IN THE HIGH COURT
OF SOLOMON ISLANDS
Civil Jurisdiction

IN THE MATTER OF: An application pursuant to Sections 83 & 33(2) of the Constitution
AND
IN THE MATTER OF: Order 58 of the High Court Rules

BETWEEN:

SIR PETER KENILOREA, KBE PC

Applicant

AND:

THE GOVERNOR-GENERAL

Respondent

Kenneth Averre for the Applicant
Nathan Moshinsky Q.C. for the Respondent

At Honiara: 25 October, 4 November 2004

Brown J. The Honourable Speaker of Parliament, Sir Peter Kenilorea comes to this court seeking answers to Constitutional questions. (For an earlier application, see Kenilorea v-Attorney-General, cc 21/83 dated 11 April 1983, Coram Daly CJ)
These suits are of upmost importance in the development of Constitutional law in the Solomon Islands and I am pleased to have had the Solicitor-General and the Public Solicitor's assistance in time and argument which the case deserved. From the nature of the claim, it can be seen why I view these cases as of upmost importance for the Court has been asked to pronounce on actions of the Governor-General which directly flow from a request of the Prime Minister and which consequently intrude on the Executive function. It is not then, an enquiry into the validity or otherwise, of legislation (see Re Petition of M.T. Somare; supra) viewed against the Constitution, but in reality, a request to rule on the Prime Minister's manner of approach in seeking the appointment of a Minister without portfolio in this fashion with the question of concomitant powers in the Governor-General to appoint.

By originating summons under Order 58 of the High Court Rules, Sir Peter seeks;

> *"A declaration that the appointment by the Respondent Governor-General of the Honourable John Garo, MP as a Minister of the Crown and any advice given by the Honourable Allen Kemakeza precedent to that appointment in accordance with section 33(2) of the Constitution is null and void and of no effect."*

The Solicitor-General filed a conditional appearance to this summons, for he, by so doing, reserved the right to apply to the Court to set aside the originating summons on the ground that it disclosed no reasonable cause of action (O.27 r4) or that the applicant had not complied with Order 58 of the High Court Rules. Since that conditional appearance, the Public Solicitor had sought to withdraw his representation for reasons relating to his statutory powers, yet the respondent joins issue with the actions of the Public Solicitor in seeking to withdraw, and while that argument is yet to be heard, for the purposes of the proceedings before me today, the Public Solicitor has quite properly appeared. The nature of the Solicitor-Generals motion to strike out the proceedings under O.58 go to such a defect in the originating summons which may justify this court setting aside such process

without the respondent having to submit to the jurisdiction of the court. For that is the nature of "conditional appearance" and as such, this court may call upon the attorney who issued process on the applicants behalf (the Public Solicitor), to assist the court in determining that threshold question. Mr. Averre has properly deigned to aid the court as an officer of the court so any argument over the continued representation of the applicant, in relation to the cause proper, has not yet arisen.

The Solicitor-General raises as the preliminary issue, (anticipated before trial pursuant to O.27 r2) that of "standing" of the applicant to bring the proceedings and says that absence of "standing" or *locus standi* is consequently fatal to the continuation of these proceedings. This applicant then has "no reasonable cause of action" for that reason alone.

If the Court should find that the applicant is entitled to be heard, Mr. Moshinsky will argue that this appointment by the Governor-General on the advice of the Prime Minister of one John Garo as a Minister of State without portfolio is an appointment where no discretion subsists in the Governor-General to refuse the Prime Minister and consequently such appointment is non-justiciable. In both instances, the Solicitor-General says no reasonable cause of action will justify this court striking out the summons. Mr. Averre has not had a proper opportunity to address the latter question for he is somewhat constricted by his inability to seek instructions for he has sought to withdraw as counsel representing the applicant, although Sir Peter is before the court asking for an order under s. 92(4)(b) of the Constitution directing the Public Solicitor to provide aid in these circumstances. In an endeavour to progress the proceedings, I allowed argument on the pure question of *standing* in this particular applicant as a threshold question. Mr. Averre was able to argue that threshold question for the reasons I have given.

The issue of *locus standi*

By virtue of O.27 r4 this court *"may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action."*

Mr. Moshinsky correctly points to O 1r.1 (interpretation) where the applicant and the summons fall to be treated in terms of the Rules so that this court may dismiss or stay the action if the court finds, as Mr. Moshinsky says, it discloses no reasonable cause of action. He does not have a cause because "he is not a *person claiming to be interested under a ... written instrument* within the meaning of O 58 r.1 of the Rules and is not a *person alleging that any provision of this Constitution ..has been contravened and that his interests are being or are likely to be affected by such contravention..* within the meaning of s. 83(1) of the Constitution." The material of the applicant sworn and filed in support, Mr. Moshinsky says, "does not disclose any basis for concluding that if there has been a contravention of the Constitution as alleged by him, his interests have been or are likely to be affected by such contravention.

Now his argument on standing relies to a large extent on United Kingdom cases, for the Solicitor-General says the applicant has failed to meet the common law standard for *locus standi* incorporated by the provisions of O.58 of the Rules. By virtue of Schedule 3 to the Constitution, s.2, the principles of common law and equity interpreted by the courts of the United Kingdom were incorporated into the laws of the Solomon Islands on Independence on the 7 July 1978 and that the effect of that adopted law was to exclude this applicant from prosecuting these proceedings. By the operative provisions of both O.58 rr.1 & 2, *"any person claiming to be interested"* or claiming *"any legal or equitable right"* have fallen to be considered under the law of *locus standi* and in this case, the claim properly to be

considered as one involving "public rights", necessarily excludes this applicants right to come to court in this fashion. Mr. Moshinsky relies on the decisions of Boyce v- Paddington Borough Council (1903) 1 Ch 109 and Gouriet v- Union of Post Office Workers (1978) AC 435.

Mr. Averre accepts the issue arises, but says the applicant has standing for the reasons enumerated by Daly CJ in that earlier case involving Sir Peter, *Kenilorea v-Attorney-General* (CC 21 of 1983 (11 Apr 1983)).

The earlier decision by the Chief Justice in this Court *held;*

"As the power in Solomon Islands is, by virtue the preamble to the Constitution, vested in the people of Solomon Islands the words in section 83 requiring an applicant to show that his interests "are being or are likely to be affected" are to be given a wide interpretation (Judgment of Kapi J in Supreme Court reference No. 4 of 1980 quoted with approval). The Applicant, as a citizen, may have a grievance if thee was a contravention of the Constitution and in this particular case the Applicant could establish that his interests as such were being affected. He therefore had locus standi to bring the application."

Mr. Moshinski while acknowledging the weight of that decision, says it should not be followed for the Chief Justice "failed to apply the qualification to the general view of standing in that decision (of the Supreme Court of PNG), namely that a court should have a discretion to refuse standing where the applicant has not exhausted other methods of achieving the same thing. In the present case, the applicant should have sought the Attorney-General's fiat to commence proceedings by way of a relator action." (Relator actions are actions to compel the performance of a public duty, to restrain interference with a public right, or as in this case, declare the law as it affects the Governor-General; the Attorney-General is a necessary party) (See *Attorney-General (on the relation of McWhirter) v-Independent* Broadcasting Authority (1973) 1 AllE.R. 689 per Lord Denning MR at 697 and *Halsbury* 3rd edit. Vol 30 para 568.570).

Mr. Averre says I should follow the reasoning of Daly CJ and accept that again Sir Peter Kenilorea has *standing* for as Speaker of the House, he is clothed with similar persona as Sir Michael Somare when Sir Michael was successful with his challenge in Papua New Guinea. Chief Justice Daly quotes extensively from Kapi J's (as he then was) judgment in S.C.R. No.4 of 1980; Petition of M.T. Somare (1981) PNGLR 265 at 295. There Sir Mari Kapi says

"Having regard to all the matters I have discussed, I would formulate a rule that would draw a line between those who can and those who cannot have standing. At the same time, the modern view on locus standi is not restrictive as is the common law. It must have a much wider conception as has been found in the Canadian cases dealing with constitutional cases."

and later

"As to what is sufficient interest, I would adopt the objective test laid down by Lord Denning in R. v. Inland Revenue Commissioners; Ex parte National Federation of Self-Employed and Small Businesses Ltd. (42). It is not possible to lay down a workable definition for all cases because each case is different. I would leave it to courts to develop the application of the rule in individual cases.

Applying this to the present case I find that Mr. Somare would have standing. As a member of the Parliament he belongs to the governmental body which has been invested with the power of law-making by the Constitution. In relation to the issue in this case, Mr. Somare has raised, amongst other things, that the law-making body has not complied with certain provisions of the Constitution in passing the Defence Force (Presence Abroad) Act 1980."

Chief Justice Daly accepted the majority view (Kidu CJ, Kearney DCJ, Kapi and Miles JJ) that *standing* was inextricably linked to the Constitutional basis of power belonging to the people (see Preamble to PNG Constitution) and that basis was identical to the Preamble to the Constitution of the Solomon Islands which states

"All power in Solomon Islands belongs to its people and is exercised on their behalf by the legislature, the executive and the judiciary established by this Constitution"

Daly CJ distinguished Gouriet's Case; *"where it is said that the rights of the public are vested in the Crown. In Solomon Islands the power is vested in the people. Her Majesty is the Head of State. For this reason alone the authorities dealing with relator actions and the powers of the Attorney-General as an officer for the Crown are not, in my opinion, strictly applicable in Solomon Islands"* (Daly CJ at 72, 73)

In Papua New Guinea the issue of the power of the Attorney-General as an officer of the Crown and repository of the public interest persona was addressed by the Chief Justice, the late Sir Buri Kidu;

"As there is no Attorney-General in Papua New Guinea it cannot be said that he or she is the guardian of the public interest" (S.C.R. 4 of 1980 ibidem, 269)

and later

> *"If the existing common law rules relating to locus standi in public interest suits are applied, Mr. Somare lacks the requisite standing. There are numerous cases asserting these (common law) rules. In Gouriet v-Union of Post Office workers, per Lord Wilberforce at 477:*
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> *"A relator action-a type of action which has existed from the earliest times-is one in which the Attorney-General, on the relation of individuals (who may include local authorities or companies) brings an action to assert a public right. It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the attorney-General as representing the public. In terms of constitutional law, the right of the public are vested in the crown, and the Attorney-General enforces them as an officer of the Crown. And just as the attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out. The rest of the Law Lords in that case reiterated the established rules of locus standi in public right or interest cases. These rules are based on different constitutional bases. In England for instance the courts have no power to rule an Act of the Imperial Parliament unconstitutional. Such a case as the one before this court could never arise in England unless the law is changed by statute.*
>
> (ibidem, at 270)
>
> Kidu CJ,

In the Solomon Islands Constitution provision is made for the Office of the Attorney-General

> Constitution s.42
>
> *"(1) There shall be an Attorney-General whose office shall be a public office and who shall be the principal legal adviser to the Government.*
>
> *(2) The Attorney-General shall be appointed by the Judicial and Legal Service Commission acting in accordance with the advice of the Prime Minister.*

(3) No person shall be qualified to hold the office of Attorney-General unless he is entitled to practise in Solomon Islands as an advocate or as a barrister and solicitor.

(4) If the Minister responsible for justice is not a person entitled to practise in Solomon Islands as an advocate or as a barrister and solicitor, the person holding the office of Attorney-General shall be entitled to take part in the proceedings of Parliament as adviser to the Government.

Provided that he shall not be entitled to vote in Parliament or in any election for the office of Prime Minister."

For it is this Constitutional provision which is at variance with the Constitution of Papua New Guinea and which the Solicitor-General says, requires me to accept that, consistent with Schedule 3 to the Constitution, the principles and rules of the common law and equity shall so have effect here and so common law rules relating to *locus standi* continue to have application and effect in the Solomon Islands. (For if they do, I accept Sir Buri Kidu's view and would opine that this applicant must pursue a relator action through the Attorney-General).

This is an attractive argument, for Sched 3(2) would clearly bring back, as it were the thread of common law running through the United Kingdom cases mentioned earlier and developed by the cases set out in Sykes, Lanham Tracey, Esser *"General principles of Administrative Law"* 4th edit. pp 312-318 (referred to me by Mr. Moshinsky) so that as I have said, a relator action by the Attorney-General would be the appropriate course.

But the argument and reliance on the law developed by those more recent overseas cases, suffers from the absence of a direct connection with the Constitutional provisions which affect the issue here, provisions which but seldom come before this court for consideration. It is for that reason that the Papua New Guinea Supreme Courts references to the Canadian case law is of assistance, for that country has as Miles J said *"in Canada the Supreme Court has rid that country of the common law limitations as to locus standi, at least in constitutional matters."*

(ibidem per Miles J; 307)

But of course, acceptance of common law authority would leave this applicant without standing to bring his complaint although as I say, common law would provide an alternate remedy, by relator action if the Attorney-General was so minded. At once the predicament is seen, for should the Attorney refuse his fiat, the applicants' complaint must dissipate for want of a hearing.

Daly CJ, having recounted the reasoning of the majority in *SCR 4 of 1980*, points to the role played by the Attorney under our Constitution s.42 as illustrating the impossibility of the Attorney as a public officer (appointed on advice of the Prime Minister)*"to be the originator of public interest actions and principal legal adviser to the Government at one and the same time"* (ibidem per Daly CJ at 73).
The Chief Justice rightly recognises the real possibility for conflict if such a role in a relator action was to be seriously envisaged for the Attorney-General. His Lordship went on to support his finding of standing on a judicial discretion which he says is to be found on a reading of s.83(1),(2) of the Constitution (jurisdiction of High Court in constitutional questions). *"I say "may have a grievance" and "general standing" because it remains within the discretion of the court to decide in an individual case whether the applicant has a genuine grievance and on this basis whether his interests are in fact being affected or likely to be*

affected, this is the import of the use of those words in s.83(1),(2) of the Constitution" (Daly CJ at 73).

With respect I would prefer to base any such discretion on other grounds for the proviso to section 83 says;

S 83(2) .....

"Provided that the High Court shall not make a declaration in pursuance of the jurisdiction conferred by this subsection unless it is satisfied that the interests of the person by whom the application under the preceding subsection is made or, in the case of other proceedings before the Court, a party to those proceedings are being or are likely to be affected."

Where this applicant through his attorney is at pains to point out that he has nothing to gain personally, from his application, then the "public interest" nature of the application is apparent and the proviso to subsect.(2) would appear to strike down this application on the same reasoning as that which criticises as a basis, the common law principles found in the United Kingdom cases.

The Chief Justice's reliance on the reasoning of Kapi and Miles JJ, does afford this court a way around the apparent impasse of the proviso to s.83(2).
Miles J alludes to an article by Professor Kenneth E. Scott in (1973) 86 Harvard Law Review 645 at 651, where the Professor says, ***"the plaintiff attacked the performance of acts which are unique to government or for which the nearest private analogy is not a legal wrong to anybody."***

How apposite that quoted statement is in this case for it is the appointment by the Governor-General of the Hon. John Garo as a Minister on advice of the Prime Minister, which is the act or acts complained of, acts clearly unique to government. So to attempt to craft these common law cases, as analogous to constitutional questions involving public interest suits is taking the analogy too far altogether.

Miles J quotes Professor Scott

"Professor Scott proceeds to demonstrate the circularity of discussing standing in terms of a legally protected interest in such a class of case and concludes at p.652 that;

-...in this category of cases the courts are necessarily making a decision on their own... with neither private law analogies nor any express statutory authorization as guides."

(Miles J ibidem at 308)

So there is, to my mind, a better basis for any discretion in this court to find *standing* in the absence of clear express statutory provision and the inappropriateness of the common law analogies (which take no account of our Constitutional framework nor the circuitous effect of attempting to apply them in public interest suits). Section.83(1) and (2) should not be read down so as to extinguish this applicants right to be heard, for to the extent that common law is inconsistent with this Constitution, it shall not have effect as part of the Constitution. Where the Constitution explicitly states and declares that *(a) all power in Solomon Islands belongs to its people and is exercised on their behalf by .... The judiciary;* there is clear judicial discretion to exercise jurisdiction under s.83 in constitutional questions (unaffected by circuitous arguments based on common law issues inapplicable to the circumstances of our constitutional imperative to empower the people of the Solomon Islands,) so as not to circumscribe such power in the absence of statutory or common law provisions. The House of Lords clearly recognises and distinguishes cases where constitutional validity arises (<u>in standing questions</u>) for as Miles J said;

"It is significant that in Gouriet v-Union of Post Office workers an important decision of the House of Lands confirming the necessity of the involvement of the Attorney-General in

public interest suits, in England, the Canadian & American decision (which had been acted with approval by Lord Denning MR in the court of Appeal) were emphatically rejected as "unimpressive support" ***precisely on the ground that they raised questions of constitutional validity which had no application in England."***

The obverse of the Lords comments appropriate here, then, is that for the very reason of the constitutional imperative, common law rules and principles affecting *standing* in public interest matters shall not have effect as part of the law of the Solomon Islands. The possibility of a relator action, then, does not arise were common law principles to be excluded in public interest suits and Mr. Moshinsky's argument about the availability of other methods of achieving the applicants aim must fall.

For the applicant is the Speaker of Parliament. To deny the Speaker standing on an issue raised in this application, where he seeks this courts opinion on an issue directly relating to the Constitution, would be in my view, to decline to exercise a proper discretion incumbent on the courts under s.83 once the common law principles of standing in public interest matters are ousted.

Where this court is called upon to exercise its discretion in this fashion, who is better suited to seek the answer to this Constitutional question than the Speaker, who presides at any sitting of Parliament.

For these reasons I find that the applicant has standing to bring this suit. Mr. Averre faces the applicant's claim to keep him as his attorney despite an impediment to that course in the statutory framework of the Public Solicitors Office. Be that as it may, this court has power under s. 92(4)(b) of the Constitution to direct representation. This is a matter where clearly the Attorney-General should not represent the applicant for his responsibility is to the Government. The question raised in these proceedings is one of public importance. In the exercise of a discretion found in s. 92, I direct further representation by the Public Solicitor in this case.

Counsel for the applicant: The Public Solicitor
Counsel for the respondent: The Solicitor-General