IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

OA No. 1/2005

IN THE MATTER the Declaratory Judgments Act 1994

BETWEEN **The Cook Islands Democratic Party Incorporated** a duly incorporated society
Applicant

AND **The Democratic Party Tumu Incorporated** a duly incorporated society
First Respondent

AND **Nooapii Teaea** Registrar of Incorporated Societies
Second Respondent

Date of hearing: 1 April 2005
Date of decision: 11th April 2005.

Mr C Little for Applicant
Mr N George for 1st Respondent
Second Respondent in person

DECISION OF GREIG CJ

1. The Applicant was registered under the Incorporated Societies Act 1908 on 12 September 1972 ander the name The Democratic Party Incorporated. By resolution passed on 28 October 2004 and registered on 1 December 2004 it changed its name to Cook Island Democratic Party Incorporated. There is no definite article in its present name. The 1st Respondent was incorporated on 1 December 2004 under the name Democratic Party Tumu Incorporated. Again there is no definite article in the name. This incorporation was made under the Incorporated Societies Act 1994 (the Act) which replaced the 1908 Act.

2. The Applicant which I will call the 1st Party makes this application for an order that the name of the 1st Respondent which I will call the 2nd Party so nearly resembles the name of the 1st Party as to be calculated to deceive and the registration of the 2nd Party is contrary to the public interest. That application is based on the wording of section 12 of the Act which in full is as follows:

> 12. Name of society not to be the same as the name of another society or body corporate – No society shall be registered under a name which is identical with that of any other society registered under this act, or of a company carrying on business in the Cook Islands(whether registered or not), or of any other body corporate established or registered in the Cook Islands under any Act, or so nearly resembles that name as to be calculated to deceive, except where that other society or company or body corporate as the case may be, signifies its consent in such manner as the Registrar requires, and the Registrar is satisfied that registration of the society by the proposed name will not be contrary to the public interest.

3. That wording is almost identical to the wording of section 11 of the 1908 Act which is the New Zealand Act of 1908 It is equally identical to the words of subsection (1)(n) of section31 of the Companies Act 1955 which was adopted by the Companies act 1970-71. They are correctly to be described as in pari materia. That is the case in Cook Islands as it was in New Zealand. The provisions of the Companies legislation in New Zealand are now substantially altered. It is obvious that the principle of applying the case law equally to incorporated societies as to Companies in the matter of name resemblance as has been done in New Zealand should be done here. I do so apply those principles and apply to the Cook Islands the same principles as applied in New Zealand. It is necessary however to distinguish with some care some of the dicta from the cases in New Zealand because under the Companies act (s.31 (4)) there was a general discretion given to the Registrar to disallow a

name which in his opinion was undesirable. That head was sometimes the basis of decision even when improper resemblance was found.

4. In Laws NZ Incorporated Societies para.20 what is described as the key test "is whether there is a serious risk that the public or a section of it will be confused: this is irrespective of motives". In *Vicomm New Zealand Limited v Vicomm Systems Limited* [1987] 2NZLR 600 C.A. at 607 the test was said to be whether there was a real likelihood of confusion. In that case the decision was made on the head of undesirability of the name. In *South Pacific Airlines of New Zealand Limited v Registrar of Companies* [1964] NZLR 1 which was approved in the *Vicomm case* it was said that it was material to ascertain whether the parties were dealing in the same commodity and whether mistakes had been made. The competing name was National Airways Corporation and it was found that the names in the circumstances were so near as to be calculated to cause confusion. In *Abacus Finance Limited v Registrar of Companies* [1985] 2NZLR 607 it was held that there was likely confusion with Abacus Holdings Limited though they were trading in different areas. Of course here there is no trade but the two societies are operating in the same area and making their appeal to the same electorate.

5. For the first party affidavits were filed by Makinti Tongia, Sir Pupuke Robati, Dr Terepai Maoate and Poro Dean. They are office bearers and long time members of that party. They assert their objection to the name of the 2nd Party and the confusion that in their view is likely. There is indirect evidence of other members of the party and perhaps members of the public voicing their anger and disapproval but there is no actual evidence of confusion. It is unlikely in the circumstances that member of the 1st Party will be confused. It is said that the 1st Party is generally known as the Democratic Party or the Demo party and these terms are used in the media. These affidavits deal in some detail with the word "Tumu" included in the name of the 2nd Party. It is said to be a Cook Islands Maori word which has several meanings. These include foundation of a house, base of a mountain, stump or trunk of a tree, source, and origin. It is suggested that the last two are the relevant meanings and give the implication that the 2nd Party is the real or true Democratic party. There is an amount of other political assertion as to the reasons and motives of the persons who have organized and incorporated the 2nd Party but I set that aside as being irrelevant to the question I have to decide.

6. For the 2nd party there is an affidavit of Mr N Glassie, who is the President of the party. He explains the political reasons for the establishment of the new party and asserts that it is the party's wish to distance itself as far as possible from the 1st Party. The political reasons are, as I have said, irrelevant to my decision. It is Mr Glassie's opinion that the word Tumu in the title means "trunk, tree unshakeable base and foundation for democracy". He refers to the previous name changes of the 1st Party to Democratic Alliance Party and

Alliance Taokotai Party and to the previous existence of a party under the name Demo Tumu Party in 1989.

7 The Second respondent did not file any affidavit and made no submission other than to say that he exercised his discretion to register the 2nd Party because there was no identical name on the register.

8. The constitution of the 2nd Party refers to itself as Demo Tamu Party which is not the name of the incorporated society and is not the name to which I have to consider and decide upon. But the evidence is that the 1st party is known or referred to in the media as the Demos or the Demo Party. To the extent that the 2nd Party becomes known as the Demo Tumu Party there will be another similarity in the names of the two parties.

9. The two names which I have to consider are Cook Islands Democratic Party Inc and Democratic Party Tumu Inc. I consider them in light of the fact that the two organizations are operating in the same area; that is politics as two competing political parties. I know that the Cook Islands population is small and that there is a strong interest in political affairs, parties and politicians. The two names are similar and I believe that I am entitled to take into account the likelihood that members of the public will continue to refer to the 1st Party as the Democrats or Democratic Party or the shortened version of Demos in some form or another. The 1st Party has been long known as the Democratic Party and must therefore have obtained some particular identification with that name. The addition of the geographical words on the one hand and the word Tumu on the other gives some distinguishing feature but there remains a substantial similarity which I believe is bound to create confusion. In an age of shortening of names and the use of acronyms and other abbreviations reference will be made to the Democratic Party or Demos in letters, messages and other usages by the public and sections of it. While the names in full are distinguishable there is still the likelihood of confusion between them. The important word in each name is Democratic and in the way in which the use of it by the 1st arty has developed use by any other party will create confusion unless there is a very clear distinguishing feature in the name. In this case there is no such feature.

10. I conclude that the name of the 1st respondent so nearly resembles the name of the Applicant as to be calculated to deceive within the meaning and intent of section 12 of the Act.

11. To continue that situation is, as a matter of general consideration, not in the public interest. In the words of Ongley J in the *Airlines of NZ* case at p 611, avoidable confusion is obviously undesirable. Those words reflect the terms

of the N Z legislation at the time of his decision. The public interest aspect is relevant, under s.12 of the Act, in the situation when the Registrar is authorized by the consent of the society with the similar name. Then he is required to consider whether even with that consent the registration will be contrary to the public interest. That interest is not a consideration which applies to the earlier consideration under the section. It is not a matter which is in issue on the question of resemblance and the likelihood of deceiving or confusion. In this case it is not a matter which I should take into account or on which I can make a declaration.

12. Accordingly I make a declaration in the terms of paragraph 10 above without more. I reserve costs and will receive submissions from Counsel if agreement can not be reached.

Laurie Greig CJ

Addendum.

I noted at the beginning of the hearing that Mr George was appearing for the 1st Respondent while he was at the same time the Speaker of Parliament. I commented that not only was he Counsel but that he had been referred to by name in the affidavit of Mr Glassie in terms which indicate that he is a member of the 1st Respondent and has a grievance against the Applicant and its members which Mr Glassie referred to as a betrayal. Mr George in the course of the argument admitted that he had drafted the constitution of the 1st Respondent.

Mr George's advocacy of the 1st Respondent's case and his inclusion in the facts presented by the sole deponent for the Respondent, however irrelevant, seemed to me to conflict with his duties as Speaker which require him to be impartial as between all the members and parties in the Parliament. It appears that he supports the case of the 1st Respondent and the various accusations and complaints made by it in its opposition to the application. This was not a matter which, in my view, disabled Mr George from appearing or affected his duties as Counsel. The effect on his position and duties as Speaker I must leave to others.

Laurie Greig CJ