**IN THE HIGH COURT OF NEW ZEALAND**
**TAURANGA REGISTRY**

**CIV-2005-470-000719**

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| IN THE MATTER OF | an Election Petition relating to the Tauranga Electoral District |
| BETWEEN | WINSTON RAYMOND PETERS<br>Petitioner |
| AND | ROBERT MONCRIEFF CLARKSON<br>Respondent |

Hearing: 28-30 November and 1 December 2005

Court: Randerson J
Goddard J
Panckhurst J

Appearances: B P Henry for Petitioner
C R Pidgeon QC and P T Kiely for Respondent

Judgment: 15 December 2005

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## DETERMINATION OF THE COURT

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Solicitors:
D J Gates, Barristers & Solicitors, Whangaparaoa, for Petitioner
Kiely Thompson Caisley, Auckland, for Respondent

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## Introduction

[1] At the general election held on Saturday 17 September 2005 the respondent Mr Clarkson was elected as the Member of Parliament for the Tauranga electoral district. Mr Clarkson was the National Party candidate and defeated the petitioner the Honourable Mr Peters, the previous member for Tauranga and leader of the New Zealand First Party.

[2] By an election petition dated 6 October 2005 Mr Peters challenged the outcome of the Tauranga election. The petition alleges that during the election campaign Mr Clarkson expended more than the permitted maximum sum of $20,000 for election expenses in the three months to 17 September and thereby committed a corrupt practice in terms of s 213 of the Electoral Act 1993. Mr Peters seeks a determination under s 237 of the Act that Mr Clarkson's election is void.

[3] The petition was heard at Tauranga as required by s 235 of the Act. We heard extensive evidence adduced on behalf of Mr Peters and evidence from Mr Clarkson's campaign manager in reply. Neither Mr Peters nor Mr Clarkson gave evidence themselves. Two principal issues arose in the case:

(a) What may properly be regarded as "materials" for the purpose of sub-clause (c) of the definition of "election expenses" under s 213(1) of the Act; and

(b) The extent to which the election expenses accepted by Mr Clarkson should be increased to include notional sums reflecting the reasonable market value of items alleged to be election expenses but which were said to have been provided to Mr Clarkson free of charge or below market value.

[4] Before addressing these issues, it is necessary to set out some background and an analysis of the 1993 Act and its statutory predecessors.

## Background to the petition

[5] Mr Clarkson secured the National Party candidacy for the Tauranga electorate in November 2004. From about that time he commenced to take various

promotional initiatives. These included the erection of a large sign or banner at the Baypark Speedway, then named the Todd and Pollock Speedway. This stadium was a development undertaken by Mr Clarkson and completed in 2001 using a construction company he owns and operates in Tauranga known as Bob Clarkson Construction.

[6] The company has been responsible for a number of developments in the Tauranga area, some of which have received extensive newspaper publicity. In particular, at the time of the opening of the Baypark Speedway in 2001, Mr Clarkson and his company were the centre of considerable acclaim about that development. Subsequently Baypark has been used as a venue not only for speedway attractions, but also for rugby games and other entertainments. On the basis of the evidence we heard, it was readily apparent that Mr Clarkson enjoys a considerable profile in Tauranga and that he sought to exploit this to his advantage throughout the election campaign.

[7] Soon after he gained the National Party candidacy Mr Clarkson established an electorate office at 42 Chapel Street, Tauranga. This is a corner site on a busy light-controlled intersection through which a large volume of traffic passes in order to gain access to the harbour bridge to Mt Maunganui. Large hoardings were erected on the front and one side of the electorate office. The commercial value of these hoardings is a major issue in relation to Mr Peters' petition.

[8] In about May 2005 a further identical banner to that on the Baypark stadium appeared on the side of a parked and disused bus. The hoarding featured a photograph of Mr Clarkson with the wording "You Are Entering Bob Clarkson Country". The bus was positioned in a paddock bordering State Highway 27 between Tauranga and Matamata in an area identified as Belk Rd. The commercial value of this hoarding during the three month period to polling day also forms a significant element in the petitioner's case.

[9] On 20 July 2005 the Bay of Plenty Times newspaper published a three page feature under the banner "Bob Clarkson Construction". The correct characterisation of this feature was the subject of much debate before us. The newspaper featured

two articles based in part upon remarks attributed to Mr Clarkson and numerous supporting advertisements placed by various commercial entities that had a business relationship with the company and its owner. Typically these congratulated Mr Clarkson and his company upon the successful completion of many commercial developments in the Tauranga area. At least one of the advertisements congratulated Mr Clarkson on his securing the National Party candidacy and wished him well at the forthcoming election. The value of this publicity was also relied upon by Mr Peters.

[10] On 24 July 2005 Mr Peters' campaign chairman, Mr Townhill, sent an open letter to the campaign manager for all candidates standing in Tauranga. The letter called for a "level playing field". It pointed out that s 213 of the Act defined election expenses and that these included the reasonable market value of materials provided to a candidate free of charge or at below market value. The letter continued by noting that "we photograph billboards of all candidates" and "As soon as we notice them we determine the market value of the (particular) sign …". The letter ended on the note "Winston Peters has impressed upon me, and his other volunteers, the importance of our campaign conforming to not only the letter of the law, also its spirit".

[11] Subsequently, in relation to an interlocutory application in the context of this petition, Mr Townhill's letter was described by Mr J E Foote (Mr Peters' campaign manager), as "aimed entirely at Mr Clarkson" because of a belief that he "would without hesitation become involved in over-expenditure".

[12] On 25 July 2005 the Prime Minister announced the election date which meant that the three month period during which election expenses are capped had already commenced (on 17 June 2005).

[13] On 24 August 2005, Mr Townhill wrote to Mr Clarkson's campaign manager, Mr Wayne Walford, advising him that the $20,000 limit "must have been breached" by Mr Clarkson. Reference was made to the feature which had appeared in the Bay of Plenty Times, to the Chapel Street, Belk Rd and Stadium hoardings and banners as well as other examples of election expenditure. The letter ended on the note:

> "The penalty for corrupt or illegal practices is serious. Your candidate's expenditures are now a legitimate issue in this campaign."

[14] On 5 September 2005 the Chief Electoral Officer Mr David Henry, wrote to Mr Clarkson concerning the newspaper feature of 20 July and the "You Are Entering Bob Clarkson Country" hoardings. Mr Henry indicated it was his preliminary view that both the feature and the hoardings were election advertisements to which s 221 of the Act applied. In terms of that section, advertisements are required to be authorised in writing by or on behalf of the candidate and must also contain the name and address of the person who directed that the advertisement be published. This had not occurred. A similar letter was sent to the Bay of Plenty Times.

[15] On 9 September and 6 September Mr Clarkson and the newspaper's general manager, respectively, responded to Mr Henry. Both letters disputed the Chief Electoral Officer's interpretation. In the event, and consequent upon Mr Peters filing this petition in early October, the Chief Electoral Officer advised Mr Clarkson on 19 October that he had suspended his inquiry into the s 221 issue.

[16] On 1 October 2005 the Returning Officer for Tauranga publicly notified the result of the general election poll. Mr Clarkson received 15,020 votes and Mr Peters 14,290. The next highest polling candidate (Ms Sally Barrett, Labour) received 4020 votes. On 6 October 2005, within the 28 day period after the election allowed by s 231, the election petition was filed.

**The grounds and relief sought in the petition**

[17] The sole ground advanced in the petition is that Mr Clarkson:

> … knowingly between 17 June 2005 and 17 September 2005 expended a sum greater than $20,000 as a candidate in the constituency of Tauranga and is therefore guilty of committing a corrupt act under s 213 of the Electoral Act 1993."

[18] The relief sought is:

> (a) A determination that the electoral expenses of the respondent in the Tauranga constituency were greater than $20,000 .

(b) A determination that the respondent is guilty of a corrupt practice.

(c) A determination that the respondent's election on 17 September as the constituency Member of Parliament for the constituency of Tauranga is void.

(d) Costs.

[19] The petition does not contain the alternative and lesser allegation that Mr Clarkson was guilty of an illegal practice: s 213(3)(b) of the Act. In opening, and in response to a direct question from a member of the Court, Mr Henry confirmed the petitioner's intention to rely solely upon an allegation of a corrupt practice.

**The concept of "election expenses"**

[20] The definition and meaning of "election expenses" as defined in s 213 of the Act is of central importance to the determination of this case. In particular the meaning and application of part (c) of the definition of election expenses in s 213(1) is both relevant and contentious. Under this provision candidates are required to include in their return of election expenses "the reasonable market value of any **materials** applied in respect of any election activity" which are provided to the candidate free of charge or at below market value. The petitioner considers that the provision of display space on buildings, and other structures, upon which Mr Clarkson exhibited electioneering hoardings fell within the definition, so that the value of such display spaces must be brought to account as election expenses. The respondent does not accept this contention.

[21] More generally the actual limits or ambit of the definition of election expenses is relevant to a number of items of expenditure upon which the petitioner relies. Counsel, to some degree, were at odds as to this question of interpretation as well.

[22] To assist in the interpretation of the 1993 Act, it is helpful to refer to the history of the concept of "election expenses" under the Electoral Act 1956 and as used in the present Act. We will also refer to the Report of the Royal Commission

on the Electoral System, "Towards a Better Democracy", December 1986, and to parts of the decision of the Electoral Court in *Re Wairarapa Election Petition* [1988] 2 NZLR 74. It is apparent that both those sources influenced the drafting of s 213 in the 1993 Act, and indeed of its predecessor, s 139, as amended by the Electoral Amendment Act 1990.

*The 1956 Act*

[23] Sections 133 to 139 of the Electoral Act 1956 under the sub-heading "Candidates' Election Expenses" required candidates to make a return of expenses and prescribed the maximum amount (five hundred pounds). Section 2 of the Act contained this definition:

> "Election expenses", in relation to a candidate at an election in any district, means expenses incurred by or on behalf of the candidate within the three months immediately preceding polling day, and relating exclusively to the campaign for the return of the candidate:

[24] This definition applied until 1981 when the Electoral Amendment Act of that year introduced extensive changes to the concept of election expenses by amendment of s139 itself. Until then this section merely prescribed the maximum amount of expenses (five hundred pounds) and provided it was a corrupt practice to directly or indirectly exceed, or knowingly aid or abet anyone to exceed, that amount.

[25] The new s 139 was introduced by s 44 of the 1981 Amendment Act and relevantly provided:

> (1) Subject to this section and to section 147A of this Act, in this Act the term 'election expenses', in relation to a candidate at an election in any district, -
>
> (a) Means expenses which relate **exclusively** to the campaign for the return of the candidate and which are incurred by or on behalf of the candidate within the 3 months immediately preceding polling day in respect of -
>
> (i) **Advertising** and radio or television **broadcasting**:
>
> (ii) **Publishing**, issuing, distributing, and displaying addresses, notices, posters, pamphlets, handbills, billboards, and cards; and
>
> (b) Includes expenses which relate exclusively to the campaign for the return of the candidate and which are incurred by or on behalf of the candidate, before or after the 3 months immediately preceding polling day, in respect of any item described in subparagraph (i) or subparagraph (ii) of paragraph (a) of this subsection if the activity

that is carried out under that item takes place within those 3 months; but

(c) Does not include the expenses of operating a vehicle on which election advertising appears if that vehicle is used bona fide by the candidate as his personal means of transport in the district.

(2) The total election expenses of a candidate shall in no case exceed $4,000.

(3) Every candidate or other person is guilty of a corrupt practice who directly or indirectly pays or knowingly aids or abets any person in paying for or on account of any election expenses any sum in excess of the maximum amount prescribed by this section. (emphasis added)

[26] Section 139(4) provided that in relation to advertising and publishing expenses incurred both before and within the three month statutory period, an apportionment was allowable so that only "a fair proportion" attributable to the activity within the three month period was an election expense.

[27] The definition of election expenses previously contained in s 2 of the 1956 Act was of course repealed. The new provisions came into force at the beginning of 1982 and remained in force in 1988 when the Wairarapa election petition was decided.

*Report of the Royal Commission on the Electoral System*

[28] The terms of reference for this Royal Commission required it to consider electoral reform generally and its recommendations of course resulted in the move to a mixed member proportional (MMP) voting system. However, chapter 8 of the report, entitled "Political Finance" responded to the eighth term of reference by which the Commission was required to consider "Whether the present limits on election expenses are appropriate …" and related issues. A good part of the chapter was taken up by a consideration of political income, particularly whether there should be a duty of disclosure in relation to donations and other income received by political parties.

[29] With respect to election expenditure the Commission readily accepted that the imposition of limits was necessary in the interests of democracy, so that the affluence of a political party did not translate into election success. That said the Commission then noted the approach which had prevailed to election expenses in New Zealand to that time and accepted the need for pragmatism. It said this:

> 8.32 Politics pervades all areas of our life as a community and the types of expenditure which may have an influence on the political process are virtually unlimited. Despite this, the current restrictions affect only a small part of that political expenditure which might be considered significant. First, the restrictions apply only to expenditure relating exclusively to the campaign for the return of an individual candidate. They thus cover neither expenditure by political parties nor joint expenditure by candidates in, say, adjoining electorates. Second, the restrictions in s.139 apply only to particular types of expenditure. Third, the prohibition on non-authorised advertising by non-candidates (s.147A) relates to a narrower range of activities than does s.139. Fourth, goods and services provided free or at lower than commercial rates are not counted as an election expense. Finally, expenditure incurred and used outside the 3-month election period is not subject to any restrictions at all.
>
> 8.33 Clearly, it would be futile to attempt to regulate all expenditure which might, directly or indirectly, affect the electoral chances of any candidate. Measures to control political spending must be confined to what is practicable. Indeed, the need to keep the system workable underlies many of the apparent omissions in the legislation. On the other hand, the nature of political competition today differs considerably from what it was when controls were first introduced. New Zealand laws in this area still reflect 19th century conditions when elections were largely contests between individual candidates and not between competing political parties. In the next paragraphs we examine several areas in which changes to the Electoral Act might usefully be considered.

[30] The major recommendation which resulted was for the extension of expenditure limitations to political parties, as opposed to a limit only upon candidates. With specific reference to the concept of election expenses the definition introduced by the 1981 Amendment Act was compared to the approach adopted in both Australia and Canada and was approved as "administratively straightforward and … appropriate in terms of the types of items upon which expenditure is restricted" (para 8.47). However, the Commission considered that a loophole existed with reference to "the commercial value of goods and services … donated or charged at less than commercial rates". It continued:

> 8.49 We consider that where donations in kind relate to the areas of activity outlined in para. 8.45, they should be included as election expenses. We do not consider, however, that volunteer labour should be valued when assessing election expenses. Such labour is almost impossible to value accurately and is an established and highly desirable aspect of election activity in New Zealand.

[31] The formal recommendation of the Commission on this topic was recommendation 32:

> Where they relate to the areas of activity listed in s.139 of the Electoral Act, the commercial value of goods and services donated or provided at less than commercial rates should be included as election expenses (para. 8.49).

More generally, other recommendations were that expenditure limits should be imposed upon political parties, that the limits pertaining to individual candidates should be regularly adjusted so as to keep pace with inflation and that certain other steps should be taken to improve the policing of the expenditure limits.

*The Wairarapa Election Petition Case*

[32] Mr R G Boorman the sitting Labour member, won the Wairarapa seat at the 1987 General Election. His majority was seven votes. The unsuccessful National candidate, Mr W B Creech, applied to the District Court for a recount. In the result Mr Boorman's majority was reduced to one. Mr Creech then filed an electoral petition in this Court by which he both challenged the validity of certain of the votes counted towards Mr Boorman's majority and alleged a corrupt practice, being expenditure in excess of the maximum allowance for election expenses of $5,000. The challenge to specific votes succeeded with the result that Mr Creech enjoyed a 33 vote majority. The Electoral Court also held that Mr Boorman was implicated in a corrupt practice because he had indirectly paid, and knowingly aided and abetted others to pay, a sum in excess of the permitted maximum.

[33] With reference to s 139 of the then Act the Court made observations on three aspects which we think warrant mention in relation to the relevant provisions under the present Act. First, at 116 the Court said this in relation to election expenses:

> Section 139 opens by defining in some detail and subject to subs (2) of s147A, the term "election expenses". It is limited to what might generally be called publicity and advertising. It does not include many other expenses which are necessarily incurred in conducting an election campaign. **It is confined to that part of the campaign which by words or sounds is intended to persuade the voter generally or in particular to favour the candidate**. The purpose of the section is to control such expenditure, to limit it to a particular specified amount and to retain among all the candidates an equality of opportunity in this **aspect of persuasion** so that, beyond an amount fixed by Parliament, no candidate may obtain any further

> advantage because of his wealth or his ability to obtain more money, or to disadvantage any candidate because of his inability to spend beyond the sum of $5000. (emphasis added)

[34] Second, at 113 the Court drew a distinction between what might be termed labour and materials in these terms:

> *Donation of time or services*
> In his assessment of the first respondent's election expenses the petitioner sought to include a value for time donated by certain persons in compiling advertising material – specifically in writing copy, and taking photographs. We agree with the first respondent that such donated time or services are not, by their very nature, expenses and are therefore not to be included, however valuable the time or service may be. The cost of donated **materials** is, however, a different matter and where appropriate, will fall to be included as expenses incurred on behalf of the candidate. (emphasis added)

No doubt the recommendation of the Royal Commission provided the genesis of these observations, but the use of the word material in contra-distinction to time or services, was new.

[35] Finally, the Court considered the classification of the offence of a corrupt practice as defined in s 139(3). In light of the then recent decisions of the Court of Appeal in *Civil Aviation Department v MacKenzie* [1983] NZLR 78 and *Millar v Ministry of Transport* [1986] 1 NZLR 660 the Election Court concluded that the offence was not one of absolute liability but rather strict liability. At 119 it said:

> The whole object of this provision is to stop the candidate from spending money on advertising expenses beyond the sum of $5000. In that sense it is an absolute control which ought not to depend upon whether the candidate knew or intended to incur expenditure which would inevitably exceed the amount. It is the total sum which is in issue and not the purpose or intention of the candidate, whether honest or not. On the other hand, we do not say that if the candidate is able to show a **complete lack of intent and of fault that he should nonetheless be and remain liable**. We conclude, therefore, that this is one of those offences which, because of the essentially regulatory and controlling nature of the provision, justifies the interpretation that proof or an inference of mens rea is not required on the part of the petitioner or the prosecutor, but that **the defendant can escape liability by showing an absence of fault**. (emphasis added)

Hence, the onus upon the petitioner was to show excessive expenditure on election expenses, in which case the respondent was required to demonstrate that any excess arose without fault on his or her part. Because Mr Boorman was unable to demonstrate a total absence of fault, a corrupt practice finding resulted.

[36] Section 139 was again amended by this Amendment Act to read as follows:

> **Maximum amount of election expenses** –
> (1) Subject to this section and to section 139A of this Act, in this Act, -
> '**Election activity**', in relation to a candidate at an election in any district, means an activity –
> (a) Which is carried out by the candidate or with the candidate's **authority**; and
> (b) Which **relates to the candidate solely in the candidate's capacity as a candidate for the district** and not to the candidate -
> (i) In his or her capacity as a member of Parliament or as the holder of any other office; or
> (ii) In any other capacity; and
> (c) Which **comprises** -
> (i) **Advertising** of any kind; or
> (ii) Radio or television **broadcasting**; or
> (iii) **Publishing**, issuing, distributing, or displaying addresses, notices, posters, pamphlets, handbills, billboards, and cards; and
> (d) Which relates **exclusively** to the campaign for the return of the candidate; and
> (e) Which takes place within the 3 months immediately preceding polling day:
> '**Election expenses**', in relation to a candidate at an election in any district, -
> (a) Means **expenses that are incurred** by or on behalf of the candidate in respect of any election activity; and
> (b) Includes expenses that are incurred by or on behalf of the candidate, before or after the 3 months immediately preceding polling day, in respect of any election activity; and
> (c) **Includes the reasonable market value of any materials applied in respect of any election activity which are given to the candidate or which are provided to the candidate free of charge**; and
> (d) Includes the cost of any printing or postage in respect of any election activity, whether or not the expenses in respect of the printing or postage are incurred by or on behalf of the candidate; but
> (e) Does not include the expenses of operating a vehicle on which election advertising appears if that vehicle is used bona fide by the candidate as the candidate's personal means of transport in the district; and
> (f) **Does not include the labour of any person which is provided to the candidate free of charge by that person**. (emphasis added)

[37] Subs (2) set new expenditure maximums, being $10,000 for candidates at a general election and $20,000 for candidates at a by-election, both amounts inclusive

of goods and services tax (the need to include GST in election expenses being a finding in the *Wairarapa* case).

[38] Section 139(3) introduced a two-tiered offence section:

> Every candidate or other person who directly or indirectly pays or knowingly aids or abets any person in paying for or on account of any election expenses any sum in excess of the maximum amount prescribed by this section is, -
>
> (a) If the act is done with knowledge that the payment is in excess of the maximum amount prescribed by this section, guilty of **a corrupt practice**; and
>
> (b) **In any other case, guilty of an illegal practice unless the candidate or other person proves that he or she took all reasonable steps to ensure that the election expenses did not exceed the maximum amount prescribed by this section**. (emphasis added)

[39] Reverting to s 139(1), we note the retained emphasis in (c) of the definition of "election activity" upon advertising, broadcasting and publishing, which reflected the approach of the Royal Commission, and the specific view contained in the first passage we have quoted from the *Wairarapa* case in para [33], namely that "election activity" (and thereby "election expenses") does not cover every aspect of an election campaign, rather that part of the campaign which by words or sounds is intended to persuade the voter how he or she should vote.

[40] Equally importantly, the distinction drawn by the Court in the *Wairarapa* case between "materials" and "donated time or services" received express recognition in parts (c) and (f) of the definition of "election expenses". As well, part (a) of the new definition identified "expenses … incurred by … the candidate", which we interpolate covers expenses actually incurred in the form of materials, or labour, or a combination of the two. This provision recognises expenses actually incurred, as distinct from part (c) which covers the provision of something which would otherwise be an election expense but which is given "free of charge". In that event, the material cost was to be included as an election expense based on "reasonable market value", but the labour content (time or services) was exempt.

[41] In moving the second reading of the Electoral Law Reform Bill the Minister of Justice, the Hon W P Jefferies, said in relation to cl 66 (eventually s 139):

> I turn to clause 66, and commend the Minister, or whoever was responsible before him, for the intent behind it. In my view the definition of the term "electoral expenses" has been one of the outstanding disasters in our electoral law for many years. The definition in the Act simply indicated that, so long as an expense related exclusively to the campaign of a candidate for election to Parliament, that was a candidate's expense within the meaning of the Act. That general definition was the subject of widely varying practices by candidates. It has been the subject of much debate among individuals in both political parties for many years. The use of the word "exclusive" in that context meant that parties engaged in practices to avoid the letter of the Act, such as joint advertising in the hope that that would make an advertisement not exclusive to one candidate or the other.
>
> Clause 66 attempts to define extensively a candidate's expenses. Whilst we will probably find in practice that there is need for further amendment, that move is very worthy. It tries to improve the clarity of the electoral law. I personally welcome the move, because I have regarded the Act as being grossly deficient in that respect. I hope that as a result of clause 66 there will be a significant improvement in the uniformity with which candidates' expenses are returned.

[42] It is plain from a reading of this and other speeches in the House that the move to a more prescriptive approach followed from the conclusions of the Royal Commission and the experience of the *Wairarapa* case.

[43] Against this background we turn to the present s 213.

*The Electoral Act 1993*

[44] This Act incorporated the changes consequent upon the decision to introduce an MMP system of voting. In relation to election expenses, however, the new Act continued the trend to closer definition of that concept.

[45] Section 213 relevantly provides:

**Maximum amount of election expenses**

(1) Subject to this section and to sections 214 and 214A, in this Act -

**election activity**, in relation to a candidate at an election in any district, means an activity –

(a) which is carried out by the candidate or with the candidate's **authority**; and

(b) which comprises –

(i) **advertising** of any kind; or

(ii) radio or television broadcasting; or

(iii) **publishing**, issuing, distributing, or displaying addresses, notices, posters, pamphlets, handbills, billboards, and cards; and

(c) which -

(i) relates to the campaign for the return of the candidate **in the candidate's capacity as a candidate for the district** and not to the candidate -

(A) in his or her capacity as a member of Parliament or as the holder of any other office; or

(B) in any other capacity; or

(ii) **encourages or persuades or appears to encourage or persuade voters not to vote for a candidate or for a party** registered under Part 4: or

(iii) both; and

(d) which takes place within the 3 months immediately preceding polling day

**election expenses**, in relation to a candidate at an election, -

(a) means **expenses that are incurred** by or on behalf of the candidate in respect of any election activity; and

(b) includes expenses that are incurred by or on behalf of the candidate, before or after the 3 months immediately preceding polling day, in respect of any election activity; and

(c) **includes the reasonable market value of any materials applied in respect of any election activity which are given to the candidate or which are provided to the candidate free of charge or below reasonable market value**; and

(d) includes the cost of any printing or postage in respect of any election activity, whether or not the expenses in respect of the printing or postage are incurred by or on behalf of the candidate; but

(e) does not include the cost of any of the following:

(i) travel:

(ii) the conduct of any survey or public opinion poll:

(iii) **the labour of any person which is provided to the candidate free of charge** by that person:

(iv) the replacement of any materials that, during their application in respect of an election activity, have been destroyed or rendered unusable by 1 or more persons (other than the candidate or any person acting on his or her behalf) or by the occurrence of an event beyond the control of the candidate and any person acting on his or her behalf. (emphasis added)

[46] By subs (2) the maxima were increased to $20,000 for candidates at a general election and $40,000 for candidates at a by-election. The offence section (s213(3)) is in identical terms to its predecessor, s 139(3).

[47] The two sections to which s 213 is expressed to be subject, ss 214 and 214A, provide for the apportionment of election expenses where an election activity relates to the campaigns for the return of two or more candidates, and for non-apportionment where an advertisement is directed to the party vote, but gives more than 10% of the coverage to a list or electorate candidate. In this event, unless certain requirements are met, the election expense is incurred wholly by the candidate and not the party. We shall return to these sections when we consider the petitioner's case in relation to certain heads of alleged expenditure to which s 214 or 214A are directly relevant. We add that expenses must also be apportioned under s 213(4) where expenses are incurred for election activities both before and during the three month period immediately preceding polling day.

**Some conclusions as to the interpretation of s 213**

[48] The starting point is that only expenses in respect of an "election activity" are potentially eligible for inclusion as an election expense.

[49] In our view the definition of "election activity" is deliberately narrowly drawn. There are four requirements of an election activity. These relate to the authorisation, nature, purpose, and timing of the activity. Parts (a) and (d) of the definition provide that the candidate must carry out or authorise the activity, and that it must occur in the three months before polling day.

[50] Of greater relevance for present purposes are parts (b) and (c), whereby election activity is confined to advertising and broadcasting as well as publishing, issuing, distributing or displaying specified items. Additionally, the defined activities must have as their purpose the promotion of the candidate in his or her capacity as an electorate candidate. Promotion of that person as a sitting member of Parliament, as the holder of other office or in any other capacity does not qualify. We also note part (c)(ii) of the definition provides that the cost of material designed

to persuade voters not to vote for another candidate (or party) is still an election expense of its publisher. This may be viewed as a form of negative persuasion (or dissuading a voter).

[51] The essence of these requirements remains, we think, aptly captured in the passage in the *Wairarapa* case where the Court spoke of "words or sounds (perhaps images should be added) intended to persuade the voter …". It is the expense incurred in the direct endeavour to persuade voters which is caught, not the myriad of other activities which may form part of an election campaign. This focus is important when, for example, it falls to decide whether the cost of retaining a campaign manager is an election expense.

[52] With reference to the definition of "election expenses", the dichotomy of expenses actually incurred and notional expenses based on reasonable market value, is retained. However, in the latter case it is still only the cost of "materials" which are to be brought to account, not donated labour which remains exempt under item (iii) in the part (e) of the list of exemptions. The date of payment of expenses (whether before or after the three month period) does not matter, provided such payment is in respect of election activity during the three month period.

[53] Further emphasis is provided to the focus on words of persuasion, by part (d) of the definition which makes the cost of printing and postage of candidacy material an election expense, regardless of whether the cost is incurred by or on behalf of the candidate. By contrast the first of the exceptions, for travel, in part (e)(i) of the definition is not an election expense because travel is not a form of persuasion by word, sound or image, but rather, at most, a step towards the task of persuasion. Put another way, the cost is only indirectly related to persuasion of voters and therefore it falls outside the narrow definition of election activity.

[54] Likewise the exception for public opinion polls in part (e)(ii) reflects the fact that polls by definition do not seek to persuade, but rather to ascertain public opinion. The final exception in part (e)(iv) is perhaps self-explanatory in that it provides an exemption in relation to election expenses which would otherwise be incurred twice as a consequence of vandalism.

**Onus and standard of proof**

[55] Counsel are agreed that the onus is on Mr Peters as petitioner to establish the corrupt practice alleged. However, there was some difference of view as to the appropriate standard. Mr Henry submitted that the appropriate standard was the civil standard namely, proof on the balance of probabilities, but with appropriate regard for the seriousness of the allegation. On the other hand, Mr Pidgeon QC for Mr Clarkson submitted that the appropriate standard was the criminal standard namely, proof beyond reasonable doubt.

[56] To support his submission, Mr Henry referred the Court to the decision of the House of Lords in *H & Ors* (Minors) [1996] AC 563 and to an extract from *Phipson on Evidence* (16th ed 2005) at paragraphs 6-54 and 6-55. The learned authors of *Phipson* express the opinion that where a serious allegation is made in a civil case, such as an allegation of criminal conduct, the standard of proof nevertheless remains the civil standard. If a serious allegation is made, then more cogent evidence may be required to overcome the unlikelihood of what is alleged and thus to prove the allegation.

[57] The issue of proof was discussed in the Wairarapa election case. In considering the correct classification of the charge of corruption the Court stated at 115:

> This raises a question of the classification of the offence created by the statute. We use the word "offence" advisedly because, although this is not a criminal proceeding, for which provision is made separately in the Act for trial on indictment, it could not be right that some different classification or standard should apply to the finding of guilt of corrupt practice by an Electoral Court on an electoral petition. We must apply the same principles in this hearing on this charge as would be applied in a trial on indictment charging the same matters.

[58] The Court did not expressly state that the standard of proof was beyond reasonable doubt but we consider that is the clear implication from the cited passage. We also observe that a finding that a candidate is guilty of a corrupt practice has serious consequences beyond the voiding of his or her election under s 237. A

finding that a person is guilty of any corrupt practice exposes that person to the risk of prosecution under s 224 which carries a maximum penalty of imprisonment for up to one year or a fine not exceeding $4000, or both.

[59] In our view, little may turn on any distinction between the civil and criminal standards of proof where an allegation of corrupt or illegal practice is made under the Electoral Act. If it is not the criminal standard of proof beyond reasonable doubt, then the seriousness of the allegations and their consequences are so significant that the Court would require a level of cogency in the evidence that is not materially different from that standard.

**The calculation of election expenses**

[60] At the time of the hearing before us, Mr Clarkson had not yet returned his election expenses as required by the Act. The time had not yet expired for him to do so. But through counsel he assessed his total election expenses as defined by s 213 at a figure of $10,022.31. It was contended on Mr Peters' behalf that the expenses are understated in a number of respects and we now deal with each of those in turn, using the numbering system adopted during the course of the hearing.

*Item 2.1 – Push Polling Campaign*

[61] It is common ground that part of the campaign for Mr Clarkson involved telephoning electors in the Tauranga Electorate seeking electoral support for Mr Clarkson. Although an attempt was made to suggest that this process could be described as the conduct of a survey or public opinion poll under part (e)(ii) of the definition of election expenses in s 213, we are satisfied from the telephone scripts used by those carrying out the telephone campaign that the process could not properly be described as a survey or public opinion poll in the sense used in the Act.

[62] It is evident that the callers went beyond merely eliciting details of the party and candidate favoured by the electors. The callers positively sought electoral support for the National Party and Mr Clarkson. For that reason, we are satisfied

that the telephone campaign amounted to advertising within the definition of "election activity". It would follow that, if expenses were occurred in connection with such a campaign, those expenses would be treated as election expenses to the extent they were incurred during the three month period prior to polling day.

[63] Mr Peters' campaign manager, Mr J Foote, maintained that if the telephone campaign had been undertaken by volunteers, the reasonable market value would amount to not less than $22,500.00. If done professionally he calculated that the reasonable market value would range from $45,000.00 to $67,500.00 depending on the number of calls made. Evidence was adduced from a Tauranga elector to the effect that she had been telephoned by someone seeking her support for Mr Clarkson in the election. Telephone records established that the call was made from a telephone used by a Tauranga based company. However, there was no evidence of who made the call to the elector nor any evidence to link the caller with Mr Clarkson. Importantly, there was no evidence adduced by the petitioner of any other calls made to any other elector either from the telephone number identified or any other telephone.

[64] To the contrary, the evidence on behalf of Mr Clarkson was that the company in question was not known to members of the campaign committee or Mr Clarkson. It was accepted there was a telephone campaign but the undisputed evidence is that this was undertaken entirely by volunteers at no cost. Those involved in the telephone campaign simply used their own telephones upon which they would have been incurring the cost of the line rental in any event.

[65] In these circumstances, Mr Henry was obliged to accept there was no evidence of any expenses being incurred which could properly be regarded as an election expense under the Act. The cost of voluntarily supplied labour is of course exempted as an election expense.

*Item 2.2 – Van Sign*

[66] The evidence established that Mr Clarkson had owned a van for some three years prior to the election. It was registered in his name and used for his personal

transport. He used it to travel to work everyday according to the undisputed evidence. In or about May 2005, the van was sign-written promoting Mr Clarkson and the National Party for electoral purposes. An invoice was produced dated 31 May 2005 showing that the total cost for the signwriting was $119.25 (GST inclusive). On one occasion speakers were attached to the vehicle for the purpose of promoting the candidate, the cost of which was $56.25. Mr Clarkson contends that the sums of $119.25 and $56.25 respectively are the only sums which qualify as election expenses.

[67] For Mr Peters, it was contended that the van was effectively a mobile billboard and that the correct approach was to assess an additional notional expense based on the reasonable market value of such a billboard. This directly raises the issue whether the provision of a sign of this kind may properly be described as the application of "materials" in respect of an election activity under s 213(1) of the Act.

[68] The same question arises in respect of the banners or hoardings displayed on the Speedway, the Chapel Street electorate headquarters and the bus bordering the State Highway at Belk Rd.

[69] We are satisfied that the only sums properly regarded as election expenses under this heading are the cost of the signwriting and the additional charge for the speakers. We do not accept the submission made on behalf of Mr Peters that the van should be treated as a travelling billboard and its reasonable market value assessed accordingly. We reach that conclusion for these reasons.

[70] First, the use of the van itself is properly exempted as a cost of travel under part (e)(i) of the definition of election expenses. On the evidence, Mr Clarkson owned the vehicle personally and used it for the purposes of travel during the election campaign. There could be no question of including as an election expense the reasonable market value of renting a vehicle of that kind during the three month period.

[71] Secondly, although the cost of the signwriting is properly accepted as advertising, the use of the van or, more precisely, the cost of the use of the space on

the side panels of the vehicle, cannot be regarded as a "material" for the purposes of the definition of election expenses.

[72] We reach that conclusion from our earlier analysis of the history and purpose of the legislation as well as the clear distinction drawn between labour and services on the one hand and materials on the other. We see no reason to depart from the natural and ordinary meaning of the expression "materials" as referring to physical items applied in respect of an election activity as defined. While the vehicle itself might be described as a physical item, the cost of its use for travel is expressly exempted as an election expense. All that Mr Clarkson has done is to make use of the space on the sides of his own vehicle for the purpose of the election signage. That is not an application of "materials" in the sense we have defined.

[73] We conclude that Mr Foote's assessment of $1056.00 as the reasonable market value of a mobile billboard is not to be treated as an election expense.

[74] Mr Foote also gave evidence that he had obtained prices from two other sources for the signwriting which averaged $1142.00. He submitted that this figure should be regarded as the reasonable market value of the signwriting rather than the figure of $119.25 actually incurred by Mr Clarkson. We do not regard the evidence produced in this respect as sufficiently cogent to persuade us that we should adopt any figure other than the sum of $119.25 as contended by Mr Clarkson. We recognise that s 240 of the Act requires that the Court be guided by the substantial merits and justice of the case without regard to legal forms or technicalities and also confers a discretion on the Court to admit such evidence as in the Court's opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible. But we are mindful of the high standard of proof required in cases of this kind.

[75] We do not consider it is sufficient simply to produce invoices or quotations from other suppliers as Mr Foote sought to do. The suppliers of the quotations were not called to give evidence and neither we nor Mr Clarkson have any means of assessing whether the quotations were for the same or similar advertising. And, the mere fact that a candidate is able to obtain signwriting or other materials at a cheaper

price than other candidates may be able to achieve does not demonstrate that the items have been obtained at less than reasonable market value.

[76] There may be a range of factors which enable a particular candidate to obtain goods or services at a lower price than another. These may include particular market conditions, the existence of other commercial relationships with the supplier, the extent of the supply, the ability to obtain bulk discounts and other factors. No evidence was produced to establish that the cost of signwriting was below the rates generally prevailing in the market for this type of signwriting. We conclude that the appropriate sum which should be allowed for this item is $119.25.

*Item 2.3.1 – Signage on Chapel Street Headquarters*

[77] With effect from 1 November 2004, the National Party campaign committee leased a portion of the premises at 42 Chapel Street, Tauranga from Baypark Speedway Limited for an annual rental of $7333.33 plus GST. The balance of the premises was used to store speedway cars and associated materials. The premises are prominently located on the corner of Chapel Street and a major traffic route (described inaccurately in evidence as Bridge Street).

[78] The lease is expressed in simple terms, the operative portion reading:

> The landlord agrees to lease the above premises to the tenant, including the right to use the Landlord's fixtures and fittings contained in the premises, common areas of the property, including the 5 carparks.

[79] The lease does not contain any express provision relating to the right of the tenant to use the exterior walls of the premises for advertising purposes. But the lease does not prohibit such use and, subject to any necessary resource consent or other regulatory control, we interpret the lease as permitting the tenant to use the exterior walls of the premises for advertising purposes. In evidence, Mr Clarkson's campaign manager Mr W D Walford stated (in response to evidence that there were billboards on adjacent premises) that the adjacent premises were leased and it was the right of the tenant to determine whether any billboards appeared on those

premises. Any income from the lease of the wall space for billboards there would be received by the tenants and not by Mr Clarkson or any company under his control.

[80] In November 2004, Mr Clarkson purchased four banners described as "skins" from Tony Hill Signs for a total of $2520.00 (GST inclusive). This equates to a cost per skin of $630.00. The banners featured a photograph of Mr Clarkson taken at the Speedway and contained no reference to electoral or political issues. They were plainly intended at that stage to promote Mr Clarkson's profile in the community generally. One of these banners was hung on the "Bridge Street" frontage of the Chapel Street premises; a second was hung on the exterior wall of the Speedway; and a third was displayed on the bus at Belk Rd. According to the evidence, the fourth was not used.

[81] The "Bridge Street" side of the Chapel Street premises was sign-written to promote both Mr Clarkson and the National Party. This material surrounded the banner and, together, clearly constituted advertising within the definition of election activity.

[82] On the Chapel Street frontage of the campaign headquarters building, a new sign was displayed to promote Mr Clarkson and the National Party. As well, an additional sign was placed giving the website address for the National Party.

[83] Although there are a number of points of difference between the parties as to the proper calculation of election expenses relating to the signage on the Chapel Street premises, the major point of contention is whether, as contended for Mr Peters, an allowance should be made for what is said to be the proper market value of the banner on the "Bridge Street" frontage. It is convenient if we deal with that issue first.

[84] Mr Foote's evidence was that the prominent location of the building, particularly on the "Bridge Street" frontage, was such that it was appropriate to allow $3,500.00 per month plus GST for the rental of the space for billboard purposes. He based that on a quotation obtained from a local company. Additionally, Mr Foote contended that a monthly allowance of $300.00 should be made for floodlighting.

This would result, he said, in a market value for the space of $3,800.00 per month plus GST.

[85] In response, it was submitted for Mr Clarkson that no allowance should be made for the use of the wall space on the "Bridge Street" frontage of the premises. It was accepted that if space had been hired on a commercial billboard site, the cost thereof would constitute an election expense. But it was submitted that using exterior wall space on the campaign headquarters building did not constitute the application of materials for the purposes of part (c) of the definition of election expenses. The lease of the premises permitted the use of the wall space and, it being common ground that the lease of the premises did not constitute an election expense, no further allowance should be made for the notional cost of the wall space.

[86] We accept the contentions by Mr Clarkson in this respect. Mr Clarkson and his campaign committee obtained the lease of the premises for the campaign headquarters and, in our view, were entitled to use the exterior walls for such advertising as they considered fit, subject to compliance with any regulatory controls. Consistent with our earlier findings, the application of materials for the purposes of part (c) of the definition of election expenses refers to the supply or application of physical materials for election activities. Here it is not the building which is supplied but the right (granted by lease, licence or other permission) to use the wall space. If that right is available free of charge because, for example, the building is leased or owned by the candidate or someone is willing to grant the right at no cost, the right so granted cannot be regarded as a "material" applied to an election activity. It is simply a lawful incident of the rights available to the owner or lessee of the building.

[87] If the contentions put forward on Mr Peters' behalf were taken to their logical conclusion then the use of land on private property for displaying electoral hoardings would constitute a "material", the value of which would have to be returned as an election expense. In our view, that could not seriously be suggested as a valid approach and would stretch the term "materials" well beyond its natural and ordinary meaning.

[88] Of course, if an existing commercial hoarding site or billboard were paid for, then the expense actually incurred would be treated as an election expense.

[89] By way of fallback it was submitted for Mr Clarkson that an amount of $1125.00 should be allowed for the wall space on the Chapel Street premises. This was calculated on the basis of a figure of $2000.00 for the cost of leasing the campaign headquarters for the three month period and then taking 50% of that sum ($1000.00) to represent the cost of two of the four walls of the premises. GST of $125.00 was then added to reach the total of $1125.00. But for the reasons already discussed, we do not consider any sum is properly an election expense for the cost of the wall space at issue.

[90] It is accepted that the cost of the skin, appropriately apportioned, must be allowed as an election expense. We accept Mr Clarkson's contention that the sum to be treated as an election expense is $189.00 being the appropriate apportionment under s 213(4) of the Act for the three month period. The total cost of the skin including GST was $630.00 and the relevant period for apportionment purposes is from November 2004 to September 2005. Three-tenths of $630.00 amounts to the figure of $189.00.

[91] Our conclusion about the cost of the wall space for the sign on the "Bridge Street" frontage applies equally to the contention that an allowance of $900.00 per month plus GST should have been made for the cost of the wall space for the sign on the Chapel Street frontage. This sum is not an election expense.

[92] There was also some dispute about signwriting and painting costs on the campaign headquarters. In March 2005 Computastyle Signs Limited charged Mr Clarkson's campaign with a total sum of $430.88 (including GST) to cover the supply and application of vinyl lettering to the banner or skin; to supply the website address sign under the National Party logo on the Chapel Street frontage; and to supply an additional sign on the Chapel Street frontage. There is no dispute as to the amount of $430.88 but Mr Clarkson contends that this sum should properly be apportioned under s 213(4). This would result in a figure for election purposes of $215.44. We accept that figure.

[93] The final item of dispute in relation to the Chapel Street premises is the cost of painting additional signage on the Bridge Street and Chapel Street frontages. In that respect Mr Foote maintained that the cost of signs on these two frontages should be returned as election expenses in the sum of $1500.00 plus GST and $900.00 plus GST respectively. Mr Walford's evidence was that the remaining signage on those walls was painted on the building around November/December 2004. The cost of this was $281.25 and, with the appropriate apportionment under s 213(4) amounted to $84.38 for election expenses.

[94] Although the documentation on this issue is sparse, we are not disposed to accept Mr Foote's evidence on this point which did not go beyond his assessment of the proper cost of the painting. There is no cogent evidence to suggest that the painting cost was supplied at an undervalue.

*Item 2.3.2(i) – Small Roadside Signs*

[95] Mr Clarkson utilised approximately 60 small roadside signs. They consist of plastic frames with advertising inserts. The signs are pushed into the ground and are capable of use for other purposes simply by removing and replacing the inserts. One side of these signs contained an advertisement for the National Party with a photograph of the party leader. The other side displayed a photograph of Mr Clarkson with an invitation to vote both for National and Mr Clarkson as the candidate for Tauranga. Mr Walford gave evidence that the plastic frames were leased from Baypark at a cost of $135.00 although no documentary evidence of any such arrangement was produced. As well, Mr Walford said he intended to include a sum of $337.50 as the cost of the inserts, apparently on an apportioned basis, although the precise basis for the apportionment was not explained.

[96] Mr Foote gave evidence of enquiries he made which suggested that the cost of the frame and the insert should have been $52.85 per unit. On that basis he contended that the appropriate figure for election expenses for the 60 signs was a total of $3371.14 (GST inclusive). He supported that figure by producing an invoice from a Tauranga company relating to 15 saleblazer signs obtained by the New Zealand First party for campaign purposes.

[97] Again, the documentation relating to the signs is sparse. We have reservations about the existence of the claimed lease in respect of the frames, given the lack of documentation. But the real question is what notional value should be assessed for the frames on the footing they constitute materials for the purposes of part (c) of the definition of election expenses. Doing the best we can on the evidence available, we assess the value of the 60 frames at $50.00 each or $3000.00 (inclusive of GST).

[98] On the footing that the signs are reusable by Baypark Speedway Limited for other purposes, but taking into account the likelihood that signs of this nature will depreciate rapidly in value, we consider it is reasonable to adopt a figure of $600.00 as representing the reasonable market value of the signs (based on 20% of the value of the frames) as an appropriate assessment of their reasonable market value for rental purposes. This is necessarily an arbitrary figure and, in the absence of any proper evidence as to the period over which the signs were utilised, we make no apportionment.

[99] Given the makeup of the signs (one side promoting Mr Clarkson and the other the National Party) it was contended on Mr Clarkson's behalf that a 50/50 apportionment was appropriate. This raises a question as to the availability of apportionment in circumstances such as these, an issue which arises in relation to another item we are about to consider. The apportionment was justified by resort to s 213(1)(c) on the footing that because only about half of the sign related to the campaign for Mr Clarkson personally, only half the cost was his election expense. We do not accept this approach to s 213(1)(c). Although there were two different sides to the roadside signs, each sign was a single item which constituted an advertisement for the election of Mr Clarkson as the Tauranga member. Therefore, we consider the whole cost of the sign is caught unless there is a basis for apportionment in terms of another section in the Act.

[100] Section 214 allows an apportionment where an "election activity relates exclusively to campaigns for the return of 2 or more candidates", but candidates in this section are electorate candidates, whereas Dr Brash was a list candidate and in

any event his appearance on the signs was with reference to seeking the party vote for National. Therefore the section is not relevant.

[101] Section 214A does, however, apply to advertisements which both seek to persuade in relation to the party vote and provide coverage to an electorate candidate. The section provides:

> **Advertisements for party lists**
> Where any advertisement that is published or caused or permitted to be published in any newspaper, periodical, poster, or handbill, or is broadcast or caused or permitted to be broadcast over any radio or television station, -
> (a) encourages or persuades or appears to encourage or persuade voters to vote for any party listed on the part of the ballot paper that relates to the party vote; and
> (b) gives more than 10% of the coverage provided in the advertisement to a person who is a candidate at any election in any district in a manner which either –
> (i) features that candidate in his or her capacity as a list candidate; or
> (ii) features that candidate as endorsing or supporting the party or its party list; and
> (c) is or is to be published or broadcast in the district in which the person described in paragraph (b) is a candidate, -
> the cost of the publishing or broadcasting of that advertisement shall form part of the candidate's election expenses unless that advertisement is published or broadcast to more or less the same extent in 10 other electoral districts in addition to the electoral district referred to in paragraph (c).

Each of the cumulative requirements in (a), (b) and (c) is met. That is the roadside signs did seek to persuade voters in relation to the party vote, did contain more than 10% coverage for Mr Clarkson who at the same time endorsed and supported National (s 214A(b)(ii)), and there was publication in the Tauranga district. It follows that the cost of the road signs form part of Mr Clarkson's election expenses, unless the proviso or exemption applies.

[102] Was the advertisement published "to more or less the same extent in 10 other electoral districts" other than Tauranga? The import of the exception is not immediately apparent. In Mr Clarkson's case, for example, it would make no sense for the subject roadside signs to be displayed in 10 electoral districts other than Tauranga. This might suggest that the exception has no obvious application. However, we think it is directed to candidates, typically party leaders, who seek election in an electorate and also (obviously) endorse their party for the party vote.

And so Mr Peters, for example, could claim the benefit of the exemption if he used road signs similar in concept to the present ones, which were also displayed in 10 other electoral districts. In that case the cost would not be an electorate expense, but rather a party expense. In any event we are satisfied that the proviso or exemption does not avail Mr Clarkson.

[103] For these reasons we conclude that the full cost of the inserts, $675, and the full rental cost, $600, a total of $1275 comprise an election expense of Mr Clarkson.

*Item 2.3.2(ii) – Large Hoardings*

[104] A number of large hoardings were prepared and installed in the Tauranga electorate in support of the Clarkson campaign. There were three types of hoardings. The first featured photographs of Mr Clarkson and the leader of the National Party, Dr Brash. These plainly seek support both for Mr Clarkson and the National Party. Similarly for the second type described as the "two ticks" signs which sought a vote for National and Mr Clarkson. A third category appears to have been directed solely at the party vote for National. We understand only one of this type was displayed.

[105] There were both taller and shorter signs. The taller ones were unusually high. Mr Foote estimated there were 42 tall signs and seven short signs. This tallies with 49 photographs of signs produced on behalf of Mr Clarkson.

[106] There are two main components to the cost of these hoardings. The first is the cost of the coreflutes (effectively the signage) which amounted to $3029.74 (GST inclusive). The only dispute between the parties on this item is whether there should be an apportionment to take account of the fact that the hoardings promoted both Mr Clarkson as a candidate in the Tauranga electorate and the party vote for National. We deal with this issue below.

[107] The second principal component is the cost of the timber which was supplied on lease by Clarkson Construction. The essence of the dispute here is that Mr Clarkson maintained that the proper amount of the election expenses was only $52.40 being the calculation of three months rental on the timber supplied. On the

other hand, Mr Foote gave evidence that the cost of the timber if purchased on the market would have been $3422.26 in total. Again, this figure does not allow for any apportionment on account of the candidate/party vote distinction.

[108] As Mr Pidgeon properly conceded, a lease of timber in circumstances such as this is a highly unusual transaction. We think the suggested lease arrangement lacks commercial reality, the sole documentation for which was an invoice rendered by Baypark Speedway Limited to the campaign for a two month period amounting to $29.70. Timber as a commodity used in hoardings must be subjected to significant wear and tear, if not damage (screw/nail holes and perhaps cutting), which makes the notion of a timber lease improbable if not unrealistic. Accordingly, we consider that the only proper basis to assess the cost of the timber as materials supplied is on the basis of Mr Foote's evidence already cited.

[109] As with the roadside signs an apportionment was claimed in relation to each of the component costs of the large hoardings. That is a 50/50 apportionment as between Mr Clarkson and the National Party. For the same reasons as we have given in relation to roadside signs, we do not accept this contention.

[110] The outcome is that the amount to be attributed to election expenses for this item is the cost of the coreflutes ($3029.74); the reasonable market value of the timber as assessed ($3422.26); and the undisputed labour costs for the erection of the signs ($506.25). This results in a total of $6958.25 for this item. A figure of $33.75 for a resource consent is separately accounted for later.

*Item 2.3.3 – Speedway Sign*

[111] For Mr Peters it was submitted that a sum of $8808.75 should be included as an election expense in relation to the cost of the banner displayed on the Speedway from approximately November 2004. It was submitted on Mr Clarkson's behalf it was not appropriate to allocate any sum for election expenses on this account. First it was said that the sign was outside the Tauranga electorate. Secondly, it was submitted that the sign was erected to promote the Speedway and could not be

treated as advertising for Mr Clarkson's election. Thirdly, Mr Walford's evidence was that the sign was specifically to promote the Speedway's summer season.

[112] The submissions by Mr Clarkson overlook the timing of events and the content of the sign. It is undisputed that the four skins or banners were all purchased in November 2004 which coincided with Mr Clarkson's nomination as the National Party candidate for the Tauranga electorate. We do not consider that the purchase at this time of the banners (one of which was displayed at the Speedway Stadium) was a mere coincidence. It is true that the Stadium sign does not contain any reference to Mr Clarkson's candidacy for the election nor any reference to the National Party. But the wording "You Are Entering Bob Clarkson Country" was clearly designed to increase his profile in the electorate in the period leading up to the campaign. The sign was not taken down once the three month period prior to polling day commenced, although it was taken down on polling day as a precaution.

[113] We are satisfied, taking into account the totality of the Clarkson advertising material in and around the Tauranga electorate, that the Stadium sign should be treated as contributing, at least in part, to Mr Clarkson's campaign for election and should be treated to that extent as the election activity of advertising.

[114] However, apart from the cost of the skin itself, we do not consider any allowance should be made for the reasonable market value of the right to display the banner on the Stadium. We reach that conclusion for much the same reasons already canvassed in respect of the Chapel Street premises. The right to display the banner cannot, in our view, be treated as the application of "materials" for the purpose of part (c) of the definition of election expenses.

[115] The outcome is that the cost of the skin, $630.00 (see para [80]), is an election expense, subject to an appropriate apportionment of that cost under s 213(4) of the Act. Three-tenths of $630 reduces the figure to $189.00.

*Item 2.3.4 – Sign on Bus at Belk Rd*

[116] Mr Walford's evidence was that this sign was displayed at the request of a follower of Speedway who asked that the sign be put on his property. Mr Clarkson agreed as he considered it would help promote the Speedway. Mr Walford added that the bus was derelict and was being converted to a caravan. Who owned the bus was not disclosed. As earlier indicated, one of the four skins purchased in November 2004 was used for this sign.

[117] Mr Foote contended that the reasonable market value of the sign was $6783.75 which he calculated on the basis of the monthly rental for a roadside trailer. The sign displayed the same photograph of Mr Clarkson taken at the Speedway accompanied by the words "You Are Entering Bob Clarkson Country". It was submitted for Mr Clarkson that the sign was well outside the electorate and did not promote Mr Clarkson as the National Party candidate or have any connection with the election. Rather, it was submitted, the sign promoted the Speedway relying on Mr Clarkson's high profile in the community.

[118] For much the same reasons as we have discussed in respect of the Stadium sign, we consider that the maximum value which could be attributed for election expenses in respect of this item is $472.50. No allowance should be made for the right to use the space on the derelict bus. The outcome is that $472.50 is attributable to election expenses on account of this item.

*Item 2.4 – Brochures*

[119] The difference between the parties on this issue relates essentially to the reasonable costs of printing the brochures. Mr Walford's evidence was that one pamphlet was distributed in May (prior to the three month period and is therefore excluded). A second pamphlet was distributed in July 2005 at a cost of $750.00. Allowing for 1400 pamphlets not used and after an apportionment under part (c) of the definition of election activity, it was submitted for Mr Clarkson that an allowance of $454.88 would be appropriate. A third pamphlet distributed in August also cost

$750.00. After allowing for 900 pamphlets not used and an apportionment in the same way as the previous pamphlet, Mr Walford stated that $469.87 would be treated as an election expense. He added that a fourth pamphlet was not distributed. That was out of an abundance of caution because, by that time, Mr Walford was concerned about allegations of overspending being made on behalf of New Zealand First even though he considered those allegations to be unjustified.

[120] Mr Foote produced an invoice received by New Zealand First for $2,503.13 (GST inclusive) for 25,000 copies of a brochure he described as similar. It was submitted that the price of $750.00 for a similar quantity of brochures was below the reasonable market value. The difference is between a rate of three to four cents per copy obtained by Mr Clarkson and nine to ten cents per copy charged to Mr Peters by another supplier.

[121] While, on the face of these figures, there is an obvious disparity between the two, we do not consider the evidence to be sufficiently cogent to establish that the cost to Mr Clarkson was below reasonable market value. There may be a variety of valid commercial reasons for a price differential. As earlier indicated, this could reflect on-going commercial relationships in other matters, business competition, bulk buying and a range of other factors. The mere fact that Mr Clarkson was able to obtain the printing of the brochures at a substantially lower cost than Mr Peters may do no more than reflect factors of this kind.

[122] We simply do not have enough evidence confidently to conclude that the cost of the brochures was below reasonable market value. We are not satisfied that the apportionments are properly made under part (c) in the definition of election activity for the reasons already discussed in paras [101] and [102]. We allow a deduction only for the pamphlets not used. This results in $708 and $723 to be treated as election expenses for the two brochures respectively.

*Item 2.5 – Three Page Feature in Bay of Plenty Times*

[123] The background to this feature published in the Bay of Plenty Times on 20 July 2005 has been summarised in [9] above. We heard evidence on this subject

from several witnesses including the General Manager of the Bay of Plenty Times Mr R A Hall, who appeared under subpoena. He confirmed the contents of the letter sent by him on 6 September 2005 to the Chief Electoral Officer in response to enquiries about the feature. These included questions about the lack of any written authorisation from Mr Clarkson or his agent for the publication which the Chief Electoral Officer had described as "an advertising feature".

[124] Mr Hall's response was that no authorisation was required from Mr Clarkson. He advised that Mr Clarkson had not had any direct or indirect involvement in the preparation or publication of the feature. Mr Hall stated that the purpose of the publication was to publish a commercial advertising feature to celebrate a milestone in the development of Tauranga namely the completion of the developments of a Bunnings Warehouse and a Mitre 10 Mega store. As was normal practice for a feature of this kind, he said the newspaper approached suppliers to see if they wished to take the opportunity to promote their business around the on-going development of Tauranga. According to Mr Hall, the feature was never designed to have a link to the elections and with one or two minor exceptions, there was no reference to the election in the feature. He accepted there had been an initial phone call with Mr Clarkson to discuss the publication of the feature based on recent commercial developments. The thrust of his evidence, however, was that the feature was initiated and pursued by the newspaper and not by Mr Clarkson or anyone on his behalf.

[125] An examination of the feature shows that the three pages are largely taken up with advertisements by companies who provided goods or services to Mr Clarkson and his companies during the course of developments in Tauranga. These advertisements were all paid for by those placing them. The general theme was to congratulate Mr Clarkson and his companies on his role in the developments and the advertisements are expressed in laudatory terms. Only one (an advertisement by Firth Concrete) referred to the election and wished Mr Clarkson "the very best of luck for the coming Tauranga MP election". Somewhat unusually, the advertisements placed by suppliers did not in general refer to the completion of the Bunnings Warehouse or the Mitre 10 Mega store which was the suggested reason for the feature.

[126] There are three portions of written material other than the advertising. On the first page, reference was made to Mr Clarkson's role as a developer and landlord well known in the Tauranga area and referred in some detail to a range of his earlier developments. There was a brief mention of "his latest two projects" being the Bunnings Hardware development and the establishment of the Mitre 10 Mega store. A second article referred back to the development of the speedway which opened in 2001. Photographs from that time were included.

[127] The third article included in the feature referred explicitly to Mr Clarkson's political aspirations with an accompanying photograph of him. This article included material expressed in the form of quotations of statements by Mr Clarkson including why he had decided to stand for national politics and the policies he and the National Party would be pursuing in the upcoming election.

[128] It was submitted on behalf of Mr Peters that the whole of the feature should be treated as advertising for the purposes of the definition of election activity in s 213(1). Mr Foote's evidence was that the reasonable market value of the advertising was $7,642.47. To the contrary, it was maintained on Mr Clarkson's behalf that this was not the first occasion on which the Bay of Plenty Times had featured Mr Clarkson and his construction company and that the material contained in the feature related solely to Mr Clarkson in his capacity as a well known property developer.

[129] A copy of a letter dated 9 September 2005 from Mr Clarkson to the Chief Electoral Officer was produced. Mr Clarkson advised that the extent of his involvement was an interview with a reporter from the Bay of Plenty Times which focused solely on his construction business. He said he had no control over the content of the material and that the reporter had decided to focus on his candidacy for the election. He expressed surprise to see this material. No authorisation for the feature was required because Mr Clarkson did not consider the feature to be an advertisement. The one advertiser who had referred to the election had done so without any authority from him.

[130] It was submitted on Mr Clarkson's behalf that the material was not advertising relating to the campaign for Mr Clarkson's election and therefore did not constitute an election activity. It was also submitted that there was no authorisation for the feature which would be necessary for the purposes of part (a) of the definition of election activity in s 213(1).

[131] We are not entirely persuaded by those submissions. We are aware of the prohibition in s 221(1) of the Act against the publication in any newspaper or otherwise of an advertisement which is used, or appears to be used, to promote or procure the election of a constituency candidate without the written authorisation required by s 221(2). Any person lawfully contravening these provisions is guilty of an illegal practice (s 221(4)). This section of the Act was the focus of the Chief Electoral Officer's concern, mentioned earlier (paras [14]-[15]).

[132] But we do not think there is any necessary connection between s 221 and part (a) of the definition of election activity in s 213(1). If it can be demonstrated that one of the defined activities is carried out by the candidate or with the candidate's authority, the cost of the activity may nevertheless be regarded as an election expense even if there was no written authority as required by s 221. If it were otherwise, a candidate could avoid the maximum permitted figure for election expenses by authorising election activity but without putting that authority in writing. Certainly, a candidate would run the risk of prosecution if that course were followed, but the focus of the definition of election activity in part (a) is on authorisation of the activity in fact not whether authority is given in writing.

[133] We are satisfied it is highly unlikely that Mr Clarkson's interviewer would have included the quotations from Mr Clarkson relating to the election and his policies without Mr Clarkson's knowledge and at least implied authority. In the absence of any contrary evidence from Mr Clarkson, we take the article in question at face value and find that Mr Clarkson did authorise publication of the material contained in that article. We further find that, at least to the extent of the material contained in the article, it does constitute advertising and is an election activity for the purposes of s 213(1). Nor can we overlook the timing of this feature, occurring as it did in the middle of the election campaign and the three month period prior to

polling day. While accepting that the substantial majority of the advertising material contained in the feature related to Mr Clarkson's successes as a commercial property developer in the area, it must have been readily apparent to Mr Clarkson that the feature would be extremely helpful to his election campaign and would be likely to persuade at least some voters to support him. In those circumstances, we regard it as proper to treat a proportion of the associated advertising by suppliers as constituting an election activity known and impliedly authorised by Mr Clarkson.

[134] Unlike for example the stadium sign, we are satisfied that the newspaper feature must be assessed in terms of s 213(1)(c) to determine to what extent it related to the election campaign, as opposed to Mr Clarkson "in any other capacity". The newspaper feature is not a single entity. It comprises multiple individual advertisements placed by different businesses, most of which have no political content, together with articles which to a degree are persuasive in an electoral sense. By contrast the stadium sign was a single item which occasioned a single identifiable cost.

[135] The assessment of what proportion should be treated as advertising for the purposes of the definition of election activity in s 213(1) is very much a matter of impression. We would assess that proportion to be in the range of 20-30% and fix 25% as the appropriate proportion to be attributed to election expenses. The cost of the advertising by the suppliers was said to be $7642.47 – hence the figure adopted by Mr Foote in his calculations. However, we prefer to adopt the figure of $4560 plus GST for the three page feature, being the price supplied to the Chief Electoral Office by the Regional Advertising Manager of the Bay of Plenty Times. Twenty-five percent of that figure amounts to $1282.50 (GST inclusive). That is the amount we determine is to be treated as election expenses for this item.

*Item 2.6 – Bumper Stickers*

[136] Mr Walford's evidence was that no bumper stickers were distributed during the three month period prior to polling day and this part of Mr Peters' petition was abandoned.

*Item 2.7 – Newspaper Advertisements*

[137] The parties are agreed that the correct figure for election expenses is $5476.47.

*Item 2.8 – Miscellaneous Advertising*

[138] With one exception the parties are agreed. The agreed items are:

| | | |
|---|---|---|
| a) | Flyer for meeting at Pillans Pt School | $ 28.12 |
| b) | Licence for photographs | $225.00 |
| c) | Rosettes | $ 66.38 |
| d) | Business cards | $ 57.50 |
| e) | Resource consent fee | $ 33.75 |
| | | $410.75 |
| | | ===== |

[139] We note that there is a slight discrepancy between the parties over the business cards in that Mr Peters has suggested the correct figure is $66.38. The difference was not explained and we do not regard it as material. We propose to adopt the figure of $57.50. The only disputed item under this heading related to photocopying costs in relation to some material contained in a newsletter issued by Crockford Real Estate. A Mr M F Winiata appeared under subpoena. He gave evidence that he approached Mr Clarkson to obtain material to include in a real estate newsletter to be circulated. He approached Mr Clarkson because he knew he had a high profile and believed this would assist him (Mr Winiata) in raising his

profile and that of Crockford Real Estate in the wider Tauranga area. He did not receive any payment from Mr Clarkson and none was sought. The newsletter included a brief statement from Mr Clarkson introducing himself, referring to his record in property development and containing some brief reference to his political candidacy and policies.

[140] It appears that several of these newsletters were distributed during the three month period prior to polling day although Mr Winiata said that Mr Clarkson was aware of only one of them. He readily agreed that the purpose of the material was to serve his own interests rather than that of Mr Clarkson. Mr Winiata said he was an independent contractor to Crockford Real Estate Limited and there was no cost to him in preparing and photocopying the newsletter. The photocopying costs were paid by Crockford Real Estate. Mr Winiata distributed the newsletters himself.

[141] In closing, Mr Henry produced a calculation of photocopying costs amount to $297.83 based on 1725 sheets at 14 cents per copy. There is no proper evidential foundation for this calculation and, in any event, we do not regard this minor publication as falling within the definition of an election activity in s 213(1). Mr Clarkson's involvement in it was tangential and the essence of the newsletter was to support Mr Winiata. Only one of the three newsletters was impliedly authorised by Mr Clarkson. We accept the submission made on behalf of Mr Clarkson that no sum need be included for election expenses for this item.

*Item 2.9 – Salaries of Campaign Staff*

[142] It was submitted for Mr Peters that a proportion of the salaries of Mr Walford as campaign manager and a paid secretary should be included as election expenses. It was submitted that the appropriate proportion should be 15% which, it was calculated, would amount to a sum of $2485.00 for the two month period. In particular, it was submitted that the evidence showed Mr Walford was involved in the preparation of newspaper advertising and brochures. This submission was made on the basis of Mr Walford's evidence that he chaired a campaign committee which co-ordinated aspects of the campaign. Mr Henry also submitted that, on the basis of Mr Walford's acceptance of counsel's suggestion that he performed a "ringmaster"

role in relation to the campaign, it could be said Mr Walford was involved in co-ordinating the volunteers responsible for the distribution of brochures and arranging advertising materials.

[143] Significantly, there was no evidence that either Mr Walford or the paid secretary were involved directly in carrying out any of the election activities defined by the definition in s 213(1). It deserves reiteration that not every expense incurred in relation to an election campaign will be treated as an election expense. The most that can be said is that Mr Walford had an indirect involvement in the co-ordination of all of the many activities involved in the conduct of the election campaign. If, for example, it were demonstrated on the evidence that he had been directly involved in the preparation of advertising by preparing copy or artwork, then there would have been some validity to counsel's submission. However, in the absence of evidence of that kind, Mr Walford's involvement (and that of a paid secretary) can only be described as indirect and too remote to be treated as taking part in an election activity in the sense described in section 213(1).

[144] We conclude that none of the salaries of Mr Walford or the paid secretary have been shown to amount to election expenses.

*Item 2.10 – Radio Advertising*

[145] The evidence was that there was no radio advertising during the three month period and this part of the claim was not pursued.

**Summary**

[146] Bringing all this material together, we are satisfied that the election expenses (whether actual or notional) incurred by Mr Clarkson have not been shown to exceed $18,159.79 made up as follows:

| | |
|---|---|
| Van | |
| Sign | 119.25 |
| Speakers | 56.25 |
| Chapel Street | |
| Banner | 189.00 |
| Signwriting | 215.44 |
| Painting | 84.38 |
| Small roadside signs | |
| Inserts | 675.00 |
| Frames | 600.00 |
| Large hoardings | |
| Coreflutes | 3029.74 |
| Labour | 506.25 |
| Timber | 3422.26 |
| Speedway sign | 189.00 |
| Belk Road sign | 472.50 |
| Brochures | 1431.00 |
| Bay of Plenty Time Feature | 1282.50 |
| Newspaper advertising | 5476.47 |
| Miscellaneous | |
| Flyer for Pillans Pt School | 28.12 |
| Licence fee for photograph | 225.00 |
| Rosettes | 66.38 |
| Business cards | 57.50 |
| Resource Consent fee | 33.75 |
| | $18159.79 |

[147] For completeness, we note that Mr Clarkson earlier provided a provisional list of expenses amounting to $12268.33. That sum was reduced to the figure of $10022.31 in his counsel's closing submissions. The difference of just over $2200.00 is accounted for mainly by the deletion of $1125.00 provisionally allocated to the Chapel Street hoarding costs and adjustments to the cost of newspaper advertising. Mr Henry did not take any issue in these respects but we note that even if the net discrepancy of just over $1100 were added to the sum of $18,159.79 as

calculated in paragraph [146], the total would still be within the maximum level permitted of $20,000.00 (GST inclusive).

**Determination**

[148] We determine pursuant to s 243 of the Electoral Act 1993 that the respondent's election as the member of Parliament for the Tauranga electorate is not void.

**Report**

[149] Pursuant to s 244(1) of the Electoral Act 1993 we report that:

a) The respondent has not been proved to have committed any corrupt or illegal practice in the 2005 election for the Tauranga electorate.

b) No evidence was adduced before us that any of the constituency candidates has been guilty by his or her agents of any corrupt or illegal practice in reference to the election.

c) There were no persons proved at the trial of this petition to have been guilty of any corrupt or illegal practice and none received any certificates of indemnity.

d) There is no reason to believe that corrupt or illegal practices have prevailed at the election in Tauranga.

**Certificate to the Speaker of the House of Representatives**

[150] We certify under s 243 of the Electoral Act 1993 that, at the trial of this petition, the Court determined that the election of the respondent Robert Moncrieff Clarkson as the Member of Parliament for the Tauranga electorate was not void.

[151] The determinations reached by this Court are those of all three members of the Court. As one of the Court's members is currently overseas, this certificate and report is signed by two of the Judges who heard the petition as permitted by s 246 of the Electoral Act 1993.

**Costs**

[152] Costs, which are governed by s 250 of the Act, are reserved. The respondent may file a memorandum by 30 January 2006 and the plaintiff shall have 10 working days within which to respond.

DATED at WELLINGTON this 15th day of December 2005.

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|---|---|
| A P Randerson J<br>Chief High Court Judge | G K Panckhurst J<br>High Court Judge |