

Constitution at an Annual General Meeting on 11 May 2016 are void on the grounds that no notice was given to the members of the intention to vote on the amendments prior to the Annual General Meeting and they were not passed by 75% of the representatives attending the meeting as required by the Constitution.

House keeping

- [2] The relevant pleadings are the amended statement of claim dated 20 June 2016 and the amended statement of defence dated 20 July 2016.
- [3] A challenge to further resolutions of the TRU passed at a meeting of the TRU on 27 November 2015 is not now pursued.
- [4] The second named plaintiff has passed away. Mr. Edwards had intended to apply to substitute another plaintiff in his stead but did not do so. I understand there is no objection to me ordering the removal of Mr. Taumoepeau as a party. I so order and the intituling on any future documents filed should reflect this.
- [5] It is accepted by Mr. Tu'utafaiva for the TRU that the remaining plaintiffs have standing to bring this action.
- [6] The plaintiffs called just one witness. That witness was Feleti Fa'otusia. His evidence was brief and not subject to any significant challenge in cross-examination.
- [7] The defendants did not call any evidence. Mr. Tu'utafaiva advises me that the TRU would prefer to have all of the issues raised in this action canvassed at its Annual General Meeting and he has only limited instructions. The stance adopted by the TRU is surprising. I have found no reason to disbelieve the evidence of Mr. Fa'otusia in its important

respects. There is nothing before me either as to the reasons the TRU wished to amend its Constitution, the circumstances existing at the time or the consequences should the Court declare the amendments void. These are matters which might have a bearing on whether the Court should exercise its discretion to grant or decline the plaintiffs a remedy notwithstanding any improper action by the TRU.

Evidence of Feleti Fa'otusia

- [8] Mr. Fa'otusia is the President of the Spartan Rugby Club. The Spartan Rugby Club is part of the Vaheloto Sub-union. Mr. Fa'otusia is a representative of the Vaheloto Sub-union and has the right to attend and vote at Annual and Special Meetings of the TRU.
- [9] The Annual General Meeting of the TRU was scheduled for 11 May 2016 and Mr. Fa'otusia attended. No notice was given of the business to be discussed at the meeting. He understood that as it was an Annual General Meeting there would be the election of Officers but that 'What took place was contrary to what I had thought and I say that it was never disclosed to the members before the Meeting held on 11 May 2016'.
- [10] Specifically, Mr. Fa'otusia said that he was not informed of the intention to amend the TRU's Constitution and no opportunity was given to discuss the proposed amendments with his club or sub-union.
- [11] Immediately prior to the meeting Mr. Fa'otusia was given a document containing proposed amendments to the Constitution (document 70-74). In broad terms what was proposed was, *inter alia*, an amendment to allow changes to the Constitution to be made on a simple majority vote, the appointment of the Prime Minister as the President of the TRU, the

removal of the members' right to elect the President, the reduction in the number of representatives of sub-unions who were members of the TRU and a quota of local players to be selected in the national team.

[12] The meeting of 11 May 2016 was initially chaired by the second defendant who was the interim President.

[13] There were 32 persons attending the meeting. The proposed amendments were tabled by the second defendant.

[14] The first matter voted on was the proposed amendment to clause 34 to allow the Constitution to be altered, added to or rescinded by a bare majority vote rather than by the vote of 75% of the representatives attending a duly convened meeting. Mr. Fa'otusia said that 17 people voted in favour of the amendment with 7 people voting against it and 8 people abstaining. This evidence conflicts with the minutes of the meeting (documents 76-83) which state that there were two votes taken and the amendment was passed on the first occasion 27 in favour and 5 against and on the second occasion 17 in favour and 5 against. I am inclined to think the number 17 is a typographical error and the minutes were intended to record the same vote on both occasions. However as the TRU called no evidence and Mr. Fa'otusia was not challenged on his evidence in cross examination I accept his evidence as to the voting numbers.

[15] The meeting then voted on the proposed amendment to appoint the Prime Minister as the President. Then the representatives cast votes on each of the other proposed amendments that had been tabled.

[16] Mr. Fa'otusia did not give evidence as to the voting numbers in respect of these other amendments to the Constitution but said that they were

passed by a bare majority of the representatives in attendance. This too conflicts with the minutes.

[17] Mr. Edwards he advised me that further evidence was not called on the voting numbers because it had been conceded by the TRU that except in relation to clause 34 no amendment was passed by a vote of 75% of the members at the meeting. Mr. Tu'utafaiva accepted that such a concession could well have been given. He did not rely on this point in his submissions. Had he done so I would have given the plaintiffs leave to call further evidence.

[18] I therefore find that the amendments to the Constitution were all passed by a bare majority and not by the vote of 75% of the representatives attending the meeting.

[19] A good deal of Mr. Fa'otusia's evidence dealt with concerns he has about the effect of the amendments on the rights of members of the TRU, particularly in relation to the appointment of the Prime Minister as President. There is no need for me to traverse his concerns. It is sufficient for me to say that I accept that they are genuine concerns and that the amendments were a substantial alteration to the rights of members of the TRU.

[20] In cross-examination Mr. Fa'otusia confirmed that he had voted against the amendments but that he had not sought an adjournment of the meeting so that he could have more time to consider them or discuss them with his club.

[21] He maintained that on important matters, such as proposed amendments to the Constitution, the members must be given reasonable notice before the meeting. He also said that after the

meeting he discussed the amendments with his club and they did not agree with them.

- [22] Mr. Fa'otusia was not aware of clause 31 of the Constitution which sets out a dispute resolution procedure but confirmed that he took no steps to invoke it.

The plaintiffs' submissions

- [23] The plaintiffs' case begins with section 5(1)(e) of the Incorporated Societies Act (the Act) which provides that the rules of a society must provide for the mode by which the rules of the society may be altered, added to or rescinded.
- [24] Under section 21 of the Act the society may alter its rules in the 'manner provided by the said rules...'.
- [25] The plaintiffs argue that the Court has jurisdiction to declare the amendments void under section 21(4) of the Act which provides that on an application by a member of a society if the Court is satisfied that an amendment to the rules of the society has not been duly made in accordance with its rules or the Act, it may in its discretion 'declare that alteration to be void in whole or in part'. The Court may also order that registration of any alteration be canceled and 'give such directions and make such provisions as seem just in the circumstances of the case'.
- [26] The plaintiffs contend that the TRU purported to amend its Constitution by a simple majority of its representatives voting at the meeting in breach of clause 34(1) of the Constitution. Clause 34(1) provides:

This Constitution shall not be altered, added to or rescinded except on a vote of 75% of the Representatives who attend a Meeting of the Union duly convened.

- [27] In addition the plaintiffs argue that the representatives were not given appropriate notice of the intention to amend the Constitution prior to the 11 May 2016 meeting. In this regard clause 19(2) of the Constitution sets out the agenda for an Annual General Meeting, clause 19(4) sets out the manner in which notice of the meeting is to be given and clause 19(5) provides:

No business other than that stated in the notice shall be transacted unless notice thereof shall have been given in writing to the Chief Executive Officer of the Union at least seven days prior to the Meeting.

- [28] I understood Mr. Edwards to be also relying on a broader proposition at law that proceedings of a society's members may be declared invalid by a Court if adequate notice of a meeting is not given.
- [29] Mr. Edwards acknowledged that the Courts have shown a reluctance to interfere in the internal affairs of societies but argued that the TRU's breaches of its Constitution are serious justifying the Court's intervention in this case.

The defendants' submissions

- [30] Mr. Tu'utafaiva presented three arguments. First, he submitted that there is no evidence that the plaintiffs had attempted to utilize the dispute resolution provision which is clause 31 of the Constitution. Whilst Mr. Tu'utafaiva accepted that the Court has jurisdiction to grant the relief sought he contends that it should refuse to do so unless the plaintiffs had first invoked clause 31.

[31] Secondly, Mr. Tu'utafaiva argued that whether or not clause 34 was lawfully amended is a question of fact and the requisite 75% majority was in fact obtained.

[32] Thirdly, Mr. Tu'utafaiva submitted that the plaintiffs should not be heard to complain about the lack of notice of the business of the meeting when they did not seek an adjournment of the meeting and there was nothing to have prevented them from doing so.

Discussion

[33] I am satisfied that the Court has jurisdiction to grant the declaratory relief sought. Such jurisdiction exists under section 21(4) of the Act and also arises from the Court's jurisdiction at law to determine disputes between a member and a society (Mark von Dadelzen '*Laws of Societies*' 3rd Ed, LexisNexis at page 55 and *Taumoepeau and ors v Sika and ors* (Unreported Supreme Court, CV 43/2014, 11 May 2016, Paulsen LCJ)).

[34] I accept the evidence of Mr. Fa'otusia that the amendments to the Constitution were not approved at the meeting of 11 May 2016 by 75% of the representatives in attendance in breach of clause 34 of the Constitution. The minutes of the meeting suggest that it was thought that the members could by a bare majority alter clause 34. There is not correct. Clause 34 is equally subject to the restriction against amendment except upon a vote of 75% of the representatives attending a duly convened meeting as any other clause.

[35] I am also satisfied that proper notice of the intention to vote on amendments to the Constitution was not given to the representatives prior to the meeting of 11 May 2016. Mr. Fa'otusia said that no notice

at all was given of the proposed amendments until he arrived at the meeting and he was not challenged on his evidence.

[36] Reading clauses 19(4) and(5) of the Constitution together it is plain that the business to be conducted at an Annual General Meeting must be stated in the notice given of the meeting. The evidence is that that did not occur in this case. In any event it has been held that notwithstanding specific terms of a society's rules notice of a meeting may be inadequate where it does not adequately inform the members of the business proposed to be discussed (von Dadelzen at page 178 and the cases at footnote 33). That must surely be case where substantial amendments to the Constitution were only provided at the meeting itself so that representatives could not discuss them with the clubs or sub-unions they represent.

[37] Turning to the defendants' arguments, there are two principal reasons why the plaintiffs failure to invoke the dispute resolution provision (clause 31) is not an answer to the plaintiffs' case. First, the Constitution encompass the contract between the members and between the members and the TRU. It creates contractual rights and obligations capable of both enforcement and waiver. In full knowledge of clause 31 the defendants have participated in this action, have responded to interlocutory proceedings, filed defences, attended directions conferences and presented a defence at trial. They have never sought to stay the action in reliance upon clause 31 despite the matter being raised directly with Counsel at a directions conference on 31 May 2016. It follows that the defendants have agreed to submit the substantive dispute to the jurisdiction of the Court and waived any right to object on the basis of non-compliance with clause 31 (*Williams &*

Kawharu on Arbitration, LexisNexis, 2011 at 4.13-4,13.3 pages 120-122).

- [38] Secondly, it is the case that the Courts will strive to give effect to agreements for the resolution of disputes unless there are good reasons from departing from them (*Heli-Flight New Zealand Ltd v Massey University* (HC, Auckland, CIV 2005-404-4855, 30 November 2005). One such reason is if the agreement is not sufficiently certain to be enforced (*Hooper Bailie Assoc v Natcon Group* (1992) 28 NSWLR 194 (SC)). This is such a case.
- [39] It is not clear whether clause 31 contemplates a range of possible options for resolving disputes between members (or between members and the TRU) or is a multi-tiered dispute resolution process beginning with 'legal opinion or legal advice' and passing through mediation and arbitration. Regardless, except in relation to arbitration (for which there are processes set out in clause 32) there is no detail as to how the processes are to be engaged and implemented or for resolving disputes on matters of process between the parties should they arise. This is a very practical objection. The documents in the bundle (which were admitted by consent) disclose that in relation to the earlier dispute concerning the resolutions passed at the 27 November 2015 meeting Mr. Edwards had unsuccessfully sought to invoke clause 31.
- [40] The second argument advanced that clause 34 was not amended by a bare majority fails. For the reasons set out above I accept Mr. Fa'otusia's evidence on the matter.
- [41] I do not accept either the third argument advanced by Mr. Tu'utafaiva that the plaintiffs did not seek an adjournment of the meeting and should not therefore be granted a remedy. There is no evidence that

the plaintiffs or Mr. Fa'otusia waived their rights to object to the lack of notice and they voted against the amendments.

The discretion

[42] I have been concerned whether I should interfere in the affairs of the TRU having regard to the Court's reluctance to adjudicate on disputes involving the internal management of clubs. I have decided that I should interfere for the following reasons.

[43] First, what has been proved is that the TRU has failed to comply with clear provisions in its Constitution as a result of which unlawful decisions have been made which are significant and affect the rights of the members. This is a category of case where the Courts have been willing to interfere (von Dadelszen at 114).

[44] Secondly, if the TRU disagrees with the conclusions I have reached it only has itself to blame. The TRU has failed to call any evidence, challenge the evidence or Mr. Fa'otusia in any meaningful way or put before me any reasons why I should not exercise my discretion in favour of the plaintiffs.

[45] Thirdly, I understand that the TRU is having its Annual General Meeting before the end of the year and it will have an early opportunity to put forward the amendments again following a lawful process.

Result

[46] I make a declaration under section 21(4) of the Act that the amendments to the Constitution of the TRU tabled and voted upon at the meeting of 11 May 2016 are void.

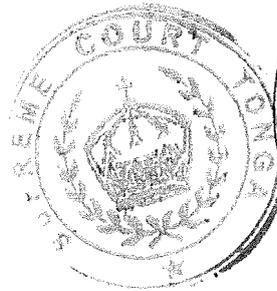
**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

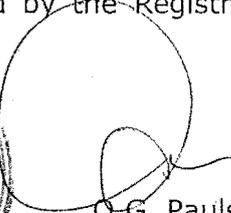
CV 15 of 2016

[47] I grant leave to any party to apply for further directions as may be required on 7 day's notice.

[48] The plaintiffs are entitled to costs to be fixed by the Registrar if not agreed.

NUKU'ALOFA: 3 October 2017.




O.G. Paulsen
LORD CHIEF JUSTICE