IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

CIV 2008-476-000125

BETWEEN	ROGER JOHN PAYNE Applicant
AND	THE NEW ZEALAND NATIONAL PARTY Respondent

Hearing: 2 April 2008

Counsel: Mr Payne appears In Person, Applicant
P T Kiely for Respondent

Judgment: 3 April 2008

JUDGMENT OF PANCKHURST J
(UPON A RECALL APPLICATION)

The Background

[1] On 20 March 2008 and in circumstances of urgency I refused the grant of an interim injunction sought by Mr Payne to restrain the process for the selection of a candidate to represent the National Party in the Selwyn Electorate. Subsequently, on 31 March, Mr Payne applied pursuant to r542(3) of the High Court Rules to recall that judgment effectively on the grounds that my decision was given without reference to a relevant provision in the Electoral Act 1993.

[2] Before I turn to the section in that Act which is principally relied upon, I shall update the situation pertaining to selection of a candidate for the Selwyn electorate. Mr Payne was one of a number of persons nominated for selection as the candidate. However, his nomination was not approved by the Board of the National Party. That nomination was solely as an electorate candidate, not for a position on the party list

as well. The selection process which is presently underway involves five remaining nominees. These persons have the right to participate in party meetings held on 28 March and last night, and to be held on 4 April, at different locations within the electorate. Following those meetings there will be a final meeting on 7 April at which financial members of the party will vote and determine the Selwyn candidate. An interim injunction is sought to halt this selection process, so that the legality of Mr Payne's non-approval by the Board can be the subject-matter of substantive determination.

[3] As is evident from my decision of 20 March the previous hearing (also conducted by telephone) occurred without my having access to a copy of the constitution and rules of the New Zealand National Party. However, Mr Kiely drew my attention to the judgment of Fisher J in *Peters v Collinge* [1993] 2 NZLR 554 (HC) and the argument proceeded on the basis that the relevant rule in 1993 concerning the power of the then Executive to approve candidate nominations essentially mirrored the present version of the rule. Because the rule conferred an absolute discretion to approve or disapprove a nomination, without reasons, I concluded that Mr Payne's treatment at the hands of the Board was not justiciable, and hence that there was not a serious question to be tried, nor justification for the grant of an interim injunction. For the purposes of the present recall hearing rather better information is available, including in particular the text of the rule by which the Board finally approves nominations.

The Final Approval of Nominations Rule

[4] There remains some dispute as to whether r96 in the 20th edition of the National Party Rules issued in May 2003, or r94 in the 21st edition of November 2007 applies. Mr Payne maintains that the 2003 Rules remain those which have been supplied to the Electoral Commission pursuant to s71B of the Electoral Act 1993. Mr Kiely understands that the 2007 Rules apply and have been registered with the Commission. In the event the point is of no moment, since the rule is in the same terms in each edition.

[5] It relevantly provides:

> Final Approval of Nominations vested in Board
>
> 94. (a) Within 3 clear days of the date of closing of nominations, the Electorate Secretary shall forward to the General Manager the prescribed forms for candidates together with any remarks the electorate committee and the Regional Chair wish to make about each candidate.
>
> (b) **The Board shall** consider the material submitted and shall **have an unfettered discretion to approve or disapprove a nomination received. The Board may undertake an investigation on its own behalf of any candidate but shall not be bound to interview a candidate it rejects or assign any reason for rejection**. The Board shall forthwith on a decision being made communicate it to the Electorate. (emphasis added)

[6] As can be seen the wording of the rule is significantly different to the iteration which existed in 1993, but in substance the rule is not dissimilar. If anything the rule has been strengthened in that, not only is the Board clothed with an unfettered discretion to approve or disapprove nominations without giving any reason for rejections, it may also undertake investigation of its own initiative, without any corresponding obligation to interview the affected candidate.

Basis of the recall application

[7] Mr Payne correctly drew attention to *Horowhenua County v Nash (No. 2)* [1968] NZLR 632 (SC), as the leading authority upon the jurisdiction to recall a judgment. In particular he invoked the second ground identified in that case, namely a failure at the time of the previous hearing to direct the Court's attention to a legislative provision of plain relevance. This was s71 of the Electoral Act, which I acknowledge was not drawn to my attention on 20 March, nor known to me at that time.

[8] The section provides:

> **Requirement for registered parties to follow democratic procedures in candidate selection**
> Every political party that is for the time being registered under this Part of this Act shall ensure that provision is made for participation in the selection

> of candidates representing the party for election as members of Parliament by –
> (a) current financial members of the party who are or would be entitled to vote for those candidates at any election; or
> (b) delegates who have (whether directly or indirectly) in turn been elected or otherwise selected by current financial members of the party; or
> (c) a combination of the persons or classes of persons referred to in paragraphs (a) and (b).

Mr Payne submitted that the Board's rejection of his nomination involved the very antithesis of democratic procedure. Hence, he contended, the decision to reject his nomination was unlawful and afforded a basis for the grant of an interim injunction. This argument effectively called in question whether r94 (or r96 in the 2003 Rules) is in breach of the statutory requirement contained in s71.

[9] Mr Payne placed considerable reliance upon an article by Andrew Geddis, *The Unsettled Legal Status of Political Parties in New Zealand*, (2005) 3 NZJPIL 105. This article thoughtfully examines whether the introduction of mixed member proportional voting (MMP) in New Zealand also signalled a change in the legal status of political parties. Previously political parties were consigned to the category of private entities which were entitled to govern their own activities according to such rules as the organisation chose to adopt. The decision in *Peters v Collinge* was redolent of an approach based upon the view that the National Party was a private organisation susceptible of oversight by the courts only if action taken was contrary to the party's internal rules, or put another way, constituted a breach of the contract represented by those rules.

[10] A central thesis of Mr Geddis' article is that since the emergence of MMP political parties should more properly be consigned to the category of public entities subject to a range of public law controls and oversight imposed from outside the organisation. He advanced the view that political parties differ from other organisations because their very raison d'etré is to place members of the organisation in positions where they can wield "coercive state power". In order to participate in an MMP environment parties must be registered under the 1993 Act. Thereafter a political party can contest the party vote, which directly translates to numerical representation in Parliament.

[11] With reference to s71 of the Act Mr Geddis said at 121:

> The candidate selection requirements contained in section 71 of the 1993 Act seek to combat a fear akin to that underlying the financial duties outlined above. Parliament was again responding to concerns that particular individuals might be able to exercise a disproportionate amount of influence over who is elected to Parliament or over those representatives once elected. However, rather than external donors exerting influence over the parties and their candidates, the relevant fear here was that some individual (or individuals) could exercise illegitimate influence through controlling the internal workings of the political parties when endorsing candidates at election time. Requiring political parties by law to follow "democratic procedures" when choosing their candidates was intended to prevent a party's leadership from insulating itself from the wishes of the grass-roots membership. Candidate selection must be a collective effort which gives an opportunity for the opinions of all party members to be canvassed, rather than an exercise in which a self-selected cabal decides amongst itself which individuals will represent the political party. Placing some legal controls on the political parties' candidate selection procedures was thought to be particularly important under MMP, as its "closed list" system of party representation gives a substantial amount of power to those persons with the power to draw up a party's list of candidates.

Mr Payne adopted this passage and, in effect, argued that the Board in rejecting his nomination acted as a cabal exercising illegitimate influence through its overarching control of the selection process.

A serious question to be tried

[12] It is the case that s71 does effect a shift with reference to the selection of candidates for election as Members of Parliament. However, it is the extent of the change which is important and, in particular, whether it is seriously arguable that r94 is incompatible with the requirement to follow democratic procedure in s71 of the Act. The section prescribes that political parties have an obligation to ensure that the selection of candidates is participatory. This may be achieved by having current financial members of the party from the relevant electorate participate in the selection process, or by having delegates of the grass-roots membership do so, or a combination of both. Relevantly in this instance the National Party seeks to fulfil the s71 requirement by providing for the participation of current financial members of the party in the final determination by vote of the Selwyn candidate. I have already described the process which is presently underway. On the face of it, that process

appears to ensure participation in the selection of a candidate by financial members of the party from the Selwyn Electorate in terms of s71(a).

[13] But, Mr Payne contends that the current final selection process does not meet the requirements of s71 because it has been preceded by a Board process for the final approval of nominations which saw the removal of himself, and others, from the participatory process at electorate level. Hence, it is said, any seeming compliance with s71 is illusory, because the field of candidates has already been significantly reduced in a process which did not follow democratic procedures.

[14] Mr Kiely submitted that there was nothing untoward in a process by which the Board is vested with the power to finally approve nominations. Counsel pointed out that there may be numerous nominations and a need for these to be reduced to a manageable number. Further, s71 is not prescriptive as to the extent of democratic procedure which must be provided. It simply provides that provision must be made for participation in candidate selection by current financial members from within the particular electorate. Here the necessary level of participation exists. A prior narrowing of the field at the unfettered discretion of the Board did not render the entire process undemocratic.

[15] It is apparent that the process for the final approval of nominations by the Board did not follow democratic procedures, in the sense that neither the principles of natural justice, nor the normal obligation to give reasons, applied. That said, it is the case that at least for the candidates who remained standing following the Board's consideration of the nominations, there is a participatory process at electorate level. They are entitled to participate in the electorate meetings and on 7 April (although there was also reference to the final meeting being on Tuesday, which is 8 April), there is to be a vote by current financial members of the party to select the Selwyn candidate. This suggests compliance with s71 despite what has preceded the final process in the electorate itself.

[16] To my mind there is a noticeable difference between the heading to the section on the one hand, and its text on the other. The heading identifies the ideal that the procedures for candidate selection will be democratic. The words used in

the heading suggest that the process as a whole must meet this ideal. Yet, the text of the section contains only a requirement that there be provision made for participation in the selection of the electorate candidate by, relevantly, current financial members of the party from the particular electorate. This is the extent of the requirement. The ideal identified in the section heading, which is an indication in ascertaining the meaning of the section (s5(3) of the Interpretation Act 1999), promises a good deal, but whether the text of the section delivers that promise is I think questionable. Therefore, I rather tend to the view that the final selection process which is underway within the electorate does probably satisfy the requirements of s71.

[17] However, the issue for present purposes is whether there is a serious question to be tried. I have not had the benefit of full argument. I was not referred to the report of the Royal Commission on the Electoral System, *Towards a Better Democracy*, published in 1986, which contained the recommendations which led to the adoption of an MMP voting system. Nor was reference made to the parliamentary debates which attended the passing of the Electoral Act in 1993. Given the fairly stark denial of democratic procedure involved in the final approval of nominations by the Board, and the impact of that process for rejected nominees, I am satisfied that there is a serious question to be tried concerning whether r94 and s71 are incompatible.

[18] This conclusion necessarily provides grounds to recall my earlier decision of 20 March 2008. That decision was squarely based upon a finding that there was not a serious question to be tried. Such finding was reached without regard to s71. A statutory requirement of high relevance was not, therefore, brought to my attention, nor taken into account. Subject to considering the balance of convenience, I am satisfied it may be appropriate to recall my prior judgment.

Balance of convenience

[19] Mr Kiely made submissions directed to this aspect. He rightly pointed out that the final selection process is well advanced. Third parties are affected by the present application. The five remaining candidates whose nominations were approved by the Board have no doubt committed resources to their campaigns in an

endeavour to secure final selection. The National Party must likewise have incurred expense in relation to the electorate meetings which have occurred, or are about to occur. Counsel submitted that these factors were worthy of consideration.

[20] Counsel also submitted that regard should be had to the traditional reluctance of the courts to be involved in the affairs of a political party, particularly with reference to such a sensitive issue as candidate selection. I acknowledge that traditional reluctance. But, as Mr Geddis observed in his article, the Electoral Act effected a "sea-change" with reference to the regulatory approach taken to political parties in New Zealand (p 115). Relevantly for present purposes s71 established a requirement of democratic procedure in relation to candidate selection, which had not previously existed. I am in no doubt that the passage of s71 means that the central issue raised by this case is properly justiciable.

[21] I also consider that the central issue entails a significant public interest component. The correct interpretation, and effect, of s71 is material to the selection of candidates nationally. It is also significant that absent an interim injunction a New Zealand citizen will be denied the opportunity to gain selection as a party candidate for an electorate. That is not a situation to be countenanced, where there is a serious question to be tried. I consider that these factors favour the grant of relief and outweigh the other factors mentioned above. In short, the overall justice of the case favours Mr Payne's position.

Result

[22] For the reasons given I am persuaded that the grant of an interim injunction is appropriate. However, there are procedural deficiencies which need to be addressed. Rule 238(3) of the High Court Rules provides that an applicant must file a signed undertaking as to damages. Mr Payne has not done so. Nor has he commenced a substantive proceeding by the filing of a statement of claim, although I accept that the application for an interim injunction was filed in circumstances of urgency as contemplated by r238(2).

[23] Accordingly, the interim order I am about to make is conditional upon Mr Payne filing an undertaking as to damages by 5.00 pm tomorrow, 4 April 2008, failing which the order will lapse. With reference to the filing of the substantive proceeding, a timetable is needed and I direct that there will be a further telephone conference at 9.00 am on Tuesday, 8 April 2008 so that directions may be made.

[24] It is ordered that the process for the final selection of the National Party candidate for the Selwyn Electorate at the next general election shall not be undertaken until the determination of this proceeding, or the further order of the Court. Leave is reserved to either party to apply with reference to the terms of this order, which remains conditional upon the filing of an undertaking as to damages within the time specified.

Solicitors:
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