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

O.A. NO. 2/13

IN THE MATTER	of Article 64(1) of the Cook Islands Constitution (Bill of Rights); and the Incorporated Societies Act 1908; and Section 3 of the Declaratory Judgments Act 1908[1]
AND	
IN THE MATTER	of an Application for a declaratory judgment against the withholding of resignation from the Cook Islands Party Incorporated
BETWEEN	**NORMAN GEORGE,** Member of Parliament for the Teenui Mapumai Constituency, Atiu Applicant
AND	**RAU NGA** as President and **TEMU OKOTAI** as General Secretary of the Cook Islands Party Incorporated Respondents

Hearing: 22 July 2013

Counsel: Mr N George, Applicant, in person
Mrs T Browne for Respondents

Judgment: 7 August 2013

JUDGMENT OF HUGH WILLIAMS J[2]

A. OA 2/13 is dismissed on the basis that the Applicant, a Member of the Cook Islands Party since at least 2006, has never validly resigned from the Cook Islands Party in terms of Rule 6(1)(a) of its Constitution.

B. Costs are to be dealt with in accordance with [42] of this Judgment.

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[1] In the above intituling spelling and date errors have been corrected plus other amendments made to conform with the issues in this case. As filed under OA 2/13, it included reference to constitutional issues which did not arise in the case and were relevant only to OA 1/13 *George v Attorney-General v Nga & Okotai*. The CIP should probably have been named as a Respondent in OA 2/13.

[2] At the commencement of the hearing the Judge advised counsel that he chairs the New Zealand Electoral Commission. No counsel objected to Hugh Williams J hearing the matter.

INTRODUCTION

[1] Mr George, the Applicant, is a longstanding Member of the Cook Islands Parliament who has, or has had, an association with one of the parties in that Parliament, the Cook Islands Party Inc. ("CIP"). That neutral manner of describing the relationship between the parties to this proceeding is adopted simply because the relationship between the respective parties is a matter at the heart of this claim.

[2] In this proceeding under the Declaratory Judgments Act 1908[3], Mr George seeks declarations:

(a) that he resigned from the CIP "when he handed in his resignation" on 7 March 2011; and

(b) that the CIP "have [sic] behaved in an oppressive and unjust manner by denying a member of the party the right to resign from it whereby [sic] the Party Constitution and the Bill of Rights provisions of Article 64(1) of the Constitution guarantees the right of any member of the party to resign at will".

FACTS

[3] According to Mr George's affidavit[4], he has been the Member of Parliament ("MP") for the Teenui- Mapumai electorate on Atiu since 1983, first as a member of the Democratic Party and then, from around 1996, as a member of the Alliance Party which he formed. The Alliance Party won four seats in Parliament in 1999 and joined the Democratic Party in coalition, with Mr George being Deputy Prime Minister from November 1999-2001.

[4] On 8 June 2006 Mr George won a by-election in his electorate, standing as an independent, but, when a general election was called for 26 July 2006 he said "I was invited to become a member of the Cook Islands Party, which I accepted". At the

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[3] A New Zealand Act in force in the Cook Islands

[4] actually filed by him in OA 1/2013. His affidavit in OA 2/2013 merely confirmed on oath the correctness of a number of documents which he put in evidence and are later reviewed.

hearing of this case, he resiled from that statement saying he had never been a member of the CIP.

[5] Mr George was re-elected in the 2006 general election and, with other CIP MPs, formed the Opposition in Parliament 2006-2010.

[6] Mr George was again re-elected for his electorate in the general election on 26 November 2010, an election won by the CIP. However, despite saying "I thought I had contributed to [the general election success] in a big way" he found "I was left out of any Cabinet position or other position despite being the most experienced and longest serving MP in Parliament".

[7] As a result of that he decided the "only option left for me was to resign from the CIP and be an independent MP" in furtherance of which he sent a letter on 7 March 2011 to Mr Nga, one of the respondents and President of the CIP,[5] addressed to the "President CIP" the letter said:

> "I now formally resign from the Cook Islands Party Inc with immediate effect forthwith."

going on to say that the right to resign is guaranteed by Article 64(1) of the Constitution and the Incorporated Societies Act 1908[6]. After making a number of comments laudatory of himself and critical of the CIP and its executive, he concluded by saying:

> "I will continue to serve my people and electorate of Teenui Mapumai as an independent MP and that 97% of my electors support and approve of this resignation."

[8] The letter received some publicity in the "Cook Islands News" but, more germane to this application, on 15 March 2011 Mr Nga as President of the CIP wrote recording his receipt of the 7 March 2011 letter regarding "your wish to resign" from the CIP and continuing:

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[5] Mr George's affidavit in OA 1/2013 said the letter was sent to both respondents but it is addressed only to Mr Nga and there is no evidence of its receipt by Mr Okotai. Indeed, Mr George elsewhere suggested Mr Okotai was no longer General Secretary of the CIP. If that is correct, he should have been struck out of the case or it should have been discontinued against him.

[6] a New Zealand statute still in force in the Cook Islands

"While I and my executive respect your wish and reasons for wanting to do this I would like to point out that you were elected as a member of parliament under the Cook Islands Party banner. As such, you have legal and moral obligations to uphold this commitment. The Cook Islands Party does not accept your resignation unless you do the right thing morally and legally by giving back the CIP seat of Teenui/Mapumai and seeking a fresh mandate from your constituency through a by-election. That should not be a problem for you given your published claim of 97% support from your constituents."

[9] Mr George replied to Mr Nga's letter the following day saying, as far as is relevant to the legal issues in this case:

"Please note that I did not write to seek your permission or acceptance to resign from the Cook Islands Party Inc. I wrote to advise you that I have resigned on 7 March 2011 with immediate effect.

I do not need your permission to resign, there is no position in the world that anyone cannot resign from; Article 64(1) of our Bill of Rights guarantees that and so does the U.N. Charter on Human Rights."

[10] On 28 March 2013 Messrs Porio and Paretoa, signing themselves as "former chairman" and "current chairman" wrote to the Prime Minister and Mr Nga. Mr Nga's affidavit said Messrs Porio and Paretoa were respectively the former and current chairman of the Teenui- Mapumai constituency. That letter recorded a meeting between Mr George and CIP supporters of the Teenui-Mapumai constituency "in the early year of 2011" at which Mr George voiced his disappointment at his lack of preferment and his request to become an independent MP. The letter recorded strong opposition to that move from a number of those attending and that "at the end of the meeting it was agreed that Mr George return back the CIP seat on the table [sic]". The letter concluded that from that time:

"We the Cook Islands Party of Teenui / Mapumai DID NOT RECEIVED ANY OFFICIAL LETTER FROM Mr Norman George. And that is Final."

CIP CONSTITUTION

[11] The CIP adopted a new Constitution on October 2009. A number of its provisions are relevant to this case. They include:

(a) in Part 1, the Definition section, "Member" means a "financial member of the CIP".

(b) in Part 3, the Membership section, Rule 5(1) says "any person may become a member of the CIP" provided a number of qualifications not relevant to this proceeding are complied with.

Although the Constitution provides for membership, Honorary membership and Life membership, there is no separate category of "registered member" as Mr George claimed, during argument, to be.

(c) Rule 6 in Part 3 deals with resignation and relevantly reads:

> "(1) Any member of the Cook Islands Party wishing to resign may do so in the following manner:
>
> (a) if a registered financial member, Life Member, Honorary Member residing in any constituency, by letter to the Secretary of the Electorate Committee of the constituency;
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> (2) Following each resignation advice of the same shall be sent to the Executive Committee by way of a letter addressed to the Secretary General.
>
> (3) On resignation, the person concerned shall immediately lose all membership rights as prescribed by this Constitution and shall be forbidden from attending any Party meeting of any kind."

[12] Part 6 of the Constitution deals with the "Parliamentary Wing (Caucus)" and Part 7 deals with the "Selection and Qualification of Candidates". In the latter section Rule 25(1) says that "Any member of the Cook Islands Party shall be eligible to stand as a candidate for any constituency..." subject to compliance with a number of criteria including being a "financial member" while Rule 26 deals with Candidate Selection "for the purpose of choosing a candidate to stand in the election as the Cook Islands Party candidate"[7]. Once in Parliament, the Parliamentary Wing (Caucus) is defined by Rule 22(a) which says:

> "The Parliamentary Wing shall comprise those members of the Cook Islands Party who stood for and were elected into Parliament and remained loyal to the Party including other Members of Parliament who have joined with the Cook Islands Party in a Coalition already approved."

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[7] Rule 26(5)

[13] Two further matters concerning the organisation or operation of the CIP should be noted.

[14] First, Mr Savage a member of the CIP Executive, said in evidence that, despite the membership fee only being $2 p.a., no member of the CIP has paid a membership fee to the central organisation for a number of years.

[15] The second matter is that it was agreed that Mr George contributed more than any other MP when, after the 2006 election, the CIP was deeply in debt and its MPs were asked to assist repayment by deductions from their Parliamentary salaries. But it was not in contest that those payments were to retire debt, not in payment of membership fees.

SUBMISSIONS

[16] Mr George's written submissions emphasised the right he said was given by the Constitution for CIP members to resign without giving any reason or explanation, a right which, he submitted, could be followed by rejoining if the Party accepted the proposed renewed membership.

[17] He submitted the Party President and General Secretary had unfairly and wilfully refused his resignation request thus transgressing what he claimed were his rights under Article 64(1) of the Constitution. Pressed, he acknowledged that in this case the only provision of the Constitution which might be relevant was the guarantee of freedom of association in Article 64(1)(f).

[18] Mr George then developed an argument that because he had never been asked to pay any membership fees since 2006 he was never a "registered member" of the CIP and accordingly the CIP had no right to decline a non-existent membership but conducted itself as if it did. His argument accordingly sought orders somewhat different from those claimed in the application for a declaratory judgment, which were to the effect that he was "never a registered member of the Cook Islands Party and his resignation was therefore unnecessary" or that he resigned from the CIP on 7 March 2011.

[19] It is of some importance, as matters have turned out, to note that the CIP's defence expressly pleaded that Mr George's letter of resignation did not comply with Article 6(1)(a) of the CIP Constitution, cited previously.

[20] Mr George's response to that issue was that Mr Nga "accepted abridging the resignation proceedings by promptly declining it instead of redirecting the resignation to the Electorate Secretary in Teenui Mapumai".

[21] For the CIP, Mrs Browne rehearsed the factual background, emphasised Mr George's admission as to membership in his affidavit and stressed the mandatory requirements of Rule 6(1)(a). She submitted Mr George was a member of the CIP and remains such as he has never validly resigned.

DISCUSSION AND DECISION

[22] Despite Mr George's submission to the contrary, there is no room to reach any conclusion other than he was a member of the CIP from at least the 2006 general election. Not only does his supporting affidavit say as much, – "since joining the CIP in July 2006" – it is clear that he stood as a CIP candidate in both the 2006 and 2010 general elections on a ballot paper which had the CIP logo alongside his name and, in the interval between the two general elections, he was an active member of the CIP Opposition: "I was, I believe, the most effective CIP MP during our opposition years". His parliamentary colleagues during that period would doubtless have been taken aback had it been suggested his participation in CIP Caucus matters and Parliamentary debates might have been on CIP's behalf but were conducted by someone who did not regard himself as a member of the party.

[23] Then, Mr George's stance was that, throughout the period from 2006 down to at least 7 March 2011 he was a "registered member" of the CIP, but not a "member".

[24] Although the CIP Constitution makes provision for classes of membership other than membership – Honorary members and Life members[8] – it does not subdivide membership itself. Accordingly, although the CIP Constitution

[8] Rule 5(3)(4)

occasionally uses the phrases "registered member" or "registered financial member"[9] it contains no categories of membership called "financial members" or "registered members". Mr George's argument in that respect must fail.

[25] Mr George next argued that, in refusing to accept his letter of resignation, the CIP was acting in breach of his rights to freedom of association under Article 64(1)(f).

[26] This argument is unsustainable for several reasons.

[27] The first is that Article 64(2) makes clear that persons and entities have mutual duties and the exercise of their rights and freedoms is limited "by any enactment or rule of law for the time being in force".

[28] Section 6(1)(d) of the Incorporated Societies Act 1908 requires rules of such societies to include the "mode in which persons cease to be members of the society". The CIP Constitution includes rules relating to cessation of membership. Accordingly it cannot be argued that Mr George's right and freedom of association[10] is not circumscribed by the rules of the incorporated society to which he belongs. It is well-settled that the rules of an incorporated society constitute the terms of the contract between the society and its members and, in this case, the terms of that contract expressly define the means by which the members of the society may resign their membership. The CIP Constitution coupled with the Incorporated Societies Act 1908 are accordingly an "enactment or rule of law for the time being in force" and Article 64(2) therefore applies to make Mr George's argument based on Article 64(1)(f) unsustainable.

[29] Additionally, though an opinion voiced in the context of the New Zealand Bill of Rights Act 1990, s 17, formal registration as an incorporated society is likely to be regarded as a reasonable limitation on freedom of association pursuant to s 5 of the New Zealand Act[11]. Section 5 is a statutory expression codifying the criteria

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[9] Rule 6(1)(a)
[10] Which includes the right to disassociate: *Rishworth et al: The NZ Bill of Rights (2003) p356*
[11] *Butler & Butler: The New Zealand Bill of Rights Act: a commentary* (2005) para 15.9.3 p 461

widely applied in deciding the validity of Bills of Rights and fundamental freedoms against the limitations of relevant statute law.

[30] That leads onto a consideration as to whether Mr George's correspondence, particularly his letter of 7 March 2011, amounted to a valid resignation from the CIP.

[31] The answer must be that it was not.

[32] Rule 6(1)(a) clearly sets out that resignations of members of the CIP must be "by letter to the Secretary of the Electorate Committee of the constituency". Mr George did not comply with that straightforward requirement for valid resignation even though he must have known who the Electorate Secretary of his constituency was. He wrote to the President of the CIP. Although, in his response to the CIP defence, he said the President declined his resignation "instead of redirecting the resignation to the Electorate Secretary in Teenui- Mapumai", his letter of 7 March 2011 makes no request for his notification to be redirected. He did not even adopt the simple device of copying (and sending) his 7 March 2011 letter to his Electorate Secretary.

[33] Even when his non-compliance with Rule 6(1)(a) was pointed out in the CIP defence dated 6 May 2013, Mr George did not follow the simple procedure of writing a letter of resignation to his Electorate Secretary and then amending his pleadings, as was his right, to allege that, at the very least, such a letter would have been a valid resignation. It is difficult to see that the CIP would have had a defence to such an amended pleading.

[34] The conclusion just reached does not represent rigid adherence to legal formalism or, as the Court of Appeal has put it, the "austerity of tabulated legalism"[12]. It is not a case where form trumps substance. It is much more practical than that.

[35] Resignations by electorate MPs usually result in by-elections. Nominations as candidates are required by the CIP Constitution to be made to the Secretary of the

relevant constituency.[13] The Secretary of the party's constituency branch can be expected to lead the canvass for suitable candidates to replace the retiring member. S 31(1)(b) of the Electoral Act 2004 requires candidate nomination papers to be signed, amongst others, by "at least two registered electors of the constituency for which the nomination is made". In a practical sense, the party's secretary for the particular party in the constituency is likely to be one of those.

[36] It is therefore clear that the requirement in the CIP's Rules for forwarding an electorate MP's resignation to the Secretary of his or her local constituency branch rather than to any other functionary of the party is a logical and efficient requirement, one which should not be disregarded and, in fact, one which requires to be observed.

[37] It remains to address one further feature.

[38] Mr George sought to draw support from the fact that CIP and its members have all acted in breach of the Constitution by not paying membership fees for a number of years to suggest that, in some way, that validated his letter of resignation to the President.

[39] That submission is likewise unsustainable. Widespread non-compliance by that entity and all its members with one provision of an entity's constitution over a lengthy period does not connote a right of non-compliance by one member of the entity in relation to an entirely different facet of the Constitution,. For the reasons just discussed, that is one which should be honoured.

[40] In all those circumstances, the only conclusion open is that Mr George, as a member of the CIP, has never validly resigned from the party because he has failed to resign in the manner required by the party's Rules.

[41] His application for a declaratory judgment in OA 2/13 must therefore wholly fail and it is dismissed.

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[12] *Clarke v Karika* [1983] CKCA 5 p 11 of 17 in PacLII version. The phrase appears in quotation marks in the Judgment but, if a quotation, is unsourced.

[13] Rule 6(6)(a)

COSTS

[42] If costs are an issue and the parties are unable to agree on them, memoranda (maximum 5 pages) may be filed with that from the respondent being due 28 days after delivery of this Judgment and that from the Applicant being due within 35 days of that date and with the parties certifying, if they consider it appropriate, that all matters of costs can be determined without further hearing.

POSTSCRIPT

[43] Though the matter does not impact on the decision in this case, it must be observed that this case has an air of futility about it.

[44] Mr George could easily have complied with the clear resignation requirements of Rule 6(1)(a). It remains a puzzle why he did not do so before 6 May 2013, the date of CIP's defence. It is even more of a puzzle why he did not do so after that date when CIP's defence alerted him to the necessity of forwarding his resignation to the appropriate functionary. If any of that had occurred previously, there would have been no necessity for this litigation. If he continues to want to resign from the CIP after receipt of this Judgment, it will be a simple matter for him to do so validly by complying with Rule 6(1)(a).

[45] A caveat must, however, be entered against the remarks made in the last paragraph. Even if Mr George succeeds in validly resigning his membership of the CIP, that may not result in his achieving his aim of being recognised in Parliament as an independent MP[i][14]. That is a matter for the Cook Islands Parliament, its Speaker, and its Standing Orders, none of which were involved in this case.

Hugh Williams J

[14] The NZ procedure in such circumstances appears in McGee: *Parliamentary Practice in NZ (3rd ed 2005) p89*