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: 18 April 2008

Counsel: R J Payne In Person, Applicant
P T Kiely and D Erickson for Respondent

Judgment: 1 May 2008

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JUDGMENT OF PANCKHURST J

Introduction

[1] On 3 April 2008 I granted an interim injunction by which the process for the final selection of a National Party candidate for the Selwyn Electorate at the next General Election was stayed, pending a substantive hearing of this case or the further order of the Court. That decision prompted the filing of an application to rescind or vary the interim injunction pursuant to r259 upon the basis that the earlier decision was made in circumstances of urgency and without the benefit of full argument. I shall refer to the procedural history of the case in more detail shortly.

[2] Subject to my being satisfied that it is appropriate to reconsider the case pursuant to r259, the issues for determination are the conventional ones; whether there is a serious question to be tried, where the balance of convenience lies and whether in terms of the overall justice of the case it is appropriate for the interim injunction to remain in place in the meantime. I shall, therefore, consider the procedural aspect and then the issues of the existence of a serious question, convenience and overall justice.

The factual background

[3] The Selwyn electorate is a new electorate comprising parts of the previous Rakaia and Banks Peninsula electorates. The sitting Member of Parliament for Banks Peninsula is Mr David Carter and for Selwyn, Mr Brian Connell, who is not seeking re-election.

[4] In October 2007 the process for the selection of a candidate for the new Selwyn electorate began. Mr Payne was nominated as a candidate for selection, as was Mr Carter. In an affidavit filed in support of the application for interim relief Mr Payne alleges that the resulting selection of Mr Carter as the party's candidate was flawed and undemocratic. He wrote letters to the Leader and President of the National Party in November 2007 which detailed his concerns.

[5] In the event it is not necessary for me to consider this aspect. An affidavit sworn by Judith Kirk on 14 April 2008 in support of the present application, refers to the October selection process, but records "because of administrative errors and concerns relating to the procedure the National Party decided to recommence the process". Beyond this bland explanation, I remain uninformed. Although Mr Carter was nominated in October 2007 as a constituency candidate, he did not again offer himself for selection in February-March 2008, being the selection process with which I am now concerned. Mr Carter is apparently to be only a list candidate.

[6] Fresh nominations for Selwyn opened on 22 February 2008. The closure date was 7 March 2008. There were nine people nominated, including Mr Payne.

[7] Following the closure of nominations within each electorate r94 of the Constitution and Rules of the New Zealand National Party provides:

> Final Approval of Nominations vested in Board
>
> (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.

This procedure was followed. It then remained for the nine member Board of the National Party to exercise its unfettered discretion to approve or disapprove nominations pursuant to r94(b).

[8] Following checks with three referees listed by Mr Payne, the Board members participated in a telephone conference meeting on 13 March 2008. They determined to disapprove Mr Payne's nomination. The other eight nominees were approved by the Board to proceed to the next stage, being candidate pre-selection.

[9] On 14 March Mr Payne wrote to the President of the party requesting a halt to the selection process until his nomination could be re-evaluated. This did not occur. On 18 March Mr Payne applied on notice for an interim injunction. I shall refer to the history of the proceeding in the next section of this decision.

[10] In the meantime selection of the candidate for Selwyn continued. An electorate pre-selection committee interviewed the eight remaining nominated candidates and on 11 March selected five candidates to participate in the final selection process, as required under the rules.

[11] Following the reduction in the number of candidates to five, two methods of final selection are available. One is a delegate system whereby a selection committee is constituted comprising delegates from branches within the electorate. The other alternative is the "universal suffrage selection option", whereby all members of the party of at least six months standing and resident in the particular electorate are entitled to vote.

[12] In this instance "meet the candidates" meetings were scheduled on 28 March, 1 and 4 April at various halls within the electorate, with the final selection meeting scheduled for Monday, 7 April. However, the grant of the interim injunction on 3 April meant that the final candidates' meeting could not proceed, nor of course the final selection meeting. Accordingly, selection of the constituency candidate for Selwyn is presently on hold, whereas the National Party has selected constituency candidates for the forthcoming election in all other electorates.

Background to the proceeding

[13] The application for an interim injunction was filed by Mr Payne on 18 March. A notice of opposition was filed the following day. On 20 March (the day before Good Friday) I heard argument in relation to the injunction application in the course of a telephone conference. Mr Payne contended that the Board's decision to veto his nomination was unlawful, but Mr Kiely for the National Party relied upon r94 and the decision of this Court in *Peters v Collinge* [1993] 2 NZLR 554 (HC). The focus of the argument was whether there was a serious question to be tried. I concluded that there was not, and therefore found that there was no basis for injunctive relief.

[14] On 31 March Mr Payne filed an application for the recall of the earlier decision. The effective basis of the application was that s71 of the Electoral

Act 1993 was neither drawn to my attention, nor brought to account, in relation to the earlier decision. The section is headed **Requirement for Registered Parties to Follow Democratic Procedures in Candidate Selection**. Mr Payne also placed considerable reliance on an article "The Unsettled Legal Status of Political Parties in New Zealand" (2005) 3 NZJPIL 105 by Andrew Geddis. This article questions whether following the introduction of MMP in New Zealand the legal status of political parties has changed such that they should now be regarded as public entities subject to normal public law controls.

[15] Although in light of the argument (which was again heard by telephone conference) I tended to the view that the final selection process then underway in the Selwyn electorate was democratic, in the sense required by s71, I was persuaded that there existed a serious question to be tried. Accordingly, I recalled the earlier decision of 20 March and granted an interim injunction on terms which included that Mr Payne immediately file an undertaking as to damages. A timetabling hearing was also directed for 8 April.

[16] On 7 April the National Party filed the present application pursuant to r259 of the High Court Rules. It contended that, given the history of the proceeding and in particular the circumstance that the two previous hearings were conducted by telephone conference in circumstances of urgency, it was appropriate to invoke r259 so that there could be an in-court reconsideration of the decision to grant an interim injunction.

[17] The telephone conference on 8 April enabled me to consider whether resort to r259 was appropriate. The rule enables a party affected by an interlocutory order to apply to vary or rescind the order, instead of appealing against it. A notice of application pursuant to subclause (1) must be filed within five working days after the order was made: r259(3). This requirement was met and, upon consideration, I was satisfied that the situation was one where resort to the rule was appropriate. Mr Payne had not filed a statement of claim to that point. Nor had the National Party filed affidavit evidence, although Mr Kiely had filed a memorandum of counsel which mentioned the selection process then underway in the electorate, the implications of an injunction and the history of r94(b), at least to a limited extent.

[18] I was also conscious of the circumstance that the recall and interim injunction decision was reached without the benefit of submissions based upon the report of the Royal Commission on the Electoral System, *Towards a Better Democracy*, published in 1986; nor the benefit of submissions directed to the passing of the Electoral Act in 1993, including reference to extrinsic materials relevant to the interpretation of s71.

[19] An urgent hearing was scheduled for 18 April and a timetable made for the filing of a statement of claim, statement of defence and affidavits in support or opposition. The statement of claim filed by Mr Payne on 10 April alleged that the decision of the Board of the National Party to disapprove his nomination was in breach of natural justice and of s71 of the Electoral Act. He also challenged the validity of the Constitution and Rules of the National Party on the basis that the most recent version was not supplied to the Electoral Commission within the time limits prescribed in s71B of the Act. He further asserted that "the National Party's undemocratic behaviour" constituted a corrupt practice, being an example of undue influence contrary to s218 of the Electoral Act. These claims were all contained in paragraph 1.

[20] Paragraph 2 of the statement of claim sought to:

> Prevent any National Party Official who was involved in the selection fixing that occurred in the first candidate selection process, National Selwyn October/November 2007, from being involved in the current selection process as they have a conflict of interest already publicly linked to abuse of power and perversion of justice in the overturned October/November 2007 process – in the best interests of …

This is a reference back to the first selection process in Selwyn and represents a consequential claim which is dependent upon the success of the first claim, by which Mr Payne seemingly envisaged that his nomination would be fully reinstated (rather than the decision disapproving him simply overturned).

[21] The allegation based on s218 of the Electoral Act is misconceived. Assuming, without deciding, that a member of the Board of the National Party could be a complainant of undue influence, the gravemen of the section is conduct directed to a person to induce or compel them by violence or threat of violence to vote, or

refrain from voting, for a particular candidate. There is no evidence of any conduct capable of falling within s218. The real gist of Mr Payne's complaint is that the Board disapproved his nomination in breach of the rules of natural justice and, therefore, of s71 of the Electoral Act. I need not consider the allegation of a corrupt practice by undue influence any further.

[22] There is another problem with the statement of claim. It is not drawn in a manner which adequately identifies the underlying basis of the claim. In particular, it is unclear whether the claim is intended to be viewed as an application for judicial review, or not. Mr Kiely averted to this difficulty, but effectively took no procedural points, preferring instead to approach the case on a broad brush basis with reference to the principles relevant to the grant of interim injunctions. That said, s8 of the Judicature Amendment Act 1972 provides for the grant of interim orders (rather than interim injunctions) in the judicial review context.

[23] But I doubt that it much matters in this instance whether relief is considered from the perspective of the principles which inform the grant of interim injunctions, or the principles relevant to interim orders. The decision of the Court of Appeal in *Carlton and United Breweries v Minister of Customs* [1986] 1 NZLR 423 emphasised that in a judicial review context the strength or weaknesses of the claim, and all the repercussions, public or private, of granting interim relief still fell for consideration. I shall not, therefore, dwell upon any possible distinction between these two avenues of interim relief.

Serious question to be tried

[24] This to my mind is the major issue which I am required to review. As noted in my decision of 3 April, the conclusion that there was a serious question to be tried arising from the requirement of democratic process in s71 of the Act was reached on the basis of limited argument. I now have the benefit of more considered argument, including reference to materials which shed light upon the genesis of s71.

The terms and availability of Rule 94(b)

[25] The terms of this rule are at the heart of the complaint made by Mr Payne concerning his being disapproved as a suitable candidate for the National Party. The rule provides:

> (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.

[26] Three aspects command particular attention. First, that the Board has an unfettered discretion, second that it may undertake investigation on its own behalf without any obvious corresponding obligations to the affected candidate, and third that it may reject a candidate without giving reasons. Mr Kiely did not shrink from acknowledging that at least the latter two aspects entailed significant inroads into the principles of natural justice.

[27] Before I turn to the history of the rule it is necessary to consider Mr Payne's allegation that the current iteration of the rules relied upon by the National Party are "invalid" as they were not "registered" with the Electoral Commission as required by the Electoral Act. The most recent iteration of the rules is the 21st edition, dated November 2007 "issued by authority of Judy Kirk, President, New Zealand National Party Board". Both this edition and the preceding one, dated May 2003, contained the rule conferring an unfettered discretion on the Board to disapprove candidate nominations.

[28] Section 71B(1) of the Act provides:

> **Obligation to provide copy of party membership rules and candidate selection rules**
>
> (1) The secretary of any political party registered under this Act must supply the Electoral Commission with the following:
> (a) a copy of the rules governing membership of the party;
> (b) a copy of the rules governing the selection of persons to represent that party as candidates for election as members of Parliament;
> (c) a copy of any changes to the rules referred to in paragraph (a) or paragraph (b).

Subsection (2) requires that the rules be supplied to the Commission within one month of the registration of a party under the Act, while s.s(3) provides that changes to the rules adopted by the party must similarly be supplied within a one month timeframe.

[29] Mr Payne contends that the one month requirement was not met in either 2003 or 2007. Annexed as an exhibit to one of his affidavits is a letter from the Electoral Commission dated 7 April 2008 which confirms that the May 2003 rules were supplied to the Commission on 16 October 2003 and that as at 7 April they remained the latest copy of the rules held by the Commission. This state of affairs is confirmed in that an exhibit to the affidavit of Mr Geoffrey Thompson, filed on behalf of the respondent, is a letter from the Secretary of the National Party dated 11 April 2008 enclosing a copy of the 21st edition of the rules with the explanation that "the changes don't relate to selection or membership but rather are technical and stylistic".

[30] As Mr Kiely pointed out s71B(1)(c) does not require all changes to the rules to be supplied to the Electoral Commission, rather only changes which relate to membership of the party or the selection of persons to represent the party as candidates for election as Members of Parliament. And, the submission continued, the changes between the 20th and 21st editions did not fall into either of these categories. Hence, technically, there was no requirement upon the party to supply the latest rules to the Commission. That it did so recently, and no doubt in response to this proceeding, was neither here nor there.

[31] I am not in a position to assess the changes between the 20th and 21st iterations of the rules. I only have a copy of the most recent edition. That said, there is nothing before me to suggest that the changes were other than "technical and stylistic". But, Mr Payne submitted, at the time his nomination was rejected in March the only rules available to the Commission were the 20th edition, and even these had not been timeously supplied in 2003. Therefore, he argued, there were no valid rules for my consideration.

[32] I do not accept this proposition. Although s71B requires that copies of rules be supplied to the Commission within a month of a party's registration, and within a month of relevant changes to the rules, the section does not prescribe the consequence which follows upon a breach of this requirement. Subsection (4) provides that members of the public may inspect the rules held by the Commission without payment of fee. No doubt the purpose of the rule is to ensure the availability of the rules of registered political parties to all citizens, or at least those rules which deal with membership of the party and the selection of candidates.

[33] Absent a prescribed consequence for non-timely supply of the rules, I do not consider their validity is thereby compromised. The authority of the rules derives from compliance with the rule-making requirements of the Constitution and the rules themselves. Their supply to the Commission, and resultant availability to the public, is a regulatory issue for which a political party may well be answerable in the event of non-compliance. But the suggestion that a failure to supply the rules to the Electoral Commission, or to do so within the time allowed, renders them invalid is in my view unpersuasive.

[34] In these circumstances I shall refer to the rules contained in the 21st edition, since this is the iteration most recently approved and issued by the National Party. Because r94 is unchanged from the 2003 version, no point is to be served by referring to its predecessor.

History of r94(b)

[35] The full history of r94(b) was not explored in argument. However, *Peters v Collinge* provides some insight. At that time r108 provided a similar process for the forwarding of nominations from the electorate to the Division in which the electorate was located, and from there to the then National Executive, accompanied by remarks or recommendations from the electorate committee or the Division, or both. The rule continued:

> After consideration of the material submitted, the National Executive or Candidate Selection Emergency Committee shall advise the Division of the approval or otherwise of the nominations received. Any approval or otherwise shall be at the absolute discretion of the National Executive or

> Candidate Selection Emergency Committee and no reasons need be assigned.

Fisher J noted with reference to r108 that it came into effect in January 1992, but that its predecessor (r110) was essentially the same.

[36] One issue in *Peters v Collinge* concerned the power of the then National Executive to disapprove the candidature of a sitting Member of Parliament with reference to a pending national election. In considering whether the rule was susceptible of judicial review and, if so, to what extent, Fisher J began by analysing the status of the National Party. He noted that then, as now, it was an unincorporated society or group established to undertake political activity. He said that fundamentally the jurisdiction to review actions of such a body was to be found in contract, unless the private body exercised "quasi-public functions", as in *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815. However, he did not consider the National Party to be an "exceptional" case which fell outside the scope of contract.

[37] This did not mean that natural justice, and in particular procedural fairness, did not apply, because there remained a strong assumption that it did unless there were clear indications to the contrary in the rules of the private body. He accepted, however, that the contract between a private body and its members could dispense with the requirements of natural justice, either expressly or by necessary implication.

[38] In response to submissions made on Mr Peters' behalf, Fisher J found that a suggested analogy between the dismissal of a professor from a university post, or of a doctor from a hospital post, and the non-approval of a sitting member by his party, was inapt. He saw the latter situation as quite different. Ultimately the election, or not, of a sitting member lay with the electorate, not the party. All the party could do was assist a candidate to seek re-election at three yearly intervals.

[39] At 568 the judgment continued:

> Politics is a notoriously volatile, not to say fickle, business. Just as ideas and policies change, so must there be room for changes in allegiances and loyalties. Those who enter politics must surely do so in that knowledge. No one can expect to have a mortgage over a party's support or over a

> parliamentary seat. I do not think that the analogy of expulsion or disciplinary proceedings in trade situations is an apt one. It is also stretching the restraint of trade concept too far. **Whether a political party is so out of sympathy with its Member of Parliament that it no longer wants him as a candidate is something which one would expect the party to be free to decide from time to time with relatively little constraint. It is essentially a political question in which one would expect a robust level of discussion, lobbying and preconception**. The result does not necessarily reflect upon honesty, behaviour or ability. One of the reasons for failing to secure approval could be nothing more than philosophical incompatibility. That a political party and a Member of Parliament have come to the parting of the ways might reflect more discredit on the party than upon the departing individual. (emphasis added)

[40] Against the background of r108 and his analysis of the subject-matter, Fisher J concluded that at most a "relatively rudimentary standard of procedural fairness was required" in relation to decisions of the National Executive. A formal hearing was not required, nor representation by counsel and the whole matter could be dealt with on the papers. However the Judge expressed the view that the affected individual would need to be told what matters adverse to his or her interests the Executive proposed to consider and an opportunity extended to comment upon those matters.

[41] It is noteworthy that to the extent that r94(b) is different to r108 the former is, if anything, stronger than the earlier rule. Whereas Fisher J noted that the only material which the Executive could consider was that emanating from the electorate and the Division, today the Board may undertake an investigation of its own, but without any corresponding obligation to interview the affected candidate. To my mind the rule as presently drawn expressly allows for additional information to be taken into account and strongly implies that there is no obligation to advise the candidate of that further information, nor of the previous information.

[42] However, before I reach a final view concerning this aspect it is necessary to consider s71 and in particular to decide whether its enactment impacts with reference to the lawfulness of the present rule by which candidates may be rejected by the Board of the National Party. Are the section and the rule in conflict, or at least incompatible?

Section 71, Electoral Act 1993

[43] The section provides:

> **71 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) of this section.

As I have commented previously, on a first reading there is an obvious difference between the heading to the section and the text of the section itself. The former promises a requirement of democratic procedure in candidate selection. But whether the text of the section measures up to the promise was to my mind questionable.

Extrinsic aids to the interpretation of the section

[44] The origins of the section are apparent from the Royal Commssion's Report, "*Towards a Better Democracy"*. Under the heading "**Candidate Selection"** appears this:

> 9.24 The selection of candidates by political parties has traditionally been left entirely in the hands of the individual party organisations and is not in any way regulated by electoral law. The Electoral Act treats candidates as individuals standing for election in their own right and makes virtually no reference to the fact that, in most cases, they are standing as members of particular political parties. However, as most voters are expressing a preference for a party rather than an individual candidate, it is the parties' prior selection of candidates which, especially in safe seats, effectively determines who is to become the electorate's representative. In the same way, political parties also determine which groups in the community will be represented in Parliament and in what number. It can be argued that the voters' power of choice is seriously curtailed by this process and that they should all be allowed a say in the party selection. The Electoral Act could require that party candidates be selected according to certain procedures which would guarantee a degree of public involvement or accountability in the manner of selection, e.g., by a meeting which all registered party members or their representatives could attend. Thus, West Germany

> requires that party candidates be selected by a meeting of constituency party members or by a meeting of representatives themselves chosen by a meeting of constituency party members.

[45] Then followed discussion concerning the desirability of a more representative Parliament in terms of members from ethnic minorities and women members. At para 9.28, headed "**Party selection rules**", the Report included this:

> We therefore recommend that if our recommendation for MMP is accepted, the law should specifically require that anyone who stands as a candidate for a particular political party should be selected according to procedures which allow any member of the party, either directly or through representatives themselves elected by members of the party, to participate in the selection of candidates for whom they are eligible to vote, such procedures to be adopted by an Annual General Meeting of the party. The rules setting out the procedures would be subject to challenge by a member of the party, with the Electoral Commission (which we later propose; para. 9.131) having responsibility to determine whether the rules are appropriate. The decisions of the Electoral Commission would be subject to appeal to the High Court. A precedent is to be found in the German Party Law. An important element in the drafting and operation of such legislation would be the balance between the regular members of the party and central party officials. In the 2 main New Zealand parties, the central party organisations have some (possibly more in the case of Labour than National) influence in candidate selection. This can have a beneficial effect on the overall quality and representativeness of the parliamentary teams and could be even more significant with the introduction of party lists. **We would not wish to prevent such procedures, provided they are acceptable to the party as a whole and provided party officials are themselves chosen by all party members or their representatives**. Because the regulation of candidate selection is a new development, we recommend that whatever legal requirements are introduced be reviewed by Parliament on the advice of the Electoral Commission after they have been in place for 2 elections. (emphasis added)

[46] On the same page a number of recommendations taken from the preceding chapter were set out including:

> •**44.** If the recommendation concerning the Mixed Member Proportional system is adopted, the Electoral Act should require that candidates standing for a political party should be selected according to procedures which allow any member of the party, either directly or through representatives themselves elected by members of the party, to participate in the selection of candidates for whom they are eligible to vote. These procedures should be adopted by an Annual General Meeting of the party and be subject to challenge before the Electoral Commission. The above requirement should be reviewed (after it has been in operation for 2 elections) by Parliament on the advice of the Electoral Commission. (para 9.28 [of the report]).

[47] The Electoral Reform Bill was referred to the Electoral Law Committee by resolution of the House in December 1992. Subsequently that Committee under the chairmanship of the Honourable Murray McCully reported back to the House. At para 2.3 the report stated:

> **Party candidate selection rules under MMP**
>
> 2.3.1 Many submissions addressed the issue of selection procedures to be adopted by political parties. The majority advocated the introduction of a requirement for what may be broadly termed "democratic party rules". The essential idea encapsulated by that expression is that political parties should be required to select candidates by democratic means and that there be some means of ensuring the selection procedures of each party are consistent with this principle.
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> 2.3.2 Officials provided to the committee a summary of candidate selection procedures for a number of political parties. The summary revealed a wide range of selection procedures. In light of the advice from officials and the substantial amount of comment contained in submissions, the committee has recommended that a provision be inserted into the bill which ensures that political parties adhere to democratic procedures in selection rules. This recommendation is contained in new clause 84A of the bill as reported back from the committee.
>
> 2.3.3 The effect of this new provision in terms of redress is that some form of review can be sought in the High Court (by individuals with proper standing, such as party members and candidates) seeking a declaration that a party's rules or procedures are unlawful. If the court found in favour of the plaintiff it might direct a party to change its procedures or rules. The provision reflects the views of the Royal Commission but differs to the extent that the responsibility for determining whether the rules are appropriate rests solely with the judiciary, rather than the proposed electoral commission.

[48] The Minister of Justice, the Honourable Douglas Graham, in introducing the Bill upon its second reading referred to a large number of submissions addressed to the need for democratic procedures in relation to the selection of candidates by political parties. He continued:

> A new provision has been inserted into the Bill to address the issue. The provision expressly requires registered political parties to follow democratic procedures in selecting their candidates. However, the Electoral Commission has not been given the task of determining whether party rules on selecting candidates are appropriate. Instead, any party failing to meet the requirements of the provision now included in the Bill would be open to challenge in the courts. The Committee considered that the oversight of such requirements was more appropriately a matter for the courts than the bureaucracy. (3 August 1993) 537 NZPD 17088.

[49] The above extracts demonstrate the genesis of, and thinking behind, s71. The nomenclature "democratic procedures" attained currency in the Royal Commission's Report. Although at first blush there may be a tendency to equate the reference to democratic procedures in s71 with the principles of natural justice, the origins of the phrase suggest otherwise. The word "democratic" was, I think, deliberately chosen to capture the notion identified in "*Towards a Better Democracy*" and subsequently endorsed by the Electoral Law Committee and by speakers in the House. What the Royal Commission, and subsequent adherents, had in mind was a requirement that the selection of candidates by political parties would be participatory; that members of the party may participate in the selection process, whether directly or through representatives (delegates) themselves elected by the membership at large.

[50] But the Royal Commission expressly recognised the influence of the two main parties in candidate selection. This was considered to have "a beneficial effect". There was no desire to prevent such influence, provided the party officials exercising that influence were elected to office and provided the procedures were acceptable to the party as a whole.

[51] This approach survived subsequent scrutiny. The only change was that, whereas the Royal Commission envisaged that any conflict between the requirement for democratic procedures and the terms of a rule adopted by a political party would be adjudicated upon by the Electoral Commission, Parliament opted for scrutiny to lie with the courts.

[52] With the benefit of reference to the above extrinsic materials the impression I held previously that the candidate selection processes adopted by the National Party probably met the requirements of s71 is strengthened. The text of the section, read in light of the Royal Commission's Report, was clearly intended to provide a defined level of participatory democracy. Candidates to represent the party at general elections are to be selected by current financial members of the party from the particular electorate or by delegates of that class of persons. But, the participatory requirement was, I think, deliberately framed so as to leave scope for the overarching influence of senior officials of the party, provided that they too were democratically elected by the party membership.

[53] Once the section is read in a broader context I do not consider there is any tension between the heading and the text. The term "*democratic procedures*" means what it says. The promise of the heading is that candidate selection will be participatory. The text of the section delivers in this regard. There is only a tension if the phrase "*democratic procedures*" is read more broadly than was intended, so as to evoke the notion that such procedures are to be equated with the principles of natural justice.

Academic commentaries

[54] In relation to s71 each side relied upon academic commentaries upon the new section. Mr Kiely referred to Raymond Miller's text, "*Party Politics in New Zealand*" (Oxford University Press, Auckland, 2005), in particular the chapter headed "**Selecting Candidates**". Mr Miller referred to the Royal Commission's rationale for a requirement of democratic procedures in candidate selection and, after noting the persuasiveness of the democratic argument, observed that there were equally strong grounds for retaining a selection process that was essentially private and internal. This line of argument, whereby the party elite retain ultimate control over candidate selection, was said to promote gender and ethnic representation and also the recruitment of candidates with particular qualifications and abilities. Hence, Mr Miller considered that political parties were able to defend the retention of selection mechanisms that were "both highly centralised and restrictive" (p 110). Generally, the commentary upon candidate selection contains nothing which calls in question the retention of party rules whereby the hierarchy may filter or reject candidates nominated for selection, provided the final selection of a candidate is made by grass roots members of the party.

[55] Mr Payne, however, placed reliance upon the article by Andrew Geddis (refer para [14]). After reference to *Peters v Collinge*, Mr Geddis observed that the regulatory approach taken to political parties underwent a sea change with the introduction of MMP and the passage of the Electoral Act. With reference to s71 he said at 121:

> 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.

In light of this assessment, Mr Geddis posed the question: "Will the new statutory duties on political parties lead to a change in the way these entities are viewed by the courts?" Fisher J's conclusion in *Peters v Collinge* that political parties are not subject to public law judicial review because they then had no statutory or public duties, was characterised as "obsolete" (p 122). But whether New Zealand's courts would subject the internal activities of political parties to a higher standard of public law scrutiny was left open as an "interesting question".

Awatere Huata v Prebble

[56] The first indication of the approach of the courts to the significance of the new statutory regime was contained in *Awatere Huata v Prebble* [2005] 1 NZLR 289 (SC). Judgment in this case was delivered in November 2004. The issue was whether following her suspension from the ACT caucus, and her membership of the party lapsing, Mrs Awatere Huata's continued presence in Parliament outside ACT distorted the proportionality of the House, given that she was a list member. In her judgment Elias CJ touched upon the status of political parties in the MMP environment. She said:

> [37] Both ACT New Zealand and the parliamentary party derived from it are unincorporated associations which exist for political purposes. They are organised under the rules adopted by their members. While a Court will enforce the agreement between the members of such bodies, including implied terms importing requirements of procedural fairness, associations will typically have wide freedom in their internal arrangements, including in the determination of their own membership and the achievement of their objects.
>
> [38] The Constitution and Rules of ACT New Zealand confer discretion on the board of the party to refuse any applicant for membership. Membership can be terminated by a majority of 75 per cent of the board, after notice and the opportunity of a hearing is given to the member. The power to expel in this way extends to any member who is a member of Parliament. The rules provide that expulsion is "an appropriate remedy for conduct that the Board considers may bring the Party into disrepute".

[57] These observations tend to indicate a traditional approach to the status of political parties; that they remain private entities which exist for political purposes and which are only susceptible to the oversight of the courts to enforce the agreement between the party and the members which the rules represent. Otherwise parties enjoy wide freedom with reference to their internal affairs, including with reference to the determination of their membership.

[58] To my mind it is a short step from these observations to the conclusion that political parties are similarly free to regulate how they will go about the selection of constituency candidates at general elections. The freedom to structure their own arrangements for candidate selection, however, was made subject to the requirements of s71 in the 1993 Act. But, for the reasons discussed earlier (para [52]), I do not consider that the requirement to adopt democratic procedures with reference to candidate selection affected the ability of parties to empower the hierarchy to veto, or filter, the nominations for each electorate. In the case of the National Party it could empower the Board to reject the nominations, provided that the membership of the Board was democratically elected. It remains, therefore, to examine the rules of the National Party to ascertain whether they comply with the requirement for democratic process contained in s71.

Do the National Party Rules comply with s71?

[59] Candidate selection is governed by Rules 87-118. Rule 87(a) provides that the selection of constituency candidates shall be controlled by electoral committees, acting under directions from the Board and with the assistance of the Regional Council or Chair. Rule 89 provides for the Board to establish a candidates' college, which is to provide training to enrolees who may subsequently seek candidate selection.

[60] Before the selection of a constituency candidate in an electorate proceeds, r91 requires that the Board must satisfy itself concerning the electorate's party organisation, the availability of suitable candidates, the timing of the selection process and whether a "universal suffrage" approach to selection is feasible in that electorate. Rule 92 requires that nominations shall be called for by newspaper

advertisements or other means and prescribes the minimum periods for the receipt of nominations. In order to qualify for nomination a candidate must have been a financial member of the party for 12 months and must be nominated by 10 members resident in the particular electorate who likewise have been members for at least 12 months: r93. Once nominations have closed, r94 provides for the approval of candidates by the Board. I have already referred to the terms of subclause (a) and (b).

[61] Given the requirement of s71 that delegates who participate in the selection process must themselves have been elected by members of the party, it is relevant to refer to the rules which regulate the Board of Directors. The Board is elected and is responsible for "the direction and control of the Party's activities and compliance of the Party with the relevant rules of New Zealand": r32. Its powers and duties are defined in r33 and the makeup of the Board is prescribed by r35. It comprises nine persons being seven members elected at the annual conference, one of whom shall become the President of the Party. The remaining two positions are reserved for the Leader of the Party and one parliamentarian elected by the parliamentary section of the Party. Subsequent rules prescribe how vacancies to the Board are to be filled, for the election of the President by the Board and for the functioning of the Board by duly convened meetings and the appointment of committees, including two standing committees, one to be the Rules Committee. The Board, then, is comprised of persons who are democratically elected by members of the Party.

[62] Returning to the electorate selection process, r98 provides for the convening of a pre-selection committee, having responsibility to reduce the number of candidates to five, in the event that more than this number are approved by the Board pursuant to r94. The committee shall comprise nine members, being the Electorate Chair, four persons elected at the previous electorate annual general meeting, two persons appointed by each of the Regional Chair and the President, being members from outside the electorate: r98(d).

[63] Following the pre-selection process, the selection of the candidate to represent the party within a particular electorate may be undertaken by a selection committee comprising delegates drawn from the branches within the electorate, or by

the universal suffrage method. Rule 114 governs the second alternative and provides for members of the party to select the constituency candidate by a progressive voting system (r113) following a series of "Meet the Candidates" meetings (r102) and a final selection meeting (r114(e)).

[64] I am satisfied that the rules of the National Party include a comprehensive code for the democratic selection of constituency candidates. The requirement contained in s71 for participation in the selection process by current financial members of the party from the electorate, or by delegates elected/selected by current financial members of the party, is met. Delegates on the Board consider the nominations and may reject one or more, while the pre-selection committee must reduce the number to a maximum of five. Thereafter, the universal suffrage option provides for current financial members from the electorate to make the final choice by a closely defined democratic process.

[65] Accordingly, the rules of the National Party do satisfy the requirement of democratic procedure contained in s71. Extensive provision is made for members of the party to participate in the selection of constituency candidates. The preceding review of the rules demonstrates as much.

Is r94(b) otherwise challengable?

[66] Section 71 aside, is it seriously arguable that r94(b) is challengable on other grounds? Mr Payne's case seemed to me to be predicated on s71, but nonetheless I shall also consider this further question.

[67] Mr Kiely anticipated this further aspect. He posed the question whether, assuming compliance with s71, there may still be a breach of the rules actionable as a breach of contract. Mrs Kirk's affidavit detailed the process which was followed by the Board in reaching its decision to reject Mr Payne's nomination. Mr Thompson's affidavit also contained some information concerning Mr Payne's actions in 2002, when his nomination for the then Rakaia electorate failed at the pre-selection stage. Mr Brian Connell became the National Party candidate, and ultimately a Member of Parliament, but subsequently Mr Payne challenged the new

member's personal background, culminating in newspaper comment and controversy.

[68] Although in terms of r94(b) there is no obligation to supply reasons for a nominee's rejection, Mrs Kirk's affidavit identifies three matters which influenced the decision. The first was Mr Payne's conduct in 2002 when he failed to win the Rakaia nomination and publicly criticised the remaining candidates, Mr Connell in particular, both when he became the constituency candidate and following his election to Parliament. Second, as a candidate for the Rakaia electorate Mr Payne was required to sign an undertaking that if unsuccessful he would not act in competition to the successful National Party candidate. Mr Payne was considered to be in breach of his undertaking because he stood for the Christian Heritage Party in Rakaia and thereby acted contrary to the interests of National. Third, Mr Payne was involved in protracted Family Court litigation with his former wife which resulted in numerous court hearings and, eventually, newspaper comment in 2005 concerning action taken to evict Mr Payne from his Wellington home. In the course of this dispute Mr Payne was also declared bankrupt for non-payment of court costs, but the bankruptcy was subsequently annulled.

[69] After considering Mr Payne's nomination and checking with his three referees, the Board decided that he was not a fit and proper person to be a candidate for the Party, particularly given his breach of the undertaking in 2002 and because "the Board was also concerned as to Mr Payne's conduct during his matrimonial litigation".

[70] Mr Payne's submissions to me were focused predominantly upon this aspect. He contended that he was a fit and proper person to be a candidate for the Party and, indeed, that it was contrary to the interests of the Party that his nomination was rejected by the Board. The rights and wrongs of the situation in 2002 were debated and Mr Payne emphatically refuted any criticism of his conduct throughout the several years of his matrimonial property dispute.

[71] It is not for me to review the merits of the Board's decision. I express no view on the matters which the Board regarded as justifying its rejection of

Mr Payne's nomination. As I endeavoured to explain to Mr Payne several times during the course of his submissions my role is confined to examining the Board's decision to ascertain whether it complied with the contractual requirements of the rules, and in particular the procedural requirements of r94(b).

[72] On the basis of Mrs Kirk's affidavit the Board did consider the required material, being the nomination form and any comments which accompanied it from the Electorate Committee and Regional Chair. In the event the Board also made some "investigation on its own behalf" in that checks were made with each of the three referees nominated by Mr Payne. I infer that the referees were supportive of Mr Payne's candidacy, because Mrs Kirk made no point in her affidavit arising from the referee checks. She simply deposed that such checks were made.

[73] Instead, the Board based its decision upon historical information concerning Mr Payne, which it regarded as relevant to his suitability. This information was not brought to Mr Payne's attention. Nor, therefore, did he have any opportunity to meet it. Finally, the Board reached a decision in the course of a duly constituted meeting (conducted by conference call) on 13 March 2008 and advice of the decision was communicated to the electorate, without assignment of any reasons for Mr Payne's rejection.

[74] Mr Payne did not submit that the decision process was procedurally deficient. As I have said, his focus was directed to the merits of the decision. To my mind the only procedural aspect which may be open to argument is whether there was an obligation upon the Board to advise Mr Payne of the matters in his background which were under consideration and which ultimately influenced the decision to reject his nomination. In 1993 Fisher J considered that the then equivalent provision, r108, entailed at least a rudimentary standard of procedural fairness which required the Executive to advise a nominee of matters adverse to his interests and to afford an opportunity for the nominee to comment upon them (p 568). Does r94(b) contain a similar requirement? Or, does the rule expressly, or impliedly, dispense with any requirement to afford a nominee an opportunity to counter adverse material which the Board proposes to bring to account?

[75] Upon reflection I do not think it is seriously arguable that r94(b) contains a requirement of notice, coupled with an opportunity to refute. The subject-matter of the decision is an important consideration. The issue at stake is whether a person should have the opportunity to represent the National Party as a constituency candidate at a national election. Section 12 of the New Zealand Bill of Rights Act 1990 confers on all New Zealand citizens who are 18 years of age or over the right to be elected to Parliament.

[76] But what is at stake here is not that electoral right, rather whether a political party will allow a particular person to represent it at an election. As to that issue I agree with the observations of Fisher J previously quoted from *Peters v Collinge* (see para [39]). The question is a political one. Are the party and the nominee philosophically compatible? Or, to borrow Fisher J's phrase, are the two "out of sympathy"? This, I think, is the assessment to be made. It is not a question of expulsion, or discipline, but rather of compatibility. Rejection of a nomination does not necessarily reflect upon a nominee's personal attributes and abilities, although, unfortunately, in this instance the affidavit of Mrs Kirk does use the language of personal fitness.

[77] More specifically the rule itself does not suggest a requirement of notice, followed by an opportunity to be heard. All the indications are the other way, and indicate to me the exclusion of even this rudimentary level of natural justice. The Board is clothed with an unfettered discretion, and is absolved of the need to interview a candidate, or even to assign reasons for rejection. This indicates a power of veto in the widest of terms.

[78] I conclude, therefore, that there is no serious question to be tried based on a contractual breach of r94(b).

Balance of convenience

[79] Mr Kiely raised three aspects under this head. They concern the adequacy of damages, inconvenience to third parties and the public interest.

[80] With reference to the first head the gist of the argument was that damages would not adequately address the losses or harm which the National Party may suffer from continuation of the interim injunction. Mrs Kirk's affidavit describes various impacts which will flow from delay in finalising the constituency candidate for Selwyn. The highpoint of the argument was that the party may not be in a position to comply with s127 of the Electoral Act by providing its ranking of list candidates to the Chief Electoral Officer within the time prescribed. Apparently, all constituency candidates are to be accorded a ranking on the list, and the contention is that until the Selwyn candidate is selected, the list cannot be finalised. The argument based on s127 impresses me as unrealistic, but for all that I accept that significant delay in choosing the Selwyn candidate may be generally disadvantageous to the Party. And, it would be no easy matter to fix damages for the delay.

[81] Much more significant to my mind is the inconvenience to third parties. Four of the remaining candidates for the Selwyn nomination made affidavits for the purpose of this hearing. I shall not refer to the detail of the individual affidavits. It is sufficient to say that the candidates each ordered their work and personal lives upon the assumption that the constituency candidate would be selected on 7 April. After my decision of 3 April the candidates were placed in a position of considerable uncertainty. Arrangements they had made to enable them to campaign through to 7 April were no longer of any utility. Whether similar arrangements for a resumed final selection process will be attainable, is questionable. Certainly, I accept on the basis of the affidavit evidence that the remaining candidates have been, and will continue to be, significantly inconvenienced until such time as a final decision is made concerning the Selwyn constituency candidate.

[82] Counsel also submitted that it was in the public interest for the National Party to have its candidate appointed at the earliest possible opportunity, which would afford the voters of Selwyn the best opportunity to make an informed choice as to their member of Parliament. Because Selwyn is a new electorate, increased importance was placed upon the timely selection of a candidate. Although I do not totally discount this consideration I regard it as of limited overall significance.

Overall justice of the case

[83] Mr Payne contended that overall justice favoured his position essentially because the case concerned matters of democratic importance. On the other hand, Mr Kiely argued that the plaintiff's case was not sufficiently strong to warrant the disruption caused by ongoing injunctive relief and the prejudice which would be occasioned to third parties and the public generally. Counsel also contended that the ultimate relief in this case could be nothing more than a requirement for the National Party to reconsider Mr Payne's nomination. The reality, he suggested, was that such relief would prove futile. Reconsideration would almost inevitably lead to the same result. Either Mr Payne's nomination would be rejected by the Board of the National Party or at the pre-selection stage.

[84] I tend to think that this is so. While Mr Payne is determined to expose what he considers is impropriety in relation to candidate selection, the National Party hierarchy is equally of a mind that he is not worthy of support as a constituency candidate. But to my mind the determinative consideration is the absence of a serious question to be tried. In light of that conclusion I regard the balance of convenience as less influential and such conclusion also means that the overall justice of the case favours the defendant.

Conclusion

[85] For the reasons given I am satisfied it is appropriate to review and in the event rescind the interim order made on 3 April. Accordingly the interim injunction granted on that day is discharged.

[86] With reference to the substantive proceeding I direct that a telephone conference be convened on 9 May 2008 at 9.15 am so that if required a timetable order may be made.

[87] Costs in relation to the interlocutory hearings are reserved. If sought by the defendant, it may file a memorandum in support within 10 working days, after which the plaintiff will have 10 working days in which to reply.

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