weaving

group of the women would be very pleased and very happy to see you.

[63] Whether such an offering is made is up to the candidate. In visiting a weaving house he is not attending a custom ceremony and providing an offering is not something that he is required to do. There is much force in the view that a custom that is optional or may be ignored is meaningless (*Salemalo* (supra)).

[64] Mr. Lavulavu has failed to establish the existence of a relevant Tongan custom that required the gifting of refreshments (or cash in lieu) to Mrs. Melekiola and Mrs. Lau'i.

Factors other than custom

[65] In support of his submission that Mr. Lavulavu had made the gift for refreshments, Mr. Tu'utafaiva referred me to the evidence of Mr. Lavulavu that he had long finished his campaign at the time the gift was made because he knew he would win the election. He also relied upon Mr. Lavulavu's evidence that he knew the law and would not have been fool enough to break the law. Finally, he

submitted that it was relevant that Mr. Lavulavu admitted to having made payments for refreshments on other occasions.

[66] Mr. Lavulavu was unclear as to when he finished his campaign. At one point he said that he was satisfied that he was going to win the election before any roads were paved. That would suggest his campaign ended during September 2014 with the election still two months away. His evidence defies common sense and is contrived. The circumstances were that Mr. Lavulavu was seeking re-election having failed to be elected to the Legislative Assembly in 2010. The election was of great importance to him. He said that he had been planning his campaign for three years and had visited over 700 homes, as well as all the churches, kava drinking and kavatonga clubs, schools and weaving houses. He had placed advertisements on the radio, he had raised posters and banners and advertised on a bus. I do not accept, in those circumstances, that Mr. Lavulavu would have risked all that and stopped campaigning well before election day and I do not believe that he did so.

- [67] The argument that Mr. Lavulavu would not be so foolish as to break the law and that therefore it should be assumed he did not do so is a hackneyed one. It invites the obvious response that, if correct, there would be no work for the Courts or the prisons.
- [68] That Mr. Lavalavu made payments for refreshments on other occasions does not of itself suggest a relevant custom, or of his innocent intent, in the absence of some evidence of the circumstances under which those payments were made. There was no evidence of Mr. Lavulavu having made an offering of refreshments (or cash in lieu) when visiting a friend he had not seen for a long time. To the contrary, there was evidence that Mr. Lavulavu had visited over 700 houses during his campaign and he offered them no refreshments or cash.
- [69] There are factors that lead to a clear inference that Mr. Lavulavu made the gift intending to influence Mrs. Melekiola and Mrs. Lau'i in their votes. It is significant that the gift was made on the eve of the election. The closer that a gift is made to an election the stronger must be the inference that it is intended to influence the vote of an elector (*Kingston-upon-Hull, Central Division, Case (1911) 6 O'M &*

H 372 referred to in *Halsbury's* (supra) at paragraph 774 fn5).

[70] The amount of the gift is also a relevant consideration. Whilst TOP\$50 is not a large sum of money, Mrs. Melekiola said that she felt burdened by the gift. In *Ha'apio v Keniasina* (supra) the High Court of the Solomon Islands (at paragraph 30) thought it not at all fanciful that a cash gift of \$50 might make a voter feel compelled to vote for a person who gives him the cash and I think that is also the case here. I heard evidence of hardship in Vava'u and that TOP\$50 was one day's wages for an operator of a heavy machine working on the road works. I also heard the evidence of Olivia 'Afu that eight weavers of the Sei 'o Lepuha Weavers Group, to whom Mr. Lavulavu gifted \$TOP100, had spent just TOP\$20 of that sum on their refreshments and divided the balance of the cash between them. It appears to me that TOP\$50 was more than Mr. Lavulavu could ever have considered was reasonably required for refreshments.

[71] Another relevant factor is that Mr. Lavulavu's evidence conflicts with Mrs. Melekiola's evidence in important respects. I found Mrs. Melekiola to be devout woman and

an honest witness. She was clearly mistaken, but I believe honestly so, when she said that Mr. Lavulavu was at the house for 20 minutes but in all other respects I found her evidence convincing. I do not accept Mr. Lavulavu's evidence that he grew up next door to Mrs. Melekiola and Mrs. Lau'i or that Mrs. Melekiola was a member of the Association or that she said she would attend the prize giving and did in fact attend. Mr. Lavulavu failed to produce the photograph that he said had been taken with her at an Association meeting. It was very clear to me that Mrs. Melekiola had no interest in the Association. I do not believe she attended the prize giving.

[72] My assessment of Mr. Lavulavu's evidence is that he was attempting to create a false impression of a long bond with Mrs. Melekiola and Mrs. Lau'i to provide an innocent explanation for his visit to their home.

[73] Finally, I note that the gift was accompanied by an invitation to the prize giving. For reasons I will give later in this ruling, I consider the prize giving was used by Mr. Lavulavu as part of his election campaign. That the invitation was made makes it even more likely that the gift was intended to influence Mrs. Melekiola's and Mrs. Lau'i's

votes. I hasten to add that I would have found this allegation of bribery proved even if there had been no invitation to the prize giving accompanying the gift.

My finding

[74] It has been established that on 26 November 2014 Mr. Lavulavu gave Mrs. Melekiola and Mrs. Lau'i a gift of TOP\$50. They were registered electors. Mr. Lavulavu has failed to discharge his burden to prove that the gift was made for some reason other than to influence their votes. I therefore find that the allegation that the gift was a bribe under section 21(1)(a) is proved.

[75] As I have found that the gift was a bribe there will be no need for me to consider Dr. Latu's alternative argument that it was undisclosed spending on Mr. Lavulavu's election expenses.

Second allegation of bribery - TOP\$100 to Uinifou Fili and Sei 'o Lepuha Weavers Group

The facts

- [76] On Wednesday, 26 November 2014 the Sei 'o Lepuha weaving group was at the Roman Catholic Church Hall of Leimatu'a. Between 3pm and 4pm Mr. Lavulavu arrived uninvited. He asked for a member of the group by the name of Naomi Kavamo'unga and then threw T\$100 to Uinifou Fili, who was closest to the door, and said "This is for refreshments". Mrs Fili was a registered elector in the Vava'u No. 16 District. She said in her evidence that Mr. Lavulavu then invited the members of the group to attend the prize giving. She said that the weaving group did not belong to the Association. She had attended just one meeting of the Association and did not consider herself a member. She did not attend the prize giving.
- [77] 'Alilia Talakai was also a registered elector in the Vava'u No. 16 Electoral District and a member of the weaving group. She gave evidence that the money gifted by Mr. Lavulavu had not all been used for refreshments but that Olivia 'Afu had changed the money at the shop and purchased some refreshments and each weaver was given TOP\$10 cash. She said that there were nine people in the weaving house so it follows that the refreshments cost just TOP\$10.

Another witness, Olivia 'Afu, agreed that each weaver had received TOP\$10 cash but said that there were only eight weavers present. Olivia 'Afu said that the remaining money, which would have been TOP\$20, was used for refreshments.

- [78] Mr. Lavulavu admits that Uinifou Fili and 'Alilia Talakai are registered voters. He accepts that he visited the weaving house and gifted TOP\$100. He said that he was not sure if this occurred on 25 or 26 November 2014 but I find that it occurred on 26 November 2014 and that Mr. Lavulavu had gone from the home of Mrs. Melekiola and Mrs. Lau'i to the weaving house. The requirements in section 21(1)(a) that money or other valuable gift be given to or for any elector are proved. Again, the only matter in issue is whether Mr. Lavulavu gave the money according to custom or intending to influence the vote. The burden of proof is upon Mr. Lavulavu.

Was the gift made to influence the vote?

- [79] Mr. Lavulavu has failed to satisfy the burden that is upon him. For reasons I have set out earlier in this ruling he has

failed to prove a relevant Tongan custom which required the making of the gift upon visiting the weaving house. That is his only explanation for having made the gift. However, other factors weigh with me also and lead me to the clear view that he made the gift intending to influence the votes of the weavers. There is the fact that the election was imminent, my rejection of Mr. Lavulavu's explanation that he had long since finished his campaign, the fact that the amount of the gift was substantially more than what was reasonably and actually required for refreshments and the fact that the gift was accompanied by an invitation to the prize giving.

My finding

[80] It has been established that on 26 November 2014 Mr. Lavulavu gave the Sei 'o Lepuha Weavers a gift of TOP\$100. Of the weavers present it was proved that Uinifou Fili and 'Alilia Talakai were registered electors. Mr. Lavulavu has failed to discharge his burden to prove that the gift was made for some reason other than to influence their votes. I therefore find that the allegation that the gift was a bribe under section 21(1)(a) is proved.

[81] As I have found that the gift was a bribe there will be no need for me to consider Dr. Latu's alternative argument that it was undisclosed spending on Mr. Lavulavu's election expenses.

Third allegation of bribery - TOP \$4,000 to Leimatu'a Growers and Women Development Association

The facts

[82] The Association made a decision to hold a social gathering and prize giving and to award prizes to those people who had planted new crops of pandanas and mulberry trees in sufficient numbers on their tax allotments. The evidence of Mr. Lavulavu and other witnesses was that the Association had no money for prizes. Sione Lisala said he asked 'Akosita Lavulavu to find money for the prizes. There are also Committee minutes produced by Mr. Lavulavu that record that the same request was made of Mrs. Lavulavu by the Womens' Development Committee on around 9 October 2014. Mrs. Lavulavu gave evidence that she had been asked by the Chairman to find money for the prizes and

that she agreed. She said she had obtained money from an aunt in Australia. This evidence was not challenged and I accept it.

[83] On the evening of 26 November 2014 the Association held the prize giving at the Sila Ki Vai Hall at Leimatu'a. At least 120 people attended although Livingi Katoa said that there were more than 200 people present. There was free food and free kava drinking which for some attendees went on all night. All the meat for the evening was donated by Mr. Lavulavu's nephew, Li'ekina Lavulavu, and some food was supplied by others. The food was prepared, plated and taken to the hall from Li'ekina Lavulavu's home which is also where Mr. Lavulavu was living during his election campaign. Mr. Lavulavu's uncle, Reverend Veikoso, awarded the prizes and led the prayers and hymns. There was a presentation in which Mrs. Lavulavu took part and 80 cash prizes of TOP\$50 were awarded. The total value of the cash prizes was TOP\$4,000. The entire TOP\$4,000 had been given by Mrs. Lavulavu.

[84] Dr. Latu argues that the TOP\$4,000 was an indirect gift to electors made on behalf of Mr. Lavulavu to influence the electors' votes and therefore a bribe. Mr. Lavulavu denies

that his wife gave the money on his behalf or to influence votes or that the payment had anything whatsoever to do with his election campaign. I regard the issues arising to be:

[84.1] Did Mrs Lavulavu give the TOP\$4,000 for the purposes of section 21(1)(a)?

[84.2] If so, did she give the money 'to or for any elector'?

[84.3] Was the TOP\$4,000 given 'on behalf' of Mr. Lavulavu?

[84.4] If so, was it given in order to induce any elector to vote or refrain from voting?

Did 'Akosita Lavulavu give the TOP\$4,000?

[85] Section 21(1)(a) requires that a candidate or any other person on their behalf "gives any money or valuable gift". Under section 21(2) the giving of money or other valuable gift includes "giving...agreeing to give...offering, promising or promising to procure or try to procure, any money or valuable gift". Mrs. Lavulavu gave the money in the sense

that she offered it, promised to procure and tried to procure it (*Scott v Martin* (supra)). She also gave the money in an ordinary sense. The word 'give' simply means to voluntarily hand over or part with possession of something to another (Collins Concise English Dictionary, Seventh Edition 2008). Mrs. Lavulavu certainly voluntarily handed over possession of the TOP\$4,000. It does not matter that the money had come from her aunt. I am satisfied that for the purposes of section 21(1)(a) Mrs. Lavulavu gave the \$TOP4,000.

Was the money given to or for an elector?

- [86] The money was given to be used by the Association for cash prizes and that is what it was used for. The prize winners were all people who had planted new crops on their tax allotments in the district. It can be safely assumed that all, or at least a good number, of the prize winners were registered electors. No argument was addressed to me otherwise. In any event, there was acceptable evidence from Livingi Katoa and Lolotonga Sekeni, who were awarded prizes, that they were registered electors in the Vava'u No. 16 Electoral District. It was therefore proved

that the money was given 'indirectly' (that is by way of the Association) 'for an elector' for the purposes of section 21(1)(a).

Was the donation made on behalf of Mr Lavulavu?

[87] The starting point must be that Mr. Lavulavu will be responsible for the conduct of his agent. In an election context the case law establishes that a person may become a candidate's agent by either actual appointment or employment or by recognition and acceptance of their actions by the candidate. In determining whether agency is established all the circumstances should be taken into account (*Bay of Islands Election Petition* [1915] 34 NZLR 578, *Petaia v Pa'u* [2007] WSSC 15 January 2007 referred to in *Faitua v Vaelupe* [2011] WSSC 50). Personal intimacy is evidence of agency. In the case of a candidate's wife, where she concerns herself in her husband's election she is *ipso facto* regarded as his agent and is taken to have acted on his behalf (*Halsbury's* (supra) at paragraph 703, *Faitua v Vaelupe* [2011] WSSC 50 and *Hastings Election* (1869) 1 O'M & H 217).

[88] The following facts were proved to my satisfaction. First, that Mr. Lavulavu used the Association as a vehicle for his election campaign. Secondly, that Mrs. Lavulavu actively participated in her husband's election campaign. Thirdly, that Mrs. Lavulavu made the donation for the purposes of Mr. Lavulavu's election campaign and, fourthly, that the donation was made with Mr. Lavulavu's knowledge and consent. It must follow that Mrs. Lavulavu made the donation on behalf of Mr. Lavulavu. I will now set out the evidence that has a bearing on these matters.

Mr Lavulavu's use of the Association for his campaign

[89] The decision to form the Association was made in early September 2014 at a kava drinking session at the Leimatu'a Wesleyan Hall. Mr. Lavulavu attended that meeting. Within a period of a few days there were two further meetings at which a Committee was appointed and the objectives of the Association were agreed upon. Decisions were made to extend the Association beyond Leimatu'a and to include women weavers. From the beginning Mr. Lavulavu took a prominent role in the Association. Sione Lisala said that it was left to Lolotonga

Sekeni and 'Etuete Lavulavu to take care of overseas marketing and to establish the laws for the Association and registration to become a legal body. However, Lolotonga Sekeni left the Association after the second meeting feeling disenchanted with its direction and, he said, because Mr. Lavulavu was using the Association for his political campaign.

[90] It was also decided in these first meetings that the Association would improve the roads in the district. The state of the roads in Vava'u had been a matter of public concern for many years and there was little Government money to maintain or improve them. There was evidence that a petition had been presented to Parliament in 2008 seeking money to buy heavy machines for road works from New Zealand but it was not until 2013 that machines were provided by China Aid. Lolotonga Sekeni said that Mr. Lavulavu promoted the idea of improving the roads and said that they could start work while looking for markets and that they could use rocks from his quarry to pave the roads. Sione Lisala's evidence was that Mr. Lavulavu was asked to find a way to fill the roads and that he said he would do what he could to fulfil the request. There was

evidence from Mr. Lavulavu and Mapa Hafoka that well before this, in February 2014, Mr. Lavulavu had agreed to a request by Mapa Hafoka and Paea Uasike, who were both District Officers, to obtain financial assistance to resurface the local roads but no work had been done. Mr. Lavulavu said that he and Felengili Taelangi, who was one of the Association's secretaries, were responsible for looking after the maintenance and pavement of the plantation roads, the cutting down of trees and obtaining funds to pave the roads. Mr Taelangi did not say anything about that in his evidence. It was Mr. Lavulavu who assumed the sole responsibility for the road works.

[91] From at least 23 September 2014 until 26 November 2014 Mr. Lavulavu was engaged on the road works in all of the villages of Feletoa, Ta'anea, Holeva, Koloa, Mataika, Houma, Leimatu'a, Tu'anekevile. During that period more than forty seven roads were formed and paved. This was over eight kilometres of roads. To put this in the context of the election, the road works were undertaken during the entire period between the issue of the writs of election on 30 September 2014 until the evening before the election. There was a clear sense of urgency about the work and a

great deal of work was completed within a relatively short period of time. Dr. Latu described standing outside his Church at 7pm on the evening before the election watching the road works in Leimatu'a. Livingi Katoa and Kulisitofa Sekeni gave evidence to similar effect.

[94] The evidence established that Mr. Lavulavu personally negotiated the use of all the heavy machines (bulldozer, loader, roller, plough and trucks) from the Ministry of Infrastructure to do the road works, paid for or organised the payment of the cost of the hire of the bulldozer to dig out the coral rocks from the quarry (the use of the other machines was provided without charge by the Ministry of Infrastructure), donated the coral rocks to pave the roads, paid for or organised the payment of the cost of fuel for the heavy machines and personally organised and oversaw the road works. I will deal with the evidence that supports these findings when considering the allegation of overspending later in this ruling.

[95] Through the Association Mr. Lavulavu was able to publicise his good works and establish himself as a generous and able man who was concerned for the people and was a good leader. There was unchallenged evidence of radio and

television programmes about the road works. A newspaper article was produced about a lorry that went into the sea on its way from the quarry and reporting comments of Mr. Lavulavu. Although Mr. Lavulavu denied speaking to that particular newspaper he acknowledged that he had spoken to another about the same incident. Mr. Lavulavu was also able to make use of the community support generated for his road works to obtain a supply of free labour. Mr. Lavulavu said that all the people of the villages helped out with the road works by cutting down the bushes and clearing the trees, planting signs to mark boundaries of each tax allotment, clearing rocks and preparing food for all the workers.

[96] Lolotonga Sekeni, Foaki Fanua, Mateaki Guttenbeil and Loni Uatahausi all gave evidence that Mr. Lavulavu told them that the road works were part of his election campaign. Mr. Lavulavu said they were liars. I believe them to be honest witnesses. However, I have exercised caution when relying on the evidence of Lolotonga Sekeni and Foaki Fanua. Lolotonga Sekeni appeared to harbour some resentment over the matters that led him to leave the Association. Foaki Fanua has reason to feel unkindly towards Mr.

Lavulavu having received, in very recent times, a letter from the Ministry of Infrastructure signed by Mr. Lavulavu terminating his daily paid contract as a driver/operator. I have no reservations at all about relying on the evidence of Mateaki Guttenbeil and Loni Uatahausi. Mateaki Guttenbeil works at Gateway Petroleum Services. I was much impressed by her as a witness. She was forthright and I believe she was entirely honest. Her evidence was that on 19 November 2014 Mr. Lavulavu had paid a bill for petrol and diesel used by the heavy machines and he told her that the fuel was for road works during his election campaign. She maintained this in cross examination. Loni Uatahausi is a road foreman with the Ministry of Infrastructure with over 32 years experience. He gave evidence that Mr. Lavulavu had asked him to make available the Government's heavy machines to carry out the road works for his election campaign. Mr. Uatahausi believed this was an inappropriate use of the machines but the decision to allow Mr. Lavulavu to use them was made by his superiors. He was strongly cross examined but maintained "...I was the person whom 'Etuete had approached and asked to help

him with his campaigning work that he was doing". Nothing led me to doubt his evidence.

[97] Another way that Mr. Lavulavu promoted his campaign was through the Association's website. The evidence was that Mrs. Lavulavu was asked to create the website for the Association and she agreed. The minutes of the meeting of the Womens' Development Committee of 9 October 2014 record that the responsibility for the website was handed over to Mrs. Lavulavu and Muna Nasilai, who worked at UTRI and assisted the Association in a secretarial role, 'together with the school'. The words 'the school' can only be a reference to UTRI. The website was subsequently built by students at UTRI as part of a Youth in Business competition.

[98] Dr. Latu referred in detail to the website, which was <http://www.leimatuagrowerandwomen.com/index.html> and also to Mr. Lavulavu's facebook account <http://www.facebook.com/etuate.lavulavu?fref=ts>. He produced the web pages as exhibits (PPD 100-103). Dr. Latu referred to features of the website which promoted Mr. Lavulavu's election campaign.

[99] On PPD 100, is a photograph of a woman and some children getting off a bus. On the side of the bus are written the words 'Unuaki o Tonga Royal' which is referring to UTRI. Mr. Lavulavu's association with UTRI was well known. The contact telephone numbers of the Association (both land and cell phones) are Mr. Lavulavu's personal telephone numbers. The first quick-link is 'Home' and the second is 'Etuete Lavulavu'. There does not appear to be any photograph or name or contact details of any other officer of the Association on the website. On PPD 100 also there is a large heading "Vahenga 16" (District 16), which is the electoral district for which Mr. Lavulavu was seeking election. Under that heading are a list of villages in the district. At the bottom right of the page there is a picture of Mr. Lavulavu. This is one of his election campaign photographs and directly below the picture there is the name of the Association in Tongan. The impression is that the Association is the *alter ego* of Mr. Lavulavu or, at the very least, that he is in control of the organisation.

[100] On PPD 101 there is a list of community needs and projects which includes 'Road Maintenance & New Roads'. That must be a reference to the road works Mr. Lavulavu was

undertaking. There is a photograph on the page of Mr. Lavulavu with villagers of Leimatu'a during the road works. This is an almost identical photograph to one that Dr. Latu produced which was taken from Mr. Lavulavu's facebook account. There is also on this page a direct reference to the upcoming election with the statement:

Separate interview of folks from Holonga in connection with the way they are seeing the general election of 2014.

[101] The reference to the General Election is incongruous on a website for a Growers Association as is the call for unity amongst the "electorate to find a good leader" which appears on PPD 102. It contains the following sentence:

We must stand up and support our electorate to find a good leader full of love and good governance with fair and equal distribution of opportunities and to ensure that there is no discrimination or favouritism to anyone and to work together in peace.

[102] On PPD 102 also there are photographs of weavers and below that is a statement which in English reads "A group of weaving women from different areas in Vava'u 16 "Go Lavulavu". "Go Lavulavu" was Mr. Lavulavu's election campaign slogan.

[103] The website was manifestly political in nature. It had the semblance of being the Association's website but I accept Dr. Latu's submission that in large measure it was a promotion of Mr. Lavulavu and his election campaign. In February 2015, after both the election and the filing of the petition, the website was removed. This is despite some witnesses saying that the Association still continues its work. There was no explanation provided by any witness as to why the website was removed or by whom.

[104] As far as Mr. Lavulavu's facebook account is concerned, Dr. Latu produced many photographs that were downloaded from the account. The photographs often feature Mr. Lavulavu upon the roads under construction with the heavy machines of the Ministry of Infrastructure or with villagers who were assisting him with the road works.

[105] Mr. Lavulavu denies any knowledge of the website's content. I do not accept this. His evidence was that his knowledge of computers was limited to the use of email but in cross examination he accepted that he did know how to get to websites on the computer. I note his use of a personal facebook account which would suggest at least a degree of computer literacy. He also said that the website

was created to "find markets overseas for the produce of the growers and also the weavers to export overseas especially to Leimatu'a people who are living overseas...". He was the person in charge of marketing the Association and could be expected to be concerned with the content of the website created for marketing purposes. Furthermore, the website was created under his wife's direction. It was clear that Mr. and Mrs. Lavulavu work very closely together. In her evidence she emphasised her commitment to his work. The evidence of Muna Nasilai was that Mrs. Lavulavu told her to supply materials for the website including photographs. As I have noted, the photographs included Mr. Lavulavu's campaign photograph and a photograph of the road works which is very similar to one from his facebook account. It is simply not believable that these would have been supplied without Mr. Lavulavu's knowledge or consent.

Mrs Lavulavu's participation in the campaign

[106] Mrs. Lavulavu actively supported and participated in Mr. Lavulavu's election campaign. She said in her evidence that because of Mr. Lavulavu's love for the people of Vava'u

she was committed to do whatever the people asked of her. She became involved in the Association, attended its meetings and oversaw the creation of the website. Mrs. Lavulavu was also involved in the road works. She said that both she and Mr. Lavulavu had asked Mr. Moehau for money to finance the road works (which for reasons I will come to I do not accept) and that she managed the money to pay for the fuel for the heavy machines and the wages of the heavy machine operators. Importantly, given her position as Dean, the resources of UTRI were put behind Mr. Lavulavu's road works project. Mrs. Lavulavu said that the road works were to count as a UTRI project and there were photographs on Mr. Lavulavu's facebook account of Mr. Lavulavu with UTRI vehicles at the villages of Mataika and Tu'anekevile. In addition, Muna Nasilai worked at UTRI but helped Mrs. Lavulavu organising payment for the fuel and machine operator's wages. Mr. Lavulavu's nephew, Li'ekina Lavulavu, also worked for UTRI but he made payments for fuel and wages and said he did other physical work such as checking that the heavy machines had fuel and driving the trucks from the quarry with coral rocks.

The donation as part of the campaign

[107] It is against the background of Mr. Lavulavu's use of the Association as a vehicle for his election campaign and Mrs. Lavulavu's participation in his campaign that the donation for the prizes must be considered. The prize giving was held on the eve of the General Election. The imminence of the election cannot have been lost on Mr. and Mrs. Lavulavu. It was made known at the prize giving that Mrs. Lavulavu had donated the prize money. Two witnesses, Livingi Katoa and Kulisitofa Sekeni, said there was an announcement made at the prize giving that the prize money was donated by 'Akosita Lavulavu "the wife of 'Etuete Lavulavu". Mrs. Lavulavu said that if there was an announcement she could not remember it but said that she thought she was thanked for finding the money. The Reverend Veikoso and Li'ekina Lavulavu were also involved in the programme that night. The prize giving would not have been possible but for the contributions of the Lavulavu family from which association Mr. Lavulavu could expect to derive admiration and gratitude. This might have been quite enough to induce some voters to vote for him at the election the next day (*Ha'apio v Keniasina* (supra) at [29]).

Mr. Lavulavu was not directly involved in the formal programme or in selecting the prize winners but he supported the event by his attendance and by extending invitations to attend to others including Mrs. Melekiola, Mrs. Lau'i and the Sei 'o Lepuha weavers. It is not without significance that the invitations were accompanied by gifts of money that were bribes. Mr. Lavulavu knew that his wife had donated the TOP\$4,000 and took no steps to distance himself from the payment. He was fully complicit in the payment and his wife must be taken to have made it on his behalf.

[109] At any other time Mr. Lavulavu could expect to receive praise for the road works, the work he did in the Association and the donation for the prizes. But this was no ordinary time and his were not common acts of generosity. It was an election time where what passes for charity is often really electioneering "following in the steps of charity, wearing the dress of charity and mimicking her gait" (*Wigan Case; Spencer & Presst v Powell* (1881) 4 O'M & H 1 at 14 referred to in *Scott v Martin* at 673).

Was the money given to influence the vote?

[110] It is for Mr Lavulavu to prove that the money was not given to influence the vote (Section 21(3) of the Act). I have already rejected Mr. Lavulavu's main argument that he had ceased to campaign well before election day. It was also argued that it is significant that there was no active campaigning at the prize giving or any other meetings of the Association. The argument appears to be that if Mr. Lavulavu said nothing to those present about voting for him then he must be taken to have innocent intent. I accept that there were no political speeches and that no exhortations to vote for Mr. Lavulavu were made at the prize giving but there was no need for there to have been any. Bribery must often be implied from the circumstance of the case and the Court must "strip the proceeding in each case of every colour, every dress and every shape to discover its real and true nature" (*Halsbury's* (supra) paragraph 780 fn 8 referring to *Belfast Borough Case* (1869) 1 O'M & H 281, 284). In this instance the act of giving TOP\$4,000 as a donation to be distributed amongst a significant number of potential voters on the eve of the General Election speaks for itself. The only inference that can be drawn is that it was an attempt to buy votes.

My finding

[111] It has been established that on 26 November 2014 Mrs Lavulavu indirectly gave, on behalf of Mr. Lavulavu, TOP\$4,000 to electors of the district at the prize giving. Mr. Lavulavu has failed to discharge his burden to prove that the money was given for some reason other than to influence the electors' votes. I therefore find that the allegation that the payment was a bribe under section 21(1)(a) is proved.

[112] As I have found that the gift was a bribe there will be no need for me to consider Dr. Latu's alternative argument that it was undisclosed spending on Mr. Lavulavu's election expenses.

Fourth allegation of bribery - Coral rocks to the electors.

[113] The quantity of coral rocks used to pave the 47 roads was substantial. Sione Tui said that around 850 truck loads of

coral rocks were taken from the quarry for the road works. I understand him to be referring to trucks with the capacity to carry 3.8 cubic metres of coral rocks. Mr. Uatahausi estimated that 284 truck loads were used but he was referring to trucks with the capacity to carry 11.4 cubic metres of coral rocks. These estimates result in a surprisingly similar quantity of around 3,230 cubic metres of coral rocks.

[114] In his final submissions Mr. Edwards did not actively advance the argument that the donation of the coral rocks was a bribe, but he did not withdraw it. He argued that the donation of the coral rocks had to be taken into account as an election expense that Mr. Lavulavu had failed to disclose in his return to the Supervisor of Elections.

[115] Section 21(1)(a) requires the giving of money or a valuable gift "to or for any elector, or to or for any other person on behalf of any elector". I consider that the words "any elector" mean some identifiable elector or electors but not voters generally. I note the contrary view in *Fasi v Pohiva* (supra) at page 82 where Martin CJ. said that for the purposes of section 21 "*It would suffice if there is an intention to influence voters generally*". I am not bound by

that decision and do not follow it. I note the, admittedly tentative, reservations about the decision expressed by the Court of Appeal in *Fasi v Pohiva* (No. 2) [1990] Tonga LR 156, 157.

[116] Although the coral rocks were undoubtedly donated it cannot be said that they were given to or for any identifiable elector or electors. The roads paved with the coral rocks benefit and are available for use by everyone in Vava'u. For that reason I find that the allegation that the donation of the coral rocks was a bribe is not proved.

[117] I will therefore need to consider Dr. Latu's alternative argument that the donation of the coral rocks was an undisclosed election expense.

The allegation of overspending

[118] I now turn to the allegation that Mr. Lavulavu spent more than the permissible TOP\$10,000 on his election campaign in breach of section 24(1).

[119] Section 24 provides:

- (1) No candidate may spend, on any election campaign, more than the sum of \$10,000.

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- (2) Without prejudice to the generality of subsection (1), the following payments are deemed to be spending on an election campaign - unless contrary to section 21 —
- (a) any donation made within 6 months of an election, either by a candidate or on his behalf;
 - (b) the cost of any entertaining (including food, drink or paid by or on behalf of a candidate within 6 months of an election;
 - (c) travelling or transportation expenses paid by or on behalf of a candidate, to enable people to travel to a polling station.
- (3) For the purposes of this section any sum expended by a candidate for his personal expenses, or those relating to his spouse, parents, grandparents, grandchildren, the brothers and sisters and half brothers and half sisters of his parents, spouse's parents, brothers and sisters and half brothers and half sisters or their children, or the brothers and sisters and half brothers and half sisters of his spouse or their children, or in relation to a church or for a charitable purpose; shall be disregarded.
- (4) Within 14 days of an election, every candidate shall deliver to the Supervisor a signed statement of his election expenses in Form 7 of the Schedule, itemized and complete in all respects.

(5) It is an offence for any candidate to spend on an election campaign more than the sum of \$10,000 or to fail to deliver the statement referred to in subsection (4) or to deliver a false statement, and any person found guilty shall be liable to a fine not exceeding \$10,000.

(6) If a person convicted under subsection (5) was elected at the election, and if the Court considers that the circumstances of the offence are sufficiently serious, the Court may declare the candidate's election to be void and if he has already taken his seat in the Legislative Assembly he shall be unseated by the Assembly.

[120] No submissions were directed to me as to what spending "on any election campaign" means. Having regard to the words and purpose of the section in the context of the Act as a whole, and subject to the sums that are to be expressly disregarded under section 24(3), I consider that those words mean all spending, either before or after an election, in respect of the conduct or management or promotion of a candidate's election campaign.

[121] Under section 24(2) any payment of a donation made by a candidate, or on his behalf, within six months of an election is deemed to have been spent on an election campaign (except in the case where it is found to have been a bribe

in breach of section 21). I have considered whether this applies only to donations of money. Upon reflection I am of the view that the use of the word 'payments' in section 24(2) is quite wide enough to include payments of money or in kind. I would doubt that donations of time and services are included but that circumstance does not arise here (*Re Wairarapa Election Petition* (supra) at page 111).

[122] I note also that by section 24(3) any sum expended by a candidate for a charitable purpose is to be disregarded. This is an important provision to which I shall return.

[123] Section 32(1) speaks of the Court being satisfied on the trial of an election petition that a candidate has "been guilty of an offence". This raises an issue as to the correct classification of the offence in section 24(1) and whether the offence is one where *mens rea* is required. In this case I have no doubt that Mr. Lavulavu knowingly and intentionally made the payments and so the issue is not one that need concern me but for future cases I note the discussion on the issue in *Re Wairarapa Election Petition* (supra) at page 114-119.

[124] Finally, I note that before the Court shall declare the election of a candidate void for breaching section 24(1) the

Court must be satisfied that "the circumstances of the offence are sufficiently serious".

Mr. Lavulavu's return

[125] In his return to the Supervisor of Elections Mr. Lavulavu declared that his spend on his election campaign was TOP\$6,360. Dr. Latu argues that the return should have included payments made in the course of the road works for fuel, wages, hire of the bulldozer and donated coral rocks. The specific amounts in issue are:

[125.1] TOP\$3,454.87 paid to Sitiveni Pongi for fuel.

[125.2] TOP\$2,255.20 paid to Gateway Petroleum Services for fuel.

[125.3] TOP\$6,250 paid to the operators of the heavy machines as wages/overtime.

[125.4] TOP\$7,590 paid to the Ministry of Infrastructure for the hire of a bulldozer.

[125.5] TOP\$68,160 for the coral rocks.

[126] There is no dispute that the amounts in subparagraphs 125.1, 125.2, 125.3 and 125.4 were expended on the road

works. Payment of them was proved with the production of receipts and the acknowledgment of payment by 'Akosita Lavulavu and Li'ekina Lavulavu. Those sums amount to TOP\$19,550.07. It is not in dispute either that coral rocks were donated and used to pave the roads. The value of the coral rocks is disputed.

[127] Mr. Lavulavu raises many defenses to the allegation that he overspent on his campaign. He argues that he did not spend these amounts because the fuel, wages and hire charges were paid for from TOP\$20,000 gifted by Saia Moehau and the coral rocks were donated by Sione Tui. He says that the payments were not made on his election campaign as the road works were carried out by the Vava'u Road Works Council, Inc. He argues also that the coral rocks had a value of just TOP\$1 per truck load. Finally, Mr. Lavulavu argues, in the alternative, that the payments were for a charitable purpose and are to be disregarded in calculating his election spend. The issues that arise are:

[127.1] Were the payments made from TOP\$20,000 donated by Saia Moehau, and, were the coral rocks donated by Sione Tui?

[127.2] Were the payments made on Mr. Lavulavu's election campaign or were, as he says, the road works carried out by the Vava'u Road Works Council, Inc?

[127.3] What was the value of the coral rocks?

[127.4] Were the payments made for a charitable purpose?

[127.5] If it is established that Mr. Lavulavu breached section 24(1), were the circumstances of the offence sufficiently serious such that the Court ought to declare his election to be void?

The donations of the money and the coral rocks

[128] Mr. Lavulavu's evidence was that he asked Mr. Moehau for money to pave the roads and that Mr. Moehau gave TOP\$20,000 through UTRI and from there it went to Muna Nasilai and Li'ekina Lavulavu to pay for the fuel, bulldozer hire and labour. Mrs. Lavulavu gave different evidence. She said that both she and Mr. Lavulavu had asked Mr. Moehau for the money and that it was decided that she would manage the money. I do not believe that Mr.

Moehau donated TOP\$20,000 or any other sum. Saia Moehau was not called to give evidence to confirm he had donated the money. That might not be of major significance if, for instance, evidence of the donation was given by credible witnesses or supported by some documentary evidence. In this case neither applies. There was no documentary evidence that Mr. Moehau had donated TOP\$20,000, or any other sum. Mrs. Lavulavu said that Mr. Moehau was given a receipt for the money but neither the receipt nor any copy of it was produced. She also gave the quite implausible evidence that she carried the money around with her in cash even though both she and UTRI had a bank account. Muna Nasilai said she was directed to "differentiate the money coming from Saia Moehau from the financial books and money of UTRI" which simply makes no sense when viewed against Mrs. Lavulavu's evidence that this was to be considered a UTRI project and she carried the money around in cash. Furthermore, if what Muna Nasilai says is true there should be some record of the money.

[129] Likewise, I do not believe that the coral rocks were donated by Sione Tui. He said that he owned and solely controlled

the Ta'anea quarry, from where the coral rocks were taken, until April 2015. No documentary evidence of his ownership was produced. That takes on some significance as the only document of title that was put before the Court was a registered lease of the quarry granted to Mr. Lavulavu and effective from April 2015. Mr. Lavulavu offered no explanation as to the circumstances under which he came to own the lease.

[130] Mr. Tui also said, as did Mr. Lavulavu, that he had initially offered to supply the coral rocks to Mr. Lavulavu at TOP\$1 pa'anga per truck load but that he later told Mr. Lavulavu that the gravels would be given free of charge. I do not accept that this is what happened. The evidence established, in my view, that Mr. Lavulavu was entitled to take the coral rocks pursuant to an arrangement that he had made with Mr. Tui's father. Mr. Tui's father was said to have owned the quarry until his death in 2006 and to have entered into an arrangement with Mr. Lavulavu that Mr. Lavulavu could take the coral rocks for free to pave roads. Mr. Tui said that "'Etuete was the one who started the quarry with my dad..." and that when he took over the quarry he had not tried to make any new arrangement with

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Mr. Lavulavu. He also gave evidence that he had offered to share a donation of money, food and Tongan koloa that he was given for supplying coral rocks on the Ha'alaufuli road construction project with Mr. Lavulavu. This only makes sense if Mr. Lavulavu had an interest in the quarry. In response to questions from the Court, Mr. Tui stated that Mr. Lavulavu did not need his permission to take the coral rocks and that he was managing the quarry for Mr. Lavulavu. The relevant exchange was:

Court In paragraph 8 of your brief you say that your father and Mr. Lavulavu had an agreement.

Witness Yes

Court Do I understand you correctly that the agreement was, that the rock in the quarry could be used for free to construct roads?

Witness Yes

Court So did Mr. Lavulavu need to ask you for the rock or was he simply entitled to use it as he chose?

Witness He was entitled to the rocks but he had asked me to manage the rocks and up to a time where he would need the rocks according to Mr. Lavulavu's agreement with my father

[131] I find that both the money to pay the costs of the road works and the coral rocks were provided by Mr. Lavulavu. I note also that the case that I understand Mr. Lavulavu to be advancing, which is that he did not spend the amounts in issue because the money and coral rocks were donated by a third party, is misconceived. It is not a requirement of section 24(1) that any payment comes from the candidate's own funds just that the candidate spends "on any election campaign."

Were the road works carried out by the Vava'u Road Works Council, Inc?

[132] Mr. Lavulavu's argument is contained in his evidence as follows:

The allegation that states that the pavement of the roads was part of the campaign of 'Etuete Lavulavu is not true. The Road Council and Growers Council of Vava'u was already established since 2008 and was later changed from the Road Council to 'Etuete Lavulavu and assisted by Netane Tonga in 2009 to 2015 and it is still operating well. At the moment there are no funds and it only operates when there is aid received and funds

from someone and also aid from the Government or any other individual enterprises..."

[133] Mr. Lavulavu is saying that he is the Chief Executive of the Council and Netane Tonga is a Board member and that in those capacities they had the Council undertake the road works. There are considerable difficulties with this evidence and I do not accept it.

[134] First, neither Mr. Lavulavu nor Mr Tonga had any authority to bind the Council or have it undertake road works for the reasons that follow.

[135] Upon its incorporation in 2008 the Rules of the Council provided for a Board of eight members. Mr. Lavulavu was an *ex officio* member by virtue of his holding office at that time as the Peoples No. 1 Representative for Vava'u. Mr. Lavulavu says that on or around 13 October 2009 variations were passed to the Rules of the Council as a result of which there was a new Board appointed and he became its Chief Executive with overall control of the Council. Netane Tonga was not on the Council prior to 2009. He gave evidence that he is now on the Board and is the Secretary as a result of the 2009 variations to the Rules. Mr. Lavulavu produced a document that he said was the 2009 variations to the

Rules of the Council. The document appears to have affixed to it the seal of the Registrar of Incorporated Societies and below that an unidentified signature and a date '08/03/10'. The variations plainly had not been passed in accordance with the Rules of the Council which required that any variations have the approval of a majority of the Council or 50% of the Board. In addition, Marcienne Fukofuka, who is the Principal Assistant Registrar for Incorporated Societies, gave evidence that the variations were never registered. She also produced the Registrar's file which showed that no documents had been filed by the Council since it was incorporated in November 2008. There was no evidence from any person that they had filed the variations with the Registrar. Netane Tonga said he did not file them. I do not know, and will not speculate, how what appears to be the Registrar's seal became affixed to the document but given the requirement in section 21(2) of the Incorporated Societies Act that the Registrar must be "satisfied that the alteration has been duly made" it is extremely unlikely that the document would have been accepted for registration. I find that the variations were never registered and cannot have taken effect (Section

21(3) of the Incorporated Societies Act). It follows that Mr. Lavulavu and Netane Tonga were never validly appointed and have no authority to represent the Council.

[136] The second reason I reject Mr. Lavulavu's evidence is that there was nothing put before the Court to give me the least cause to consider that the Vava'u Road Works Council, Inc took any part in the road works. Whilst it was repeatedly asserted that the Council had planned the road works as long ago as 2009 or 2010 the plans were not produced into evidence. Neither Mr. Lavulavu nor Mr. Tonga produced any minutes of meetings, resolutions, correspondence, or bank statements from which it might be inferred that the Council had been active at any time in recent years. This was despite both claiming that such documents exist. I note that Mr. Lavulavu produced three substantial reports which purport to have been prepared by or for the Council. In each case they were prepared after the issue of the petition. It was apparent that Mr. Lavulavu and Mr. Tonga had very little, if any, knowledge of the compliance requirements of the Incorporated Societies Act or even of such prosaic matters as who are the members. I was not satisfied that since its incorporation the Council has

undertaken any substantial road works and certainly not for some years. Netane Tonga did say that in 2009 the Council had paved Tefisi and started filling some potholes but that was some years ago and I heard of no other work that had been done.

[137] The Council certainly did not contribute any money for the road works nor was it suggested that the Council had any role in arranging payments for the fuel, wages and the bulldozer hire. The heavy machines themselves were provided free of charge by the Ministry of Infrastructure except for the bulldozer. The Council did not supply any labour either. Apart from the operators of the heavy machines, who were paid for their work, all the labour appears to have been provided by the villagers for free. All the planning and oversight of the work on a daily basis appears to have been undertaken by Mr. Lavulavu personally. This is well demonstrated by the numerous photographs that appeared on his facebook account. Mr. Hafoka, who said that he understood that Mr. Lavulavu was the Chairman of the Council and also claimed to be a member of the Council himself, said in cross examination of Mr. Lavulavu's contribution to the work as follows:

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Edwards You said you were part of the Vava'u Road Council

Witness Maybe the answer I gave you earlier is the answer
but what I remember is that the work continued.

Edwards But who managed these works?

Witness I believe that 'Etuate was responsible for everything
so that is my answer?

Edwards That is your recollection that 'Etuate performed all
the works and you were not a part of it?

Witness Yes

[138] There was evidence from Auto Tupou, who works for the Ministry of Infrastructure and has been closely associated with Mr. Lavulavu, that he had worked with the Council since 2009 and had assisted the Council with its mapping and engineering needs. Again no documents were produced to substantiate that. He also said that a letter had been received by the Ministry of Infrastructure from the Vava'u Road Works Council, Inc signed by Mr. Lavulavu and Mr. Tonga requesting that the Council be allowed to use the Ministry's heavy machines for the road works. I do not believe any such letter was ever sent by the Council or

received by the Ministry. The letter was not produced and Mr. Tupou was the only person to refer to it. Mr. Lavulavu and Mr. Tonga made no mention of the letter in their evidence, as they would undoubtedly have done had it existed.

[139] I see the position in very simple terms. Mr. Lavulavu was in total control of every aspect of road works. He cannot hide behind the Council or the Association and attribute what he did to them. His degree of control can be illustrated by the following. It was proved that Mr. Lavulavu provided the money to pay for the fuel, wages and hire charge and donated the coral rocks. There is no question that Mr. Lavulavu personally negotiated the use of the Ministry of Infrastructure's heavy machines. At least on that matter the witnesses for both sides agree. There was evidence from Mrs. Guttenbeil that Mr. Lavulavu negotiated credit terms for the supply of fuel. There was evidence also, which I accept, from Mrs. Guttenbeil and Mr. Uatahausi respectively, that Mr. Lavulavu personally made payments for fuel and the bulldozer hire. Receipts were issued by the Ministry of Infrastructure in Mr. Lavulavu's name and this corroborates Mr. Uatahausi's evidence that

he directed Mr. Lavulavu to the cashier to pay the hire charges before the bulldozer could be taken. Although Li'ekina Lavulavu said he made all the payments, when asked to identify the receipts that were produced into evidence he said could not really recall them. Furthermore, whilst on the one hand he said he was concerned to tell cashiers to issue receipts in the name of UTRI he could not provide an adequate explanation for why some receipts were made out to Mr. Lavulavu. He also said some receipts had been issued in the name of Takiama & Associates Limited but when asked who had issued those receipts he could not remember and Mr. Lavulavu's evidence was that he has had no association with Takiama & Associates Limited since 2011. I do not accept Li'ekina Lavulavu's evidence that he made all the payments.

[140] The contention from Mr. Lavulavu that the road works were performed by the Council is of most recent origin. There was evidence that at the time the road works were being undertaken Mr. Lavulavu claimed them as his own and as part of his election campaign.

[141] I find that the Vava'u Road Works Council, Inc had no part to play in the road works.

What was the value of the coral rocks?

[142] The result of this petition will not hinge on the value of the coral rocks but for completeness I will set out the evidence and what I make of it.

[143] Loni Uatahausi presented two valuation methods. The first method calculated the value of the coral rocks as the product of the number of truck loads of coral rocks (284) multiplied by the rate of TOP\$240. This rate is what Mr. Lavulavu charges the Ministry of Infrastructure for coral rocks from his quarry. On this basis the value of the coral rocks is TOP\$68,160. The second method applied the Ministry of Infrastructure's guidelines for the cost of paving roads, which was \$6,000 to \$7000 per kilometre. On this basis the value of the coral rocks was said to be between TOP\$48,000 and TOP\$56,000.

[144] Mr. Tu'utafaiva challenged Mr. Uatahausi's estimate of the quantity of the coral rocks. In one sense this was surprising as the evidence of Sione Tui would suggest that the estimate was broadly correct. Mr. Lavulavu did not dispute Mr. Uatahausi's evidence that coral rocks were

supplied from his quarry at that rate of TOP\$240 per truck load nor did he challenge the fact of the Ministry of Infrastructure's guidelines of roading costs. He did give evidence that he had agreed to pay TOP\$1 for the coral rocks from Sione Tui but I have found that there was no such agreement. There was also some evidence from Mr. Tui that he had charged the 'Otumohemohe company TOP\$5 per truck load of coral rocks but that was in 2011 and 2012 and was considered to be very cheap.

[145] Upon reflection Mr. Tu'utafavia may well be correct that Mr. Uatahausi has over estimated of the quantity of the coral rocks. This is because the assessment was based on a number of variables that are open to challenge and Mr. Uatahausi's first valuation method produces a value of the coral rocks which substantially exceeds the Ministry's guidelines and this is surprising.

[146] Recognising that Mr. Uatahausi's evidence that Mr. Lavulavu supplies coral rocks at the equivalent of TOP\$240 per truck load is not disputed, I put the value of the coral rocks at TOP\$48,000. That makes a very substantial allowance for the possibility that the quantity of coral rocks used was less than both Mr. Uatahausi and Mr. Tui believe.

It is also the lowest value arrived at by applying the Ministry's guidelines.

Were the payments made for a charitable purpose

[147] Mr. Lavulavu's statement of defence does not expressly plead that his spending was for a charitable purpose. In his closing submissions Mr. Tu'utafaiva stated that the "road works were for charitable purposes within the meaning of section 24(3) of the Act" but presented no arguments to advance the submission. Mr. Edwards did not refer to the issue at all.

[148] There is no definition of 'charitable purposes' in the Act but section 2 of the Charitable Trusts Act provides that 'charitable purpose' includes every charitable purpose, whether it relates to relief of poverty, the advancement of education or religion, or any matter beneficial to the community". I accept that a "matter beneficial to the community" may include the repair of causeways and highways (See the useful discussion in the New Zealand Supreme Court in *Re Greenpeace* [2014] NZSC 105;

Halsbury's 3rd Ed. Vol 5 paragraph 538 and *Attorney-General v Day* [1900] 1 Ch 31).

[149] In this case the payments were not made for a charitable purpose. They were made for the purpose of Mr. Lavulavu's election campaign. When a payment is made for a mix of charitable and non-charitable purposes it will not be sufficient if the charitable purpose is merely "ancillary in the sense that it was secondary, subordinate or incidental" to a non charitable purpose (*Re Education New Zealand Trust* [2010] NZHC 1097). This is consistent with the object of section 24. The reason why candidates' spending is limited is to provide a level playing field. It also prevents "excess and to avoid unfair competition and unfair advantage simply because of the more ready availability of money in one case than another." (*Re Wairarapa Election Petition* at page 116). Support in an election should be the product of the candidate demonstrating good character, ability and appropriate experience. The restriction on spending may also operate as a check on bribery due to the requirement that election expenses be disclosed (*Halsbury's* (supra) at paragraph 707). The exclusion of expenses for charitable purposes recognises that a

candidate may have made donations for charitable purposes in the past and it would not be expected, and would be harmful to society, if he could not continue to do so because he is standing for election. However, it cannot be expected that a candidate may make extra exertions or spend more than would otherwise be the case but for the desire to obtain favour with the electors. The payments made by Mr. Lavulavu were extraordinary and in no sense can they be regarded as having been made for a charitable purpose.

Are the circumstances sufficiently serious?

[150] I find that it is proved that Mr. Lavulavu failed to disclose spending on his election campaign amounting to \$67,550.07. This is the sum of the amounts in subparagraphs 125.1, 125.2, 125.3 and 125.4 of TOP\$19,550.07 and \$48,000 for the coral rocks. When one takes account of the amount he declared in his return to the Supervisor of Elections Mr. Lavulavu's spend on his campaign amounted to TOP\$73,910.07. There is no doubt that Mr. Lavulavu made these payments knowingly and intentionally and I am satisfied that it has been

established that he committed an offence against section 24(1).

[151] I must consider whether the circumstances of the offence are sufficiently serious that the Court ought to declare Mr. Lavulavu's election to be void. There is no guidance as to what is meant by "sufficiently serious" in the Act but I have no doubt that an order should be made declaring Mr. Lavulavu's election void. The relevant circumstances are the amount by which Mr. Lavulavu overspent on his campaign (which was very significant), that the spending was in relation to a major roading project for which Mr. Lavulavu must have obtained significant kudos and support, that there is a very real prospect that the road works had a major and even decisive effect on the result of the election and that Mr. Lavulavu knowingly and intentionally made the payments.

My finding

[152] The allegation that Mr. Lavulavu spent more than TOP\$10,000 on his election campaign in breach of section 24(1) is proved. I am satisfied that he did so knowingly

and intentionally. The circumstances of his offence are sufficiently serious as to require the making of a declaration that his election is void.

Recrimination

[153] For completeness I should record that Mr. Lavulavu called evidence of a recriminatory nature alleging, as I have noted earlier, that Dr. Latu had himself given refreshments to the weaving halls and also that he had conducted his own road works during the election period by paving the Talahale and Ha'anofu roads. I extended to Mr. Lavulavu some latitude in allowing this evidence to be called. Whilst I accepted Mr. Tu'utafaiva's submission that evidence of other candidates giving refreshments might be relevant to the issue of Tongan custom, the allegation about road works was of little or no relevance to any issue that I had to decide as Dr. Latu was not claiming the seat for himself or anyone else (Section 31(5) of the Act). In any event, I find the allegations were unproven. I have dealt with the allegation that Dr. Latu provided refreshments earlier in my ruling and will not repeat myself about that. As far as the allegation about road works is concerned, I am satisfied

that those road works were carried out by the Leimatu'a Village Committee and paid for with Government money and that they had no part to play in Dr. Latu's election campaign.

The conclusions

[154] I make a declaration that in accordance with the findings in this judgment 'Etuete Sungalu Lavulavu committed bribery on three occasions in breach section 21(1)(a) of the Electoral Act 1989. I make a further declaration that in accordance with the findings in this judgment 'Etuete Sungalu Lavulavu overspent on his election campaign in breach of section 24(1) of the Electoral Act 1989.

[155] In respect of each matter, pursuant to section 32 of the Electoral Act 1989 I make a declaration that the election of 'Etuete Sungalu Lavulavu on 27 November 2014 as the Peoples' Representative for the Vava'u No. 16 Electoral District is void.

[156] Pursuant to section 37 of the Electoral Act 1989 I shall forthwith certify this result to the Speaker of the Legislative Assembly.

Costs

[157] The parties are invited to reach agreement on costs. I will hear the parties on costs if they cannot agree and each party is to file any submissions if not agreed within 42 days.




O.G. Paulsen

NUKU'ALOFA: 29 January 2015.

LORD CHIEF JUSTICE

