

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV 2008-485-756

UNDER The Judicature Amendment Act 1972

BETWEEN JUDITH KIRK
Plaintiff

AND THE ELECTORAL COMMISSION
First Defendant

AND NEW ZEALAND AMALGAMATED
ENGINEERING, PRINTING AND
MANUFACTURING UNION
Second Defendant

Hearing: 14 May 2008

Counsel: P T Kiely with D J Erickson for plaintiff
P Gunn with D Brookes for first defendant
R E Harrison QC with J A Wilton for second defendant

Judgment: 21 May 2008 at 2.15pm

In accordance with r540(4) I direct the Registrar to endorse this judgment with a delivery time of 2.15pm on the 21st day of May 2008.

RESERVED JUDGMENT OF MACKENZIE J

The proceedings

[1] This application for judicial review raises a short but important point of statutory interpretation concerning the Electoral Finance Act 2007 (the EFA). The essence of it is: is the second defendant a “person” as that word is used in s 13(2)(f) of the EFA?

[2] The factual background in which that question arises may be briefly stated. The second defendant (the Union) applied to the first defendant (the Commission) for listing as a third party under s 13 of the EFA. The Commission posted details of the application on its website. Mr Farrar, a person who has had a long standing involvement in the National Party, learned of that application from the website. He wrote to the Chief Executive of the Commission on 7 February 2008 setting out reasons why he thought that the Union should not be registered as a third party. The essence of these reasons was that Mr Farrar contended that the Union is “a person involved in the administration of the affairs of” the New Zealand Labour Party, and therefore rendered ineligible by s 13(2)(f)(i). The Commission sought comment from the Union and also sought a legal opinion. In a letter dated 4 April 2008 to both Mr Farrar and the Union, the Commission advised that it had received legal advice that in the context of s 13(2)(f)(i) of the EFA “person” means a natural person. The Commission took the view, in the light of that legal advice, that that subsection applies only where the entity seeking listing as a third party is a natural person, so that no inquiry as to whether the Union is involved in the administration of the affairs of the Labour Party was necessary. It consequently determined that the Union is eligible to be listed as a third party. It indicated that the Union would be so listed on 17 April, unless the Commission was ordered otherwise by a Court.

[3] New Zealand National Party, which is a political party registered under part 4 of the Electoral Act 1993 and therefore a party as that term is defined in the EFA, challenged that decision. These proceedings were issued by the National Party as plaintiff, and interim relief was sought. The Commission indicated that further action on its decision would be deferred, pending this hearing. The statement of claim, as originally filed, sought a declaration that the Union is ineligible to be a third party, and an order setting aside the decision of the Commission to list the Union as a third party. The Union has filed a counterclaim which contends for a declaration to the contrary effect, and also seeks declarations concerning the processes followed by the Commission in its consideration of the Union’s application.

[4] At the outset of the hearing, I made orders, by consent:

- (a) Substituting the name of Judith Kirk, the President of the National Party, as plaintiff, in place of the New Zealand National Party; and
 - (b) Granting leave to the plaintiff to file an amended statement of claim, intended to make clear the limited extent of the issue before the Court.
- I made that order on the basis that statements of defence to that amended statement of claim would not be necessary.

[5] The Commission did not take an active part in the argument at the hearing. It did file an affidavit by the Chief Executive giving helpful background.

The EFA

[6] The EFA was passed in December 2007. Its purpose is set out in s 3 which provides as follows:

[3] **Purpose**

The purpose of this Act is to strengthen the law governing electoral financing and broadcasting, in order to—

- (a) maintain public and political confidence in the administration of elections; and
- (b) promote participation by the public in parliamentary democracy; and
- (c) prevent the undue influence of wealth on electoral outcomes; and
- (d) provide greater transparency and accountability on the part of candidates, parties, and other persons engaged in election activities in order to minimise the perception of corruption; and
- (e) ensure that the controls on the conduct of election campaigns—
 - (i) are effective; and
 - (ii) are clear; and
 - (iii) can be efficiently administered, complied with, and enforced

[7] One of the key aspects of the Act is the control which it imposes on spending for election advertising, and other election expenses. For present purposes no more than a brief description is required of the way in which these controls are imposed, and the way in which they affect several different categories of persons defined by the legislation. Limits are imposed on election expenditure by parties and electorate candidates contesting an election. The Act also imposes controls on expenditure on election advertising by persons other than parties and candidates. A person on

whose initiative an election advertisement is published becomes a “promoter”. As such, that person is subject to a number of controls. One is that that person may not, in the regulated period prior to a general election, incur expenses for election advertisements exceeding \$12,000 in total (s 63), unless that person becomes listed by the Commission as what the EFA terms a “third party”. If the person is so listed, the limit on election expenses is \$120,000 (s 118).

[8] The procedure for listing as a third party is contained in ss 13 to 18 of the Act. Section 13 sets out who is eligible to be listed as a third party. Section 14 requires the Commission to establish, maintain and publish a list of third parties. Section 15 sets out the process for application to be listed as a third party. Section 16 prohibits listing as a third party in the period immediately prior to and during an election. Section 17 sets out the grounds upon which listing must be refused. Section 18 provides that if the Commission determines that there are not grounds for refusing, the Electoral Commission must list the promoter as a third party.

[9] Section 13 is the key provision in this case. It says:

13 Persons eligible to be third party

- (1) A person is eligible to be listed as a third party if the person is—
 - (a) a New Zealand citizen or ordinarily resident in New Zealand; or
 - (b) a body corporate that is not an overseas person within the meaning of the Overseas Investment Act 2005; or
 - (c) an unincorporated body of which the majority of its members are persons described in paragraph (a).
- (2) The following are ineligible to be a third party:
 - (a) a party (other than a non-contesting party):
 - (b) a candidate:
 - (c) a person whose name is specified in a party list submitted under section 127 of the Electoral Act 1993:

- (d) the financial agent of a party or a candidate:
 - (e) each of the following persons or bodies:
 - (i) the chief executive (however described) of a department of State or Crown entity:
 - (ii) a department of State:
 - (iii) a Crown entity:
 - (iv) a State enterprise (within the meaning of section 2 of the State-Owned Enterprises Act 1986) or a Crown-owned company:
 - (v) any other instrument of the Crown:
 - (f) a person involved in the administration of—
 - (i) the affairs of a party; or
 - (ii) the affairs of a candidate in relation to his or her election campaign.
- (3) For the purposes of this section, a non-contesting party is a party that—
- (a) is listed as a third party under section 18 (being a party that has submitted a non-contest declaration under section 15(4)); or
 - (b) has submitted a non-contest declaration under section 15(4) and is awaiting a decision on whether it is to be listed as a third party under section 18.

[10] The narrow point which is in issue here is whether the Union is a “person” within the meaning of s 13(2)(f). There is no issue concerning s 13(1). It is common ground that the Union is a person eligible to be listed as a third party, under s 13(1)(b). It is a trade union and an incorporated society under the Incorporated Societies Act 1908, and is not an overseas person. If it is a “person” within the meaning of that term in s 13(2)(f), then it must satisfy the Commission, under s 17(1)(c), that it is not a person “involved in the administration of ... the affairs of a party”. If it is not a “person”, s 13(2)(f) has no application to it, and the Union must be listed as a third party, since none of the other grounds of ineligibility in s 13(2) are relevant.

The rival contentions on the main issue

[11] The plaintiff's contention is that the word "person" in s 13(2)(f) means a legal person, and so includes a body corporate such as the Union. The plaintiff submits that the following principles apply to the interpretation of that provision:

- (a) There is a general principle that a 'person' means a legal person, including bodies corporate;
- (b) The presumption is only displaced if the context of that provision requires otherwise;
- (c) Any 'conflicting contextual indications' in s 13 or the EFA more generally are not determinative and s 13(2)(f) should be interpreted on a stand alone basis;
- (d) It is unnecessary to consider these principles given the plain wording of s 13(1), and the overriding consideration of the purpose of s 13 and the EFA more generally.

[12] In support of these submissions, Mr Kiely refers to the definition of "person" in s 29 of the Interpretation Act 1999. That provides that, in an enactment "'person' includes a corporation sole, a body corporate and an incorporated body". He also refers to s 4 of that Act, which provides that that Act applies to an enactment unless the context of the enactment requires a different interpretation. He submits that it is apparent from a reading of the EFA as a whole, that some references are intended to refer to natural persons only, while others relate to both natural and artificial persons. He submits that there is no clear contextual reason within s 13(2)(f) to exclude bodies corporate or unincorporated bodies; rather the context requires the inclusion of such bodies. He draws support from the listing procedure in s 15(2), which refers to applications for listing by such bodies, and upon other provisions in the EFA. He further submits that limiting the application of s 13(2)(f), to natural persons would subvert the intentions of the legislation. Mr Erickson, in support, contests the

submission of counsel for the plaintiff that the New Zealand Bill of Rights Act 1990 (BORA) mandates an interpretation which would limit the meaning of the word 'person' in s 13(2)(f) to natural persons. He refers to the approach suggested by Tipping J in *R v Hansen* [2007] 3 NZLR 1 at para [92] and submits that any inconsistency with BORA is a justified limitation, or alternatively that it is not reasonably possible to find a less inconsistent meaning than that contended for by the plaintiff.

[13] Mr Harrison QC for the Union notes that the word "person" is used throughout the Act, in a variety of different contexts, sometimes, (as in s 9), plainly meaning a natural person only and sometimes, (as in s 13(1)), plainly referring not only to a natural person but also a body corporate and an unincorporated body. He refers to the overall structure of s 13 and notes that in s 13(1), which states the categories of person who are eligible to be listed as a third party, it is clear that eligibility is not limited to natural persons. He refers to the various categories of person referred to in s 13(2) and notes that these are each directed to different concerns. He submits that there is an intention to distinguish, within the overall internal structure of s 13(2), between natural persons and bodies, whether corporate or unincorporated. He submits that it is significant that s 13(1) itself distinguishes between natural persons (dealt with in 13(1)(a)) and bodies, whether corporate or unincorporated (dealt with in s 13(1)(b) and (c)). Counsel points to the difference in wording between s 13(2)(e), with its reference to persons or bodies, and (f), with its reference to "a person" He submits that is deliberate and that "person" in (f) is intended as a matter of construction to refer only to a natural person. Counsel further submits that the ordinary and natural meaning of 13(2)(f) read as a whole supports this approach. He submits that the word "person" is to be read and understood in the context of the wider expression "a person involved in the administration of the affairs of a party". He submits that administration is a "hands on" task carried out by individuals. He submits that political parties in New Zealand are made up of and run by individuals, even if they incidentally permit corporate membership. Counsel draws attention to other parts of the Act in which the words "involved in the administration of the affairs of a political party" are used. Counsel also draws attention to the purposes of the Act, and to the legislative history of the Act, as supporting that interpretation.

[14] The Union also relies, in support of the interpretation contended for by it, upon BORA. Counsel submits that when s 13(2) of the EFA is read in the light of the BORA rights contained in s 12 (electoral rights) and s 14 (freedom of expression), the restriction of s 13(2)(f) to natural persons is more consistent with these freedoms, and so is to be preferred under s 6 of BORA.

The interpretation of s 13(2)(f)

[15] Section 29 of the Interpretation Act 1999 provides that in an enactment, “person” includes a corporation sole, a body corporate, and an unincorporated body. It is to be noted that s 29, in providing for definitions of terms and expressions in legislation, does not expressly contain the qualification normally included in definition sections within specific statutes, namely that the expressions defined will bear their defined meaning “unless the context otherwise requires”. That qualification is contained in a somewhat different form, in s 4(1) which provides as follows:

4 Application

- (1) This Act applies to an enactment that is part of the law of New Zealand and that is passed either before or after the commencement of this Act unless—
 - (a) The enactment provides otherwise; or
 - (b) The context of the enactment requires a different interpretation.

So, a defined meaning in the Interpretation Act applies to another enactment (which includes the whole or a portion of an Act) unless the context of the enactment requires a different interpretation. Section 5(1) of the Interpretation Act provides:

5 Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[16] The “context” of an act, for the purposes of an interpretation section, can include the policy of the Act, the history of the legislation, the consequences of a

given interpretation, as well as the surrounding text (*Police v Thompson* [1966] NZLR 813 at 820-1).

[17] I consider that the scheme of s 13 suggests that there should be a symmetry of interpretation between ss 1 and ss 2. Both natural and artificial persons fall within the categories of persons who are eligible to be a third party. That would suggest that where any of the categories of ineligible persons may potentially include natural and artificial persons, those categories should similarly extend to both, unless a very clear contrary intention is evident. For some of those exceptions in s 13(2), particularly paragraphs (b) and (c), only a natural person is capable, as a matter of law, of falling within that category. Similarly, for the category referred to in (a), only an artificial person is capable, as a matter of law, of falling within that category. Paragraph (e) creates a category which may comprise either natural persons (sub paragraph (i)) or artificial persons (sub-paragraphs (ii) to (v)). Paragraph (f) defines a category, the membership of which is not, as a matter of law, confined solely to either natural persons or artificial persons. That is to say, there is nothing in law which makes it legally impossible for an artificial person to be involved in the administration of the affairs of a party. The administration of the affairs of a political party is a matter for that political party. It will be provided for within the rules of the party. It is a question of fact whether, having regard to the rules of the political party, and to the role which a particular person (natural or artificial) has under those rules, that person is, or is not, involved in the administration of the affairs of the party.

[18] Because there is no legal impossibility involved in the proposition that an artificial person might be involved in the administration of the affairs of a party, to read the word “person” in s 13(2)(f) as limited to natural persons would in effect create two categories of persons involved in the administration of the affairs of a party:

- (a) Natural persons ,who are ineligible to be listed as a third party; and
- (b) Artificial persons, who are eligible to be listed as a third party.

[19] Mr Harrison submits that a wider perspective than a focus on the single word “person” in s 13(2)(f) is required, and that the phrase “a person involved in the administration of the affairs of a party” is to be read as a whole. He submits that, when this is done, this shows an intention to exclude only those who have the type of “hands on” involvement which can only be achieved by individuals. I do not consider that that is the correct view, for several reasons.

[20] First, there is, as I have said, no legal impossibility involved. To consider, as an analogy, company law, a director of a company must, under s 151(1) of the Companies Act 1993, be a natural person. But s 126 brings within the definition of director a wider range of persons, not limited to natural persons. (See for example *Dairy Containers Limited v NZI Bank* [1995] 2 NZLR 30 at 90-91.) A person (natural or artificial) who fell within the s 126 definition would, on the ordinary use of language, be properly described as being involved in the administration of the affairs of the company. For a political party, where there is no legal restriction equivalent to s 151 of the Companies Act, and where artificial persons are not excluded by law from being capable of exercising an administrative role under the rules of the party, the possibility of an artificial person being involved in the administration of the party exists. That means that the meaning of the word “person” cannot be limited by its context in the wider phrase as the Union submits.

[21] Second, in the absence of such a legal prohibition, the question of whether a particular person is involved in the administration of the affairs of the company is a question of fact. The scheme of the Act is such that the determination of that question of fact is a matter for the Commission. Under s 17(1)(c) the Commission must refuse an application if it is not satisfied that the applicant is eligible to be listed. To interpret s 13(2)(f) as not applying as a matter of law to artificial persons, by adopting a narrow meaning of the word “person” from its context in the wider phrase, would be to pre-empt the very question which the Commission is required to address.

[22] Third, I can discern no reason, derived from the purposes of the Act, which would justify exclusion, from the category of persons created by s 13(2)(f), of an artificial person involved in the administration of the affairs of a party, as distinct

from a natural person who is so involved. The clear purpose of s 13(2)(f) is to ensure a degree of separation between persons involved in the administration of political parties, on the one hand, and third parties, on the other. That purpose is best achieved by excluding from eligibility all persons involved in the administration of a political party, not merely a subset of such persons.

[23] Counsel for the Union places some reliance on the distinction in wording between sub paragraphs (e) and (f) of s 13(2), in that sub paragraph (e) refers to “persons or bodies” while sub paragraph (f) refers only to “a person”. I do not consider that it is possible to derive any assistance from the wording of paragraph (e) in interpreting paragraph (f). Paragraph (e) is concerned with the Crown in all of its manifestations. It may be doubted whether some of those manifestations fall within the definition of “person” in s 29 of the Interpretation Act. I consider that the addition of the words “or bodies” is to be seen as making it clear beyond doubt that all manifestations of the Crown are excluded, whether or not they fall within the meaning of the term “person” in s 13(1), rather than as indicating an intention to limit the term “person” to natural persons.

[24] Counsel also draws attention to the use of the same or similar phraseology in other parts of the EFA. In particular, counsel places some reliance on the use, in the definition of “party donation” in s 21 of the EFA, of the expression “any person or body of persons on behalf of the party who are involved in the administration of the affairs of the party”, and submits that the absence of the phrase “or body of persons” in s 13(2)(f), supports the view that “person” is limited to a natural person. I do not agree, for three main reasons:

- (a) The use of the phrase “or body of persons” in s 21 is in my view to be regarded as directed to the possibility of a grouping of persons which is less formal than “an unincorporated body”;
- (b) The s 21 wording recognises that involvement in the administration of the affairs of a party can extend beyond individual natural persons; and

- (c) The use of the phrase “or body of persons” would be superfluous in s 13(2)(f), since a less formal grouping than an unincorporated body is not eligible for listing under s 13(1).

[25] Counsel also refers to s 28, and submits that in that section the words “person involved in the administration of the affairs of” appears in a context which indicates restriction to a natural person. I do not think that that is necessarily so. I do not derive any assistance from s 28 in interpreting s 13(2)(f).

[26] Counsel also sought to gain some support from the report of the Justice and Electoral Committee following consideration at the Select Committee stage. I have not found it helpful to have regard to that material. I do not find in the passages to which I was referred any clear indication of the views of the majority of the Select Committee on the narrow point which is before me.

[27] For these reasons I conclude that, on its proper interpretation, the word “person” in s 13(2)(f) bears the meaning given to it by s 29 of the Interpretation Act 1999.

A Bill of Rights interpretation

[28] I do not consider that the contention that the EFA is to be interpreted in a way which is consistent with BORA leads to a different conclusion from that which I have reached. The question of whether the EFA does impose a limitation on the rights in s 12 or s 14 of BORA, and the further question whether, if so, that limitation is justified under s 5 of BORA, are not directly before me. I express no view on either of those questions. I assume, but do not decide, that the question whether an interpretation which limits the application of s 13(2)(f) to natural persons is more consistent with those rights, under s 6 of BORA, may arise. Making that assumption, I should proceed directly to step 5 in the exercise suggested by Tipping J in *R v Hansen*. I must consider whether it is reasonably possible to find a meaning consistent or less inconsistent with the BORA rights. The hypothesis (it is no more than that, given the assumptions I have made) is that s 13(2)(f) imposes an unjustified limit on the right of freedom of expression of those persons who are

rendered ineligible for listing as third parties. To adopt a restricted interpretation of the word “person” in s 13(2)(f) would not, in my view, achieve a meaning more consistent with the rights and freedoms contained in BORA. That interpretation would maintain the limit on freedom of expression for one category of persons (natural persons involved in the administration of the affairs of a party) but relax the limit for another category of persons (artificial persons so involved). That would create a distinction between persons whose positions are otherwise similar, based solely on their status. Section 29 of BORA provides that its provisions apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons. The interpretation contended for by the Union, would place greater limits on the freedom of expression of natural persons than of artificial persons. That distinction would not resolve an inconsistency with BORA rights, rather it would create an inconsistency with respect to those BORA rights. That is not what s 6 of BORA requires.

Decision on the main issue

[29] For these reasons, I consider that the Union does potentially fall within the scope of s 13(2)(f) of the EFA and that the question of whether it does so must be determined by the Commission before it can be listed as a third party. I emphasise that, in so holding, I express no opinion whatever on that question. The question whether the Union is involved in the administration of the affairs of the Labour Party is not before me. All that I have decided is that the Union is a “person” for the purposes of applying the test in s 13(2)(f).

The Commission’s processes

[30] The second aspect of the Union’s counterclaim is a challenge to the procedures adopted by the Commission in dealing with Mr Farrar’s letter, to which I have referred to in paragraph [2]. The Union submits that the Commission acted contrary to the relevant provisions of the Act and thereby exceeded its legal powers, in the following respects:

- 10.1 The Act contemplates and requires that, subject to the Commission's power conferred by section 6(2)(aa) of the Electoral Act 1993 to make such inquiries as it thinks necessary for the proper discharge of its functions, applications to be listed as a third party, and in particular questions of eligibility to be so listed, are to be dealt with "on the basis of the application" (section 17(1)(c) of the Act).
- 10.2 The Act confers no right of objection (or opposition) or entitlement to be heard upon either political parties or their supporters (such as Mr Farrar) or on members of the public generally, in relation to applications for listing as a third party.
- 10.3 Accordingly and in any event, the Act does not contemplate or permit the Commission to conduct a contested hearing or objection process, when determining applications for listing as a third party.
- 10.4 Further or alternatively, the Commission, even if permitted by law to do so (which is denied), is under no legal duty to receive and/or to determine objections or representations from persons other than the applicant for third party listing, such as Mr Farrar or the second counterclaim defendant.

[31] The Union seeks the following declarations:

- (a) A declaration that in proceeding as alleged in paragraph 9 above, the Commission exceeded its lawful powers conferred on it for the purposes of dealing with applications to be listed as a third party under the Electoral Finance Act 2007;
- (b) Further or alternatively, a declaration that the Electoral Finance Act 2007 (i) confers no right of objection (or opposition) or entitlement to be heard upon any person or party other than the applicant for listing as a third party, and/or (ii) does not permit – or in the alternative, does not require – the Commission to receive and/or determine objections (or opposition) or representations from persons other than the particular applicant for third party listing with which the Commission is dealing.

[32] I can deal with this aspect of the matter briefly, and in the circumstances it is best that I do so, and that I do not embark upon a discussion of the Commission's powers. The Commission has the responsibility to consider an application for listing as a third party, and to determine whether or not there are grounds under s 17 for refusing the application. The form of an application to be listed as a third party is prescribed by s 15(3) which provides as follows:

- (3) An application to be listed as a third party must—
 - (a) be in the form required by the Electoral Commission; and
 - (b) be accompanied by—

- (i) a notice in the required by the Electoral Commission setting out the name, address, and contact details of the person (being a person who is eligible for appointment under section 9) who is to be appointed as the financial agent of the third party; and
- (ii) the signed consent to the appointment of the person referred to in subparagraph (i); and
- (iii) a statutory declaration made by the applicant declaring that to the best of the applicant's knowledge the applicant is eligible under section 13 to be listed as a third party.

[33] The grounds on which listing must be refused are set out in s 17(1) which provides:

- (1) The Electoral Commission must refuse an application by a promoter to be listed as a third party if—
 - (a) the application does not comply with section 15; or
 - (b) in the case of an application to which section 15(4) applies, the declaration given under that subsection is incorrect; or
 - (c) the Electoral Commission is not satisfied, on the basis of the application, that the applicant is eligible to be listed as a third party; or
 - (d) the name of the promoter is—
 - (i) offensive; or
 - (ii) likely to cause confusion with the name of a candidate or a party; or
 - (iii) likely to mislead members of the public.

[34] The extent of enquiry which the Commission may make, and the processes which it may undertake, to determine whether, in particular, s 17(1)(c) is met, based on the application made under s 15(3), is not specified in the Act. It is a matter for the Commission. The Commission has power, under s 6(2)(aa) of the Electoral Act 1993 “to make such enquiries as the Commission thinks necessary for the proper discharge of its functions”. I do not consider that it is appropriate for this Court to direct the Commission as to how it should go about the performance of its functions, or how it should conduct its enquires. The granting of declaratory relief is discretionary. I decline to make any declaration on this aspect of the counterclaim.

Result

[35] There will be a declaration that word “person” in s 13(2)(f) of the Electoral Finance Act 2007 has the meaning given to it by s 29 of the Interpretation Act 1999.

[36] The parties may submit memoranda as to costs.

“A D MacKenzie J”

Solicitors: Kiely Thompson Caisley, Auckland, for plaintiff
Crown Law Office Wellington for first defendant
J A Wilton, NZ Engineering Printing and Manufacturing Union Inc. Wellington for
second defendant