

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

OA NO.2/2016

IN THE MATTER of the Cook Islands Constitution
and the Declaratory Judgments Act
1994

AND

IN THE MATTER of applications for declaratory
judgments

BETWEEN **WESLEY KAREROA MP, JIM
MARURAI MP, TETANGI
MATAPO MP, TANGATA
VAVIA MP SELINA NAPA MP,
TAMAIVA TUAVERA MP,
GEORGE ANGENE MP,
NGAMAU MUNOKOA MP,
WILLIAM HEATHER MP and
JAMES BEER MP, Members of
Parliament**

Applicants

AND

ATTORNEY-GENERAL

Respondent

Hearing: 5 and 6 December 2016

Date: 1 March 2017

Court: Hugh Williams CJ, Grice and Keane JJ.

Counsel: Mr I Hikaka and Mrs T Browne for Applicants
Mr D James, Solicitor-General, for Respondent

JUDGMENT OF THE FULL COURT

SUMMARY OF DECISION

- [A] **The actions of the Clerk of Parliament in denying the Applicants access to Parliament building on 22 June 2016 exceeded his powers in the ways described in the judgment, but his actions were in good faith and explicable and the actions of the Applicants on that occasion do not qualify them for any declaration in their favour**
- [B] **The Electoral Amendment Act 2007 is not unconstitutional and can only be amended or repealed by complying with Article 41 of the Constitution.**
- [C] **Parliament was quorate on 12 and 13 September 2016 and any business transacted on those days was valid.**
- [D] **The invocation of the Part 9A procedure in the Electoral Amendment Act 2007 against Mr Albert Nicholas could never have succeeded on the facts.**
- [E] **Other consequential decisions – including costs – are as dealt with throughout the judgment.**

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INTRODUCTION

[1] The ten Applicants are all Members of the 24 seat Parliament of the Cook Islands. Nine are Members of the Democratic Party. Mr Angene is a One Cook Islands Party Member. Together with a former Member of the Cook Islands Party Government, Mrs Rose Toki Brown, they constitute the Opposition.

[2] The case has two facets. The first concerns whether the Clerk of Parliament acted unlawfully in denying the Opposition members access to Parliament buildings on Tuesday 21 June 2016¹.

[3] Parliament had adjourned on the preceding Friday, 17 June either to a date to be notified or until 22 August at the earliest. But on the Sunday, 19 June, the Leader of the Opposition asserted in a letter to the Clerk that Parliament had not adjourned validly in either sense and that under Standing Orders² it had to resume sitting on Monday, 20 June in the afternoon.

[4] On that Monday afternoon, and in the face of the Clerk's advice that Parliament stood adjourned until formally reconvened, the Opposition Members gathered in the Chamber. They declared they had a quorum to resume Parliament's Friday session. They appointed the Deputy Speaker, Mrs Rose Toki Brown, to replace the Speaker. They expressed a lack of confidence in the Prime Minister, and their confidence in the Deputy Speaker as Prime Minister. They adjourned to obtain the assent of the Queen's Representative to the Deputy Speaker's appointment as Prime Minister

[5] Against that background, the first aspect of the case requires us to consider whether in denying the Opposition access to Parliament on Tuesday, 21 June 2016, the Clerk acted outside the terms of his office and beyond the extent of his powers. If he did, did he deny the Opposition Members any rights of substance?

¹ All dates in this judgment refer to 2016 unless otherwise specified

² Hereafter "SO"

[6] The second and more significant facet of the case concerns whether, when Parliament next convened formally on 12-13 September, there was a sufficient quorum, and legislation was validly passed.

[7] That revolves around the fact that, on 12-13 September, the Opposition Members boycotted Parliament by electing to remain away, and the Government Members present could only have constituted a quorum (12 Members excluding the Speaker³) if one former Opposition member, Mr Albert Nicholas⁴, who had left the Democratic Party on whose ticket he had been elected and joined the Government, retained his seat (the Avatiu-Ruatonga-Atupa-Panama-Palmerston seat known by the acronym, “RAPPA”) despite the Opposition endeavouring to trigger the operation of Part 9A of the Electoral Act 1994⁵ against him to bring about the vacation of the his seat

[8] On 7 September, before the September session, the Opposition had, by notice, purportedly invoked Part 9A to try to have Mr Nicholas’ seat rendered vacant on the ground that he had failed, on a vote on an issue of confidence, to support the party to which he was affiliated when he was elected.

[9] Two issues result from this second facet, the first of which, taken by the Attorney-General, is whether Part 9A is inconsistent with the Constitution and consequently invalid and devoid of effect. If Part 9A is valid and operative, did the Opposition Members have the capacity to invoke it to have Mr Nicholas’ seat declared vacant?

[10] Formally, in this proceeding the Applicants seek:

- a) declarations that the RAPPA seat was vacated on 7 September because of the operation of Part 9A; that Parliament had no quorum to transact business on 12 or 13 September; and any business purportedly transacted by it on those dates was invalid; and

³ More fully considered elsewhere

⁴ By direction of the Court Mr Nicholas was served with all papers filed in the proceedings and advised he had a limited time in which to apply to participate as an Intervenor. Beyond making an affidavit on behalf of the Respondent Mr Nicholas took no part in the case.

⁵ Enacted by the Electoral Amendment Act 2007. Hereafter “Part 9A” or the “2007 Amendment”

- b) a declaration that the barring of the Applicants from the precincts of Parliament by the Clerk of Parliament on 21 June was unlawful in the circumstances described elsewhere in this judgment.

[11] By way of counter-claim, the Attorney General seeks declarations that Part 9A and the 2007 Amendment are inoperative as contrary to the Constitution of the Cook Islands and, alternatively, that Part 9A can be repealed or amended by a simple majority vote in Parliament.

EVENTS OF 17-21 JUNE 2016

[12] In denying the Opposition Members access to Parliament on Tuesday, 21 June, the Clerk's intent was he says (and he says he acted after consulting with the Speaker) to deny them the ability to resume in the Chamber their asserted right to convene as the Parliament. In this proceeding, as mentioned, they seek a declaration that, in acting as he did, the Clerk acted unlawfully.

[13] They contend that, as Members of Parliament, they enjoyed the right on that Tuesday afternoon to enter and to remain within the precincts of Parliament; and the Parliamentary library and the Opposition office in particular. The Clerk, they say also, acted in breach of their fundamental rights under the Constitution to equality before the law, to freedom of peaceful assembly and association, and to freedom of movement.

[14] The resulting question to be answered, whether the Opposition Members are entitled to a declaration that the Clerk acted unlawfully on 21 June when he denied them access to Parliament buildings, entails three issues.

[15] The first is whether this Court has jurisdiction to grant such a declaration. This Court has by statute a general discretionary power to grant declaratory relief, but the Clerk calls in aid a Constitutional and statutory immunity he enjoys as an officer of Parliament. Is that an immunity on which he is entitled to rely? The Opposition Members contend that his actions lay beyond the powers of his office, and his powers, and beyond the reach of any such immunity.

[16] The second issue, which arises if the Clerk is not immune, again has two facets. The first is whether it lay within his power to deny the Opposition Members access to Parliament

on the Tuesday afternoon, either in his own right or as the Speaker's delegate (should the evidence go that far). The second and larger issue, if the Clerk lacked power to act as he did, is this: to what extent did he deny Opposition Members any right of access they were then entitled to exercise?

[17] The third issue, if the Clerk did act unlawfully, and did deny the Opposition Members any aspect of their rights of access, is whether this Court should grant the declaration contended for. This question of discretion also has two aspects. One is whether the Opposition Members deserve the declaratory relief they seek. The other is whether any declaration could serve any useful legal purpose.

Salient events

[18] These three issues cannot be resolved by fixing solely on the Clerk's conduct on 21 June. They must be set against the Speaker's decision, as announced on 17 June, to adjourn Parliament to a date to be notified, and not, as the Opposition Members then wished, until 22 August. They must be set equally against the Opposition Members' actions in the Parliamentary Chamber on Monday, 20 June.

Friday 17 June

[19] On Friday, 17 June, the date on which Parliament had last formally convened in session, the main item of business on the Order Paper was the Appropriation Bill 2016, which it first considered as the Committee of Supply, and then passed on the second and third readings.

[20] During the question time which preceded the committee phase that day, the Opposition established that the Prime Minister and some cabinet Ministers were about to travel to overseas conferences. Then, during the committee phase, they contended that, to accord those commitments priority, the Government was intent on truncating the 10 days allocated to the committee phase of the Appropriation Bill by SO 307.

[21] The Leader of the House immediately moved that Standing Orders be suspended. The Opposition called for a division. The Government succeeded by a bare majority: 12 votes to

11. (Mr Albert Nicholas was absent - the subject of one section of the second part of this case.) The committee phase and the two readings were then completed without recorded dissent.

[22] Once other matters before Parliament that day were also resolved the final issue became the date to which Parliament was then to adjourn. The Leader of the House moved that Parliament adjourn sine die (i.e. not to a specified date) and that motion was seconded. However the Opposition responded by moving an amendment, also seconded, that it be to 22 August to review a Select Committee report on purse seine fishing.

[23] The Government Minister chairing that Select Committee then supported the original motion. He said that the report, and that of another Select Committee, would be before Parliament by August, but that the date could not yet be fixed. The Speaker then put the motion without saying whether it was the original or amended motion and, after it was passed, that became an immediate issue.

[24] The Leader of the Opposition contended that the motion agreed to had to be that as amended. The Speaker ruled that it had to be the original motion, just endorsed by the Select Committee chair. Hansard⁶ records that the House then adjourned “sine die”, and thus to a date to be notified.

Sunday 19 June

[25] At 9.25pm on Sunday, 19 June, a letter was delivered to the Clerk from the Leader of the Opposition. It said this:

The Parliamentary Opposition has taken advice of the confused procedures that attended upon the adjournment motion at last Friday’s sitting and has concluded that the House was neither adjourned sine die as was the Government’s wish nor to the 22 August as was the Opposition’s.

The position therefore is that in the absence of any clear direction from the House, the House stands adjourned until the next sitting day which is Monday, 20 June 2016.

This note is then to formally advise you and through you the Speaker that the Parliamentary opposition will be attending in the house at 1.00pm and is a courtesy to enable you to make appropriate arrangements.

⁶ Correctly, the “Minutes”: SO 44. There was no challenge to the accuracy of the Minutes in evidence.

[26] The Clerk's evidence is that he found this letter "disturbing". He then considered, as he does still, that the assertion in the letter that Parliament had not adjourned on the Friday *sine die* was irreconcilable with the Speaker's ruling, as recorded in Hansard, and therefore "false".

Monday 20 June

[27] On the Monday morning the Clerk, having consulted, he said, with the Speaker and the Solicitor-General, invited two senior police officers to Parliament Buildings to ensure that, when Opposition Members arrived, there was no disturbance. The officers remained, he says, throughout the afternoon.

[28] At 12.30pm the Opposition Members arrived, together with two then Government members, the Deputy Speaker, Mrs Rose Toki Brown - who had decided that day to quit the Government and join the Opposition - and Mr Albert Nicholas, the Government Minister and erstwhile Opposition Member, who says he was there out of curiosity. With them as well were 11 supporters, one of whom, Norman George, was a lawyer, a former Member of Parliament, Minister and Speaker. Also the CITV cameraman who normally recorded proceedings only to be denied entry by the Clerk.

[29] The Clerk says he told the Leader of the Opposition that Parliament stood adjourned until formally reconvened, and that he was not that day under any of his duties as Clerk when Parliament was in session (a stance he had set out to make clear, he says, by wearing an island shirt to which Mr George took exception).

[30] The Clerk did not, he says, attempt to deny the Opposition Members access to the Chamber. Nor did he deny access to the CITV cameraman, he says because he wanted to ensure there was an accurate record.⁷

[31] Then, in the Chamber, and after the customary prayer, the Clerk welcomed the Opposition members but advised them that Parliament stood adjourned until a date still to be formally notified, and that it could not resume sitting that afternoon.

⁷ We were invited to, and have relied on the transcript as to which there is no issue which matters. We have seen no need to view the video recording.

[32] The Leader of the Opposition did not accept that to be so. He responded by saying, in effect, that because the Speaker's Friday ruling on the adjournment was incorrect it was without effect, and that under Standing Orders Parliament had to resume sitting that afternoon. He then outlined what was to ensue.

[33] He said that the Opposition Members present and the two Government Members constituted a quorum (a minimum of 12 members excluding the Speaker⁸), and that they could appoint the Deputy Speaker in place of the Speaker, and begin by dealing with the Bills still outstanding on the Order Paper from the Friday before.

[34] The Clerk said that he and the Speaker had met the Solicitor-General that morning; and that the Solicitor-General's advice was that the Speaker's Friday ruling was correct as recorded in Hansard. The Leader of the Opposition said, however, that, absent a written opinion from the Solicitor-General, the Opposition members could act as he had outlined. He put motions in those terms as if Parliament were in session.

[35] At that point the Clerk said again that he intended to comply with the Speaker's Friday ruling, and the Leader of the Opposition told him he was relieved of his duty that day, and moved that the Deputy Speaker take the chair. The Clerk left the Chamber.

[36] The Opposition members then acceded to a motion suspending their sitting for half an hour (between 1.30 – 2.00pm) to set an agenda, and, when they resumed, adopted as their order paper that for the Friday before. They then agreed to a motion suspending all Standing Orders, "in order that a motion concerning matters of urgent public importance as it appears in the Order Paper be taken forthwith".

[37] In short order, they passed motions expressing a lack of confidence in the Cabinet, and affirming that the Deputy Speaker commanded the confidence of the majority of members. They called on the Queen's Representative to appoint her Prime Minister, and suspended their sitting to enable her to present herself to him, in their company. It was then 2.15pm.

⁸ Art 34(4) of the Constitution

Aftermath

[38] The Deputy Speaker, and the Opposition Members accompanying her, found the gates to the Queen's Representative's residence closed. After some 20 minutes, they were told by his Official Secretary that he was elsewhere. They did not meet the Queen's Representative before they returned to Parliament on the Tuesday at 1.00pm to resume their suspended Monday sitting.

Jurisdiction

[39] The first question, whether this Court has jurisdiction to grant a declaration that the Clerk acted unlawfully, turns on the interplay between the Declaratory Judgments Act 1994, which confers a general power to grant declaratory relief, and the Constitution, as supplemented by the Legislative Assembly Powers and Privileges Act 1967 ("LAPPA"), which confers the immunity on which the Clerk relies.

Declaratory Power

[40] The Declaratory Judgments Act 1994 Act, which derives from and is essentially identical to the Declaratory Judgments Act 1908 (NZ), confers on this Court a general power to grant declaratory relief. Section 2 says:

No action or proceeding in the High Court shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the said Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

[41] Section 11 confirms that this Court has that ability even where it cannot give any other form of relief; and, though it is not relevant to this case, s 9 enables this Court to make a declaration in anticipation of an act or event.

[42] Equally importantly, the jurisdiction the Act confers is entirely discretionary. Section 10 says:

The jurisdiction hereby conferred upon the High Court to give or make a declaratory judgment or order shall be discretionary, and the said Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.

[43] This Court is able, as the Court of Appeal confirmed in *Clarke v Karika*⁹, to make declarations as to the validity of parliamentary conduct by reference to the Constitution. It can, as that decision recognises, and we are invited to do in the second aspect of this case, declare a statute inconsistent with the fundamental rights conferred by the Constitution, and to that extent invalid and inoperative. This Court is also able to declare that Parliament has not acted in accord with its constitutionally prescribed process: *Robati v Privileges Standing Committee*¹⁰.

[44] As those cases also illustrate, however, this wide declaratory power must always be exercised consistently with the constitutional principle identified by the Judicial Committee of the Privy Council in *Prebble v Television New Zealand*¹¹ namely that the Courts and Parliament must both be astute to recognise their respective constitutional roles, and that, so far as the Courts are concerned, they will not allow any challenge to be made to what is said or done within the walls of Parliament in the performance of its legislative functions and protection of its established privileges.

Constitutional and statutory immunity

[45] The privileges of Parliament to which the Judicial Committee referred, and which Members and officers of Parliament necessarily share, are set out in Art 36 of the Constitution and the Clerk invokes the immunity conferred by Art 36(2). But we must begin more broadly. The Clerk also invokes any customary immunity preserved by s 4A of LAPPa which reads:

Subject to the provisions of the Constitution, the Assembly and the Committees and Members thereof shall have, hold, enjoy and exercise the like privileges, immunities and powers as are held enjoyed and exercised by the House of Commons of the Parliament of Great Britain and Northern Ireland and by the Committees and Members thereof whether such privileges, immunities and powers are held possessed or enjoyed by custom, statute or otherwise, and the Leader of the House may at any time give such instructions as may be necessary to ensure the orderly progress of parliamentary business and which are authorised or ratified by the Assembly.

⁹ [1983] CKCA 5

¹⁰ [1993] CKCA 1

¹¹ [1983] 3 NZLR 1 at 6

[46] Section 4A, to our mind, is unlikely to confer on Parliament or its Members or the Clerk any privilege, immunity or power material to this case beyond those conferred by Art 36 and the Constitution as a whole.

[47] Leaving aside Art 36(2) for a moment, Parliament's privilege is preserved in the widest way by Art 36(1):

The validity of any proceedings in Parliament or in any committee thereof shall not be questioned in any Court.

and Art 36(3)-(5) reflects Art 9 of the Bill of Rights 1688 with which *Prebble* was concerned, which applies still by virtue of s 4A and prohibits

...freedom of speech and debates or proceedings in Parliament

from being

impeached or questioned in any Court or place out of Parliament.

[48] More pertinently still, however, Art 36(2), which the Clerk does invoke primarily, is itself widely expressed:

No officer or member or Speaker of Parliament in whom powers are vested for the regulation of procedure or the conduct of business or the maintenance of order shall in relation to the exercise by him of any of those powers be subject to the jurisdiction of any Court.

[49] Furthermore, this immunity is also given by s 31 of LAPP: A:

Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any Court in respect of the exercise of any power conferred on or invested in him by or under this Act or the Standing Orders of the Legislative Assembly.

[50] The Clerk unquestionably enjoys this immunity expressed statutorily and thus that given by Art 36(2). An *officer of the assembly* is defined by s 2 of LAPP: A to be:

...the Clerk or any other officer or person acting within the Chamber or the precincts thereof with the authority of the Assembly or the Speaker and includes any police officer on duty within the precincts of the Assembly.

[51] The *precincts of the assembly* are also widely defined by s 2 to include, not just Parliament buildings but also the surrounding grounds. They are defined to be:

... the Offices of the Assembly and places provided for the use or accommodation of strangers, members of the public and representatives of the press and includes, while the Assembly is sitting and is subject to any exceptions made by direction of the Speaker, the entire building in which the Chamber is situated and any enclosure or open space adjoining or appertaining to such building and used or provided for the purposes of the Assembly.

[52] The critical issue is whether the Clerk acted within the scope of any power vested in him, or lawfully delegated to him by the Speaker. If he acted beyond his power his immunity cannot avail him and this Court has jurisdiction. If he acted within his power the converse is the case.

Two generic discretionary factors

[53] In the event that the Clerk exceeded his power, the issue to which we are about to come, and this Court does have jurisdiction to make such a declaration, there will still be a question as to whether in its discretion it should do so. And two generic factors come into play whenever declaratory relief is applied for.

[54] The first is a matter of public policy. The declaration sought must serve a lawful purpose. Furthermore, and even though a declaration is not an equitable remedy, applicants seeking declaratory relief must always have clean hands: *Puttick v Attorney-General*¹²; *Kung v Country Section NZ Indian Association*¹³. The Opposition Members, and their conduct, and the declaration they seek, must survive scrutiny from those converging perspectives.

[55] The second is that the declaration must have some intrinsic value. Whether the Clerk acted within his power may well be a question of public law capable of being resolved by a declaration, even if the issue has ceased to have immediate significance: *R v Gordon-Smith*¹⁴. But it must still serve some useful purpose: *Re Chase*¹⁵.

¹² [1980] Fam 1

¹³ [1996] 1 NZLR 663(HC)

¹⁴ [2209] 1 NZLR 721(SC)

¹⁵ [1989] 1 NZLR 325(ca)

Legality of Clerk's conduct

[56] The issues whether the Clerk acted consistently with his office under the Constitution and whether he exercised legitimately any express or delegated power he did possess, are interrelated.

Clerk's office and functions

[57] The office of the Clerk of Parliament, is created by Art 38, which assigns to the Clerk the duty to keep a record of the proceedings of Parliament and transmit it to the Queen's Representative. Part XII of the Standing Orders also confirms that the Clerk's duty is to keep a comprehensive record.

[58] This is solely an administrative role. Under the Constitution the Clerk has only one role which is in any sense supervisory, and it is highly specific. When an election for Speaker is required, the Clerk assumes the chair. That cannot enlarge the Clerk's role in any way that counts in this case. But the Clerk also has specific powers and can act on the Speaker's delegation.

Express and delegated powers

[59] Section 32 of LAPPa confers on officers of the Assembly all the powers of a police officer and under s 33 these extend to a power of arrest. The Clerk must have those powers, we accept, in respect of strangers to Parliament. Whether the Clerk could ever invoke them in respect of Members is an entirely different question.

[60] The Clerk is also entitled to exercise any power validly delegated by the Speaker under s 12(1) of the Legislative Service Act 1968-69. It says:

Except where the Standing Orders or any enactment otherwise provides, the Speaker may from time to time, either generally or particularly, delegate any of his powers to the Clerk or other officer of the legislative service.

[61] Section 12(2) then enables the Clerk to exercise that power delegated as if it were directly conferred:

Subject to any general or specific directions given by the Speaker, the person to whom any powers are so delegated may exercise those powers in the same manner and with the same effect as if they had been conferred on him directly by this Act and not by delegation.

[62] The issue remains whether the Speaker can delegate all her or his powers under the Constitution, the Standing Orders and statute, those to supervise Parliament's proceedings, and those to control and protect Parliament's estate, the buildings and the grounds.

[63] The Clerk invokes those wider powers but the Opposition Members contend that only powers the Legislative Assembly Act 1968-69¹⁶ itself confers may be delegated by the Speaker.

Related conclusions

[64] We need only resolve these issues as to the possible extent of the Clerk's direct and delegated powers, beyond the administrative, to the extent that they arise on the evidence and they do not. The Clerk did not invoke any of the powers of a police officer. Nor did he purport to arrest anyone. Nor did he act on any delegation from the Speaker.

[65] On the evidence, we find, the Clerk acted of his own accord. The only evidence is that he says he consulted with the Speaker on the Monday morning before the Opposition Members came to Parliament, and before they returned on the Tuesday afternoon, and that he acted with her agreement. The Clerk does not go so far as to say that the Speaker instructed him to act as he did, or that she delegated to him any power she considered she possessed to act in that way.

[66] As a result, we conclude that when the Clerk denied the Opposition Members access to Parliament Buildings on the Tuesday afternoon he exceeded his administrative function and his powers. But we also find that he acted in good faith to give effect to the Speaker's Friday ruling and for understandable reasons.

[67] The critical issue, we consider, is whether the Clerk denied the Opposition Members the ability to exercise any right of access they did possess either as Members of Parliament or under the Constitution and how significant that right is.

¹⁶ As cited by counsel: LAPP A?

Opposition Members' rights of access

[68] Members of Parliament, elected to represent the electors in their constituencies, enjoy a right of access to Parliament buildings to discharge that responsibility. That is a customary right of long standing, inherently part of the rights secured to them by s 4A of LAPPA, which strangers to Parliament do not and cannot possess.

[69] The Opposition Members also say that, as well as being denied that right, they were denied their fundamental rights under the Constitution to equality before the law, and to its protection (Art 64(b)); to their freedom to assemble peacefully and to associate with each other (Art 64(f)); and to their freedom of movement at common law (Art 42, Magna Carta).

[70] We question however, in the absence of any submission, what, if anything, those fundamental rights and freedoms, enjoyed by every person in the Cook Islands, add to their primary and definitive right of access to the precincts of Parliament on the Tuesday afternoon, by virtue of their membership.

[71] Even more to the point, that right, large though it may be, is not absolute. It is not a personal and private right. It is a right they enjoy to discharge their duties as Members of Parliament under the Constitution. To sustain their complaint that they were denied that right unlawfully they must first establish that they were exercising it consistently with the Constitution. In our view they cannot.

[72] The Opposition Members do not say precisely why they returned to Parliament Buildings on the Tuesday afternoon. But, on the evidence, that can only have been to resume in the Chamber where they had left off the day before on the premise that they had then supplanted the Government and had a sufficient quorum to function as Parliament. That premise is irreconcilable with the Constitution, and two central complementary features of it most obviously.

[73] The first is that Parliament is, as Art 27(2) of the Constitution prescribes, a sovereign body of "24 members elected by secret ballot under a system of universal suffrage by the electors of the ... islands or groups of islands or areas", which comprise the entire Cook Islands. That is the premise on which the Constitution as it concerns Parliament is ordered; nothing

less. A quorum of 12 members can only come into play under Art 34(4) and SO 55, if Parliament in that full sovereign sense has been duly convened.

[74] The second is that, under Art 29(1), Parliament meets “at such places and at such times as the Queen’s Representative appoints in that behalf”; and the prorogation of Parliament also rests with the Queen’s Representative under Art 37(1). While Parliament is in session, when it sits and for how long, has necessarily to be the subject of Standing Orders devised, “for the regulation and orderly conduct of its proceedings”: Art 34(5).

[75] Standing Order 51 provides that, “During any one session Parliament may adjourn a meeting for such periods as it may determine.” Where Parliament adjourns sine die, SO 52 provides that the Queen’s Representative is to decide when it is next to meet and to inform the Speaker.

[76] Whenever Parliament adjourns, and even when that is to a specific date, SO 53(1) obliges the Clerk to, “send to each member not less than seven days written notice directing attention to the meeting”, subject only to the Queen’s Representative’s right to summon a meeting on shorter sufficient notice, “which will ensure that members are duly informed”. Where Parliament adjourns for more than seven days SO 53(2) obliges the Clerk to include with the notice a copy of the Business Paper.

[77] Standing Order 54, on which the Opposition Members necessarily rely, governs sitting days and hours, and those days are Monday to Friday inclusive. So if Parliament concludes on a Friday without adjourning sine die or to a specific date, under SO 54(5) it will resume on the *next sitting day*, which is the Monday. But equally plainly it will resume on a day of which every member had notice on the Friday.

[78] In this instance, on the face of the Hansard record on the Friday, SO 54 never came into play. Parliament adjourned sine die and the date when it was next to meet lay with the Queen’s Representative. Even assuming, as we do, that in the hubbub of the Chamber that afternoon the Speaker was incorrect in her ruling¹⁷ and that the motion agreed to was the amended motion,

¹⁷ Pitchforth *Meetings, Practice and Procedure in NZ* 4th ed 2010 p 3-135

Parliament stood adjourned until, at the earliest, 22 August, and all members were entitled to notice of that and the proposed Business Paper.

[79] What was not elaborated to us in submissions was the Opposition Members' assertion in their Sunday evening letter to the Clerk that, as a result of an error by the Speaker in what she announced as to the adjournment agreed to, Parliament did not adjourn to any date. Such a submission, if made, would not have begun to withstand scrutiny. Parliament at least adjourned to 22 August. Nor, we hardly add, did that letter give any notice to the Government Members of the resumed sitting proposed for the following day.

Conclusions

[80] Against that background we conclude, firstly, that the Clerk was right, when he received the Sunday evening letter, to be concerned that the Opposition Members proposed to act the following day inconsistently with the Constitution. Parliament then stood adjourned, if not sine die, then at least until 22 August.

[81] Secondly, we conclude the Clerk was right, after taking advice on the Monday morning, to adhere to that position when the Opposition Members met in the Chamber that afternoon. It did not constitute a duly convened meeting of Parliament, and the fact that they had sufficient numbers to constitute a quorum if Parliament had been duly convened, did not validate their meeting. Their motions were inconsistent with the Constitution and devoid of effect.

[82] Thirdly, we conclude, on the Tuesday the Clerk exceeded his office and powers when he denied them access to Parliament building. But the only rights of access they were entitled to assert were to their office and to the library, which they did not wish to exercise or only incidentally. They wanted access to the Chamber, to resume where they had left off the day before, to which they had no right under the Constitution. In denying them that, the Clerk denied them nothing.

[83] Fourthly, we conclude, while the Clerk did exceed his office and powers on the Tuesday the actions of the Opposition Members do not deserve any declaration that, to that extent, he acted unlawfully. He acted in good faith and explicably. Nor in the singular circumstances of this case do we consider that such a declaration would serve any useful legal purpose.

[84] The result of those findings is that, apart from the conclusion in paragraphs [66], [82] and [83] as to the Clerk's actions, this part of the case is dismissed.

EVENTS OF 20 JUNE – 13 SEPTEMBER 2016

[85] In the General Election held on 9 July 2014, Mr Albert Nicholas was elected as the Member for the RAPPa seat.

[86] The political party appearing against Mr Nicholas's name in the nomination paper nominating him as a candidate for the RAPPa seat was the Democratic Party. But, in May 2015, he left the Democratic Party, joined the Cook Islands Party in Government and has since held the portfolio of Minister of Internal Affairs. On 12 November 2015, by letter from the leader of the Opposition and the Democratic Party, the Hon. W Heather, Mr Nicholas's membership of the Democratic Party was terminated.

[87] On 20 June Mr Heather wrote to Mr Nicholas in the following terms:

I am writing to inform you that it is my considered view that Section 105B(a) of the Electoral Amendment Act 2007 ("the Act") applies to you in your position as the Member of Parliament for Ruatonga, Avatiu, Panama, Palmerston, Atupa ("RAPPa"). My reasons are as follows:

1. You did not vote with or support the Opposition Democratic Party Members of Parliament in opposing the budget, an issue of confidence as defined by Section 105A of the Act, when it was put to the vote on Friday, 10 June 2016. In fact you seconded the motion.
2. This particular enactment was also known as the "anti-party hopping legislation". It introduced a new part into the Act, Part 9A entitled "Party Integrity". As its name implies, it was designed to put an end to Members of Parliament "crossing the floor", as it were, or deserting the party which elected them into Parliament, once they have been so elected.

It is therefore my intention to give written notice to the Speaker of Parliament pursuant to Section 105B(b) of that Act to have your seat declared vacant.

However under Section 105D(a)(ii) of the Act, I am required to give you 7 working days from the date of receipt by you of this notice to respond to me in writing on the matters raised herein. I do so now through this written notice. Upon the expiry of that period of time, and taking into consideration your conduct and your response (if any) to this notice, I will then take the next step provided under the Act.

[88] Mr Nicholas did not reply.

[89] The opposition to the budget to which paragraph 1 referred was the debate on the Appropriation Bill which was introduced on Friday, 10 June and ultimately passed by the House on Friday, 17 June.

[90] During this hearing there was some doubt expressed as to Mr Nicholas's actions in relation to the Appropriation Bill.

[91] From Hansard the correct position is that on 10 June the Minister of Finance delivered his budget speech in support of the Appropriation Bill at the conclusion of which he moved the second reading of the same. The motion was seconded by Mr Nicholas. It passed unanimously and without debate.

[92] On the following Friday, 17 June, the House resolved into the required Committee of Supply following which the House's consideration of the Bill continued until the division was called on a motion that Standing Orders be suspended to permit completion of the debate on the Bill by 1pm that day. As noted, the Government was successful, 12-11, in the division. Mr Nicholas' vote was not recorded. The debate then continued clause by clause with almost no Opposition input. *Objection from the Opposition* is recorded on the votes on the first 16 of the 32 departmental or other appropriations. There is no opposition recorded on the remainder. At the conclusion, the Minister of Finance reported progress on the Bill to the Speaker and that it had been approved without amendment. The Minister then moved the third reading which was passed without opposition being recorded or a division called for.

[93] The reason for Mr Nicholas not being mentioned in the Hansard report of proceedings on the Appropriation Bill on 17 June was because his affidavit said he "did not attend Parliament on any of the votes on the Appropriation Bill" on that day. That statement was not challenged and, in relation to the assertion in the 20 June letter that Mr Nicholas "did not vote with or support the Opposition Democratic Members of Parliament in opposing the Budget" Mr Nicholas made the point, correctly, that Hansard contains no record of which Democratic Party members were present at that juncture and opposed the budget votes. There is also no record of how many Democratic Members opposed it or, given the lack of debate, how their opposition was expressed.

[94] Parliament was summoned to sit on Monday, 12 September. But, on 7 September, Mr Heather wrote to the Speaker in the following terms:

“Pursuant to Section 105B(b) of the Electoral Amendment Act 2007 (“the Act”), I, as Parliamentary Leader of the Democratic Party, hereby give written notice that the Honourable Albert Nicholas Jnr, Member of Parliament for Ruatonga, Avatiu, Palmerston, Panama and Atupa did fail to support the Democratic Party Members of Parliament on an issue of confidence namely the provision of supply by way of appropriation for 2016-2017 when it was put to a vote in Parliament on Friday, 10th June 2016.

This written notice is also signed by not less than two-thirds of the parliamentary members of the Democratic Party in accordance with Section 105C(a) of the Act.

A statement required by Section 105C(c) is attached to this written notice. That statement complies with the requirements of Section 105D.”

[95] Mr Heather and all Applicants other than Mr Angene signed the letter. It seems to have been accompanied by a further letter to the Speaker of the same date, the relevant parts of which read:

“NOTICE UNDER SECTION 105D OF THE ELECTORAL AMENDMENT ACT 2007

This statement is prepared in accordance with the requirement of Section 105C(c), and in full compliance with Section 105D of the Electoral Amendment Act 2007 (“the Act”). It is signed by me as Parliamentary Leader of the Democratic Party, and by not less than two-thirds of the parliamentary members of the Democratic Party.

The Honourable Albert Nicholas Jnr was nominated as a Democratic Party candidate, and subsequently elected at the 2014 elections as the Member for Ruatonga, Avatiu, Palmerston, Panama & Atupa (“RAPPA”). He was elected to Parliament as a Democratic Party member.

...

The said Member, Hon. Albert Nicholas Jnr, has failed upon a vote in Parliament on an issue of confidence, namely the provision of supply by way of appropriation for 2016-2017 on 10 June 2016, to support the majority view of the Democratic Party Members of Parliament on that matter.

I confirm that I, as Parliamentary Leader of the Democratic Party, have delivered to Hon. Albert Nicholas Jnr, written notice dated 20th June 2016 informing the Member that I considered Section 105B(a) applies to him, and the reasons for that opinion and advising him that he had 7 working days from the date of receipt of the notice to respond to the

matters raised in the notice by notice in writing addressed to me. A copy of the written notice I delivered to the Member is attached herewith as Attachment A.

No response has been received from the Member.

The parliamentary members of the Democratic Party have considered the conduct of the Member and his lack of reasons. I confirm that not less than two-thirds of the parliamentary members of the Democratic Party have agreed that I should deliver notice to you under Section 105B(b) of the Act.”

[96] That, too, was signed by Mr Heather and the same eight Democratic Party MPs and had a copy of the 20 June letter attached to it.

[97] Mr Heather again wrote to the Speaker on 7 September – it would appear after taking legal advice – and, after rehearsing the delivery of the various notices sent to the Speaker that day the letter continued:

“The delivery of this notice has not been taken lightly but has been made after careful and deliberate consideration, including for the following reasons:

- (a) The legislation that provides for this solemn process, the Electoral Amendment Act 2007, was promoted by Government and supported by Members of Parliament as a means to put an end to members crossing the floor and moving from party to party. As Minister Tangata Vavia, Minister responsible for the Bill said when introducing it to Parliament on Friday, 13th April 2007, this sort of behaviour was causing a lot of headache for our people over the years, and his Government wanted a law that would stop party hopping as requested or asked for by the people of this country.
- (b) In addition, the Act was passed in accordance with Article 41 of the Constitution, requiring the support of not less than two-thirds of the Members of Parliament, and having an interval of not less than 90 days between the second and third readings. This indicates its paramount importance.
- (c) Honourable Albert Nicholas Jnr was a Democratic Party candidate at the 2014 elections, and was elected to Parliament as a Democratic Party Member. He was sworn in as Minister of the current Government on 13th March 2015. Honourable Albert Nicholas Jnr’s status as a Democratic Party Member of Parliament took effect from when he was elected in 2014 and it remains and continues under Sections 105A and 105B(a) of the Act. The Act clearly defines his status as a Democratic Party member as that was the political party appearing as required under section 45(7) of the Electoral Act 2004 against his name in the nomination paper nominating him as a candidate at his or her election.

In all of the circumstances set out above, and in order to protect the honour and integrity of Parliament and Parliamentary Members as well as uphold the declared and inherent intent of the legislation against party hopping, I and my colleagues are therefore duty bound to give you the necessary notice and accompanying statement.

As a consequence of the delivery of the required notice to you, the seat of Ruatonga, Avatiu, Palmerston, Panama & Atupa has become vacant by operation of law under s 105B and s 9(1)(o) of the Act. The delivery of a notice under s 105B(b) is in itself sufficient and complete evidence of the satisfaction of the requirement of s 105B(a) of the Act.

You are now obliged under s 9(4) of the Act to declare in writing that the seat has become vacant and the cause thereof, and forthwith notify the Chief Electoral Officer and cause that declaration to be published in the *Cook Islands Gazette*.

The seat having come vacant more than six months before the expiration of the then present term of Parliament, the Chief Electoral Officer must appoint a date for a by-election to fill the vacancy.

We look forward to seeing the declaration required by law being provided and the publishing of that declaration in the *Cook Islands Gazette* by the Chief Electoral Officer.

[98] The Speaker replied on 14 September:

“Re: Request for Speaker to declare the RAPPa seat vacant Under Section 105B of the Electoral Amendment Act 2007

Thank you for your letter of the 7th September 2016 delivered on that date. You describe it as *notice under section 105D of the Electoral (sic) Amendment Act 2007* (referred to below as “Electoral Act 2004 part 9A” or “the Act”) to Hon Member Albert Nicholas (“Mr Nicholas”). You say his seat has become vacant.

For the reasons stated below, and on assessing the reasons set out in your letter to Mr Nicholas dated 20 June 2016 (Act s 105D(a)(i)); and on its being common knowledge that Mr Nicholas was not present in Parliament when the *no confidence* Appropriation Bill was put to the vote; I do not find that you had reason to state that he,

“...upon a vote in Parliament on an issue of confidence, the member fails to support the majority..” (Act s 105B(a)).

It follows that I cannot find the RAPPa seat to be vacant.

I accept that the statement was prepared in accordance with the form requirement of the s 105C(c), and s 105D, of the Act 2007. The letter was signed by you as the Leader and not less than two thirds of the parliamentary members of the Democratic Party. The statement outlines the history Mr Nicholas' becoming a Member of Parliament for the RAPPa seat.

However, your statement claims that Mr Nicholas failed upon a vote in Parliament on an issue of confidence, namely the provision of supply by way of appropriation for 2016-2017 on 10 June 2016, to support the majority view of the Democratic Party Members of Parliament on that matter.

But, Mr Nicholas was not present in the Chamber at the time that the question was put on the Appropriation Bill 2016-2017 for the "vote in Parliament." Mr Nicholas clearly had not failed "upon a vote in Parliament" (s105B(a)), on an issue of confidence, to support the majority view of the Democratic Party Members of Parliament because he was not in the Chamber.

Some doubt was expressed by Justice Williams in *N George v Attorney-General*, OA No. 1/13, August 2013 at [77] to [80] as to the meaning of 'fails to support' in respect to an absent member; I view its meaning as above. And it must be common ground that there have been a number of 'fails to support' by an absent member on a *no confidence* vote and no party leader has suggested that there was reason to find that s 105B applied (for examples: Mr George and Mr Nicholas).

I have been influenced in the conduct of this particular business of Parliament, that requires a close reading of the Act, by this historic conduct of political parties; and I expect Members to have also been impressed by this pattern of conduct by the political parties. My reading of the Act is also influenced by the significant affect the Act can have on Constitution of the Cook Islands, Article 64 fundamental rights and freedom; and the Article 65(1) duty to construe legislation so that it will have the least abridgment of those rights.

I note that you delivered a letter to the Hon Albert Nicholas on the 20th June. I have been shown no proof that it was delivered to him. But I am proceeding with this determination without that proof because the result would be the same if there were such proof. That letter indicated 7 days to respond and you did not take action on the issue until 7th September 2016 when you delivered the letter to Parliament. You waited to proceed until the notice of the Parliament sitting was set on 30th August 2016 for commencement on 12 September 2016. In the meantime, you left Mr Nicholas to continue with his Parliamentary role as a Member of the Purse Seine Committee as well as his Ministerial and constituency responsibilities. It has taken you from June to September to take action and I consider now, when the Speaker has been preparing for and chairing Parliament, delivering such a letter is disruptive of the crucial business of the House.

I also record that on the first day of this Parliament sitting, 12 September 2016, no opposition Members attended which is profoundly disrespectful of the essential business of Parliament. This left 12 members which meets the quorum threshold.

As part of your Act s 105B (b) statement to me at (a), you record how vital the legislation is, “.. to put an end to members crossing the floor and moving from party to party ... causing a lot of headache for our people ... Government wanted a law that would stop party hopping” However on 5 September 2016 I was informed in writing by a letter co-signed by Hon Tamaiva Tuavera, ‘Deputy Parliamentary Opposition Leader,’ that the new ‘Parliamentary Opposition Leader’ shall be Member Rose T Brown, (Deputy Speaker), who was elected by way of CIP (government) party nomination. This appointment however is described as that of “the joint Coalition Caucus decision dated 21 July 2016.” You are a member, it seems, of that coalition and approve this event of party hopping.

This development calls into question the commitment you express towards the principle of party integrity. Furthermore, on another appropriate occasion I may need to consider whether there remains in Parliament, as once seemed apparent after the general election, the same two recognisable political parties in opposition. If they are one entity can there also be separate parliamentary leaders capable of signing the s 105B notice and the s 105D statement?

It is my decision therefore that the seat of RAPPAs seat has not become vacant.”

[99] These proceedings were launched on 12 September.

Quorum

[100] Dealing with quorum in a more detailed way than previously, on 25 August the Arutanga-Reureu-Nikaupara seat, which was held by an Opposition Member, was vacated by operation of law under section 9(h) of the Electoral Act 2004 when its MP was convicted of a corrupt practice punishable by imprisonment for a term of one year or more.¹⁸ Until the resultant by-election was held¹⁹ the numbers in the House were therefore reduced to 23, and to 22 if, on receipt of the notices of 7 September, Mr Nicholas’s tenure of the RAPPAs seat was automatically terminated and the seat vacated by force of law under Part 9A. Parliament needs a vote by a majority of its members present to pass legislation and, as noted, the Opposition boycotted the House by non-attendance on 12 and 13 September.

¹⁸ An appeal against conviction was dismissed by the Court of Appeal on 6 December. An Appeal against sentence was allowed and the sentence reduced

¹⁹ After 13 September 2016

Submissions

[101] The Applicants contend that if they were correct and Mr Nicholas's tenure of the RAPPa seat was terminated by force of law under Part 9A on 7 September, Parliament must have been inquorate on 12 and 13 September because the Opposition's boycott meant Parliament could not have the necessary majority of its members present in order to transact business. By contrast, they accepted, however, that if Mr Nicholas remained the Member for the RAPPa seat on 12 and 13 September, their claims for declarations in relation to the Parliamentary proceedings on those days must fail²⁰.

[102] Mr Hikaka, leading counsel for the Applicants, submitted that the fact that Mr Nicholas did not vote with the Democratic Party in opposition to the Appropriation Bill satisfied the requirements of the Act, the remaining procedural requirements of Part 9A were complied with and the Speaker had, in terms of the statute, no discretion or decision-making role in deciding whether the RAPPa seat was vacated: it was automatically vacated on the receipt of the notice. He submitted the Speaker's role was mechanical rather than deliberative, drawing on the peremptory phrase *shall become vacant* in s 105B. Any deliberative aspect of the process was, he submitted, only that of the Parliamentary leader of the party concerned. That last aspect of the process, was, he acknowledged, judicially reviewable. This was the line of action taken in similar New Zealand litigation.²¹

[103] As to the 12-13 September Parliamentary proceedings, Mr Hikaka submitted the evidence showed the requisite number of Members could not have been present at any time on those days, the absentees being the 10 Applicants and Mrs Rose Toki Brown. Because the Arutanga-Reureu-Nikaupara seat had earlier been vacated and, in the Applicants' submissions, the RAPPa seat had been vacated on 7 September, Mr Hikaka submitted there could never

²⁰ Art 34(2) provides that subject to Arts 41 and 34(3) - neither presently relevant - "every question before Parliament shall be decided by a majority of the votes of the members present", a provision which is mirrored in Standing Order SO 141. Those provisions fit within Art 34(4) which provides that "no business shall be transacted at any sitting of Parliament if the number of members present ... is less than 12" and SO 55 which provides that "a quorum of Parliament ... shall be 12 members".

²¹ *Awatere-Huata v Prebble* [2004] 3NZLR 359 (HC); 382 (CA) and *Awatere-Huata v Prebble* [2005] 1NZLR 289(SC) which, on Appeal, was an application for an Order prohibiting the Parliamentary leadership of a political party from delivering the requisite notice to the Speaker.

have been more than 11 members present on 12-13 September. Parliament was thus unable to transact business pursuant to Art 34(4).

[104] For the Respondent, the Solicitor-General's submissions focused on the Speaker having a deliberative role in the Part 9A process, including the ability to take account of delay on the part of Mr Heather and the Democratic Party between their letters of 20 June and 7 September

Constitutionality of the 2007 Amendment

[105] In the counterclaim summarised above, the Attorney-General sought a declaration that the 2007 Amendment was unconstitutional. It is unprecedented in our experience for the Senior Law Officer of the Crown and a member of the Government to challenge the constitutionality of a statute, but, the matter having been raised, it is the first aspect of this part of the case which must be addressed since, if the 2007 Amendment is ruled unconstitutional and therefore invalid, there was no legal basis for the Applicants to move against Mr Nicholas under Part 9A and their application for a declaration that his seat was automatically vacated by the notices they gave must be dismissed.

[106] To set the background against which the constitutionality of the 2007 Amendment is to be assessed it is appropriate, despite its length, to recount almost the whole of Part 9A.

[107] After saying it was passed in accordance with Art 41(1) of the Constitution of the Cook Islands – a point to which it will be necessary to revert – the 2007 Amendment reads:

105A. Definitions: - for the purposes of this Part, unless the context otherwise requires -

“issue of confidence” means -

- (a) an expression of no confidence in Cabinet under Article 14(3)(b) of the Constitution;
- (b) an issue which the Prime Minister has declared to be an issue of confidence under Article 14(3)(b) of the Constitution;
- (c) the provision of supply by way of appropriation;

“parliamentary leader”, in relation to a political party, means -

- (a) the member recognised for the time being as the parliamentary leader of the political party by the majority of parliamentary members of that political party;
- (b) the member for the time being acting as the parliamentary leader of that political party;

“political party for which the member of Parliament was elected” means the political party appearing as required by section 45(7), against the name of the member in the nomination paper nominating the member as a candidate at his or her election;

“Speaker” includes the Deputy Speaker, or if the Speaker and the Deputy Speaker are absent from the Cook Islands or if the member who is the subject of a notice under section 105B(b) is the Speaker or Deputy Speaker, the Clerk of Parliament.

105B. Consequence of member ceasing to support political party - The seat of a member, other than a member elected as independent, shall become vacant if -

- (a) upon a vote in Parliament on an issue of confidence, the member fails to support the majority of the parliamentary members of the political party for which the member was elected; and
- (b) the parliamentary leader of that political party delivers to the Speaker a written notice that complies with section 105C.

105C. Notice from parliamentary leader of party - A written notice under section 105B(b) must -

- (a) be signed by the parliamentary leader of the political party for which the member who is the subject of the notice was elected and by not less than two-thirds of the parliamentary members (inclusive of the leader) of that political party; and
- (b) be addressed to the Speaker; and
- (c) be accompanied by a statement that complies with section 105D.

105D. Form of statement to be made by parliamentary leader - The statement referred to in section 105C(c) must be in writing and signed by the parliamentary leader concerned and by not less than two-thirds of the parliamentary members of that political party, and must

- (a) state that the member concerned has failed upon a vote in Parliament on an issue of confidence, to support the majority view of the parliamentary members of the political party for which the member was elected and that the parliamentary leader has delivered to the member concerned, written notice -
 - (i) informing the member that the parliamentary leader considers that section 105B(a) applies to the member and the reasons for that opinion; and
 - (ii) advising the member that he or she has 7 working days from the date of receiving the notice to respond to the matters raised in the notice by notice in writing addressed to the parliamentary leader; and
- (b) state that, after consideration of the conduct of the member and his or her response (if any) by the parliamentary members of the political party for which the member was elected, the parliamentary leader of that party confirms that not less than two-thirds of the parliamentary members (inclusive of the leader) of the party have agreed that notice should be given by the parliamentary leader under section 105B(b).

[108] The task of considering the constitutionality of the 2007 Amendment has been greatly eased by two factors. The first is that, as at mid-2013, the constitutionality of Part 9A as seen

through its reach, effect and text were fully considered in *George v A-G*²² and we largely adopt the analysis of Part 9A set out in that case. The second is that the correct approach to challenges to constitutionality has recently been authoritatively restated in the decision of the Privy Council in a Cook Islands case: *Arorangi Timberland Limited & Others v Minister of the Cook Islands Superannuation Fund*²³. The recency and binding authority of the latter decision makes it unnecessary to deal with other authorities on the topic cited by counsel.

[109] *Arorangi Timberland*, was a case challenging the constitutionality of the Cook Islands' National Superannuation Act 2000 on the grounds it involved a taking or deprivation of property or was unjustifiably discriminatory. The decision of their Lordships particularly focused on whether compulsory extraction of superannuation contributions from employees' wages – including those of migrant workers – represented deprivation of those contributions.²⁴

[110] The Privy Council first agreed with the Court of Appeal that it was a principle of constitutionality that a Court should if possible interpret a statute so as not to conflict with constitutional limitations²⁵ and went on to observe²⁶ “...save perhaps in extreme circumstances, a statute should be presumed to be constitutional until it is shown to be otherwise, that ... the burden is on the party alleging that a statute is unconstitutional, and that any Court should be circumspect before deciding that a statute is unconstitutional.”, noting that “in so far as the issue of constitutionality turns (as here) on proportionality the second limb of the presumption normally adds nothing to the ingredients of the proportionality exercise.”

[111] The Privy Council then held that the test of proportionality is as set out in *Bank Mellat v H M Treasury (No 2)*²⁷ where it was held²⁸, focusing on the macro-economic implications of the scheme with which it was concerned, that:

36. ...an issue of proportionality:

“depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important

²² [2013] CKHC 65

²³ [2016] UKPC 32. Judgment 17 November 2016

²⁴ *Arorangi Timberland* at [25]

²⁵ *Arorangi Timberland* at [29]-[30] and Article 65 of the Constitution

²⁶ *Arorangi Timberland* at [31]-[32]

²⁷ 2014 [AC 700]

²⁸ *Arorangi Timberland* at [36]-[37]

to justify the limitation of a fundamental right: (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.”

37. As Lord Reed said in para 69 of his judgment in *Bank Mellat*, “the intensity [of a proportionality review] – that is to say, the degree of weight or respect given to the assessment of the primary decision-maker – depends on the context”. Thus, the intensity of the review which the Court carries out in a proportionality exercise depends on a number of factors, including in particular the right involved, the nature of the issue and the identity of the decision maker.

38. ... When it comes to policy choices of a social and macro-economic nature, the courts should be particularly diffident about interfering, given the nature of the functions, expertise and experience of the judiciary as against the executive or (as in this case) the legislature ...

39. So far as the decision-maker is concerned, in this case it was Parliament. The legislature is entitled to a wider margin of judgment than the executive. Unlike a person exercising delegated powers, the legislature has a wider range of options open to it, and, as a result of being elected it, enjoys democratic legitimacy and has direct democratic accountability.

[112] Their Lordships agreed that the relief of poverty and the rational connection between the Act and the Trust Deed supporting it were aspects of the proportionality test which were satisfied²⁹ and turned to the lack of a Government guarantee, accepting that a guarantee entrenched constitutionally would have been less intrusive than the method chosen, but observing³⁰:

44. ...when it comes to the third stage in the proportionality analysis, as Lord Reed explained in *Bank Mellat*, para 75:

“the limitation of the protected right must be one that ‘it was reasonable for the legislature to impose’ and that the courts [are] ‘not called on to substitute judicial opinions for legislative ones as to the place at which to draw a precise line’. This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified; ...a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any

²⁹ *Arorangi Timberland* at [42]

³⁰ *Arorangi Timberland* at [44]

situation, and thereby enable himself to vote to strike legislation down especially, ...if he is unaware of the relevant practicalities and indifferent to considerations of cost.”

[113] The Privy Council then turned to the fourth test - whether a fair balance had been struck between the legislation and the fundamental rights - holding that, in the circumstances:

54. ...It appears to the Board that it would require an exceptional case before a court could properly hold that a legislative decision on such an issue could be rejected as being disproportionate. Self-evidently, it is very difficult for a judge, who has relatively limited relevant experience and appreciation of the competing demands on the nation’s finances, to decide that the conclusion which the legislature reached on such a macro-economic, policy-based issue was unreasonable or disproportionate.

[114] The majority of the Privy Council then held that the absence of a guarantee, entrenchment or right of early withdrawal from the Cook Islands’ Superannuation Scheme did not render the Act setting it up unconstitutional but went on to hold that the scheme’s treatment of migrant workers was unjustifiably discriminatory.

[115] *George* was referenced in *Arorangi* and we note that, in considering constitutionality, *George*³¹ summarised the approach:

[86] The authorities demonstrate that what generically needs to be taken into account in deciding on constitutionality is:

- a) Constitutions, and statutory amendments which comply with the procedures required to amend the Constitution, must be construed in the light of their subject matter and the surrounding circumstances with reference to which they are made.
- b) the substance of the challenged law must be considered, not the form, label or title given to it, so the challenged legislation must first be interpreted against Parliament’s plenipotentiary power
- c) there is a rebuttable presumption that Parliament has acted constitutionally in enacting the challenged legislation, with the presumption being rebutted if a Court is satisfied no reasonable MP could suppose the provisions were reasonably required for the peace, order and good government of the Cook Islands or that the measure was enacted for the constitutional purposes it describes. The test becomes: “is the object constitutionally legitimate and do the means adopted bear a reasonable relation to it?” The question is

³¹ Case references in *George*

whether the challenged legislation amounts to reasonable regulation of freedom of speech and expression which remains compatible with an open and democratic society

- d) Courts should recognise that Parliament is the principal arbiter of what is required “in the interests of public safety order or morals, the general welfare or security of the Cook Islands” and should be most cautious about approving measures which trench across those “fundamental” rights and freedoms.

[87] With more specific reference to the 2007 Amendment the Court of Appeal in *Clarke v Karika* set out the correct approach to construing the constitutionality of legislation argued as infringing the fundamental human rights and freedoms. They are “truly” fundamental and, so far as subsequent legislation is concerned they are a “statutory declaration of fundamental human rights and freedoms [and not] little more than a rule for the construction of statutes” especially when made in accordance with the constitutional amendment procedures³².

[88] The 2007 Amendment being an anti-defection statute, it is to be construed with the observations in *UDM* and *Awatere Huata* in mind. Acts dealing with non-defection are not per se unconstitutional or undemocratic because MPs remain able to vote in accordance with their personal conscience. Such legislation fulfils legitimate aims of discouraging defection or enticements to defection and enabling Governments to function. However, MPs who defect and political parties which set the defection provisions in operation need to recognise both the political risk and voters’ reactions in deciding whether to take action.

[116] This Court is also content to largely follow the *George* analysis of the approach to anti-defection legislation, such as the 2007 Amendment, when it affects Constitutional rights and freedoms. That shows:

- a) The correct approach to interpreting written Constitutions containing Bills of Rights appears in the Privy Council decisions in *Hinds v The Queen*³³, and *Attorney General of Trinidad & Tobago v McLeod*³⁴ and the decision of the Constitutional Court of South Africa in *United Democratic Movement v The President of the Republic of South Africa & Others*³⁵

³³ [1976] 1 All ER 353, *Hinds & others v The Queen*; *Director of Public Prosecutions v Jackson*; *Attorney General of Jamaica* (intervener); *George* [32]ff

³⁴ PC Appeal 24/1982, 11 January 1984, [1985] LRC (Const) 81

³⁵ Case CCT 23/02, 4 October 2002, [2003] 4LRC 98]; *George* [32]-[41]

- b) The approach to anti-defection legislation is that set out in *McLeod* and in the New Zealand Court Appeal and Supreme Court's decisions on the Electoral (Integrity) Amendment Act 2001 (NZ) in the *Awatere-Huata* litigation
- c) The correct approach in considering the impact of domestic legislation on the fundamental human rights and freedoms in Part 4 IV A of the Constitution is as appears in *Clarke v Karika*

[117] The salient factors of Part 9A as identified in *George*³⁶ affecting the reach and effect of the text of the 2007 Amendment are:

- a) That it was passed by use of the special procedure for Constitutional amendment in Art 41, presumably as a result of concerns about the impact of Part 9A on the fundamental rights and freedoms in Part IV A.
- b) That, over time, the pre-eminence of political parties has risen while that of Members has fallen, at least in jurisdictions other than the Cook Islands. It may be doubtful the same applies³⁷ in the small, island-based constituencies of the Cook Islands, several with electoral rolls of under 100 voters.
- c) The 2007 Amendment contains no statement of its purposes or objectives though the Hansard of the day suggests it was passed to quell widespread disquiet at MPs defecting from the parties for which they were elected.
- d) The issue in relation to the 2007 Amendment is *whether the reduction in dissent it effects and the consequent easing of the passage of votes on issues of confidence amounts to reasonable regulation of dissent which remains compatible with an open and democratic society.*
- e) That if Members act so the parliamentary party for which they were elected has the discretion to implement the Part 9A procedure against them, there is no time limit, other than the balance of the parliamentary term, for the party to take that

³⁶ *George* at [58],[68]ff

³⁷ *George* at [59]-[67]

action. It can be held over the head of the defecting Member for the rest of the term.

- f) The effect of a Member's party taking effective action under Part 9A may be seen as draconian – the vacation of the Member's seat – though there is nothing to stop the Member standing in the subsequent by-election.
- g) What can amount to a Member failing to support his or her party on a vote on an issue of confidence is unclear, particularly whether it extends to abstention from voting on an issue of confidence and whether it extends to contrary views expressed by the Member other than in the casting of the particular vote in Parliament.
- h) The right to initiate the expulsion procedure in Part 9A can arise from no more than a single failure to support the Member's original party on a vote on an issue of confidence.
- i) The *reasons* for the Parliamentary leader's opinion that the Member has failed to support the majority of the party on the issue of confidence can go well beyond the matters in issue on the dissenting vote. It expressly includes the *conduct* of the Member. The party's consideration of the matter may not need to comply with the rules of natural justice.
- j) That it would appear that once the Speaker receives a notice or statement complying with s 105C the Speaker is given no discretion but is obliged to declare the seat of the dissenting Member automatically vacated.

[118] We turn, with that analysis of authority in mind, to consider whether the Respondent has rebutted the presumption that Parliament acted constitutionally in enacting the 2007 Amendment. Could no reasonable MP conclude its provisions were required for the peace, order and good government of the Cook Islands? Was the object of the 2007 Amendment constitutionally legitimate and do its provisions bear a reasonable relationship to it? Does Part 9A meet the tests for proportionality and other criteria set out in *Bank Mellat* and *Arorangi Timberland*?

[119] In considering the objective of Part 9A the underlying constant in the *exacting analysis of the factual case* must be that Parliament in 2007 plainly regarded defections by MPs as sufficiently prevalent and disruptive of both the electoral process and the capacity of the Government of the day to govern as to require discouragement of the practice and reduction of Members' fundamental rights by infliction of one of the most significant possible political sanctions for Parliamentarians: eviction from Parliament, even if, possibly, temporary.

[120] Not only does eviction from Parliament loom as a possibility for defection, a further aspect of the terms of the 2007 Amendment is that it crimps Members' fundamental right to freedom of speech and expression appearing in Art 64(1)(e).

[121] Dealing first with the Art 64(1)(e) argument, *George* noted that the fundamental right to freedom of speech and expression is one enjoyed by all persons in the Cook Islands, but the 2007 Amendment only applies to 24 of those persons; only applies to them during the comparatively few weeks of the year when Parliament is sitting; only applies when an *issue of confidence* is before the House; and only applies when voting takes place on that *issue of confidence*. Seen in that light, Part 9A does not impinge on Members' right to freedom of speech – they are free to speak as they like in accordance with their views and consciences – but only constricts their freedom of expression of their right of free speech, namely, in the way they cast their *vote...on the issue of confidence*. That analysis significantly diminishes the operation and reach of Part 9A and influences the decision as to whether that minimal limitation of Members' fundamental rights is justified.

[122] As mentioned, not only was the 2007 Parliament clearly of the view that the objective of penalising – not outlawing – defection was sufficiently important to justify that occasional limitation on Members' fundamental rights, it did so by utilising the special procedure for amending the Constitution set out in Art 41³⁸. That can only be seen as recognition by Parliament that Members' fundamental rights were being affected by Part 9A and special measures were therefore required to pass those restrictions into law, but that, despite that, and despite the strictures in *Clarke v Karika*, Parliament was determined to enact those restrictions.

³⁸ Two thirds majority and at least 90 days elapsing between votes on the measure

[123] The rational connection between the 2007 Amendment and Parliament's objective is that Members who are no longer prepared to support the party of their election on *votes... on issues of confidence*, should be evicted from Parliament, but if they contend they continue to enjoy the support of their electorate – as Mr Nicholas contends – they can test that support by standing in the consequent by-election, thus possibly circumventing the effect of the sanction of eviction for their contrary vote.

[124] We note, with *George*, that less intrusive means might have been found to achieve the anti-defection objective but any such amendments, importantly for the achievement of that objective, would be highly likely to leave the consequence of eviction for a contrary vote unchanged. In any case, any amendment must be a political decision to meet political objectives.

[125] The final question is whether the 2007 Amendment strikes a fair balance between Members' rights and the community's interests.

[126] We find that it does.

[127] As outlined above, Part 9A will only seldom affect the way Members cast their votes. It restricts their fundamental right to freedom of expression but, as shown, only minimally. By putting it in the hands of the party for which the dissentient Member was elected to evict them from Parliament and for the Member then either accept their expulsion or again face the hazards of selection and election imposes a sanction on the Member for defection and an impost on the electorate of a by-election, but at least the electorate will again – or continue to – be represented by an MP who commands the confidence of the majority of voters. That, we find, fairly balances the interests of the relevant communities – the Member's party of election and the voters of the Member's electorate – against the interests of the Member.

[128] From that our conclusion on the issue of proportionality is that the terms and effect of the 2007 Amendment have not been shown to be disproportionate to the perceived mischief they were designed to prevent; the interference with Members' fundamental rights is no more than occasional and minimal; and the result, though considerable for Members affected, can be remediable by them. We reach that view bearing in mind that the proportionality of

Parliament's response is predominantly a political decision with electoral consequences, and we recall to mind the remarks in *Arorangi*³⁹ that

it would require an exceptional case before a Court could properly hold that a legislative decision on such an issue could be rejected as being disproportionate".

[129] When all those factors are weighed, together with the wide measure of respect required to be accorded the decision of the 2007 Parliament to enact Part 9A, we come to the view that the Respondent has failed to rebut the presumption that the 2007 Amendment was, and is, constitutional. The Respondent's application for a declaration that the Electoral Amendment Act 2007 is unconstitutional therefore fails.

[130] Though largely confirmative of *George*, that finding departs from the tentative view expressed in that case that the 2007 Amendment might be found unconstitutional when a factual matrix against which the statute could be measured was before the Court.

[131] The reasons for that departure from *George* are that, here, the facts compelled a closer examination of the terms of the statute in action. In *George*, there was less examination of the primacy under Part 9A of the *vote*, as contrasted with dissent more generally considered, and the impact of *Arorangi Timberland*.

Could Part 9A apply to Mr Nicholas' actions?

[132] Having held the 2007 Amendment not unconstitutional, the next question is whether, on the facts, the Applicants' actions resulted in the RAPPAs seat being vacated, and to decide if Mr Nicholas's actions actually entitled the Applicants to move against him under Part 9A. .

[133] The pleadings are opaque as to whether the Applicants challenge Mr Nicholas's actions on 10 June, 17 June or both: they simply say that "Mr Nicholas failed to support the majority of parliamentary members of the Democratic Party on the Appropriate (sic) Bill 2016" without specifying how Mr Nicholas is alleged to have "failed" or which vote was under challenge.

³⁹ At [54] cited above at [42]

Since Mr Nicholas' position potentially affected the composition of Parliament, it might have been helpful to have had the nub of the allegations relating to his actions clarified.

[134] The Applicants' main submissions were also ambiguous in that, after citing the relevant section of Part 9A, they asserted Mr Nicholas failed to support the Democratic Party on *issues [sic] of confidence in opposing the Appropriation Bill (put to vote on 10 June 2016)* and rely on Mr Heather's first affidavit to in support. The paragraph in Mr Heather's first affidavit to which the submissions referred relied only on his 20 June letter to Mr Nicholas, and that, in its turn, relied only on the events of 10 June, specifically on Mr Nicholas seconding the Minister's motion.

[135] From that, the Court infers that the only actions by Mr Nicholas which, the Applicants' contend, entitled them to move against him under Part 9A was his seconding of the Minister's motion on 10 June that the Appropriation Bill be read a second time, and the vote on that motion later that day.

[136] By seconding the motion for the second reading of the Appropriation Bill on 10 June and voting on that motion in the same way as every other Member of the House present, did Mr Nicholas fail to support the majority of the Democratic Party on the issue of confidence which voting on the Appropriation Bill constituted?

[137] The answer must be that Mr Nicholas could not be said to have voted contrary to the majority of the Democratic Party on the issue since seconding a motion is merely a procedural device which enables a debate to ensue and a vote to be taken; it is not the vote itself. Though seconding motions is derided by one authority⁴⁰ as *nearly useless and unnecessary*, SO 111 requires motions to be seconded. However, the essential role of seconding is⁴¹: *A second to a proposed motion is an indication that there is at least one person besides the mover that is interested in seeing the motion come before the meeting. Hearing a second ... is guidance to the chair that he should state the question on the motion, thereby placing it before the assembly. It does not necessarily indicate that the seconder favors [sic] the motion.* A leading New

⁴⁰ *Tilson's Manual* (1948) p95 cited in the Wikipedia entry *Second (Parliamentary Procedure)*

⁴¹ *Robert's Rules of Order* (11ed 2011) cited in Wikipedia op cit.

Zealand authority describes the procedure in the following way⁴²: “A motion is proposed to the House by a member moving it and thus formally putting the proposition that it contains before the House, so that ultimately it may be adopted or rejected”.

[138] As to the vote itself, the vote on the motion for the second reading was unanimous which shows that, had it not been Mr Nicholas who seconded the Minister’s motion, some other Member would have done so, as all Members of the House wanted the Budget and the Appropriation Bill debated and SO 111(1) would have prevented that debate taking place had the motion not been seconded⁴³: “unless it is otherwise expressly provided in any of these Orders, every motion unless made in committee, must be seconded, and if not seconded shall not be debated or entered in the Minutes”. Mr Nicholas’ seconding of the Minister’s motion was therefore routine, unremarkable and should have been seen, in the circumstances, as inconsequential.

[139] More importantly for present purposes, in voting for the motion in the same way as every other Member present, Mr Nicholas could not be said to have failed to support the majority of the Democratic Party on a *vote on an issue of confidence*.

[140] The Court accordingly finds that no action by Mr Nicholas on 10 June gave rise to any entitlement on the part of the Applicants to initiate the Part 9A proceedings against him. That aspect of the claim accordingly fails.

[141] For the sake of completeness, even if the Applicants claim their pleading comprehended a challenge to Mr Nicholas’ actions on 17 June, the same conclusion is the only one available.

[142] Standing Orders say that once the House is in the required Committee of Supply, amendments to departmental votes are limited to motions to reduce the vote in question⁴⁴. Hansard shows there were no motions to that effect on 17 June. There was debate on the Vote: Foreign Affairs which was interrupted by the division on the vote to suspend Standing Orders but, of the 32 subsequent votes on various departmental estimates and expenditure under the

⁴² McGee *Parliamentary Practice in New Zealand* 3rd ed 2005 p174, though NZ Parliamentary procedure almost never requires motions to be seconded. To similar effect see von Dadelszen *Members’ Meetings’ 2nd ed para 6.10.9 p63*; Pitchforth *Meetings: Practice and Procedure in NZ* (4th ed 2010 para 3-085 p53

⁴³ SO 1

⁴⁴ SO 308

Bill, the Opposition is only recorded as opposing the first sixteen. The latter sixteen are recorded as having been agreed to unanimously.

[143] Of the first 16 votes, Mr Nicholas is correct in saying that Hansard records no more than *Objection from the Opposition* but neither records the manner in which that objection was demonstrated nor, importantly, how, in each case, the majority of the Opposition expressed their opposition or, more importantly still, voted on those measures. There are no entries in Hansard on the first 16 estimates votes comparable to the identification of Members on the division on the motion that Standing Orders be suspended.⁴⁵

[144] The conclusion must be that Mr Nicholas would not have failed to support the majority of the Democratic Party on the votes on the second 16 of the departmental estimates on 17 June as they were unanimous and, as regards the opposed votes on the first 16, the Applicant's case fails for lack of evidence as to the way in which the majority of the Democratic Party voted.

[145] On this part of the case, the conclusions are:

- a) That, for the reasons appearing in this part of this judgment, although the 2007 Amendment is not unconstitutional, the application for a declaration that the RAPPAs seat was vacated by the Applicants' 7 September notice could never have succeeded on the facts and is dismissed; and
- b) In view of the Applicants' concession earlier recounted⁴⁶, their applications for declarations that Parliament was inquorate on 12 and 13 September 2016 and any business transacted on those days was invalid are likewise dismissed.

Consequential Issues: Abstention, Speaker's Discretion and Majority to Amend

[146] Though not matters truly in issue, we record our observations on these issues as they were raised in argument

⁴⁵ Part 28 XXVIII and SO 149 and 150.

⁴⁶ At [101]

Abstention

[147] For lack of a factual matrix against which to apply the analysis of Part 9A in *George*, doubt was expressed as to whether s 105B required every member of a political party actually to vote with the party for which he or she was elected on issues of confidence or face possible expulsion from Parliament. Whether abstention by the dissenting Member from the House when an issue of confidence was put to the vote insulated that Member against action under Part 9A was left open.

[148] This Court takes the view that abstention from voting in the House when a vote on an issue of confidence is taken does not preclude dissentient MPs' parties from initiating and completing the Part 9A procedure against them.

[149] There are several reasons for that conclusion.

[150] Generally, in a Westminster-style Parliament such as that of the Cook Islands a prime task of the Opposition is to hold the Government of the day to account, principally by challenging the enactment of the Government's bills on votes in Parliament. If a Member, elected for an Opposition party, fails to vote with the majority of that party, both generally or on an issue of confidence, he or she fails in their obligation to strengthen the Opposition's discharge of its principal obligation and diminishes the impact of the Opposition's principal weapon.

[151] More specifically under s 105B, the focus as to whether a dissentient MP's party of election has the right to initiate the Part 9A procedure against the Member is twofold: there must be a *vote in Parliament on an issue of confidence* and the Member must fail to support the majority of his or her party on that vote.

[152] Taking the second component first, the ordinary dictionary definition of *failed* is "not to render the due or expected service or aid ... to disappoint, give no help to"⁴⁷ and the dictionary definition of support is "to strengthen the position of (a person or community) by one's assistance, countenance or adherence; to uphold the rights, claims, authority, or status of;

⁴⁷ Oxford English Dictionary Second Edition, Vol V, p666

to stand by, back up.”⁴⁸ Those definitions clearly connote that a Member *fails to support* his or her party if they do not act positively and strengthen the position of the party by voting with the majority of its other Members. A failure to support is therefore a failure to take positive action with the majority of the Member’s elected party, namely to vote with them on an issue of confidence. Abstention is not enough to fulfil the Member’s statutory obligations as the Member is not rendering the service of casting their vote with the majority of their party of election and is not strengthening or assisting the party’s position.

[153] On the earlier issue, the text of section 105B(a) makes clear that a Member’s support is required to be cast with the majority of his or her political party *upon a vote in Parliament on an issue of confidence*. That makes it clear that a Member may dissent or decline to participate in debates on an issue of confidence but when it comes to the *vote in Parliament* on that issue the Member will fail to support his or her elected party if he or she fails to vote with the majority.

[154] For all those reasons, the Court concludes that, as a matter of construction of Part 9A, unless a dissentient Member actually casts his or her vote with the majority of the party for which he or she was elected when Parliament is voting on an issue of confidence, he or she exposes themselves to the party choosing to take action against the Member under Part 9A.

[155] For completeness, the Court expresses no view as to whether a Member’s absence from the House with leave when a vote is taken on an issue of confidence would entitle their party to activate the Part 9A procedure against them. The 2007 Amendment makes no distinction between possible reasons for the Member’s actions – a failure to vote is a failure to vote, irrespective of the reason – but the Member’s former leader may be open to injunctive relief to prevent the s 105B letter being delivered to the Speaker. However, the issue may be left for a case when it actually arises.

Speaker’s discretion

[156] As to whether the Speaker is vested with a discretion or power of deliberation to accept or reject a notice received under s 105B(b), the view of the Court is that the comment in

⁴⁸ Oxford English Dictionary Second Edition, Vol 17, p258

*George*⁴⁹ is correct and that, beyond confirming that, on its face, the notice complies with the terms of ss 105C and 105D, the Speaker's role is confined to that of a functionary: the Speaker must act in accordance with s 9(4) of the Electoral Act 2004, declare the vacancy, and the cause, in writing, notify the Chief Electoral Officer, and arrange the declaration's publication in the *Gazette*. We add that the Speaker is not given the power to enquire whether ss 105C and 105D have been complied with: if the terms in which the notice is couched appear to fulfil the statutory criteria, the Speaker is obliged to accept what the notice says on its face, and declare the seat vacant.

[157] It follows that we agree with the Applicants that the peremptory language of s 105B means a seat becomes vacant upon the Speaker's receipt of a notice which apparently complies with ss 105C and 105D, provided, of course, and crucially, that, if challenged legally by someone other than the Speaker, it can be proved that s 105B(a) has been complied with.

Majority for amendment

[158] As to the Respondent's counterclaim concerning the majority required to repeal or amend the 2007 Amendment, in view of our earlier findings it is unnecessary to review the authorities relied on and it is sufficient for us to say that the Parliament of the day considered that enacting the Amendment required compliance with Art 41, and we would not be disposed to differ because it has an impact on the Part IVA fundamental rights and freedoms.

Result

[159] With the exception of the finding (in paragraphs [66], [82] and [83]) that the Clerk exceeded his powers in a minor and excusable way not justifying any declaration from the Court, all the Applicants' claims having been determined against them, those claims are dismissed.

[160] That the Electoral Amendment Act 2007 is not unconstitutional and can only be amended by following the procedure set out in Art 41 for Constitutional amendments. Other than that, all the Respondent's applications are dismissed.

⁴⁹ At [35](j)


[161] The sittings of Parliament on 12-13 September 2016 were quorate, but on the facts, the Applicants' could never have validly instituted the Part 9A procedure against Mr Nicholas as, on 10 June 2016 – or any other relevant time -, he never failed *upon a vote in Parliament on an issue of confidence ... to support the majority of the members of the political party for which the member was elected*. When he voted, he voted with them. When he did not vote with them, his actions were not challenged and challenges were not open on the facts.


[162] If costs are an issue, memoranda may be filed with that for the Applicants being due 28 days after delivery of this judgment and that for the Respondent being due 7 days after receipt of the Applicants' memorandum.

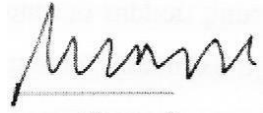
OBSERVATIONS

[163] Though not affecting our conclusions the following observations are apposite:

- a) That, though it may be termed *imaginative*, should Parliament contemplate amending Part 9A, it might turn its attention to, first, rendering a dissentient Member's party's right of action under that Part spent after a short period, so obliging the party to act while the effect of the failure to support remains recent or operative but still deterring defection; and, secondly, dealing with a Member's failing to vote on an issue of confidence arising from absence from the House with leave. However, any amendment must remain a matter for Parliament's judgment as it must be a political solution to a political situation; and
- b) That parties for which initiation of the Part 9A procedure against one of its Members is open are not, as the 20 June letter asserted, *duty bound* to commence action against that Member. Action is optional at the party's discretion, and the evidence in this case suggested that, over the period since 2007, some Members have failed to vote in support of their party of election on votes on issues of confidence, but no Part 9A action has been taken against them. If so, that strengthens the case for amendment.


Hugh Williams, CJ


Grice J


Keane, J