IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 123 of 2011

BETWEEN : **PREM SINGH , RAKESH PRAMOD KUMAR** and **ELLE NARSHEA** as lawful Trustees of the Bhartiya Mitra Mandali, the governing body of Tilak High School.

Plaintiffs

AND : **GANGA REDDY, JAGDISH SINGH , SUREND VENKAT, DAYA NAND, NAVEEN KUMAR, ANIL PRASAD, JANEND SINGH , RAKESH CHAND, SATYA DASS, KUMAR SAMI NAIKER** and **PRAKASH NAIR** as office bearers and members of the Bhartiya Mitra Mandali Management Board.

1st Defendants

AND : **THE ATTORNEY-GENERAL OF FIJI**

2nd Defendant

AND : **SWAMI KUMAR MAHARAJ**

Interested Party

Counsel : Ms Natasha Khan for the Plaintiffs
Mr. D.S. Naidu for the 1st Defendants
Mrs. Lee for the 2nd Defendant
Interested Party in Person

DIRECTIONS

INTRODUCTION

[1]. The Bhartiya Mitra Mandali (**"TBMM"**) is an unincorporated organisation with a charitable purpose. It runs and manages the Tilak High School (**"THS"**). This organisation is fraught with issues caused by a division between its trustees on the one hand and it's Management Committee (**"MC"**) on the other. There are allegations and cross-allegations of corruption and improprieties between the parties. Some of these are admitted by the alleged perpetrator, but often, with a cross-allegation that the accusing party is equally culpable. Others are denied.

CONSTITUTION AND DEED OF TRUST

[2]. The TBMM adopted its constitution on **30 November 2008**. That constitution was then registered with the Registrar of Deeds. Some 17 months later, on **24 March 2010**, TBMM drew up a Declaration/Deed of

Trust. This was also registered with the Registrar of Deeds. Under the Deed, Prem Singh, Rakesh Pramod Kumar, Elle Narshea, Arvin Kumar and Jagdish Singh were appointed as trustees. TBMM's Deed of Trust describes the organisation as:

> "....an association with membership open to persons as provided in its constitution which was duly adopted at Lautoka on the 30th day of November, 2008 **AND WHEREAS** the said **BHARTIYA MITRA MANDALI** is a charitable organization **AND WHEREAS** the committee holds Leases situated at Hollander Road, Lautoka being Lot 1 DP 4129 and Lot 48 DP 4203 for and on behalf of the said **BHARTIYA MITRA MANDALI** and on Lot 1 DP 4129 is constituted a secondary school known as **TILAK HIGH SCHOOL** and on Lot 48 DP 4203 is constructed the Principal's quarters.

[3]. Clause 4 of the TBMM constitution provides for membership as follows:

> **4. MEMBERSHIP**
>
> a. The membership of the Mandali shall comprise of all paid members who attended the Mandali's 2007 Annual General Meeting held at the school on Sunday 28th June 2008. List of those members are on page 11 of this constitution.
>
> b. The annual subscription of membership shall be $5.00 and is payable to the school Bursar during working hours before the final working day of January.

OPEN HOSTILITY

[4]. Barely a year after the Deed was drawn up, the first open manifestation of hostility between the parties erupted. This happened on **01 March 2011** when the trustees dissolved the MC. The trustees would say that they took this action amidst allegations of nepotism and non-payment of school fees on their (MC members') part.

[5]. A little over a month after the Trustees took that action, TBMM held an Annual General Meeting on **17 April 2011**. In that meeting, the defendants (who were members of the MC) voiced their allegation that the trustees had tampered with the TBMM constitution.

[6]. On **03 August 2011**, a Notice of Special General Meeting was advertised in the Fiji Times by Nacolawa and Company on the instructions of a "new" board, advising members that an SGM was scheduled for **14 August 2011**.

ALLEGATIONS AGAINST TRUSTEES

[7]. The appointment of new trustees was amongst the items on the 03 August 2011 agenda by Nacolawa. It appears that the move to call for the removal

of the trustees was provoked by some quite serious allegations of improprieties against them. Below I summarise these allegations.

(i) Conflict of Interest.
The MC members who are defendants alleged that the trustees are in a conflicted position. They were appointed under the Deed of Trust and are also still members of the MC.

(ii) Ultra Vires
The trustees had taken steps to dissolve the MC in April 2011. The constitution gives them no such powers.

(iii) Tampering with the constitution.
The MC members allege that the trustees had tampered with the constitution to give them certain powers which were not in the original constitution. They have no power to do such because the constitution provides that it can only be changed by a 66% majority of voting members present at an AGM or SAGM.

(iv) Abuse of position.
e.g. allegation by the trustees that former trustee Jagdish Singh, whilst a member of the board, had tried to award a tender for purchase of school desks and chairs to his brother. Apart from the obvious nepotism involved, this raises the more fundamental question – why is a trustee involved in the tender process?

e.g. trustees (except Jagdish Singh) say that after they learnt of what Jagdish Singh was up to, they intervened and arranged for desks and chairs to be purchased from an alternative cheaper source.

e.g. trustee Prem Singh getting paid for labour services rendered to the school along with other board members.

e.g. trustee Rakesh Parmod Kumar, a para-legal, was paid $8,095 for his "expertise to handle legal matters of TBMM. That payment was approved by the TBMM. Matters he handled related to the preparation and registration of declaration of trust and registration of trustees on lease as well as registration of TBMM with Registrar of Deeds. This sum included $5,000 paid to him for having recovered for TBMM some outstanding debt.

e.g. Prem Singh not paying school fees for son.

e.g. Prem Singh arranging for wife to work at school canteen for pay.

e.g. alleged abuse of school funds

e.g. removing building materials from school for own private use.

e.g. trustees voting at meetings.

e.g. trustees holding positions at Management Committee.

[8]. The very next day, on **04 August 2011**, after the publication of the above Notice of SGM, Nacolawa gave a written notice to Natasha Khan & Associates of the following:

(i) an SGM was scheduled for 14 August 2011.
(ii) the trustees had no power under the constitution to dismiss the MC.
(iii) MC can only be removed by SGM.
(iv) the trustees had tampered with the constitution.
(v) trustees had breached the trust of the members.

[9]. Then on **05 August 2011**, Nacolawa wrote another letter to Natasha Khan giving a notice and a warning that the plaintiffs (trustees) were not to set foot on the school grounds.

TRUSTEES' REACTION

[10]. Khan responded on **08 August 2011.** Their letter contained the following:

(i) the trustees have power under the constitution to dismiss the MC.

(ii) after the trustees had dismissed the MC, the trustees had then called a General Meeting within one-month. That GM then appointed a new Management Board (which I gather, is the new MC).

(iii) the MC (Nacolawa's client) had no power under the constitution to dismiss or relieve the trustees of their position. The trustees can only be dismissed or relieved of their position under section 4 of the Trustees Act.

DEFEDANTS' RESPONSE

[11]. The defendants (MC) responded to Khan's letter as follows:

(i) both the MC and the trustees can be appointed, elected or dissolved through an AGM.

(ii) the power, and the correlating provision in the constitution, that the plaintiffs rely on in dismissing the MC, is exactly the power that they gave themselves after tampering with the constitution. The provisions relating to those powers are contained in an extra page to the constitution.

PLAITIFF'S FILE ACTION

[12]. On **10 August 2011**, the plaintiff/trustees filed an Originating Summons in the High Court at Lautoka seeking an injunction to restrain the defendants from preventing them from carrying out their duties as trustees and from proceeding with the threatened SGM. They also sought a declaration that the purported dismissal of the trustees dated 04 August 2011 by the MC was unlawful the TBMM constitution and that they (plaintiffs) are still the lawful trustees.

ORDERS OF FERNANDO J

[13]. The Orders of Fernando J of **10 August 2011** were as follows:

(i) an injunction restraining the defendants from preventing, prohibiting or retraining the plaintiffs from carrying out its duties as the Trustees of the TBMM until 17 August 2011.

(ii) an injunction restraining the defendants from proceeding with the Special General Meeting schedule to be held on 14 August 2011 advertised in the Fiji Times dated 03 August 2011.

[14]. A further Order was made on **17 August 2011** to the effect that both parties should maintain the status quo as trustees and as MC until further Orders of the Court.

[15]. However, as it turned out, thereabouts 26 and 27 November 2011, the plaintiffs took steps to dissolve the MC. Later, on **02 December 2011**, the plaintiffs wrote a letter to the Principal Education Officer saying that they were rescinding the dissolution of the MC on an undertaking that an SGM will be called soon before the end of the year to sort out issues. The actions taken by the plaintiffs to dissolve the MC on 26 and 27 November 2011 was later brought to the attention of Fernando J who was outraged by the plaintiffs total disregard and in contempt of the *"maintain status quo"* Orders he had given earlier. However, because the plaintiffs had retracted their action vide their 02 December 2011, and because the defendants were not pressing it, the matter was left at that by Fernando J.

[16]. Fernando J however noted and ordered as follows as recorded in the court records:

> The parties now wish to hold the "Special General Meeting" and after hearing the counsel the Court determines that the said "Special General Meeting" be held on the 08/January/2012 at 10. 00 am at the Tilak High School Library at Lautoka.
> As such, app pleadings, written submission earlier directed to be filed I this action is deferred till after the said Special General Meeting to be held on the 08/January/2012 as above.
> Both counsel and the parties agree that the notification of the "Special General Meeting" to be held on the 08/January/2012 should be done by the Defendant as the Management Committee and such notice to be done by publication I both the Fiji Times and Fiji Sun newspapers of 10th December , by the Defendant Management Committee.
> Both parties advised in open court that they have to comply with the undertakings to maintain the status quo of "Trustees" and Management Committee as given on 17/08/2011 till the end of the special General Meeting of 08/01/2012.
> After the conclusion of the Special General Meeting of 08/January/2012 the undertaking of the parties given on 17/08/2011 shall cease.
> Mention on 02 February 2012 at 10. 00 am.

CONTEMPT PROCEEDINGS AGAINST DEFENDANTS

[17]. On 08 January 2012, an SGM was held by the MC as per Fernando J's Orders. However, on 24 January 2012, Ms Khan submitted before Fernando J that the elections by SGM were not done in compliance with the exact orders of Fernando J in that the advertisements were not done on

10 December 2012 as directed but were done much later on 24 December 2011. That prompted Ms Khan to file contempt proceedings in this court. The affidavit of Prem Singh sworn on 16 January 2012 deposes *inter alia* as follows:

> Thereafter the Management Committee only advertised for a SGM on 24 December 2011 and the agenda being as follows:
>
> 1. Presidential Address
> 2. Re Consideration of the Management Committee
> 3. Re Consideration of the Trustees
> 4. Re Consideration of the School Constitution
> 5. General
>
> Despite the Court Order that status quo be maintained till elections Daya Nand fourth named Defendant wrote to the Manager, Jainend Singh, Assistant Secretary Navin Kumar, and Vice President Anil Singh removing them from the Management Committee.....
>
> The Agenda of the SGM was in clear contempt of court as not only was it advertised late it also only called for "Re consideration of the Management Committee, Trustees and School Constitution and not for elections.
>
> On 08 January 2012, I with the other Plaintiffs attended the SGM ad we raised our objections to the agenda. The President Ganga Reddy overruled our objections on the opinion of Ashwini Maharaj who had been invited by Mr. Reddy as an observer. Elections are held by calling nominations for a position and thereafter votes are casted by show of hands to determine the successful contender for that particular position. There were no nominations called at all and as such no elections took place.
>
> The only item on the agenda addressed by Mr. Reddy was item No.2 whereby he asked one of the Management committee members to move a motion of confidence in the Management Committee (this after he had removed four members of the Committee). The Treasurer Mr. Anil Prasad moved the said motion. Upon counting the votes he advised us that the trustees votes will not be considered. Our votes if considered would have meant that the motion for confidence is the Management Committee would have been defeated.
>
> We objected to the same as we are all paid up members and entitled to vote. However, the President and Mr. Aswini Maharaj (who is not even a member) ruled that trustee had no voting rights.
>
> Hence faced with this unusual situation all trustees tendered in their resignation I order to vote, even than Mr Reddy ruled that we could not vote and he advised that our resignation will be considered later by the Management Committee. His exact words to us were "I have made my ruling that the trustees can't vote and that is final". Trustees have always voted at elections.
>
> There was no further discussions and meeting was abruptly closed by Mr Reddy.
>
> The said SGM was unfair in all circumstances and in absolute contempt of this Honourable Court. There were no elections held only a motion of confidence in the Management Committee Tabled. The said contemptors were at all times aware of this Honourable Courts orders as we all signed and acknowledged the same, Prakash Nair (one of the contemptors) is actually a police officer.
>
> Ordinarily an official from the Ministry of Education is called as an observer in the elections, the same was not done in this instance.

The Management Committee at 10 am on the day of elections steps down in order for nominations to be called. The same was not done either.

[18]. Ganga Reddy did respond to the above affidavit in June 2012. Reddy would depose that though the defendants were present in court on 07 December when Fernando J delivered his oral ruling, they did not comprehend the gist of it save for the fact that they were required to hold an SGM on 08 January 2012. Their counsel did not explain anything to them either immediately after the oral ruling was handed down. He deposes that the defendants only received a copy of the typed ruling sometime in early January 2012. He deposes that he did comply with clause 8. 1. a in having given at least seven days notice in writing to each member by advertisement in at least one newspaper.

[19]. Reddy also sets out in his affidavit the details of what exactly went on at the SGM which are not necessary to reproduce here.

[20]. But while the committal proceedings are yet part-heard, the interested party has filed the application now before me for another Order of this Court for an Annual General Meeting in order to resolve the issues between the parties.

ATTORNEY GENERAL, INTERIM MANAGEMENT

[21]. On 24 January 2012, Fernando J ordered inter alia that in light of "the current inability of Management Committee and the Trustees to cooperate and act in the interest of the School....that the Attorney General and the Minister of Education may act in the interim to preserve the school ...."

APPLICATION NOW BEFORE THIS COURT

[22]. The application now before me is filed by Mr. Swani Maharaj seeking the following orders:

(i) to allow Swani Maharaj to call SGM of registered 2011 members and conduct elections of office bearers as per the constitution of TBBMM.
(ii) that the MC appointed by the CEO Education handover the Management of Tilak High School to the newly elected Committee within days of the election of the MC of the TBMM.

[23]. The application is made "pursuant to the High Court Rules" and to the inherent jurisdiction of this court.

COMMENTS

[24]. This is actually the second occasion that an application is being made seeking an Order that the TBMM be directed to hold another SGM for the purpose of electing new office bearers. The first Order made by Fernando J was not carried out in accordance with the Court's directions. Will the election of new office bearers resolve the issues that have long plagued the TBMM? Is the SGM the appropriate forum to resolve these considering the prevailing hostility and internal bickering within the TBMM. If both parties are adamant to hold fast to their respective sides, will not an SGM merely be a forum for a showdown between them? Are the parties really willing to collaborate?

PARTIES' POSITION

[25]. The plaintiffs appear to support Swani Maharaj's application. However, Ganga Reddy, by his affidavit sworn on 23 September 2013 for and on behalf of the defendants, says that Swani Maharaj does not have the confidence of the majority of the members. He points to various allegations of improprieties against Swani Maharaj committed during the time he was running the affairs of TBMM in 2013. There is no need for me to go into detail on these allegations. Suffice it to say that Swani Maharaj has an explanation for these.

THE COURT'S POWERS

[26]. The court has power to direct that an SGM be held to elect office bearers. But the foundation on which that power is explained will depend on how one characterizes TBMM as an entity. Is TBMM an unincorporated association or is it a charitable trust by virtue of the fact that it has a board of trustees and is a *"charitable organisation"* (according to its Deed (see paras above). Or is it simply an unincorporated charitable trust?

Private Club &/Or Unincorporated Association Analysis

[27]. Generally, except in certain cases, Courts do not interfere with the affairs of private clubs. In **Rokotavaga & Ors as the FPGA v Singh & Others** [2007] FJHC; HBC 170 of 2007S (3 June 2008), Madam Justice Phillips

took the view that the remedy to disputes over election of office bearers in a private club is to be found in the association's constitution and not in the Courts. In **Horner v Trustees and Executives of the Sigatoka Club** [2011] FJHC 311; HBC 241.2010L (1 June 2011), Mr. Justice Inoke observed that, where management has taken a heavy handed approach and acts with self-interest at the expense of the interests of members as a whole leading to disunity, the court will interfere to put a check on the dispute escalating. In **Mistry v Chandra** [2009] FJHC 236, HBC 149.2009L (23 October 2009), Inoke J opined at paragraph [17]:

> [17] Further, this is a matter of private law and not public law. The Articles clearly, in my view, give absolute authority to the Council and the Board. They have the power to change the Articles and hence the power to validate any election procedure or result. The Plaintiffs as members of DIAS are bound by the Articles. This Court should be loath to rewrite those Articles which have been adopted by consensus of the members. This Court should also be loath to interfere with the use of any such powers, unless there is a clear case of fraud or abuse and the majority of the members want the Court to interfere. (my emphasis)

[28]. It is long recognized in law that members of an unincorporated association are bound together by contract, the terms of which will be in the rules of the organization. Those rules will identify their common purpose, mutual undertakings, duties and obligations, who shall control the funds, and how members can join leave the association. In **Conservative and Unionist Central Office v Burrell** [1980] 3 All ER 42, it was argued that there are six characteristics which are either essential or normal characteristics of a non-profit association. These are, it was argued:

1. there must be members of the association;
2. there must be a contract binding the members among themselves;
3. there will normally be some constitutional arrangement for meetings of members and for the appointment of committees and officers;
4. a member will normally be free to join or leave the association at will;
5. the association will normally continue in existence independently of any change that may occur in the composition of the association; and
6. there must as a matter of history have been a moment in time when a number of persons combined or banded together to form the association.

[29]. Lawton LJ in **Conservative & Unionist** said as follows:

> I infer that by "unincorporated association" in this context Parliament meant two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organization which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will. The bond of union between the members of an unincorporated association has to be

contractual. This was accepted by the Special Commissioners and was the basis of their conclusion. The point of law which arises is whether on the facts they found they could properly have come to the conclusion which they did. The facts are set out fully in the case. For the purposes of this judgment I need do no more than refer to those which I consider to be relevant to the point of law.
Since membership of an unincorporated association is based on agreement between the members, a starting point for examining the legal nature of the Party is to consider how anyone can join it.

[30]. The Australian High Court in **Cameron v Hogan** (1934) 51 CLR 358 took the view that courts should not assume that members of unincorporated non-profit associations intend to be contractually bound by the association's rules unless the rules actually make it clear that they are to be bound contractually by the rules. Hence, unless the rules say so, members of an unincorporated association cannot maintain a court action alleging a breach of the rules[1].

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[1] In Cameron v Hogan [1934] HCA 51 CLR 358 (03 August 1934), Rich, Dixon Evatt, and McTiernnan JJ said:
Judicial statements of authority are to be found to the effect that, except to enforce or establish some right of a proprietary nature, a member who complains that he has been unjustifiably excluded from a voluntary association, or that some breach of its rules has been committed, cannot maintain any action directly founded upon that complaint. For example, in Forbes v. Eden*[4] Lord* Cranworth *said: "Save for the due disposal and administration of property, there is no authority in the Courts either of England or Scotland to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs." (Compare per* Jessel *M.R.,* Rigby v. Connol*[5]; per* Barry *J.,* O'Keefe v. Cardinal Cullen*[6].)* Gavan Duffy *J. considered that such statements should be understood as relating only to the jurisdiction of Courts of equity. There are, however, reasons which justify the statement that, at common law as well as in equity, no actionable breach of contract was committed by an unauthorized resolution expelling a member of a voluntary association, or by the failure on the part of its officers to observe the rules regulating its affairs, unless the members enjoyed under them some civil right of a proprietary nature. As a generalization it expresses the result produced by the application of a number of independent legal principles: it is not in itself the enunciation or explanation of a rule or rules of the common law. One reason which must contribute in a great degree to produce the result is the general character of the voluntary associations which are likely to be formed without property and without giving to their members any civil right of a proprietary nature. They are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and material advantage. Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations* inter se, *the rules adopted for their governance would not be treated as amounting to an enforceable contract. (Compare per* Jessel *M.R.,* Rigby v. Connol*[7], and per* Scrutton *L.J.,* Rose and Frank Co. v. J. R. Crompton and Bros. Ltd.*[8].)*
*In the next place, the difficulty of framing an action by one member of a large body of persons for damages for breach of a contract constituted by his admission to membership has always been very great. Such a contract apparently is considered joint, and in common law in strictness it would have been necessary for the plaintiff to join all the members as defendants. It is true that his failure to do so could only be taken advantage of by the member or members sued by a plea of abatement. If the members of the body were very numerous, it might well become too difficult for a defendant to succeed upon such a plea. For the common law was that "the plea must accurately disclose the names of all the contracting parties so as to give a better writ; and if a party be omitted or too many be stated, the plaintiff may take issue on the plea and will succeed on the trial" (***Chitty's Pleading, 6th ed. (1837), p. 719***). But a plaintiff might well hesitate on his side, and in fact no such action appears to be reported. Since the* Judicature Act, *the objection that co-contractors have not been joined must be taken by interlocutory proceeding, and cannot otherwise be relied upon (*Smith v. Auchterlonie*[9];* Tipping v. Richelieu*[10]). But if the objection is properly taken, it will seldom, or perhaps never, be possible to overcome it by constituting the defendants representative parties under* ***Order XVI., r. 9.*** *If the defendants were to represent the "association" as an unincorporated body, with a view to the plaintiff's recovering the damages exclusively from its funds, they would represent the plaintiff as well as the other members: see* Kelly v. National Society of Operative Printers*[11], per* Phillimore *L.J.; compare* R. v. Cheshire County Court Judge and United Society of Boilermakers*[12], per* Scrutton *L.J. If the defendants were sued on behalf of themselves and the members other than the plaintiff, the damages would be sought, not out of the association's funds, but against them personally. Such a representative proceeding would not fall within the rule: see* Hardie and Lane Ltd. v. Chiltern*[13], and the cases there cited.*
But if these procedural difficulties were overcome, and an enforceable contract of membership of an unpropertied voluntary association were found to have been in contemplation, it would become necessary to consider whether a breach of contract had been committed, and who was responsible. If the member suing complained that his expulsion had been improperly resolved upon by a committee or other officers of the association, he would be met by two answers. If the resolution was not authorized by the rules, it would be simply a void act: his membership would be unaffected, and there would be no breach of contract. "In the case of a purely voluntary association, a Court of equity bases its jurisdiction on property, there being nothing else for it to act on. A Court of common law before the Judicature Act regarded the invalid expulsion as void, and gave no damages. So between the two jurisdictions the plaintiff could rely only on property as the basis of jurisdiction" (per Isaacs *J.,* Edgar and Walker v. Meade*[14]). If the member whose expulsion has been invalidly resolved upon asserts rights arising out of his membership, it may be that those who, relying upon the attempted expulsion, resist the assertion, will be led into the commission of acts which are tortious because they lack the justification which a valid expulsion may give them. For the tort the member may then sue.* Innes v. Wylie*[15] affords an example. But he cannot recover from the committee or the members for breach of contract. Cases in which a member, improperly expelled from a proprietary club, has recovered damages from the proprietor supply an illustration of another application of the same principle. Each member is entitled by contract with the proprietor to have the personal use and enjoyment of the club, in common with other members, so long as he pays his subscription, and is not excluded from the club under its rules (per* Stirling *J.,* Baird v. Wells*[16]). If a member is improperly expelled by the committee, his expulsion is invalid, he remains a member, and can enforce his contract with the proprietor.*
If a member of a voluntary association complains, not of an invalid expulsion, but of some failure to observe the rules on the part of the committee or other officers, it would be necessary for the member complaining to show that the rules were intended to confer upon him a contractual right to the

> One reason which must contribute in a great degree to produce the result is the general character of the voluntary associations which are likely to be formed without property and without giving to their members any civil right of a proprietary nature. They are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and material advantage. Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract. (Compare per *Jessel* M.R., ***Rigby v. Connol***[7], and per *Scrutton* L.J., ***Rose and Frank Co. v. J. R. Crompton and Bros. Ltd.***[8].)

[31]. In this case before me, the TBMM constitution provides vide clause 4.2.(a),(b) and (c) that its members are, by contract, bound to its (constitution's) provisions:

a. Members of the Mandali shall bind to abide by the provision of this Constitution and decisions of the Management Committee.
b. This Constitution is a contract between each of them and the Mandali and that they must comply with this Constitution and, any Regulations, By laws, Determinations, Resolutions or Policies which may be made or passed by the Management Committee or the Mandali.
c. They are entitled to all benefits, advantages, privileges and services of membership as are conferred by this Constitution, and any Regulations, by laws, Resolutions or Policies implemented by the Management Committee.

[32]. In my view, clause 4.2.b is a clear indication that TBMM members, upon becoming members, are in fact entering into legal relations with each other. Their governing instrument (constitution) envisages the creation of legal relations between members which are to be enforceable in a court of law.

WHAT APPROACH SHOULD THE COURTS ADOPT IN INTERPRETING THE RULES OF AN UNINCORPORATED ASSOCIATION?

[33]. At the outset, let me just point out here that Mr. Naidu of counsel for the defendants has questioned in his submissions whether or not Fernando J had powers to order the Attorney General to take over interim management of the TBMM/School.

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performance of the particular duty upon which he insists. It can seldom be the true meaning of the rules of any large association of such a kind that those under-taking office thereby enter into a contract with each and every member that they will execute the office in strict conformity with the rules. If, however, it were determined that the committee or the officers of a voluntary association in attempting to exclude the member complaining, or in some other respect, had committed a breach of contract, the remaining members of the association would not be responsible. The committee or officers may be agents for the members of the association. But if so, they are agents for all the members. If in the case of a member complaining they have violated the rules, they have exceeded their authority. Upon no doctrine of agency can one of the joint principals hold the others responsible. (See Kelly v. National Society of Operative Printers*[17]).*

[34]. Having said, the answer to the question posed in the above heading was recently addressed by Mr. Justice Clarke of the Irish Supreme Court in **Dunne & Ors -v- Mahon & Anor** [2014] IESC 24. After reviewing some English cases on the question – Clarke J said:

> 5.5 It has often been said that the modern approach to the construction of all documents which have an effect on legal rights and obligations is to analyse the text of the document but in its proper context by reference to the so called factual matrix within which the document was produced. It seems to me that this "text in context" approach applies across the board to all documents designed to affect legal relations. However, part of the "context" in which the "text" is to be viewed is the nature of the document itself. As was pointed out by Lord Hoffman in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** **[1981] 1 W.L.R. 896,** we do not, for example, expect mistakes to have been made in carefully drafted contracts. Likewise, we expect statutes to mean what they appear to say. On the other hand, there is authority for the proposition that the rules of a club should not be approached with the same degree of rigor. In ***In re GKN Bolts & Nuts Ltd Sports and Social Club*** [1982] 1 W.L.R. 774 at p. 776, Megarry V.-C. observed:
>
> > *"In such cases, the court usually has to take a broad sword to the problems, and eschew an unduly meticulous examination of the rules and resolutions. I am not, of course, saying that these should be ignored; but usually there is a considerable degree of informality in the conduct of the affairs of such clubs, and I think that the courts have to be ready to allow general concepts of reasonableness, fairness and common sense to be given more than their usual weight when confronted by claims to the contrary which appear to be based on any strict interpretation and rigid application of the letter of the rules. In other words, allowance must be made for some play in the joints."*
>
> 5.6 It is not that the underlying principle is different. Rather it is that the context of a carefully drafted legal contract between two major corporations entered into after detailed negotiations is very different from the context of the relatively informal rules adopted by a members club to govern their business.
> 5.7 While a club is, therefore, in one sense, no more than a set of interlocking mutual contractual relations between its members, it does have a form of existence which goes beyond that and which is subject to the jurisdiction of the courts. Also, those contractual terms or rules need to be viewed against the background that they are not to be found in a carefully drafted legal document but rather represent the view of the members of the club as to the rules by which they are to be bound. Against that backdrop, it is appropriate to turn briefly to this Court's assessment as to whether counsel for both parties to this appeal were correct in disagreeing with the trial judge's view that a term should be implied into the Rules permitting amendment by simple majority.
> (my emphasis)

Charitable Trust Analysis

[35]. In contrast to the private law analysis above, organizations which take the form of a charitable trust, even if unincorporated, are of interest to the public. The public interest element derives from the fact of their charitable purpose. In **Halsbury's Laws of England (4th Ed)**, the learned authors, at paragraph 870, observe that charitable trusts are essentially

matters of public concern and as such, the Crown is the *parens patriae* of all charitable trusts property.

> "The Crown as *parens patriae* is the constitutional protector of all property subject to charitable trusts, such trusts being essentially matters of public concern. The Attorney-General, who represents the Crown for all forensic purposes, is accordingly the proper person to take proceedings on behalf of and to protect charities".

[36]. The Crown's role as *parens patriae* derives ultimately from the ancient prerogative jurisdiction of the Crown. That prerogative jurisdiction treats it (the Crown) as the guardian or protector of persons under legal disability which, historically, has included beneficiaries of charities. In Fiji, the role of the Crown as *parens patriae* over charitable trusts was more or less reprised in our legislation in the form of the Charitable Trusts Act (Cap 67). In **Parshotam v Narain** [1977] FJSC 60; Civil Action 054 of 1977 (21 October 1977), Kermode J, following the English approach, acknowledged the role of the Attorney-General as *parens patriae* of charitable trusts:

> The action has been brought against the first eleven defendants and the Attorney General who is sued as the parens patriae of the Charitable Trusts in Fiji

[37]. In my view, a charitable trust which is not registered under Fiji's Charitable Trusts Act is no less a matter of public interest than one which is registered under the said Act. I say that bearing in mind that there is nothing under the said Act that makes registration compulsory (although, to attract tax benefits, the relevant tax legislation in Fiji might that the entity be incorporated under the Charitable Trusts Act).

[38]. Also, I say that, bearing in mind that the *parens patriae* doctrine, which embodies the public interest element, is ultimately a common law prerogative which applies in Fiji by virtue of section 22 of the High Court Act[2].

> *What imperial laws to be in force*
>
> **22**.—(1) The common law, the rules of equity and the statutes of general application which were in force in England at the date when Fiji obtained a local legislature, that is to say, on the second day of January, 1875, shall be in force within Fiji subject to the provisions of section **24** of this Act.

[2] Section 22 of the High Court states:

What imperial laws to be in force

22.—(1) The common law, the rules of equity and the statutes of general application which were in force in England at the date when Fiji obtained a local legislature, that is to say, on the second day of January, 1875, shall be in force within Fiji subject to the provisions of section 24 of this Act.

(2) For the removal of doubt, it is hereby declared that the provisions of sections 24 and 25 of the Supreme Court of Judicature Act, 1873, are in force in Fiji notwithstanding that the commencement of that Act was postponed in England until after the said second day of January, 1875.

> (2) For the removal of doubt, it is hereby declared that the provisions of sections **24** and **25** of the Supreme Court of Judicature Act, 1873, are in force in Fiji notwithstanding that the commencement of that Act was postponed in England until after the said second day of January, 1875.

[39]. I have not directed my mind to the question whether or not TBMM is indeed a charitable trust. Suffice it to say that if it were, this court would still assume jurisdiction over its affairs as a matter of "public interest", but on the application of the Office of the Attorney General as *parens patriae*. However, having said that, this court can still assume jurisdiction under the Trustees Act with regards to the removal and appointment of trustees if an application is made.

[40]. Section 51 of the Trustee Act 1956 of New Zealand is an exact replica of Fiji's section 73[3]. In the New Zealand case of **Eden Refuge Trust & Ors v Hohepa & Fletcher**(07 March 2008), a case which concerned a registered charitable trust created for religious purposes, Duffy J applied section 51 to consider whether or not to remove the trustee who had committed a series of serious acts of misconduct and opined, citing **Mendelssohn v Centrepoint Community Growth Trust**[1999] 2 NZLR 89, that the Court can exercise its jurisdiction under s 51 once it is satisfied that a trust is without any effective means of operation. In addition, Duffy J acknowledged that the Court had an inherent jurisdiction to order the removal of a trustee and the substitution of a new trustee in circumstances of trustee misconduct or in circumstances in which the

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[3] Section 51 of the New Zealand Act provides:

51 Power of Court to appoint new trustees

(1) The Court may, *whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court*, make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

(2) In particular and without prejudice to the generality of the foregoing provision, the Court may make an order appointing a new trustee in substitution for a trustee who—

(a) Has been held by the Court to have misconducted himself in the administration of the trust; or

(b) Is convicted, whether summarily or on indictment, of a crime involving dishonesty as defined by section 2 of the Crimes Act 1961; or

(c) Is a mentally disordered person within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992, or whose estate or any part thereof is subject to a property order made under the Protection of Personal and Property Rights Act 1988; or

(d) Is a bankrupt; or

(e) Is a corporation which has ceased to carry on business, or is in liquidation, or has been dissolved

(3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(4) Nothing in this section shall give power to appoint an executor or administrator.

(5) Every trustee appointed by the Court shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Court is of the opinion that the administration of the trustee is inimical to the interests of the trust and the beneficiaries.

[41]. However, this is for consideration for another day as no such application under section 73 is before me now so I will save this for another day. Query though whether section 73 might also be applicable for the removal of members of the MC, but this may depend on whether or not the management committee can be classified as "trustees" under our Trustees Act. This is also for another day when the appropriate application is made.

[42]. However, for the record, since Mr. Naidu has queried whether or not Fernando J had powers to order the Office of the Attorney General to take over interim management of Tilak High School, I believe Fernando J's Orders to that effect were premised on the special *parens patriae* role of that office and I believe that the Minister for Education, in this particular case, is justifiably involved as an agent of the state which the Attorney General represents.

SHOULD THE COURT ORDER AN AGM?

[43]. I am of the view that it would be premature to hold an AGM now to elect new members until the issues between the parties are resolved. In taking that position, I am saying that some of those issues are better resolved at a trial than through an AGM. Below I record my thoughts on this. At the end of the day, it is up to the parties to decide whether they would like to press on with an AGM or whether they would prefer to reserve the issues (or some of them) for trial. I intend to call the parties before me at some point later in the week to review their respective positions, after having read my thoughts and observations in these directions.

Defendants' Allegation of Tampering With Constitution

[44]. It is alleged by the defendants (MC) that the plaintiffs/trustees did tamper with the constitution in order to give themselves certain powers. I have read and compared the constitution that Ganga Reddy annexes to his affidavit and that which Prem Singh annexes to his. There is indeed a whole new extra section containing various provisions which include powers to the trustees to dismiss the MC. These provisions are not in the

constitution that Reddy relies on but are in the constitution that Singh relies on.

[45]. The rules (constitution) of an unincorporated association can only be amended in accordance with the specific amending mechanism prescribed therein the rules. This is in accordance with the view (see **Conservative & Unionist Central Office v Burrell** supra) that the rules constitute the contract and the members are bound by contract to abide by any amending mechanism stipulated in the rules.

[46]. If the rules do not specify any amending mechanism, the better and more popular view is that the unanimous agreement of all members is required before the constitution can be amended (see Supreme Court of Victoria (as per Brooking J) in **Master Grocers' Association of Victoria v Northern District Grocers' Co-Op Limited** [1983] 1 CR 195 for an insightful discussion, see also **Harington v Sendall,** [1903] 1 Ch 921[4]; **In Re Unley Democratic Association, [1936] SAStRp 47; [1936] SASR 473, at pp. 477-85; PS Marwaha & Ors v Singh & Ors** [2013] EWHC B6 (Ch); **Dunne & Ors v Mahon & Anor** [2014] IESC 24;). This means that the majority decision of the membership, regardless of percentage, will not be able to change the constitution or the rules of the association.

[47]. In this case, of course, the TBMM constitution stipulates a 66% majority to alter the constitution:

> Alteration to Constitution
> This Constitution may only be amended, added to or appealed (sic[6]) by a resolution of 66% of members present who are eligible to vote at any Annual General Meeting or Special Annual General Meeting.

[48]. The allegation that the plaintiffs did tamper with the constitution is tantamount to saying that they did amend the constitution without complying with the prescribed amending mechanism. The plaintiffs, of course, refuted the allegations.

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[4]where Joyce, J. held that the majority of those present at a meeting did not have a right to change the rule of an unincorporated body depends upon and is a matter of contract. As such, dissolution is possible a club fixing the annual subscription since the constitution only if all of the members agree
[5]where Reed A.J. held that, the majority in a special meeting called in accordance with the rules might dissolve the association had it not been for another rule which prohibited dissolution so long as there remained five members who desired that the association should continue.
[6]Probably meant to read "repealed".

Acquiescence

[49]. Having said that, TBMM members must take note that they may be estopped by equity from denying a rule change if they have permitted the constitution to be implemented over a prolonged period of time on a basis which does not strictly comply with the rules and particularly, where the parties have changed their position on the basis of the purported rule change. In **Dunne** (supra), the Irish Supreme Court reiterated this position relying on the oft cited English case of **Crabb v Arun District Council** [1975] 3 All ER 868:

> 12.2 The reason why the rules of a club cannot, in the absence of a specific amending mechanism being provided for in the rules, be amended without the agreement of all members is because the rules are essentially a contract between all of those members. However, if parties to a contract permit the contract to be implemented over a prolonged period of time on a basis other than in strict compliance with the contractual terms so that parties act in reliance on the contract being in that charged form, then a situation may be reached where any party to such a contract may be estopped from denying that the contract has so changed. The fact that a party to a multi-party agreement could have objected to the contract being changed above its head does not mean that a party can stand by and allow the implementation of the contract on different terms for a prolonged period (where the other parties rely on the purported change) and then be heard to say, retrospectively, that the contract should not have progressed on the amended basis in the first place.
> 12.3 Finlay P., in ***Smith v Ireland & Ors*** **[1983] I.L.R.M. 300**, was satisfied that a passage from ***Crabb v. Arun District Council*** **[1975] 3 All ER 868** represented an accurate statement of the law in this jurisdiction. In the relevant passage from ***Crabb***, Denning M.R. outlined the circumstances in which an equitable estoppel might arise at p. 871:
>
> > *"Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights knowing or intending that the other will act on that belief and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied."*
>
> 12.4 If a rule change is put in place in circumstances where there might be a legitimate legal argument to the effect that the rule change is not permissible (either because no rule change is permissible without unanimity or because the specific provisions of the rules allowing for rule change have not been properly complied with), then any aggrieved party is entitled to seek to have the rule change declared invalid. However, if parties acquiesce in allowing the club to continue as if the amendment had validly taken place, then a point will be reached where all parties will be estopped from denying the validity of the rule change concerned. This will particularly be so where parties have changed their position on the basis of the rule change. Anyone who joins a club on the basis of a particular set of rules appearing (without challenge) to be the rules of the club is entitled to assume that their contract is in accordance with those terms. Those parties who join after the impugned rule change have clearly signed up to the club in the form given effect by the rule as amended and have placed reliance on the rules thus appearing to have been amended. But equally all members who were part of the club prior to the impugned rule change will have allowed new members to join on the basis of that altered position and cannot, equally, for that reason, be heard to deny the validity of the new rule.

(my emphasis)

[50]. The above is simply applying the contractual principle of acquiescence in the context of an unincorporated association (see **De Bussche v Ali** (1878) 8 Ch.D. 286, 314 for a statement of the principles of acquiescence).

Trustees Dissolving the MC

[51]. Do the trustees have power under the constitution to dissolve the MC? The defendants would say that their dismissal by the trustees was unlawful. The trustees would insist that it is within their powers to dissolve the MC for cause so long as a new MC is appointed within one month thereafter. But, of course, the defendants would say that the plaintiffs are relying on tampered provisions of the constitution. Apart from the issues of fraud involved, what this all boils down to is: what management structure did the TBMM intend by its constitution? Some small unincorporated associations favour a two tier management structure. First, there are the managers who are sometimes called the managing trustees or the management committee who manage the affairs of the organisation on a day to day basis. Second, are the trustees, sometimes called the holding or custodian trustees who are appointed solely to hold title to the land or property on behalf of the organisation. In that regard, the holding or custodian trustees are usually not involved in the day to day running of the organisation and are usually appointed on a somewhat permanent basis until death or until such time as they wish to retire so as to avoid the periodic unnecessary expense of having to change the names on the titles to property.

[52]. Sometimes, an unincorporated association will prefer that the holding or custodian trustees should not also be a managing trustee or be in a management committee. This is done in order to ensure better accountability and good governance. However, at the end of the day, there is no legal restriction as such when it comes to an unincorporated association. It is, after all, a matter of what the members desire through their constitution or governing rules.

[53]. Clearly, one of the main points of contention between the trustees/plaintiffs of TBMM on the one hand and the MC/defendants on the other is, whether the trustees are strictly holding or custodian trustees merely to hold title to the properties of the TBMM, or whether they are

also to be involved in the day to day management of the TBMM. Ideally, a well written constitution will provide the answer to these questions. In this case before me, the fact of the existence of the allegation of constitution-tampering makes adds a rather complicated twist to the issue.

In Whom is Management of TBMM Vested?

[54]. Both the Deed and the constitution contain provisions which appear to confirm that the management of the affairs of TBMM vests entirely in the MC.

> **AND WHEREAS** by constitution of the **BHARTIYA MITRA MANDALI** it is amongst other things provided in rule 6 that the management of the affairs of the Mandali shall be in the hands of the Committee consisting of the President, Vice Presidents, Treasurer, Secretary, Assistant Secretary and Committee Members, who under rule 6 shall comprise of eleven members duly elected **AND WHEREAS** it was resolved on the 14th day of March 2010 that the property being the Housing Leases hereinbefore described shall be the property in Trust unto the Mandali and who in matters relating to the disposition or dealing with the said property of the Mandali are to act on the direction of a resolution of the Committee for the time being.

[55]. Clause 6(c) of the constitution provides:

> c. The entire administration and management of the Mandali shall be vested in the Management Committee.

[56]. Under the Constitution, the MC is elected at an Annual General Meeting (clause 6(a))[7] for a term of two years (clause 6(b))[8] and eligible for re-election at the next AGM.

[57]. I also observe that under clause 7.c and 7.d of the TBMM constitution, the trustees are free to attend any MC meeting or AGM. However, they do not have any voting right in these meetings.

[58]. I observe that the properties of the TBMM vests in the trustees **"who shall hold the same in (sic) Trust unto the Mandali and who in matters relating to the disposition or dealing with the said property of the Mandali are to act on the direction of a resolution of the Committee for the time being"** (see Deed of Trust). In addition to that, clause 7.a. of the TBMM constitution states that

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[7] Clause 6(a) provides as follows:

a. The Mandali shall at its Annual General Meeting elect a Management Committee consisting of the following officers: 1 President, 2 Vice Presidents, 1 Manager, 1 Secretary, 1 Assistant Secretary, 1 Treasurer, 4 Committee Members.

[8] Clause 6(b) provides:

b. The members of the Management Committee shall serve for a two year term of office until the next election where they will be eligible for re-election.

TBMM's properties shall vest in the maximum of five trustees only. These five trustees will be appointed for that purpose at the AGM.

[59]. One of the key roles of the Trustees is to advise the MC when required. I also observe that there are no specific provisions in the TBMM constitution that specifically prohibit the trustees from being members of the MC as well. However, having said that, there are provisions in the Constitution which, arguably, assume that the trustees cannot be members of the MC and vice versa (see discussion below).

Trustees Holding Dual Positions - Conflict of Interest?

[60]. The defendants allege that the plaintiff's appointment as trustees was unlawful *vis a vis* the TBMM Constitution which forbids a trustee from holding dual positions. They say that this requirement was put in place to avoid a conflict of interest but was overlooked. The defendants say that Prem Singh for example, was Manager of the Mandali (i.e. TBMM) when he was appointed trustee. Elle Narshea was President of the Mandali and Prakash Kumar, the Secretary. The defendants say that, as such, the plaintiffs/trustees all had a conflict of interest. Whether or not the trustees really do hold dual positions and if so, whether or not they are conflicted as such, again, the first place to look for answers is the TBMM constitution itself. The trustees have not refuted that they do hold dual positions. I have not seen any specific provision in the TBMM constitution that says that members of the board of trustees cannot also be members of the MC.

[61]. It is arguable (although this is not a conclusive observation as I have yet to hear argument from counsel on this point) that the intention is that the trustees were to function merely as custodian trustees. In other words, they were merely to hold title to the properties of TBMM and were to be separated and removed from any involvement in the management functions of the TBMM including the appointment and removal of the Management Committee. To give an example, the fact that the MC is required under the clause 6(o) of the Constitution to first seek the approval of the trustees when it comes to any capital expenses may suggest that a separation of functions is intended and that it would be a conflict of interest if the members of one were also members of the other.

Clause 6(o):

o. The Management Committee must seek the approval of the Trustees for all capital expenses.

MC - Structure of MC

[62]. The MC consists of a President, two Vice Presidents, a Manager, a Secretary, an Assistant Secretary, a Treasurer and four Committee Members. The quorum for any MC meeting is six (clause 6(d))[9]. The MC is obligated to render all assistance to the School Principal in the orderly running of Tilak High School[10]. But when it comes to any capital expenses, the MC must seek the approval of the Trustees[11]. The constitution does not say what is to happen if the trustees refuse to approve any particular.

[63]. Under clause 4(d) of the constitution, a trustee or any member of the MC shall be deemed to have vacated his office if any of the following situations do arise.

- Resign his or her office seat in writing addressed to the Management Committee.
- Be adjudged bankrupt.
- Is guilty of breach of trust or refuses or neglect to perform duties.
- Is incapacitated due to illness.
- Migrated or being absent from the Fiji Islands, without taking leave in writing from the Management Committee, for more than three months.
- Missed three conservative meetings without the Management Committee's approval.

[64]. If a member's activities are, in the opinion of the MC, contrary to or obstructive or detrimental to the object(s) of the TBMM, the MC will table the matter at an AGM meeting to seek approval for expulsion. A member who is thus expelled may appeal against the resolution to a Committee. That "appellate" committee is appointed by the MC (clause 4 (c))[12].

[65]. Clause 8 of the constitution makes provisions for the procedure/protocol for, *inter alia*, General Meetings and Special General Meetings. The MC or the secretary may call an SGM on a special requisition in writing signed by

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[9] Clause 6(d) provides:
d. Six members of the Management Committee shall constitute the quorum for any of its meeting.

[10] Clause 6(n) provides: The Management Committee shall render all assistance to the school principal in the orderly running of the school.

[11] Clause 6(o):
o. The Management Committee must seek the approval of the Trustees for all capital expenses.

[12] Clause 4(c) states:
c. The Management Committee shall seek the approval of an AGM to expel a member whose activities are, in the opinion of the Management Committee, contrary or obstructive or detrimental to the object or objects of the Mandali and the member shall be entitled to appeal to a Committee that will be appointed by the Management Committee and whose decision shall be final.

no less that 50% of TBMM members (clause 8a[13]). A seven-day written-notice is required which must be by way of newspaper advertisement and any media (clause 8.1.). The notice must state the place, date, time and the nature of the business to be considered at the meeting[14]. The quorum is 50% of all members eligible to vote at an AGM[15]. If a quorum is not present, the SGM must, either be dissolved (if called by the members) or adjourned (if called by the MC – clause 8.1.c[16]).

[66]. Clause 8.2.a, 8.2.b and 8.3 make provisions on some voting procedure and protocol. Every financial member present at any meeting is entitled to a vote and shall have one vote on every motion (clause 8.2.a). If there is a tie in the votes, the chairman shall cast the deciding vote[17].Voting is done by show of hands. But the chairman has a discretion to take votes by any other method he deems fit, on any particular matter (clause 8.2.b)[18].

[67]. After voting, the chairman shall declare, either that a resolution has been carried unanimously or by a particular majority or that the motion is lost. Whatever the chairman declares will be noted in the Minute Book. It is not necessary to specify numbers in either the chairman's declaration or in the minutes (clause 8.3)[19].Provided that a General Meeting has been held in *"substantial conformity with the rules"*, all resolutions passed therein shall be conclusive and binding on all members (clause 8.3.b)[20].

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[13]Clause 8a. provides:

Special General Meeting

a. Special General Meeting may be called by the Management Committee or by the Secretary on a special requisition in writing signed by no less than 50% of the members of the Mandali.

[14] Clause 8.1.a provides:

8.1 Notice of and proceeding at meetings generally

a. The Secretary shall give at least seven days' notice in writing to each member by advertisement in at least one newspaper and any media, which notice shall state the place, date, time and the nature of the proposed business to be transacted at the meeting.

[15] Clause 8.1.b provides:

b. That all quorum at all General Meeting shall not be less than 50% of all members eligible to vote at an Annual General Meeting.

[16] Clause 8.1.c provides:

c. If within half an hour after the appointed time for the commencement of the Special General Meeting a quorum is not present, the meeting:

1.If convened upon the requisition on Members, shall be dissolved.

2.If the Special Annual General Meeting is called by the Management Committee and the quorum is not present then the meeting shall be adjourned to another date.

[17]Clause 8.2.a states:

8.2 Voting at Meetings

a. Every financial member present is entitled to a vote shall have one vote on every motion and in the case of equality of votes, the Chairman shall have casting vote besides a deliberating vote.

[18] Clause 8.2.b states:

b. The voting at such meetings shall be a show of hands generally provided that the Chairman may on any a particular matter take votes by any other method he deem is fit

[19] Clause 8.3 states:

8.3 Recording of Determinations

a. A declaration by the Chairman that a resolution has, on the show of hands, been carried unanimously, carried by a particular majority or lost, will be noted to the effect in the minute Book of the Mandali. As evidence of the fact, without specification of the number or proportion of votes recorded in favour of, or against, that resolution.

[20] Clause 8.3.b states:

b. All resolutions passed at any General Meeting shall be conclusive and binding on all members thereof, whether present or not, provided such meeting has been held in substantial conformity with the rules.

[68]. Although, under the constitution, the trustees appear to play no role in the affairs of the MC. provides that the MC shall meet once a month (clauses 6 (e) and (f))[21]. Clause 6(l) and (m) make notice provisions for the normal monthly meeting and also for urgent meetings[22]. An MC member who is ineffective in his duties may step down, on a vote of no confidence supported by more than 50% of MC members present at any MC meeting (clause 6(g))[23]. Clause 6 sub clauses (h), (i), (j) and (k) make provisions, respectively, on:

(i) how the MC has power to fill temporary vacancies in the MC pending the next AGM[24],

(ii) how the MC may form 4-member subcommittees in named key areas[25],

(iii) how the MC may employ staff [26] and the, seemingly, now redundant power to determine and levy fees from students.[27]

[69]. It would appear from all the above that the MC is indeed given wide management powers.

WHICH MEMBERS TO VOTE?

[70]. During the hearing of the application, one of the issues raised by the parties was, which membership register is to e considered when holding elections. The plaintiffs argue that those who were members in be the only ones who should be allowed to vote and hold positions.

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[21] Clause 6 (e) and (f) provide:

e. All monthly meetings of the Management Committee shall be called by the Secretary at the direction of the President.

f. The President shall preside at all Management Committee meetings and in the absence of the President, one of the Vice President or one of the Committee members can sit as the Chairman of that meeting.

[22] These provisions are:

l. The Secretary on the direction of the President shall give a week's notice by phone, email or by circulars for an ordinary meeting. An emergency meeting may be called on a shorter notice upon request by the Principal consulting the Manager and President to make the decision.

m. All decisions of the Management Committee shall be made whether by consensus, or by voting in which a simple majority of one shall be required for approving a motion.

[23] Clause 6(g) provides:

g. Should a Management Committee member be found unable to carry out his or her duties effectively, another member or members of the Management Committee may execute a vote of no confidence in the officer. Should over 50% of those present at the meeting concur, the officer will be requested to step down from his or her position.

[24] Clause 6(h) provides:

h. In an event of vacancies on the Management Committee, whether by death, removal, resignation or otherwise an officer of the Mandali, the Management Committee shall have the power to fill, vacancy with a person who would normally be eligible for election, and such person shall automatically vacate the office at the next Annual General Meeting.

[25] Clause 6(i) provides:

i. The Committee may form four or more members subcommittees for: (a) Finance and tender Process (b) Education (c).Maintenance and new Projects (d).Where ever need arises.

[26] Clause 6(j) provides:

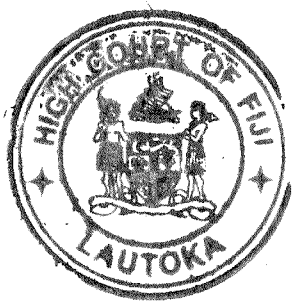
j. The Management Committee shall employ staff, and shall assess review and regulate their salaries and have the right to dismiss or otherwise dispense with services of staff employed by it.

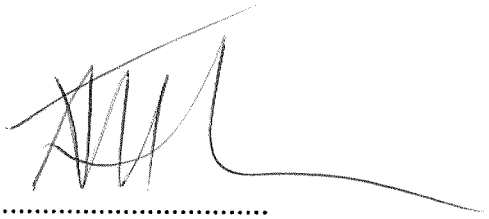
[27] This is provided for under clause 6(k) but which is now redundant in light of recent legal and policy developments which make Education free in Fiji.

[71]. The defendants appear to be saying a different thing. In my view, if elections were to be held now, then only the current members should be allowed to vote. Not only is this what the constitution requires, but it is also in accordance with the contract principle that binds the members. Voting is a right conferred by the constitution which, as I have stated above, is the governing instrument or contract. It is a constitutional/contractual right. A person who has ceased to be a member no longer has that right.

CONCLUSION

[72]. The above are my thoughts. I will now adjourn this matter for one week to give the parties time to mull over the observations I have recorded above. In my view, only if the parties are unanimous that an SGM be held to elect office bearers, will I then make orders accordingly. Otherwise, I believe an SGM will merely be a forum for a showdown between two parties who are unwilling to collaborate. Case adjourned to 16 October 2014 for mention.





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Anare Tuilevuka
JUDGE
06 October 2014