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

**OA No. 4/2010**
**APP No. /2010**

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| IN THE MATTER | of the Declaratory Judgments Act 1994 |
| AND | |
| IN THE MATTER | of the Constitution of the Cook Islands Democratic party Incorporated |
| BETWEEN | **COOK ISLANDS DEMOCRATIC PARTY INCORPORATED** |
| | Applicant |
| AND | **SEAN WILLIS** |
| | First Respondent |
| AND | **HONOURABLE ROBERT WIGMORE** |
| | Second Respondent |
| AND | **HONOURABLE CASSEY EGGELTON** |
| | Third Respondent |
| AND | **HONOURABLE WILLIAM (SMILEY) HEATHER JNR** |
| | Forth Respondent |
| AND | **HONOURABLE APII PIHO** |
| | Fifth Respondent |

Hearing: 31 May 2010 (NZT) / 30 May 2010 (CIT)

Counsel: Mrs Tina Browne for Applicant
Mr Norman George for Respondents

Judgment: 1 June 2010 (NZT) / 31 May 2010 (CIT)

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**JUDGMENT OF THE COURT**

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**Introduction**

[1] The applicant seeks an interim injunction to prevent the respondents from proceeding with a Conference set to commence 31 May 2010 (CIT) which Conference is proceeding under the banner of the Democratic Party. The applicant does not seek to prevent the meeting going ahead. Rather, it seeks to prevent the meeting proceeding as if it were a Conference of the Democratic Party.

[2] The applicant also seeks a declaratory judgment under the Declaratory Judgments Act 1994. Such a declaration, at best, can only be available following a full hearing. I discuss this particular application in more detail below.

[3] The papers were filed late last week. Over the course of the weekend the Chief Justice gave directions as to the conduct of the hearing. In compliance with his direction various affidavits and submissions were filed. The matter then was heard by me in a telephone conference lasting approximately two hours. At the conclusion of the conference I refused the interim injunction on the basis that I would give these reasons today. It is never desirable that the actual decision and the reasons for it should be separated but the exigencies of time left me with no alternative. It would not have been appropriate to attempt an oral judgment over the telephone (even if only because there would have been no means of recording it).

[4] In this decision I will set out my reasons briefly. There is not the luxury of time for me to set them out in any more detail.

**Some preliminary procedural issues**

[5] At the commencement of the hearing yesterday I disclosed some associations with persons either directly parties to the litigation or one step removed. Counsel did not raise any objection to my sitting on the matter.

[6] I have some reservations as to whether there is proper authority for the applicant to seek this injunction. I inquired of Mrs Browne whether there had been any formal resolution or process followed seeking approval. She was not able to assist me on the point other than to say her instructions were that the President and Secretary-General were authorised to initiate the litigation on behalf of the Party. For present purposes, and despite my reservations, I am prepared to proceed on that assumption.

[7] An issue was also considered as to whether Mr George could properly represent the respondents. This was a topic raised by the Chief Justice in his Minute. Mr George filed submissions setting out why he was acting. He explained that attempts had been made to secure alternative counsel but, because of the shortness of time, that had not been possible.

[8] The Chief Justice's concerns arose from the fact that Mr George had been critical of some or all of the respondents, including other politicians associated with the Democratic Party, in relation to but not limited to problems associated with the Toa case. There is no doubt that Mr George has made political capital of those matters but in all the circumstances I am satisfied it was appropriate that he should represent the respondents in the telephone conference. If he had not done so, there would have been no one able to represent the respondents. Consequently, the better option was to allow Mr George to represent the respondents. That occurred on the basis that the question of Mr George's representation may need to be reconsidered at some future time.

**The applications and the response to them**

[9] Mrs Browne filed two applications, one for a declaratory judgment and secondly for the interim injunction. At the outset I made it clear that the application under the Declaratory Judgments Act was misconceived because there were disputed facts which certainly could not be resolved during the course of a telephone conference. I also made it clear that while the Court had inherent jurisdiction to order an interim declaration, there would need to be very clear circumstances before it would do so. The case proceeded essentially on the basis that it was one about an interim injunction (or not).

[10] There were several affidavits filed in support of the application. There was no undertaking as to damages given but Mrs Browne indicated that, if the injunction was granted, her client would need to give such an undertaking.

[11] Following a direction from the Chief Justice, Mr Tongia filed a second affidavit which dealt, inter alia, with the delays in bringing this application. I come to that below.

[12] Approximately two hours prior to the hearing Mr George was able to complete a response to the applications together with an affidavit from Mr Willis. There were voluminous exhibits to that affidavit together with

further documents which were referred to in the affidavit but not specifically listed as exhibits. I treated those as exhibits for the purposes of the hearing.

**The legal threshold**

[13] In order successfully to obtain an interim injunction the applicant must show there is a serious question to be argued and that, secondly, the balance of convenience favours the granting of the interim injunction. Issues such as delay, inconvenience to third parties and other factors fall to be considered under the second head. There is a final obligation on the Court to stand back and assess the overall justice of the case.

**Serious question to be argued**

[14] Mrs Browne's case is deceptively simple. She says that the annual conference can only be called in terms of Article 11(b) of the Constitution. This provides that the Democratic Executive shall decide when the Conference is to be held and is then responsible for the arrangements for calling it. Article 11(a) provides there shall be an annual or bi-annual Conference. Article 4(a)(iv) of the Constitution provides that the Secretary-General shall be responsible for calling meetings of the Democratic Executive. He gave evidence by way of affidavit that he had not done so.

[15] Mrs Browne argued that the Executive had not called the Conference and that, as a result it was invalid.

[16] Mr George, in opposition, argued that the Executive had decided to hold the Conference. He referred to a meeting that occurred on 12 April 2010 together with a series of communications between Mr Willis and various party representatives as supporting that conclusion.

[17] The Court is left with a distinct factual dispute as to the role of the Executive. Both the applicant and the respondents refer to and rely on the Executive as having made certain decisions. The applicant says that the Executive has decided that the Conference should not proceed on 31 May. The respondents take the opposite view. Neither the applicant nor the respondents can point to a formal convening of the Executive at which these decisions were made. Rather, both have canvassed the Executive and each purports to draw different conclusions from what has occurred. For example, Mr George claimed 28 votes in the respondents' favour and 22 against. Mrs Browne criticised particular parts of the calculation. It is simply not

possible for the Court to resolve those factual disputes. I can, however, make some provisional observations.

[18] First, Mr Tongia gave evidence that 46 persons out of the 57 said to be on the Executive opposed the Conference occurring (that is 80% opposed). Mrs Browne in her submissions then said that those figures were inaccurate and that 38 of 63 opposed (that is 60%). There was no further evidence from Mr Tongia supporting the figures given in the submissions. That is entirely unsatisfactory. At the least, Mr Tongia should have filed a further affidavit explaining how he reached those figures and how the earlier mistake had occurred.

[19] Secondly, I have real doubt that there are 10 committees (which comprise part of the overall Executive) such that the Chairman of those committees would each have a vote. Mrs Browne said that these Chairmen were elected at the Conference last year but the informal minutes before the Court do not support that conclusion. Those minutes were put forward by the respondents. Mrs Browne criticises them as inaccurate but there is no formal evidence from the applicant in support of her submission.

[20] Thirdly, there is evidence before the Court (in the form of the minutes) that a decision was made at the Conference last year to hold a further Conference prior to the general election this year.

[21] Fourthly, Mr Willis attempted to persuade the President/Secretary-General to call a Conference but his correspondence appears to have been ignored. It would be an odd state of affairs if a political party, which is designed to participate in a democracy, was able to be controlled by the actions of a few contrary to the wishes of the many. There was argument before me as to whether the Constitution contained powers that might be relevant to this. However, the applicant had failed to place the Constitution before the Court and it was not a matter in respect of which I could draw any firm conclusions.

[22] Fifthly, even if there is a full hearing at which evidence is called and tested there may be some difficulties in assessing who properly comprises the Executive. That is because the 24 constituency representatives appear, at least at this preliminary stage, to be less than precise in their definition. So it may be possible for several people to claim to be the proper constituency representative. While I raise this as part of my assessment of whether there is a serious question to be argued, it is a matter perhaps more relevantly

assessed under the heading of balance of convenience. It points to the desirability of the membership of the Party making key decision rather than the Court endeavouring to ascertain who is the proper representative of a particular constituency.

[23] I think it suffices, for present purposes, to accept that there is a serious question to be argued and then to consider the balance of convenience.

**Balance of convenience**

[24] The most significant factor here is the very considerable delay in brining this application – just days before the Conference was due to start.

[25] It appears the Conference may have been formally called as early as 11 May 2010. Certainly, the question of a Conference has been on the table for longer than that. Yet it was not until several days ago that any formal steps were taken by the applicant. Indeed, if steps had been taken on or about 11 May it would have been possible for this matter to be heard before the Chief Justice while he was sitting in Rarotonga. That would have been a far more desirable course than leaving it for a telephone conference at the last minute.

[26] Mr Tongia filed a second affidavit giving some explanation as to the delays. In essence he said that there were continuing discussions between the parties with a view to resolving issues. He also said it took some time to receive documents from the outer island constituencies. While I can perfectly understand both explanations, they are not an appropriate basis upon which to withhold an application for interim injunction. Notwithstanding that discussions apparently remain on foot, the applicant has now sought an interim injunction. So both courses of action can proceed in parallel. There was no reason, then, why the usual rule (that an interim injunction should be sought at the earliest possible time) should not have applied to the applicant.

[27] The effect of delay, and the conclusion that lengthy delay is often fatal when seeking an interim injunction, is not simply an empty rule. The longer the delay, the more difficult it is to reach a clear conclusion as to whether an interim injunction should be issued. The respondents are put under pressure of time and so is the Court. Other options, such as granting an urgent hearing on the merits, are precluded. There are real consequences that flow from delay and these consequences are taken into account by the Court in assessing the balance of convenience.

[28] Closely allied with the question of delay is the fact that granting the interim injunction at this point would seriously inconvenience those persons who have made arrangements to attend. A number of these have flown in from the outer islands. I raised the question of who would pay their costs if the Conference was called off but there was no clear position in relation to that.

[29] Mrs Browne argues that there is no need to call the Conference off. She emphasised on several occasions that her goal is to stop the meeting proceeding as if it were a Conference of the Democratic Party. In my opinion, however, this is splitting hairs. If I were to strip the meeting of its title I believe that would have the same consequence as effectively preventing the meeting going ahead. And while I believe there is a serious question to be argued as to whether the Conference has been properly called, there is also prima facie evidence before the Court that the Executive supports the calling of the Conference.

[30] Mrs Browne also argued that there would be confusion if the Conference was allowed to proceed apparently under the banner of the Democratic Party but accepted there was no actual evidence before the Court that anyone had been confused. Indeed, it seems unlikely that most people are confused. The question of what is happening in the Democratic Party is a matter of considerable public debate and attention in the media. It seems unlikely that many people will be confused about what is happening.

[31] And there is then the question of democracy in action. It seems undesirable that the affairs of a political party should be resolved by the Court without allowing the membership to speak. At the end of the day, the party serves the members and so do the leaders of the party.

[32] As noted above, I am not in a position to make a final decision as to whether the Conference has or has not been properly called. But in the absence of any clear evidence of confusion there seems to be no particular problem arising if the Conference proceeds in its current form. If it has been lawfully called then its decisions will be binding. If it has not been lawfully called then other consequences may follow. There may need to be a further hearing of the Court to determine them. But there seems little need to grant the injunction (to prevent the organisers of the Conference associating it with the Democratic Party).

[33] For these reasons I find that the balance of convenience supports the respondents and not the applicant.

**Overall fairness**

[34] I do not believe there are other factors I need to address in addition to those set out above. However, I am firmly of the view that fairness strongly points to the Conference proceeding in its current form.

**Conclusion**

[35] As a consequence of the reasoning above, the application for interim injunction is refused. While there is a serious question to be argued, the balance of convenience strongly supports the respondents. So does the overall fairness of the case.

[36] During the course of submissions Mr George volunteered that the Conference could be delayed for two days. He invited me to issue a direction that the Secretary should call the Conference so as to regularise its affairs. Mrs Browne advised me that her client was not prepared to do this but would consider giving an undertaking to call a Conference within 30 days.

[37] I cannot give the direction that Mr George seeks for the reasons identified above. That is, I am not able to reach a sufficient degree of certainty as to the matters I need to address before so directing. That is because the facts are in dispute and because the full Constitution is not before the Court.

[38] However, I strongly urge the applicant, by its President and Secretary-General, to endeavour to work in with the Conference which has been called. I suggest to the respondents there is considerable merit in delaying the start of the Conference to allow the applicant to consider its position and to ensure attendance at the Conference if it is so minded.

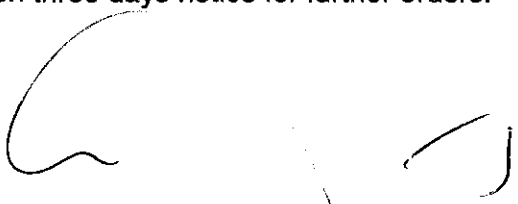
[39] Both parties agree there are discussions continuing between the two factions as represented by the applicant on the one hand and the respondents on the other. I urge those parties to continue the discussions. It seems to me far better that those discussions proceed to a fruitful conclusion rather than to seek to have the Court impose solutions from the outside. A political party should seek to determine its affairs by reference to the will of its members rather than the determination of the Court applying its Constitution between the members as if it were applying a simple commercial contract.

**Costs**

[40] Mr George raised the question of costs but agreed, following discussion, that costs should be reserved. I reserve costs accordingly.

**Any further orders?**

[41] I have urged the parties to endeavour to reconcile their differences. If that occurs there may be no need for further orders. If that does not occur then this proceeding will need to be, either, discontinued (in which case costs would need to be considered) or, alternatively, to continue as an ordinary proceeding. If the latter, timetable orders will need to be made. Any of the parties has leave to apply upon three days notice for further orders.



Weston J