02 SEP 1996

IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

(Civil Jurisdiction) **Civil Case No.75 of 1996**

BETWEEN: Rialuth Serge Vohor in his apacity as President and a Member of the Present National Executive Council of the Union of Moderate Parties of Port Vila.

First Plaintiff

AND: Keasipai Song in his capacity as Vice President and Member of the present National Executive Council and as a Member of the Union of Moderate Parties of Port Vila.

Second Plaintiff

AND: Petre Malsungai in his capacity as Secretary General and Member of the Union of Moderate Parties Port Vila.

Third Plaintiff

AND: Willie Jimmy in his capacity as Secretary General and Member of the Union of Moderate Parties of Port vila.

Fourth Plaintiff

AND: Amos Adeng of Port Vila

First Defendant

AND: Charlie Nako of Port Vila

Second Defendant

AND: Maxime Carlot Korman of Port Vila

Third Defendant

AND: Amos Bangabiti of Port Vila

Fourth Defendant

AND: Demis Lango of Port Vila

Fifth Defendant

AND: Louis Carlot of Port Vila

Sixth Defendant

AND: Cyriaque Metmetsan of Port Vila

Seventh Defendant

CORAM: LUNABEK J.
Mr David HUDSON for the Plaintiffs
Mrs Susan BOTHMANN BARLOW for the Defendants

JUDGEMENT

By Originating Summons dated 15 May 1996, the Plaintiffs herein, in a representative action, claimed relief as set out in the Summons against the defendants. On 17 May 1996, the Plaintiffs sought on ex-parte, Interim injunctions and Orders before his Lordship the Honourable Chief Justice Vaudin d'Imécourt in the terms contained in the Originating Summons. His Lordship did refuse to grant the interim relief sought and adjourned the matter to 12 June 1996 at 9.00am o'clock for all the parties to be served and properly represented and for full evidence and legal submissions to be heard. On 12 June 1996, the matter was brought before me in Court and by Consent, directions were made to the

parties as to the filing servicing of and discovery and inspection of documents between the parties. On 22 July 1996, again by Consent it is ordered, inter alia, that both parties prepare and exchange with each other submissions in written form on the issue of the Courts power to make Orders concerning the use of the names of political parties. On 7 August 1996, both parties agreed that because there are important legal issues involved in this case and in order to speed up the process and facilitate the determination of these issues, it is appropriate for the Court to consider these preliminary points of Law before proceeding to hear evidence. The matter was then so adjourned.

In the case before the Court, an injunction is sought to prevent the use of the name of a political party by some of its members who have broken away from others of its members. It is also alleged, by both sides, that the Constitution of the party has been breached.

Preliminary observations as to the role of the Court in the type of cases as this.

Before I proceed any further, I do think it necessary for me to make few observations concerning the role of the Court and my role as a Judge of this Court, in the type of cases as this one. Vanuatu is a small country with a small size population and thus a small community in which people tend to know each other, have strong family relationships, have custom and traditional values. Some of you today in this Court are chiefs, leaders of the Community, that is, "Big Men" of this Country. You brought your application before the Court of law seeking for justice as it is said that repeated efforts have been made to settle your differences but, without success. As far as I am concerned as a Judge of the Supreme Court of the Republic of Vanuatu, I must make it quite clear that the Law I am bound to apply in this case and cases of this nature, is the Law of Vanuatu. I will apply that Law to this case without any consideration whatsoever for political views or policies or its consequences. Those political and/or policies considerations and its consequences are for you only, "Big Men" to consider but, not for the Court. In order to explain further the role of the Court, I will borrow and adopt the words of Megarry V. C. in the case of John -v- Rees (1969) 2 All E.R. 363 at 367, who describes the role of the Court in this way:

> *"I must make explicit what all lawyers will recognise as implicit, but which those who are not lawyers may not fully appreciate. I am not in the least concerned in this case with the rightness or wrongness or the desirability or undesirability of any political views or policies within the confines of any political or other unit. My concern is merely to see that those concerned in these proceedings obtain justice according to law, irrespective of politics"*

The questions of law to be answered by this Court are two folds:

1- Is it open to the Court to make Orders giving the exclusive right concerning the use of the names of political parties.

2- The role of the Court in looking at the internal workings of a voluntary unincorporated Association.

I will deal with them in turn.

First Issue: Voluntary unincorporated Associations such as political parties as parties to passing - off actions.

General Observations as to Passing-off Actions

It must be understood that the question whether the use of particular words or badges, is calculated to pass-off the Defendant's goods as those of the Plaintiffs is often one of difficulty, but it is in substance a question of fact. In Reddaway -v- Banham (1896) AC 199, 204, Halsbury L. C. said this:

> *" The principle of law may be very plainly stated, that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs, or pictures, does or does not come up to the proposition enunciated in each particular case must always be a question of evidence and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact, the legal consequences appear to follow".*

And further more,

> *"It should never be forgotten that in these cases the sole right to restrain anybody from using any name he likes in the course of any business he chooses to carry on is a right in the nature of a trade mark, that is to say, a man has a right to say "you must not use a name, whether fictitious or real. You must not use a description, whether true or not, which is to represent, or calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement deprive me of the profits of the business which would otherwise come to me". An individual Plaintiff can only proceed on the ground that having established a business reputation under a particular name, he has a right to restrain anyone else from injuring his business by using that name",* as per James LJ. in Levy -v- Walker (1879) 10 ch. D-436 at p.447.

In Erven Warmick B.V. -v- J. Townend & Sons (Hull) Ltd (1979) 2 All E.R. 927 at 932, (1979) AC 731 at 732 (the Advocate case), Lord Diplock expressed the basic law as to passing-off in this way:

"... the later cases make it possible to identify five characteristics which must be present in order to create a valid cause of action for passing-off: (1) a misrepresentation (2) made by a trader in the course of trade (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or good will of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quiet time action) will probably do so".

It must be noted that Lord Diplock went on immediately to make clear that these ingredients were necessary, but not sufficient, conditions for actionable passing-off.

More importantly, reference should be had to the fact that although the essentials of passing-off (as expressed by Lord Diplock) may require that both parties to a passing-off action be traders, it is clear from the cases cited before this Court (as we shall see) that they include instances of the application of the principles of passing-off to trade and Professional Associations which have frequently succeeded in passing - off actions, as for example, in British Legion -v- British Legion Club (Street) Ltd (1931) 48 RPC 555, Farwell J. granted injunctions restraining the defendant from using the words "*British Legion*" in its title; and in Dr Barnardo's Homes: National Incorporated Association -v- Barnardo Amalgamated Industries Ltd (1949) 66 RPC 103, Vaisey J granted an interlocutory injunction restraining the defendant from using the word *"Barnardo"* in its title. Those two (2) instances are examples of successful passing - off actions against commercial organisations. There are also instances of charities, trading or not which can maintain a passing-off action against another charity or against any other defendant who cannot properly be called a trader as in the cases of British Diabetic Association -v- Diabetic Soc. (1995) 4 All E.R. 813, and Holy Apostolic & Catholic Church -v- Attorney General (NSW) (1990) 18 NSWLR 291. It seems, thus, that the concept of trade is much wider and indeed the scope of passing - off is extended further beyond the concept of trade and/or business in the ordinary sense.

A political party, such as the Union of Moderate Parties in the case before this Court, is an unincorporated Association and, as such, is not in the ordinary sense, a trader.

Assuming that the members of a political party have been divided into two (2) factions. For the sake of simplicity I will call them "Group 1" and "Group 2". Assuming also that any member of the said political party has standing. Assuming further that members of "Group 1" still represent themselves as members of the same political party (mother party) as "Group 2" and use the same name, badges, symbol and other descriptions like members of "Group 2". The question is whether or not a member of "Group 2" has any right to say to members of "Group 1" and

to members of a different political party who happen to use the same name and descriptions to their political parties "you must not use that name - you must not use that description" which is to represent, or calculated to represent, to the public that the goods and/or services which either members of "Group 1" or members of a different political party are offering are in fact the goods or services of the "Group 2" and so, by fraudulent misstatement, appropriate the standing and reputation which "Group 2" has built up, which would otherwise come to members of "Group 2".

The case of Kean -v- Mc Givan (1982) Fleet Street Reports 119 was referred to this Court on that point. In this case, the Plaintiffs sought an interlocutory injunction to restrain defendants from using the name *"Social Democratic Party"*, which the Plaintiffs had been using for some time as the name of their political party. On the appeal from the refusal of an injunction at first instance, the Court of Appeal held that the Plaintiffs were not involved in the commercial activity necessary to found an action for passing-off, and thus, refused to grant an injunction.

Submissions for the Plaintiffs.

Mr Hudson submitted on behalf of the Plaintiffs that Kean -v- Mc Givan cannot be followed in Vanuatu. In order to support his submission, he relied on the decision of the Court of Appeal in New South Wales, Australia, in Holy Apostolic & Catholic Church -v- Attorney General (NSW) (1990) 18 NSWLR. 291 and English and United States of America cases which were relied on to support this conclusion, including American Gold Star Mothers -v- National Gold Star Mothers Inc. 191 F 2d 488 (1951); Purcell -v- Summers 145 F 2d 279 (1944), British Legion -v- British Legion Club (Street) Ltd. 1931 48 RPC 555, and Dr Barnado's Homes: National incorporated Association -v- Bernado Amalgamated Industries Ltd (1949) 66 RPC 109.

In Holy Apostolic & Catholic Church, the New South Wales Court of Appeal Judges commenting on the English case of Kean -v- Mc Givan said this:

> *"Such a submission fails, of course, to draw upon a not inconsiderable body of authority and the case should not be followed".*

In Holy Apostolic & Catholic Church, it was held that a religious or charitable organisation may have attributed to it an element essentially indistinguishable from commercial goodwill, and so is entitled to the protection of the law of passing-off in respect of the use of its name. This is a case in which it is recognised that one church could restrain another church from using its name.

It is also put for the Plaintiffs that in the recent English case British Diabetic Association -v- Diabetic Society Ltd (1995) 4 All E.R. 812 at

812, 820, Holy Apostolic & Catholic Church and Purcell -v- Summers were followed in the court's finding that:

> *"the scope of passing-off action was wide enough to include deception of the public by one fund-raising charity in a way that tended to appropriate and so damage another fund-raising charity's good will, namely the other charity's attractive force in obtaining financial support from the public."*

It is, equally, submitted for the Plaintiffs, that political parties, just as much as charities and churches, are *"dependant upon the contributions of their members for means to carry on their work".*

It is further submitted for the Plaintiffs that, in Vanuatu, the Supreme Court has granted an interim injunction ex-parte, to restrain the unauthorised use of the name of a political party by a break-away faction, in Kalpokas -v-Lini, Civil Case 127 of 1991, on 12 September 1991. And again, in Korman & Jimmy -v- Mensul Civil Case 106 of 1995, the Supreme Court ordered that electoral candidates not on the official U.M.P. list could not use the U.M.P. name, colour, or emblem (judgement page 9). In that case, it is further contented for the Plaintiffs that the defendant Korman relied on the power of the Court to restrict the use of a political party's name.

It is, therefore, submitted that Kean -v- Mc Givan cannot be followed in Vanuatu, in view of the two (2) Supreme Court decisions to the contrary, and local requirements and circumstances and that the Court should proceed to consider the evidence put before it by the parties in relation to their compliance with the U.M.P. Constitution.

Submissions for the Defendants.

Mrs Susan Barlow Bothmann submitted on behalf of the Defendants that the Court should follow the decision of the Court of Appeal in Kean -v- Mc Givan concerning the rights about a name of a political party.
She also contented that there is no particular reason why this Court should consider a decision of the New South Wales Appeal Court but even if it does so, the case should be distinguished because it does not apply in this case. The U.K. Appeal Court decided Kean -v- Mc Givan in 1982 and the Court therein stated (at the top of page 121) referring to Mr Kean, the Plaintiff,

> *"he has unable to draw our attention to any situation where the remedy of bringing a passing-off action has operated in a situation where there was no trade in the widest meaning of that word, no commercial activity carried on. Accordingly, in my judgement there is no basis in this case for a claim based upon the tort of passing-off".*

She further pointed out for the Defendants that the Court of Appeal in Kean -v- Mc Givan stated that in that case there was no basis for contending that a tort has occurred. the interlocutory injunction was refused because there was no cause of action. She thus, submitted for the Defendants that in the case before the Court there is even less basis for the Orders sought by the Plaintiffs because there is no cause of action.

She said also that Mr Kean apparently referred to ***"general equitable principles"*** *but the* Appeal Court dealt with that submission in these terms:

> *" but those equitable principles do not provide us with the right to sit under a palm tree and dispense what we think is a fair and kindly jurisdiction to prevent what Mr Kean thinks is an unjustifiable interference with his activity. He must show that wrong has been done if a remedy is to be found... "(p. 21).*

She argued also that in British Diabetic Association -v- Diabetic Society Ltd (1995) 4 All E.R. 812 the decision followed the line of authority that has considered allowing the tort of passing-off to extend to activities of charities and churches because those Organisations do have rights akin to commercial rights to protect.

It is also contented for the Defendants that in the Holy Apostolic case the Court chose to follow American authorities and quoted from the US case Purcell -v- Summers 145 F 2d 979 (1944) at p. 985 in these terms:

> "*We have no doubt that these principles ordinarily applied in the case of business and trading corporations are equally applicable in the case of churches and other religious charitable organisations for, while such organisations exist for the worship of Almighty God for the purpose of benefiting mankind and not for purposes of profit, they are nevertheless dependant upon the contribution of their members for means to carry on their work, and anything which tends to divert membership or gifts of members from them injures them with respect to their financial condition in the same way that a business corporation is injured by diversion of trade or custom".*

Therefore, the US Court, it is submitted, speaks specifically of "*churches and other religious charitable organisations"* and highlights the potential injury to their *"financial condition".* None of these issues are applicable to political parties , yet the New South Wales Court of Appeal in Holy Apostolic & Catholic Church case seeks to overrule Kean -v- Mc Givan on the basis of so - called *" not inconsiderable body of authority".* It is stated that authority which the Defendants submit is at best contracdictory to the view taken traditionally by English Courts but which in any case does not go as far as the New South Wales Court proposes.

It is, thus, submitted for the Defendants that there are no authorities anywhere that the Plaintiffs can cite that extend the broadest scope of passing-off actions to political parties.

COURT CONSIDERATIONS

With the greatest respect to the powerful submissions put on behalf of the Defendants, I am afraid, I cannot accede to these submissions. In the case before this Court, I think, I should follow the *"natural progression of the basic principle of passing-off action which had already been extended some way beyond normal commercial trading activities"* (As per Robert Walker J. in British Diabetic case (at 820)). I, therefore, accept the Plaintiffs' submissions that Kean -v- Mc Givan cannot be followed in Vanuatu.

I share the view that: *"source, reputation and good will are as important to eleemosynary institutions as they are to business organisations"*, (as per Boazelon J in American Gold Star Mothers Inc. -v- National Gold Star Mother Inc. 191 F 2d 488 (1951) at 489). In my judgement, standing and/or reputation and goodwill are equally important for a political party.

As a matter of general principle, I cannot see any reason why a political party should not have the same protection as to the reputation and/or standing and good will in its name as is afforded by the law to commercial organisations and now extended to charities and churches organisations. If it can be said that whilst political organisations may not have ordinary commercial good will, they have something closely analogous thereto in that their standing and/or reputation will be damaged by people falsely ascribing as an adjunct to them the organisation which is holding itself out by a deceptively similar name.

I, further, accept the Plaintiff's submission that political parties, just as charities and churches, are *"dependant upon the contributions of their members for means to carry on their work"*. It seems that political parties such as the Union of Moderate Parties in this case, are political associations which for their financial needs depend to a high degree on self-help. If this factual situation can be proved, it is my view that passing-off can provide a remedy in a situation such as the present, if misrepresentation is established.
As it has already been mentioned, the use of particular names (words), signs can come up to actionable passing-off but, it must always be a question of evidence.

In my judgement, a political party which has long standing , compete through democratic electoral processes to have its representatives into the National Parliament of the country and have members of its party in the National Parliament shows that it has reputation in its name, symbol and other descriptions and as such should have the protection of the Law in order to avoid the confusion with others who can falsely use the same name and description to their political parties.

In Kean -v- Mc Givan (1982) Fleet Street Reports 119, Ackner LJ. referring to the factual situation of the case, said:

> *"He (Kean) has referred to the possibility of confusion existing between his party and the later party; and I am quite prepared to approach the matter on the basis that confusion could arise, although in very limited circumstances partly due to the very small numbers ... to Mr Kean's party ... and the limited area in which it operates..." (at p. 120) .*

It should have been noted that in the case of Kean -v- Mc Givan, the risk of confusion between the two political parties calling themselves *'Social Democratic Party"* may be limited in a Country like United Kingdom but in a country like Vanuatu, taking into account of the size of its population, the standard of its development and in particular the fact that the majority of its population are illiterate and live in rural areas, the limited confusion found in Kean and Mc Givan's case could mean a lot and very different thing for the people of this country.

Therefore, in my judgement, the use by one political party of the name of another for the purpose of appropriating the standing and goodwill which the other has built up constitutes a form of the wrong known to the law as unfair competition, against which this Court will intervene to use the full power of the injunctive process. On the same line of thoughts, in Vanuatu, the Supreme Court has granted an interim injunction, ex-parte, to restrain the unauthorised use of the name of a political party by a break-away faction, in Kalpokas -v- Lini, Civil Case 127 of 1991, on 12 September 1991. Again, in Korman & Jimmy -v- Mensul Civil Case 106 of 1995, His Lordship Vaudin d'Imécourt said that:

> *"the issue is solely over the question of who is entitled to described himself as an official UMP candidate and who is not".*

His Lordship went on to note :

> *"It is a question of some importance , at least to those candidates who are not able to 'fly the party flag' at the forthcoming elections, since they would not have the backing of the official party nor would they be able to use the party colours or emblems or use the official party name"* (p. 2 of the Judgement).

In that case, it was, therefore, held that electoral candidates not on the official UMP list could not use the name or the colour or the emblem of the Union of Moderate Parties. It is clear from the case that the issue was framed in a different way but the Court reaches the following conclusion: the Court can use its injunctive power and it did use it in that case to restrict the use of a political party's name namely, the Union of Moderate Parties.

Furthermore, I accept the submission of the Plaintiffs that in the particular circumstances of Vanuatu, it is desirable, so as to avoid confusing, less sophisticated voters, that there should be clear distinctions between political parties otherwise, it will be practically impossible to hold democratic elections in this country. This is reflected in the Representation of the People Act (CAP 46) Section 25 (1) (d), which refers to "*a candidate sponsored by a political party having a symbol approved by the Electoral Commissioner*" and section 27 (2) of the same Act referring to *"another candidate sponsored by the same party"*. If two factions of a party, or two separate parties, are both allowed to use the same name, elections in Vanuatu would become impossibly difficult to administer.

It can also be foreseen, as advanced by the Plaintiffs, and I accept that, that in Vanuatu context, were the courts to do nothing, civil disturbances could occur if a group of people have built up a political machine, a popular following, and some other groups, or faction within their own party, appropriating that name to their own use.

Therefore, in my judgment the court has power to make orders giving the exclusive right concerning the use of the name of political parties.

The second issue: The Role to the Courts in the internal workings of an unincorporated association such as a political party

I must go on to the second issue, concerning the role of the Courts in the internal workings of an unincorporated Association such as a Political Party. The submissions of all parties proceed on the basis that each is a member of an unincorporated Association namely, the Union of Moderate parties (U.M.P.), a political party. In this case, an injunction is sought to prevent the use of the name *"Union of Moderate Parties"* by some of its members who have broken away from others of its members. Breaches of the Party's Constitution are alleged, by both sides, so that the Court has an important question to answer whether or not the Court can intercede.

Submissions for the Plaintiffs;

It is submitted on behalf of the Plaintiffs that the Court can, and should rule that it intercedes. Mr Hudson relied on John -v- Rees (1969) 2 All E.R. 274 which has been applied in Vanuatu in several decisions in preference to the decision in Cameron -v-Hogan (1934) 51 C. L. R. 358. He goes on to say that in Mataskelekele -v- Abbil, Civil Case 99 of 1991, Goldsbrough A. C. J. held that :

> "*the law to be applied here is that found in John-v- Rees. Applying that law this Court is of the opinion that it is open to any member of a Voluntary unincorporated Association to bring an action to*

Court when that member alleges the association to have failed to comply with its own rules or Constitution or, where they apply it has failed to observe the rules of natural justice".(at page 3 of the Judgement). His Lordship went on : *"The doctrine illustrated in John -v- Rees shows that a contract exists between the members of an association such as the Vanuaaku Pati. Thus any member may ask the Court to consider any alleged breach of the contract"* (also on page 3 of the Judgement).

On the Appeal from the Judgement of Goldsbrough A.C.J., the Court of Appeal (in Civil Case No. 7 of 1991, at p. 3 of the Judgement) said:

> *"On the hearing of the appeal, the Defendants did not argue that his Lordship's decision was incorrect in this respect. His Lordship's decision is supported by authority: See John -v- Rees (1969) 2 All E.R. 274, although there is other authority to the contrary: See Cameron -v- Hogan (1934) 51 CLR 358 and the cases cited in Meagher, Gummow & Lehane, 'Equity Doctrines & Remedies', 2nd Edition, para 2154 et Seq".*

The Court of Appeal then went to deal with the *"real question at issue between the parties"* (page 3 of the Judgement), and not merely the question of locus standi.

It is also submitted for the Plaintiffs that again, in Korman & Jimmy -v- Mensul Civil Case 106 of 1995, the Supreme Court interpreted the rules of the Union of Moderate Parties, in reliance on the decisions in Mataskelekele -v- Abbil (Judgement page 2). In that case, it is said that the Defendant Korman conceded that the parties had locus standi to obtain a ruling from the Court, which expressly found that they did.

In Kalpokas -v- Lini, Civil Case 127 of 1991, the Supreme Court granted interim injunction on 12 September 1991 against the use of *"Vanuaaku Pati"* by a breakaway groups of that party.

It is finally submitted, therefore, that in view of there four (4) decisions of the Supreme Court and Court of Appeal, which are based upon current English case law, a consistent line of authority has been established for Vanuatu which should not now be departed from. This line of authority also has the clearly desirable social effect of *preventing "judicial abdication from areas the orderly regulation of which has become of even increasing importance. The resultant categorisation in legal analysis of a great political party or the effective regulatory institution of a major sport in the community, with a group of friends agreeing to meet for a game of tennis, is simply inadequate",* see, Mc Kinnon -v- Grogan (1974) 1 NSWLR. 296, at 297. thus, it is submitted that the Court can and should rule that it intercedes.

Submissions for the Defendants.

Mrs Susan Barlow Bothmann submitted for the Defendants that the original and traditional approach by English Courts to applications to interfere in the internal workings of voluntary unincorporated associations was not to so interfere.

She then referred this Court to a passage on Associations and Clubs Law in Australia and New Zealand in which the learned Author Sievers wrote (at p. 129) :

> *" At Common Law, disputes between members of a voluntary non-profit association and the associations or between members among themselves were matters to be dealt with according to the rules of the association, whatever its legal status. If a club or association wished to expel or to take other disciplinary action against a member, it could only do so if its rules included the necessary powers and if it complied strictly with all the procedures laid down in these rules (See Young -v- Ladies Imperial Club Ltd (1920) 2 K B 523). As long as there was no breach of an association's rules the Courts would normally refuse to interfere with any decisions revoked by it. If, as in Young -v- ladies Imperial Club Ltd, a member had been wrongfully expelled, the remedy was a declaration that the purported expulsion was void and if necessary an injunction to prevent further action by the association". (2nd edition, The Federation Press 1996).*

It is also put for the Defendants that in this case the Plaintiffs have purported to expel the Defendants from the U.M.P. The defendants never accepted there was any valid expulsion because no proper procedures were followed and so the defendants continued to operate as if they were members and they have continued to do so. They are within their legal rights to seek a declaration of their rights as members because they take the view that any purported expulsion is void ab initio and of no effect. The Defendants, it is put, have not ever attempted to expel the Plaintiffs from the same organisation and continue to take the view that the Plaintiffs are still members of the UMP albeit unruly ones.

It is further contended for the Defendants that the Plaintiffs are not seeking a declaration they are seeking restraining orders, which require the Court to make permanent injunctions. There is no application for interlocutory relief, the Summons is for permanent relief. In these circumstances on general principles alone the Court would have to satisfy itself that there is a valid cause of action.

On that basis, counsel for the Defendant refers this Court to another passage from the learned Author Sievers in his Book, Association and

Clubs Law in Australia & New Zealand, 2nd edition The Federation Press 1996 (at p. 53) (referred to earlier).

> *"Neither the committee nor the general meeting of a club or association has any inherent power to take disciplinary action against its members in the absence of an appropriate provision in its rules: Dawkins -v- Antrobus (1879) 17 ch. D. 615. If an association does not possess any property, at common law the member is given notice and an opportunity to defend her or himself: Innes -v- Wylie (1844) 174 E.R. 800. In all other circumstances it would first be necessary to amend the association's rules to confer the necessary power on either the committee or the general meeting. Any disciplinary power must be exercised strictly in accordance with the procedure laid down in the rule, otherwise the member concerned will have ground to support an application for the disciplinary action to be set aside, as happened in Young-v- Ladies Imperial Club Ltd (1920) 2 K.B 523".*

But counsel for the Defendants noted further that:

> *"In that case the Court of appeal made it quite clear that, as long as a club had acted in accordance with its rules and in a manner which was not contrary to the principles of natural justice, the Courts would not intervene. But if the prescribed procedure had not been followed the purported expulsion would be set aside. There are many similar reported cases in which the purported suspension or expulsion of a member has been overturned for this reason".*

The Defendants say further that the Plaintiffs are trying to rely on the exceptions to the general legal rule to establish their right of action. It is thus, submitted for the Defendants that even if the more liberal approach to representative actions were taken by this Court it would be inappropriate to do so in such a case as this. The Court should use its discretion to decide that this is a case where the appropriate form for the dispute is within the organisation itself, to be worked out by the disputing parties in accordance with proper party rules. The Defendants submit that that process has occurred subsequent to the summons being issued in any event and therefore the need for this application is defunct.

It is further contended for the Defendants that the Plaintiffs argue that Mataskelekele -v- Abbil (1991) and Korman & Jimmy -v- Lini (1991) establish a line of authority in Vanuatu. But the Defendants say the Appeal Court decision in Mataskelekele -v- Abbil in fact left the issue open. The Korman & Jimmy -v- Mensul case can be considered on the basis that it also did not address the point and the role of the Electoral Commission in the matter as a third party affected, was relevant. The Kalpokas -v- Lini case took the matter no further than an ex-parte interim injunction. The Defendants say this present case is the first time the issue has been fully argued and can now be fully considered by the

Court. Counsel for the Defendants finally give a summary on the question of interference with the workings of a voluntary unincorporated association by Courts in U.K., Australia and New Zealand.
In the United Kingdom, the Courts were initially strictly against it but then softened their approach in certain cases particularly where expulsion of members was involved. But now a series of U.K. cases adopt the rule of non-Interference. See R-v- Football Association Ltd exp. Football League Ltd (1993) 2 All E.R. 833 and R -v- Disciplinary Committee of the Jockery Club, exp. The Aga Khan (1993) 2 All E.R. 853.
The Australian position of Cameron -v- Hogan seems to have been the main stream approach since 1934 but various courts have to varying degrees, sought to limit, distinguish or overrule the case.
The New Zealand position seems to have initially favoured non-intervention and followed the Cameron-v- Hogan line: see Bouzail -v- Harowhera indoor Bowls Centre Inc. (1964) NZLR. 187 but more recently may have adopted a more liberal approach. See Turner -v- Pickering (1967)1 NZLR. 159 and Walker -v- Mount Victoria Residents Association inc. (1991) 2 NZLR. 520.

COURT CONSIDERATIONS :

In the present case, the summons was brought by four members of an unincorporated association known as the Union of Moderate parties. It is therefore a representative action. The case of Kalkot Mataskelekele -v- Iolu Abbil and Donald Kalpokas Civil Case 99 of 1991 and the corresponding Appeal as Civil Appeal case No.7 of 1991 are authorities for the proposition that

> *"it is open to any member of a voluntary unincorporated association to bring an action to Court when that member alleges the association to have failed to comply with its own rules or Constitution, or, where they apply, it as failed to observe the rules of natural justice"*

and I am, thus, bound by these decisions including recent decision on the same point in re Korman & Jimmy -v- Mensul, Civil Case 106 of 1995.

As it was mentioned in these previous cases, representative actions can be brought under the rules that are applied to these courts, namely Order 17 rule 9 of the High Court (Civil Procedure) Rules, 1964. Order 17 r.9 is expressed in broad terms and it is to be interpreted in the light of the purpose of the rule, namely, to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions. Although there is no legislation or a rule of Court prescribing an elaborate set of rules regulating representative actions in this country, Order 17 r.9 is, I think, to be interpreted and used as " a flexible tool of convenience in the administration of justice".

In John -v- Rees (1970) ch. 345 at 370, which is applied in Vanuatu in various decisions as referred to above, Megarry J. adopted the more liberal approach and emphasised that a representative action was not a *"rigid matter of principle but a flexible tool of convenience in the administration of justice"* which could be used in the case before him to bring all the parties involved in an internal dispute within the British Labour Party before the Courts.

The High Court of Australia has recently reached a similar conclusion. *In Carnie -v- Esanda Ltd (1995) 127 A.L.R. 76, the High Court (Australia)* interpreted the requirement for the parties to a representative action to have the same interest in a cause or matter very liberally. It is interesting to note that in a separate judgement with which Brennan J agreed on this point, Mc Hugh J. noted that:

> *" A plaintiff and the represented persons have the same interest in legal proceedings when they have a community of interest in the determination of any substantive question of law or fact that arises in the proceedings. Other factors may make it undesirable that the proceedings should continue as a representative action, but that is a matter for discretion, not jurisdiction (at 95)".*

Cameron -v- Hogan establishes that the executive of a voluntary association by failing to observe rules governing the a ssociation's affairs commits no breach of contract actionable either at Common law or in equity, unless the member complaining has under the rules some civil right of a proprietary nature.

With the greatest respect to the eminent and forward looking judges who gave the decision, I do not accept that view. There is no doubt that the position adopted in Cameron -v- Hogan in 1934 refuses access to justice to members of voluntary association unless the member complaining has under the rules some civil rights of a proprietary nature. Proprietary right is not the only basis for a Court of law to entertain complaints from members of voluntary associations and on that basis alone grant the relief sought. Contractual right or what can be termed as "the concept of contractual negative stipulation" is not only sound in point of principle as the true basis of the Court's jurisdiction, it is also much more convenient. As it is pointed out by the Learned Authors : Meagher Gummow Lehane in Equity Doctrines of Remedies, Third edition, Butterworths 1992 :

> *"It enables the Courts to deal, not only with disputes between members and association but also with disputes between third parties and the association. Russell v Duke of Norfolk (1949) 1 ALL ER 109 furnishes an example;" (at p.586).*

In Abbott v Sullivan (1952) 1 KB 189, and Lee v Showmen's Guild (1952) 2 QB 329, the English Court of Appeal decided according to the Plaintiffs' rights in contract, and did not require a proprietary interest to

be shown, holding that negative contractual stipulation could be enforced.

In Vanuatu, in the case of Mataskelekele v Abbil (1991) Goldsbrough A.C.J., applying John v Rees expressed the similar view in this way :

> *"The doctrine illustrated in John v Rees shows that a contract exists between the members of an association such as the Vanuaaku Parti. Thus any member may ask the Court to consider any alleged breach of that contract" (p3 of the judgment).*

It must also be noted that people who are involved in voluntary associations are citizens who are entitled to look to the courts for the assistance in resolving disputes about the conduct of their sport, social and political organisations such as in the present case. If people of this country involving themselves in voluntary associations were refused to have access to the courts on the sole basis of "proprietary rights", I share the view and accept that :

> *"a vast and growing sector of the lives of people in the affluent society will be a legal no man's land, in which disputes are settled not in accordance with justice and the fulfilment of deliberately undertaken obligations, but by deceit, craftiness, arrogant disregard of rights and other means which poison the institutions in which they exist, and destroy trust between members;" (As per Wootten J in McKinnon v Grogan (1974) 1 N.S.W.LR 295 at p.297.*

I, further, agree and adopt as my own the view expressed by Wootten J in the same case (McKinnon v Grogan) when he said :

> *" ... it (Cameron -v- Hogan) has tendered to justify judicial abdication from areas the orderly regulation of which has become of ever increasing importance. The resultant categorisation in legal analysis of a great political party, or the effective regulatory institution of a major sport in the community, with a group of friends agreeing to meet for a game of tennis, is simply inadequate. One can understand that judges, who feel so keenly the importance of standing apart and being seen to stand apart from partisan politics, would be reluctant to see the internal fractional struggles of political parties brought into the Courts. But the proper desire to avoid identification of the judiciary with partisan politics is not a justification for eschewing responsibility for legal questions which happen to arise in the political arena. Courts have to venture amongst political divisions in many cases, notably in deciding constitutional issues and in enforcing the rules of trade unions, and a proper discharge of the judicial function in such areas will do more for their standing and reputation for impartiality than a failure to assist in settling the legal aspects of*

disputes which ravage great and small institutions in the community ... The difficulties raised in Cameron -v- Hogan as explaining the policy of judicial non-intervention are capable of solution if a policy of intervention is adopted" (at pp. 297,298).

Despite Cameron -v- Hogan, it is not the first time that the Courts of this country deal with disputes between individual members of unincorporated Associations, such as Political Parties; see Mataskelekele -v- Abbil (1991); Kalpokas -v- Lini Civil Case 127 of 1991; Korman & Jimmy -v- Mensul Civil Case No 106 of 1995.
The Courts should be willing to assist in resolving disputes with such organisations in which members have deliberately adopted formal rules to govern their relations.

In my judgment, people who join an unincorporated Association such as the Union of Moderate Parties and subscribe to its Constitution and by-laws should be taken to intend to be bound by them and should be entitled to invoke the Courts in appropriate circumstances to have their disputes settled and the limitations, if any, to be placed on the right is, no doubt, to be worked out on case to case basis. A Court can therefore interfere in the internal workings of an unincorporated association, such as a political party and I so rule.

DATED AT PORT VILA, this 27th Day of August 1996.

LUNABEK VINCENT J.
Judge.