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

Plaint No: 78/07

BETWEEN	**GEORGE TURIA** of Rarotonga, Chief Executive Officer
	Plaintiff
A N D	**THE OFFICE OF THE LEADER OF THE OPPOSITION** of the Government of the Cook Islands, an office holder appointed by virtue of the Civil List Act 2005
	First Defendant
A N D	**TOM MARSTERS** of Rarotonga, Leader of the Opposition of the Government of the Cook Islands
	Second Defendant

Date of hearing: 10 April 2008

Counsel: Mr T Vakalabure for the Plaintiff
Mr N George for the Second Defendant
The Solicitor-General of the Cook Islands as Intervener

Judgment: 4 September 2009

JUDGMENT OF WILLIAMS CJ

Introduction

[1] By his amended statement of claim dated 10 January 2008, the plaintiff Mr George Turia says that he entered a contract of employment as a chief executive with and for Mr Tom Marsters on 1 July 2006, but that Mr Marsters terminated that contract on 14 May 2007 and again (after a temporary reinstatement) on 6 June 2007. The plaintiff claims damages for wrongful dismissal.

[2] The plaintiff's claim names "the office of the leader of the opposition of the Government of the Cook Islands" as first defendant and Mr Marsters personally as second defendant. Mr Marsters was the occupant of the office of the Leader of the Opposition (the "**Office**") at all relevant times.

[3] In my minute dated 25 September 2008, I provisionally indicated my view as being that the Office was not amenable to suit (paragraph 14) and that Mr Marsters should not have been named personally (paragraph 15). I invited submissions from the Solicitor-General on these points.

[4] By his submissions dated 24 November 2008, the Solicitor-General agreed that the Office was not amenable to suit (paragraph 42), but submitted that Mr Marsters should be amenable personally (paragraphs 21, 46, 49).

[5] By submissions in reply dated 23 January 2009, the plaintiff appeared to abide by my provisional view that the Office was not amenable to suit (paragraph 10) but variously maintained that the Crown in respect of the Cook Islands was the appropriate defendant (paragraphs 4, 8, 9, and 10). For this reason the plaintiff submitted that the Attorney-General should have been joined to these proceedings (paragraph 13).

Issues

[6] The questions which arise for determination are:

(a) whether the Office is amenable to suit for the actions of the Office holder; and/or

(b) whether the "Crown" is directly or by way of some other department within the government of the Cook Islands amenable to suit in respect of the actions of the Office holder; and/or

(c) whether Mr Marsters is personally amenable to suit for his actions during the time he was the Office holder.

[7] For the reasons set out below the conclusions reached by this Court are that:

(a) The Office itself is not amenable to suit. The powers and responsibilities of the Office (and as a corollary, its potential liability to suit) depend on the precise system of Westminster Parliamentary democracy in which the question arises. In the Cook Islands the Office is primarily a functional and political position. While it has achieved some formal recognition, that is not sufficient to bestow independent corporate or legal identity upon it such that it can be sued in its own right.

(b) Neither the Crown nor any other department within the government in respect of the Cook Islands is amenable to suit in respect of the actions of Mr Marsters as the Office holder. Crown liability in contract arises almost exclusively vicariously and thus rarely arises other than by action of an emanation of the Crown. Where a claim is founded in contract (as here) and not tort, Crown liability on the basis of an agency relationship is highly unlikely. For this reason it is conceptually difficult to see how the Crown might be liable for the acts of an Office holder when the Office itself cannot be liable at first instance. In any event, an agency relationship is not supportable on the facts.

(c) Mr Marsters may be amenable to suit in accordance with the principle that there are circumstances in which proceedings can be brought in relation to an official's performance of acts or duties, but where that official is not sued as representing the Crown. Whether Mr Marsters is actually amenable would of course require a determination at trial as to whether he had entered a contract which

was valid and binding upon him, and whether he is without other defences.

[8] My conclusions are in accord with the submissions filed by the Solicitor-General.

Relevant Statutes

[9] The primary basis for Crown liability is the Crown Proceeding Act 1950 (NZ). The Act applies in the Cook Islands with some modifications pursuant to s 350(1) of the Cook Islands Act 1915 (NZ). Section 3(2) of the Act outlines the claims enforceable against the Crown, and provides:

> **3 Claims enforceable by or against the Crown under this Act**
> [...]
> (2) Subject to the provisions of this Act and any other Act, any person ... may enforce as of right, by civil proceeding taken against the Crown for that purpose in accordance with the provisions of this Act, any claim or demand against the Crown in respect of any of the following causes of action:
>
> (a) The breach of any contract or trust:
> (b) Any wrong or injury for which the Crown is liable in tort under this Act or under any other Act which is binding on the Crown:
> (c) Any cause of action, in respect of which a claim or demand may be made against the Crown under this Act or under any other Act which is binding on the Crown, and for which there is not another equally convenient or more convenient remedy against the Crown:
> (d) Any cause of action, which is independent of contract, trust, or tort, or any Act, for which an action for damages or to recover property of any kind would lie against the Crown if it were a private person of full age and capacity, and for which there is not another equally convenient or more convenient remedy against the Crown:
> (e) Any other cause of action in respect of which a petition of right would lie against the Crown at common law or in respect of which relief would be granted against the Crown in equity.

[10] Other bases for liability also exist; s 6 of the Act provides that a claim can be bought "against the Crown" where tortious liability arises from the actions of Crown "servants or agents".

[11] Regarding who "the Crown" will be in respect of the Cook Islands; s 350(2)(a) of the Cook Islands Act 1915 (NZ) provides:

> (2) In the application of the Crown Proceedings Act 1950 to the Cook Islands, unless the context otherwise requires,- (a) Every reference in that Act to the Crown or Her Majesty shall be construed as including a reference to Her Majesty in respect of the government of the Cook Islands.

[12] Regarding the possibility that the Crown or Her Majesty might be liable other than under the Crown Proceedings Act; s 5 of the Act provides:

> **5 Liability of the Crown under other Acts**
> (1) Except as expressly provided by this Act or any other Act, this Act shall not be construed so as to make any Act binding upon the Crown which would not otherwise be so binding, or so as to impose any liability on the Crown by virtue of any Act which is not binding on the Crown.

[13] These Acts and sections provide the basis for liability against the Crown. The plaintiff's claim names the Office as first defendant. The claim is a "civil proceeding", and provided the plaintiff has a prima facie case for wrongful dismissal, he has a "claim or demand ... in respect of any of the following causes of action" within the meaning of s 3(2) (most likely s 3(2)(a)).

[14] Because the plaintiff's claim otherwise complies with s 3(2), a key issue in determining the appropriate defendant is whether the claim is also "against the Crown"/"Her Majesty in respect of the government of the Cook Islands". If the Office is part of the Crown the answer will be yes.

[15] For that reason I first consider the nature of the Office and whether it is a legal entity in its own right.

The legal status of the "Office of the Leader of the Opposition"

[16] In my minute of 25 September 2008 I noted that accommodation was provided for the holder of the Office pursuant to cl 13 of the Civil List (Members of Parliament Allowances, Expenses and other Entitlements) Order 1996, and is provided by continuation of that order pursuant to s 27(1) of the Civil List Act 2005. I also noted that the Office itself is recognized by s 3 of the Civil List Act 2005 (paragraphs 6 – 8).

[17] My provisional but firm opinion was that this order and the Civil List Acts do not endow the Office with a separate legal personality by which it could enter into contractual arrangements. In my view this is confirmed by the mechanism through which proceedings can be brought against the executive in the Cook Islands – specifically, that there appears to be no

way the Office could be sued except pursuant to s 14(2) of the Crown Proceedings Act[1] (paragraphs 9 – 13).

[18] On this basis I held that the plaintiff's action was misconceived insofar as it named the Office.

[19] By his submissions on this point the Solicitor-General agrees that the Civil List Order and Acts are not sufficient to establish the Office as an instrument or emanation of the Crown (paragraphs 11 – 14). Concerning s 14(2), the Solicitor-General notes that proceedings against the Office are not necessarily proceedings against the Crown on the basis that Office holders may on occasion be personally liable (paragraph 19).

[20] The plaintiff's submissions on this point are somewhat contradictory. They appear to provide that the plaintiff abides by my decision that the Office has no independent contractual capacity (paragraph 10) yet also state that (paragraph 4):

> The position of Leader of Opposition in most countries modelled under the Westminster Model is always a creature of the Constitution or specific legislation which can sue and be sued in its own right. The position in the Cook Islands is not provided for by legislative means however it is not an entirely isolated office so as to not fall within the realm of the provisions of the section 14(2) of the Crown Proceedings Act as the office remains effectively part of the Crown.

[21] A brief consideration of the nature of the Office is required to resolve this issue.

[22] The Office of "Leader of the Opposition" is traditionally held by the leader of the largest political party other than the ruling party in a Westminster system of parliamentary democracy. As indicated by its title the position is first and foremost political; it designates the Member of Parliament ostensibly capable of forming a government in the event that the ruling party is no longer able to.[2] As a concomitant of this 'capability' or 'readiness' political practice is that the Office holder will lead the

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1 Section 14(2) provides that the Attorney-General should be named as the default defendant in the absence of specific statutory authority for the particular office or department being amenable to suit in its own right.

2 In New Zealand for example, the Office is not statutory. Rather, the leader of the largest opposition party is entitled to be recognized as the Office holder as a matter of custom and by Standing Order (S.O.36).

opposition in Parliamentary debates and formulate or direct criticism of government policy and action.[3]

[23] The formal powers and duties associated with the Office vary between the parliamentary systems in which it exists. The Office is commonly acknowledged by a statutory provision of a salary for the Office holder[4] and administrative expenses related to the Office.[5] However the statutory powers of decision and matters of state affairs in which the Office holder is involved are far from uniform and may be as diverse as:

- Having the power of nominating a member of the Broadcasting Standards Authority, serving as a member of the Lottery Grants Board, or being entitled to receive a copy of the Inspector-General of Intelligence and Security's annual report, as in New Zealand;[6] to

- Having the power to advise the President on the appointment of 8 of the 32 members of the Senate, and to consult with the President together with the Prime Minister concerning the appointment of the Constituency Boundaries Commission and the Chief Justice, as in Fiji.[7]

[24] It is of note that none of the examples of the "powers" granted as just listed would seem to be of the kind for which an action within the categories set out in s 3(2) of the Crown Proceeding Act might lie, even if the Office were part of the Crown.

[25] It is also of some note that in New Zealand there have been calls suggesting that the Office has become redundant and should not be

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3 In New Zealand again, this is also recognized by Standing Orders providing that the Officer holder will initiate debate on the Prime Minister's statement each year. He or she is also entitled to precedence on the opposition side of the House when participating in other major parliamentary debates (S.O. 347).

4 See for example the *Ministers of the Crown Act* 1937 (UK) by which the Office in that jurisdiction was provided for the first time with an annual salary, amounting at the time to some two thousand pounds.

5 As for example in the present situation by cl 13 of the Civil List (Members of Parliament Allowances, Expenses and other Entitlements) Order 1996.

6 Refer the Broadcasting Act 1983 as it existed between 27 May 1989 and 7 July 1993, s 116A of the Gaming and Lotteries Act 1977, and the current Intelligence and Security Act 1996 respectively.

7 Refer cll 82, 76 and 132 of the Fijian Constitution respectively.

formally recognized.[8] I believe the nature of the debate is illustrative and will consider it briefly.

[26] While the Office is arguably an important functional position within a parliament dominated by two powerful parties, New Zealand Parliament is populated on a mixed member proportional representation basis; a system which frequently necessitates coalition governments. For this reason, proponents for abolition of the Office in New Zealand have claimed it is an outmoded tradition to recognize a leader of an 'opposition', where such might be the largest third party not in power, required to support the ruling party on confidence and supply, and/or required to enlist the support of other parties to assume power if called upon to do so.

[27] Others would likely differ in their opinion of the Office's importance; in *Parliamentary Practice in New Zealand,* former speaker David McGee (writing well after the demise of 'first past the post') states "*In no other instance is the peculiar strength of the parliamentary system of government so vividly demonstrated that in its recognition of the office of Leader of the Opposition.*"[9]

[28] Esteemed commentators have made observations suggesting this is more rather than less true since the advent of MMP; in "*New Zealand's Constitutional Arrangements: where are we heading?*" the Rt Hon Sir Geoffrey Palmer notes that while the Westminster model of government is deeply offensive to the separation of powers in the sense that its essence is the deliberate connection of the Executive branch of government to the legislative branch (in the words of Bagehot, by way of cabinet as "a buckle which fastens"[10]), nonetheless:

> The adoption of a new electoral system by referendum following the report of the Royal Commission on Electoral Law in 1986 changed the dynamics of the New Zealand system profoundly in ways that are still not fully appreciated... **In terms of the theory of separation of powers MMP has had the effect of making distinction between the Executive and Parliament more distinct and real.** (emphasis added)

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[8] See for example, Green Party press release, "*Abolish Leader of the Opposition*", 19 August 2002: www.greens.org.nz/node/12123

[9] McGee, *Parliamentary Practice in New Zealand*, (Dunmore Publishing, Wellington, 2005) at 85.

[10] W alter Bagehot, *The English Constitution*, as cited in The Rt Hon Sir Geoffrey Palmer, *The New Zealand Constitution in 2005*, New Zealand Law Society CLE Seminar, May 2005, p 7.

[29] The issue of course does not so sharply present itself in the Cook Islands given that its Parliament is largely comprised of only two parties. However the nature of the argument that can be had in New Zealand in relation to whether:

- the Office is now more necessary because Parliament outside the executive is more clearly delineated, or
- less necessary because government by coalition has granted New Zealand's Parliament a new 'defining strength',

demonstrates that in a comparable jurisdiction the Office can be reasonably regarded as primarily a functional and political title, firmly outside the executive, with its formal legal powers and duties being few, minimal, and attendant rather than intrinsic.

[30] As noted by the Solicitor-General's submissions, s 16 of the Civil List Act also supports this view in respect of the Cook Islands inasmuch as it provides that the Office holder must give notice of his or her resignation to the Speaker and not to the Queen's representative (as the Prime Minister must), suggesting that the Office is regarded purely as a matter of internal parliamentary organisation (refer paragraph 37).

[31] For these reasons the plaintiff is in my view mistaken when he suggests in his submissions that the Office "*is always a creature of the Constitution or specific legislation*" (refer paragraph 4). Rather, on close examination the function and nature of the Office strongly suggest that it is not always such a creature, and that this Court should not grant it legal capabilities (and thus liabilities and an unintended status) beyond those expressly conferred on it by statute or some other action of Parliament's.

[32] Having reached this conclusion, I next consider whether Parliament or the Crown in respect of the Cook Islands might have clothed the Office with any such capabilities as might make the Crown liable for the actions of the Office holder, notwithstanding that the Office itself has no independent legal status.

Crown or Parliamentary liability if the Office cannot be liable directly

[33] My minute did not address the possibility that the Crown might be liable for the actions of the Office holder if the Office itself cannot. My provisional view was only that *if* the suit was intended to have been brought against the Crown then it should have named the Attorney-General as the Crown's representative (paragraph 15).

[34] Further to their agreement with my provisional view that the Office is not an independent legal entity, the submissions of the Solicitor-General devote little attention to whether the Crown might be liable notwithstanding that the Office cannot (paragraphs 14, 20 and 38).

[35] The submissions do however consider several possible means by which an appropriate defendant might be the relevant person in respect the Cook Islands' Legislative Service or the State Service departments (paragraphs 31 and 39).

[36] In respect of the Legislative Service, the Solicitor-General's submissions consider that the Speaker might be an appropriate defendant on the basis that he or she: (paragraphs 22 to 31)

(a) Can be delegated authority over the Legislative Service by the Prime Minister pursuant to s 4 of Legislative Service Act 1968-69;

(b) Has control of the Service pursuant to s 5 of that Act;

(c) Can in turn delegate any of his or her powers to any other officer of the legislative service pursuant to s 12 of that Act; and

(d) May have so delegated control over the hiring of staff for his or her office to the Leader of the Opposition.

[37] The submissions suggest the argument might be made out on the basis that Mr Marsters had the actual or ostensible authority of the Speaker to hire the plaintiff as a member of the Service (paragraph 31), and may be attractive inasmuch it would place responsibility and budgetary power for any person purportedly hired by the Office holder in the same place (paragraph 32).

[38] In respect of the State Service, the Solicitor-General's submissions consider that the plaintiff might claim to have been employed as a member of the State Services pursuant to the Public Service Act 1995-96 (paragraph 39). It would seem the argument might be made on the basis that:

(a) Pursuant to section 44 the Act defines the State Services as "all instruments of the Crown" in respect of the Government of the Cook Islands, "whether department, corporations, agencies, or other instruments which are not prescribed departments agencies or other instruments pursuant to section 42(d)";

(b) Pursuant to section 45 the Act further defines an "employing authority" as a "person or body designated by any enactment as the employing authority in respect of that service"; and

(c) The plaintiff might claim that Mr Marsters was an employing authority by virtue of his holding the Office where the Office was an "instrument of the Crown" which had not been prescribed by regulations issued under s 42(d).

[39] By his submissions in reply the plaintiff states that the Crown for the purposes of the Crown Proceedings Act will include the Queen's Representative in the Cook Islands, but also the "*variety of public bodies, departments, and their responsible Ministers*" of which the Crown is additionally comprised (paragraph 6). The submissions further suggest that Mr Marsters as the Officer holder contracted with the plaintiff as "agent" for the Crown (paragraph 10).

[40] To appropriately respond to these submissions it is necessary to give some brief consideration to the nature of the power and liability of the Crown and the Parliamentary departments.

[41] Historically, and prior to the transfer of executive power to English Parliament, "the Crown" referred to the King acting in his political capacity and actions of "the Crown" were his or the Queen's sometimes exercised through their ministers. It has been suggested that the accession of George I in 1714 marked the point at which a transfer of power occurred

such that Crown ministers, rather than being instruments of government, began to govern through the instrumentality of the Crown.[11]

[42] In modern times the term "the Crown" is typically used co-extensively with the terms "the Government", "the Executive" or "the administration", and is understood to include the Governor-General, the Executive Council, the Prime Minister, Ministers and Ministries.[12] The concept of the Crown is taken to include these bodies while, to all intents and purposes, *being* them. Crown liability in this sense may be considered vicarious.

[43] However the Crown is also liable for, while not being immediately comprised of, certain other departments, entities, and 'instruments of the Crown' to which it might devolve its powers and functions, including on occasion, state-owned enterprises and public authorities. Crown liability in this sense may be considered as arising by way of agency.

[44] Historically (prior to the early 19th century say) the concept of vicarious liability was unknown, and the issue of how to identify the personality of the public authority who might be derivatively liable for the actions of individuals operating within a government organisation (including perhaps the Crown) was difficult. The effect of the Crown Proceedings Act 1947 (UK) (on which the Crown Proceedings Act 1950 (NZ) was closely modelled) has been said not to have given the Crown a legal personality in the sense of its being able to be sued for its own acts, but rather as enabling the Crown to be sued for the actions of those it employed.[13]

[45] In determining whether this form of liability exists, the courts will consider the degree of control "the Crown" (in the narrower, vicarious sense) exercises over the organisation or entity in question, and the functions of that organisation vis a vis Crown functions.[14]

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[11] Refer Profe ssor Janet McClean, *The Crown and the Treaty of Waitangi*, Paper for Festschrift for Sir Kenneth Keith, NZ Institute of Public Law, August 2007, p 4 and the several authorities refereed to therein.

[12] Terrance Arn old QC, "*Litigating Against the Crown*", New Zealand Law Society Intensive, July 2002, p 4.

[13] Dr Andrew Butler, Geo ff McLay, *Liability of Public Authorities*, New Zealand Law Society Seminar, June 2004 ,p 7

[14] Refe r for example the judgment of Keith J in *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA)

[46] For the reasons outlined concerning the Office's lack of individual identity, there is presently no question of liability arising by virtue of the Office being a part of the Crown such as to give rise to vicarious liability. The issues I considered there in any event make it clear that had the Office any independent status, it would be as something more antithetical to "the Crown" in its strictest sense than part of it. Nor, because the plaintiff's claim is not one in tort, am I required to consider whether Mr Marsters might have been an "agent" of the Crown in a general sense pursuant to s 6 of the Crown Proceedings Act.

[47] As outlined above however, the Solicitor-General in his submissions considers several arguments by which the plaintiff might possibly claim to be an employee of the Legislative Service or State Service Departments. These arguments anticipate that Mr Marsters might have exercised ostensible authority to hire on behalf of the relevant department, possibly in the way envisaged by the plaintiff in his claims that Mr Marsters was acting as an "agent" of the Crown.

[48] Should a claim of the kind suggested be plausible, it would have two consequences: First, it would establish an appropriate public defendant (ie, the head of the relevant parliamentary services department) and second, it would require at least cursory consideration of whether the Crown was liable for the acts of that defendant as a Crown agent.

[49] I consider first whether there is any realistic chance of the plaintiff being able to claim that he was employed by one of the services in question.

[50] For the reasons which I outline below I find that the arguments proposed by the Solicitor-General in favour of the plaintiff concerning the latter's possible employment with the Legislative Service contain several flaws.

[51] The Solicitor-General's submissions note one flaw as being that "the numbers and designations of the appointees to the Legislative Service are dealt with and limited in the [Legislative Service] Act" (paragraph 33(b)). To expand upon this; any such claim by the plaintiff would face the further difficulties that:

(a) The plaintiff's employment was obviously not as one of the titled officers of the Service (being the "Clerk of the Legislative Assembly", "Clerk-Assistant", or "Editor of Debates", see ss 13 – 15 of the Act);

(b) The plaintiff's employment could not reasonably have been as one of the un-titled officers of the Service because such are defined in the appointing provision at s 16 as including "interpreters, translators, shorthand reporters, typists, secretaries.." etc, none of the categories of which match the plaintiff's job title; and in any event

(c) Appointment to an titled position could not be valid given that s 16 requires that appointment of titled officers be made by the Prime Minister "on the recommendation of the Speaker", making it impossible for such power of appointment to have been delegated to the Speaker pursuant to s 4 (and hence ostensibly to Mr Marsters); and further

(d) The Speaker's power of delegation pursuant to s 12 extends only to "the Clerk *or other officer of the Legislative Service*", when Mr Marsters was not an officer.

[52] There is a power available to the Speaker to hire "wage workers" to perform the Service's work pursuant to s 37 where the employment of salaried employees is not warranted. However the plaintiff's agreement with Mr Marsters makes it clear that the plaintiff was not to be a "waged worker".

[53] There is also a power of the Clerk to exercise the powers of the Speaker pursuant to s 6 during the Speaker's absence or inability. However any such exercise would still be subject to the restrictions listed above even if Mr Marsters were allegedly acting under the Clerk's ostensible authority rather than the Speaker's.

[54] In summary, it seems quite impossible that the plaintiff could claim that in hiring him Mr Marsters acted with any kind of authority to appoint members of the Legislative Service. In my view the Solicitor-General

somewhat understates the position in his submissions when he suggests that *"it may not be easy to find an intra vires appointment to have been made"* (paragraph 33(b)).

[55] I also find that the argument which might be made concerning the plaintiff's potential claim to be an employee of the State Service department pursuant to the Public Service Act is flawed and, as the Solicitor-General states, "highly doubtful" because:

(a) The Governor-General has the power pursuant to s 42(d) of the Act to pass regulations identifying departments, agencies or other instruments, the employees of which shall be part of the Public Service; but

(b) The Office is not named by the relevant regulations as one of those "other instruments"; and

(c) While the Act provides that the "departments, corporations, agencies, or other instruments" not named in 42(d) will be part of the State Services, section 44 of the Act provides that the "employing authority" in respect of a State Service shall mean the "person or body designated by any enactment as the employing authority in respect of that service" and if none such exists shall be "the Minister responsible for that service"; and

(d) There would seem no enactment specifying an employing authority for the State Service of the Office because there is no State Service of the Office, and in the absence of one nor is there a Minister responsible for the Office, and accordingly the plaintiff cannot have been validly employed by Mr Marsters as a member of the State Service because Mr Marsters could not have been an "employing authority".

[56] Further, it would seem difficult for the plaintiff to suggest he was being validly paid pursuant to the Civil Lists Acts (no matter how purportedly employed) because, pursuant to cl 13 and as noted in my minute (paragraph 6) that Act provides only for *"...the cost of official calls, type writers, secretarial staff, stationery and office supplies.."* (emphasis added)

which does not (as with s 16 of the Legislative Service Act) encompass the plaintiff's role.

[57] For these reasons, there does not appear to be any plausible argument that Mr Marsters could have been acting with the authority of the State Service or Legislative Service Departments in hiring the plaintiff.

[58] For the avoidance of doubt, even if one of the arguments outlined above was to succeed, the plaintiff's s tatus as an employee of the relevant service department would not establish Mr Marsters as an agent of the Crown or grant the plaintiff a claim against "the Crown" within the terms of s 3(2) of the Crown Proceeding Act.

[59] This is because, as the Solicitor-General notes, the effect of the Public Service and Legislative Service Acts is to 'seal off' the administrative staff from the executive branch of government, and to maintain the traditional separation of powers between the Executive and legislative branches (paragraphs 28 and 32).

[60] The services departments each have entirely distinct constitutional functions from that of the executive, and on an application of the 'function' and 'control' tests referred to above would not be considered organisations for which the Crown is liable on an agency basis. While no identical provision appears to exist in the Cook Islands, this exclusion is express in New Zealand; the Parliamentary Service there is declared not to be an instrument of the executive by s 6(2) of the Parliamentary Service Act 2000 (NZ). Somewhat analogously Article 1 of the Constitution of the Cook Islands states that a "crown servant" "*does not include a person who holds office by virtue of being a member of Parliament*". By extension, those who serve such members in the parliamentary services departments are even less likely to be included.

[61] These factors, together with the relevant principles of Crown liability as developed at common law since the mid 20th century and set out in *Commissioner of Inland Revenue v Medical Council of New Zealand* (supra), all lead to the same conclusion: even if an agency relationship could be established between Mr Marsters and the State or Legislative Service Departments, this would not give rise to the Crown liability

contended for by the Plaintiff. In any event, for the reasons outlined above, no such agency relationship is plausible on the present facts.

Personal liability of the Leader of the Opposition

[62] My minute of 25 September did not address the possibility that Mr Marsters might be personally liable as the Office holder.

[63] As outlined above, by his submissions the Solicitor-General submits that actions against officers of the Crown may not necessarily be actions against the Crown (paragraph 16) and that the present claim should be against Mr Marsters personally (paragraph 21).

[64] The plaintiff's submissions do not address this point.

[65] I have considered above the Crown's potential liability as it might arise either vicariously or as a matter of agency. If Mr Marsters' actions give rise to a legitimate claim yet there is no relationship between him the Crown on either of these bases, there appears to be no reason why Mr Marsters cannot be personally liable for that wrongdoing.

[66] As the Solicitor-General's submissions note, in *Bird v Auckland District Land Registrar* [1952] NZLR 463, Adams J noted that: (at 466)

> There are no doubt circumstances in which proceedings can be brought [against an officer of the Crown] personally in relation to his official acts or duties, but in such cases he is not sued as representing the Crown.
>
> I think, therefore, that, from the technical point of view, the present proceedings are not proceeding against the Crown, but are proceeding against the Minister personally.

[67] The issue of whether a Crown Minster can be personally liable in respect of actions taken in the course of his ministerial employment has been raised several times since the decision in *Bird v Auckland District Land Registrar* and would now appear beyond doubt.

[68] In *Meates v A-G* [1983] NZLR 308 (CA) the New Zealand Court of Appeal considered whether the Crown could be liable for the actions of the Prime Minister, the Minister of Trade and Industry, and the Minister of Finance in the tort of negligent misstatement. The Court held that it could, stating that (at 378 - 379):

> Ministers of the Crown do not as such carry on a business or profession, but they necessarily hold themselves out as having special knowledge and authority in the fields of their own portfolios... *there can be no doctrinal reason to start with an assumption that Ministers are automatically exempt from duties of care in such matters.* (emphasis added)

[69] On this basis the Crown was held to be liable following a finding that the ministers were personally liable for breach of duties each had assumed or owed to the plaintiff.

[70] In *Takaro Properties v Rowling* [1986] 1 NZLR 22 (HC & CA) the Court of Appeal considered whether the Crown could be liable for the negligence of the Minister of Finance in exercising a statutory power of decision pursuant to the Capital Issues (Overseas) Regulations 1965 and the Exchange Control Regulations 1965. Woodhouse P considered whether the nature of the decision could somehow exempt the Minister from owing a duty of care, before concluding: (at 59)

> *But certainly a Minister of the Crown will not be relieved of a common law duty of care by reason of status alone* nor will it be possible for him or any other authority to move himself outside the scope of such a duty by the mistaken process of applying extraneous policy considerations to a substantially practical and even routine decision. (emphasis added)

[71] On that basis the Crown was again held liable because the Minister had failed to properly exercise a power of decision in a way which had caused loss to the plaintiff.

[72] In *Equiticorp Industries Group Ltd v Hawkins* (14/12/93, Smellie J, HC Auckland, CP2455/89) the Court considered an application bought by the Crown to remove two ministers as parties in proceedings against the Crown. Those ministers were at the relevant time the Ministers of Finance, and Trade and Industry. The application sought to remove them on the basis that:

> Third Parties [ie, the Ministers] are not necessary because the Crown would be either directly or vicariously liable for their acts, and in any event would indemnify them.

[73] The Court declined to permit removal on the bases that the individuals' involvement as litigants was necessary, but also because it held that "*there can be no argument that [the plaintiff] is entitled to sue not only the Crown ... but also the individual servants of the Crown alleged to be guilty*

of the equitable Wrongdoing" citing the decisions of both *Meates v A-G* and *Takaro Properties v Rowling* in support.

[74] These decisions make it quite clear that where Crown liability arises for the actions of ministers, its liability might be *several*, with the ministers (while nonetheless very likely entitled to indemnity) remaining personally liable.

[75] This result follows from a standard application of the law of agency or vicarious liability, and the consequences seem apparent where – as I have found presently – the personal defendant is not sufficiently linked to the Crown as to give rise to Crown liability. That is, without the Crown as an 'employer' or 'principal' the would-be 'employee' or 'agent' is liable alone, and the claim can proceed against that person notwithstanding that they were conducting what were perhaps official duties.

[76] Concerning a suit against an Office holder in respect of his or her official duties specifically, I note such suits have recently been threatened or implemented elsewhere in the Commonwealth.

[77] For example, shortly prior to the Canadian Federal Election in 2006 the then Prime Minister Paul Martin threatened to bring libel proceedings against then Leader of the Opposition Stephen Harper for calling the former's Liberal Party of Canada a form of "organised crime". The matter was settled for $3.5million in February this year (although I note settlement was with the Canadian Liberal Party rather than with Mr Harper directly).[15]

[78] I also note that on 5 May 2009 the South Australian Premier Mike Rann announced that he had served a notice pursuant to s 14 of the Defamation Act 2005 (Aus) on the Liberal leader of the Opposition, Martin Hamilton-Smith, for comments made by Mr Hamilton-Smith on 28 April 2009.[16]

[79] It seems to me relevant that in both these instances liability was alleged (or threatened) on the basis of conduct of the Office holders in acting pursuant and a manner typical to their political roles. Absent some

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[15] The Toronto Star, "*Harper's Libel Lawsuit Settled*", 7 February 2009: www.thestar.com/News/Canada/article/583836

[16] Government of South Australia, "Response to Leader of the Opposition" press release, 8 May 2009: www.ministers.sa.gov.au/news.php?id=4748

defence available to Mr Marsters and not yet proposed there would seem to be no obstacle to his also being named personally for acts conducted by him while he was the Office holder.

Conclusion and Formal Orders

[80] Having considered it at length there does not seem any plausible basis upon which the Crown, the Office, the Parliamentary Services departments, or any other organ of the Government of the Cook Islands could be liable for the actions of Mr Marsters.

[81] Rather, provided the plaintiff is entitled to bring a suit at all, the appropriate defendant is Mr Marsters personally.

[82] For all of the foregoing reasons, the plaintiff's claim against the first defendant cannot succeed and is struck out. The plaintiff is entitled to continue against Mr Marsters if he so desires. All questions of costs are reserved.

[83] For the avoidance of doubt, this judgment does not deal with the question of whether Mr Marsters is entitled to any contribution or indemnity from his party, the Democratic Party.

[84] Costs on the strike out are reserved for further consideration.

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David Williams CJ

Dated: 4 September 2009