



## Supreme Court New South Wales

<b>Medium Neutral Citation:</b>	<b>Kevin Prakoonheang as Public Officer of the Wat Buddhalavarn Incorporated v the Wat Buddhalavarn Incorporated [2018] NSWSC 1004</b>
<b>Hearing dates:</b>	25 June 2018
<b>Date of orders:</b>	29 June 2018
<b>Decision date:</b>	29 June 2018
<b>Jurisdiction:</b>	Equity - Expedition List
<b>Before:</b>	Sackar J
<b>Decision:</b>	Orders Made
<b>Catchwords:</b>	ASSOCIATIONS – interpretation of constitution of organisation – particular issue ordered pursuant to UCPR rule 28.2 – members and election of Management Committee
<b>Legislation Cited:</b>	Associations Incorporation Act 2009 (NSW) Universal Civil Procedure Rules 2005 (NSW)
<b>Cases Cited:</b>	Donaldson v Natural Springs Australia Ltd [2015] FCA 498 Faehrmann v Van Vucht [2018] NSWSC 397 HNA Irish Nominee Ltd v Kinghorn (2010) 78 ACSR 553; [2010] FCAFC 57 Kevin as the Public Officer of the Wat Buddhalavarn Incorporated Prakoonheang v Thonsoun Phanthaoudomm, Abbot of the Wat Buddhalavarn Monastery [2016] NSWSC 305 Prakoonheang v Wat Buddhalavarn Inc [2017] NSWSC 1776
<b>Texts Cited:</b>	n/a
<b>Category:</b>	Procedural and other rulings
<b>Parties:</b>	Kevin Prakoonheang as Public Officer of the Wat Buddhalavarn Incorporated (Plaintiff/Applicant) The Wat Buddhalavarn Incorporated (6th Defendant/Respondent)
<b>Representation:</b>	

Counsel:  
J Jobson (Plaintiff/Applicant)  
M Condon SC (6th Defendant/Respondent)

Solicitors:  
Goldsmiths Lawyers (Plaintiff/Applicant)  
Liberty Lawyers (6th Defendant/Respondent)

**File Number(s):** 2013/204918

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## JUDGMENT

### Proceedings

- 1 These proceedings concern the governance of the Wat Buddhalavarn Incorporated (**the Organisation**) which is the Fourth Defendant in proceedings recently before Parker J (see for example *Prakoonheang v Wat Buddhalavarn Inc* [2017] NSWSC 1776).
- 2 The dispute in this proceeding is between the Plaintiff Kevin Prakoonheang as Public Officer of the Wat Buddhalavarn Incorporated and the Sixth Defendant the Venerable Khamphaeng Saenpraseut.
- 3 On 21 December 2017 the Sixth Defendant filed a Cross-Claim (pursuant to a direction made by Parker J). On 19 April 2018 Parker J ordered pursuant to the *Universal Civil Procedure Rules 2005* (NSW) (**UCPR**) rule 28.2 that the relief claimed at prayer 4 of the Cross-Claim be determined separately and in advance of all other issues.
- 4 The issue concerning prayer 4 came before me on 25 June 2018. I indicated at the conclusion of argument my answers to the questions posed and invited Counsel to prepare short minutes to reflect these answers. I indicated I would provide reasons. Annexed hereto marked A and B are the questions, my answers and Orders disposing of the balance of this aspect of the proceeding. What follows are my reasons.

### Background Facts

- 5 The Organisation was incorporated on 17 August 1987 and its Constitution was filed with the Commissioner for Fair Trading.
- 6 The Organisation owns land at Wedderburn on which is located the Wat Buddhalavarn Forest Monastery and Meditation Centre. The Monastery operates in accordance with Buddhist rites and those who support it are principally members of the Laotian community in Australia.
- 7 On 24 November 1988 the Constitution was amended (**the 1988 Constitution**). This is an issue to which I will return.

Proceedings were commenced in 2013 as a result of disputes which had arisen between various factions of the clerical and lay communities who make use of the Monastery about the governance of the Organisation. In particular the disputes have centred on the rules which apply to membership of the Association and the election of the management committee which controls the activities of the Organisation as a corporate entity (**the Management Committee**).

- 9 The background to these disputes is provided for example by Slattery J in *Kevin as the Public Officer of the Wat Buddhalavarn Incorporated Prakoonheang v Thonsoun Phantha-oudomm, Abbot of the Wat Buddhalavarn Monastery* [2016] NSWSC 305.
- 10 On 8 March 2017 the Plaintiff filed a Notice of Motion seeking inter alia the appointment of a receiver to the Organisation. On 15 December 2017 Parker J ordered that a receiver be appointed to the Organisation (*Prakoonheang v Wat Buddhalavarn Inc* [2017] NSWSC 1776) and on 21 December 2017 the Sixth Defendant filed a Cross-Claim.
- 11 The receiver's first task was to determine the lay membership of the Association and did so on 29 March 2018. The next task for the receiver will be to convene a general meeting to elect a Management Committee. Before that can be done the controversy relating to the provisions of the 1988 Constitution concerning its make-up and election per prayer 4 of the Cross-Claim must be resolved.
- 12 The prayer 4 of the relief claimed by the Sixth Defendant provides:
4. A declaration that, on its proper construction, the fourth defendant's Constitution lodged with the Office of Fair Trading in 1987, as amended in 1988 (the "Constitution") provides that:
    - a. The Management Committee of the fourth defendant consists of:
      - i. a President, Secretary and Treasurer and two monastic members of the Association (collectively the "Office Bearers"); and
      - ii. nine (9) lay members.
    - b. The President, Secretary and Treasurer are elected in accordance with paragraphs (e)-(g) below.
    - c. The Office Bearers are selected by the monastic members of the fourth defendant at the annual general meeting.
    - d. The nine (9) lay members of the Management Committee are selected by the Office Bearers, as their assistants.
    - e. Any Buddhist Monk is eligible to run for the offices of President, Secretary and Treasurer of the Association upon submitting an application in writing to the Management Committee at least fourteen (14) days before the date of the annual general meeting.
    - f. If no applications for the office of President, Secretary and Treasurer are received by the Management Committee in writing at least fourteen (14) days before the date of the annual general meeting, the Management Committee shall submit at least four (4) names and not more than five (5) names of possible candidates to contest the election of President, Secretary and Treasurer at the annual general meeting.
    - g. If more than one candidate is standing for election as President, Secretary or Treasurer, the person with the majority of votes of the monastic members present at the annual general meeting shall be deemed to be elected to that position.

## The 1988 Constitution

13 The key provisions of the 1988 Constitution as amended include clauses 9, 10 and 12:

### 9. Management

(a) The management of Wat Buddhalavarn Incorporated shall be vested in a Management Committee consisting of office bearers and two members who are monastic members and (9) nine other lay-person members as their assistants. No members of the Management Committee shall be appointed to any salaried office of Wat Buddhalavarn Incorporated paid by fees and no remuneration or other benefit in money or money's worth shall be given by Wat Buddhalavarn Incorporated to any member of the Management Committee except repayment of out-of-pocket expenses;

(b) Each member of the Management Committee shall be elected annually and shall, subject to these rules, hold office until the conclusion of the annual general meeting following the day of the member's election, but is eligible for re-election.

(c) Wat Buddhalavarn Incorporated shall be an autonomous body and the sole responsibility for the administration of its affairs rest with the members and the Management Committee;

(d) The sub-committee members of lay persons shall be appointed by the Management Committee to assist them in different offices as required.

### 10. Office bearers

(a) The office bearers shall consist of three (3) monks, being a President, a Secretary, a Treasurer and two (2) other monastic members as shall be decided by the monastic members of Wat Buddhalavarn Incorporated at the annual general meeting.

14 Clause 12 of the 1988 Constitution provides:

### 12. Election of office bearers

(a) The President, the Secretary, and the Treasurer and two (2) officers, beings [sic] members of monastic community (Sangha) shall be chosen by the members of the Sangha of Wat Buddhalavarn Incorporated;

(b) Any Buddhist Monk shall be eligible to run for the offices of President, Secretary, and Treasurer of Wat Buddhalavarn Incorporated upon submitting an application in writing to the Management Committee at least fourteen (14) days before the date of the annual general meeting;

(c) If no application for the offices of President, Secretary and Treasurer are received by the Management Committee, by the closing date, the Management Committee shall submit at least (4) names and not more than five names of possible candidates to contest the election of office bearers at the annual general meeting of Wat Buddhalavarn Incorporated;

(d) If more than one candidate is standing for election for President, Secretary or Treasurer, the person with the majority of votes of the members present at the annual general meeting shall be deemed to be elected to that position;

(e) Should the number of general Management Committee members nominated exceed five (5), voting for the Management Committee members shall be decided by a show of hands;

(f) Prior to the election of office bearers, members of the new Management Committee and auditor, the retiring Management Committee shall present the annual report and an audited financial statement;

(g) At the conclusion of the annual general meeting, the retiring Management Committee shall resign and hand control of all books and properties to the incoming Management Committee.

## Validity of the 1988 Constitution

I note that Counsel for the Plaintiff submitted that at first instance the 1988 Constitution as amended was invalid.

16 The original Constitution of the Organisation was filed on 17 August 1987. The Constitution was amended on 24 November 1988 as apparent in the Annexure A to the 1988 Constitution which sets out a summary of the amendments.

17 It was this 1988 amendment that the Plaintiff said was invalid.

18 The Sixth Defendant submitted that the 1988 Constitution was valid and denied that the Plaintiff should be able to raise its alleged invalidity. In support of this argument the Sixth Defendant adverted to a number of important considerations.

19 Firstly the Further Amended Statement of Claim filed on 25 July 2016 on behalf of the Plaintiff alleged at paragraph 3:

3. At all material times, the fourth defendant had, and was bound by the following:

A. A Constitution signed in June 1987 (“the constitution”); and

B. Amendments to the Constitution made on about 24 November 1988 (“the 1988 amendments”).

20 Secondly the Defence filed on 5 August 2016 on behalf of the First Defendant (the Venerable Thonsoun Pantha-oudom (as spelt in that document)) which expressly admitted paragraph 3 of the Further Amended Statement of Claim:

3. The first defendant admits the matters alleged in paragraph 3 of the FASOC.

21 Thirdly the decision of Slattery J in *Kevin as the Public Officer of the Wat Buddhavarn Incorporated Prakoonehang v Thonsoun Phantha-oudomm, Abbot of the Wat Buddhavarn Monastery* [2016] NSWSC 305 concerning the disputes of these proceedings (at [34] and [37]):

As indicated earlier in these reasons, in 1987 the plaintiff, the first defendant and several others founded the Wat. On 17 August 1987 the Wat was incorporated and its Constitution was filed with the office of the Commissioner for Fair Trading. The Constitution was amended on 24 November 1988 (“the 1988 Constitution”).

...

At the time these proceedings first came on for directions before me, the parties disagreed which of these two constitutions represented the current Constitution of the Wat. The issue as to the prevailing Constitution has now been resolved. Both parties are now agreed that the failure to ensure the proper registration of the 1996 Constitution in accordance with the *1988 Act* means that the 1988 Constitution has remained validly in force.

22 The Plaintiff notwithstanding these factors sought leave to re-open the issue of the validity of the 1988 Constitution, and to withdraw prior admissions that the 1988 Constitution was invalid.

23 I denied leave as the conduct of the relevant parties clearly demonstrates that they have resolved by agreement or admission at a prior point the validity of the 1988 Constitution and the Plaintiff should not now be allowed to agitate to the contrary (T9/16-T10/2).

## Plaintiff’s submissions

### *Members of the Management Committee*

24 The Plaintiff submits the Management Committee is defined by clause 9(a) to consist of office bearers and seven others (Submissions [3]).

### *Election of the Management Committee*

25 The Plaintiff submits that the Management Committee's lay members cannot be appointed without an election, and must be elected by the members of the Organisation at an Annual General Meeting (Submissions [14]-[19]).

26 The Plaintiff argues that the Sixth Defendant's construction of the 1988 Constitution offers the monastic members complete control over the appointment of all individuals to the Management Committee without elections. The Plaintiff further submits all members (including lay members) of the Management Committee should be elected in the ordinary manner at an Annual General Meeting and no appointments to the Management Committee should occur without elections (Submissions [20]-[21]) (T21/1-5).

### **Sixth Defendant's submissions**

#### *Members of the Management Committee*

27 The Sixth Defendant highlights how clauses 9(a) and 10(a) potentially define the Management Committee differently. The Sixth Defendant suggests that the correct interpretation of the 1988 Constitution is that the Management Committee consists of (Submissions [15]-[22]):

- (1) President, Secretary, Treasurer and two other monastic members (the five monastic members); and
- (2) Nine lay members.

28 The Sixth Defendant argues this reading of the 1988 Constitution, whilst acknowledging an inconsistency between clauses 9(a) and 10(a), is correct and bolstered when read in the context of clause 12.

29 The Sixth Defendant further submits that the office bearers of the Management Committee comprise only three people: President, Secretary and Treasurer (T14/11-15). The lay members of the Management Committee also consist of a subclass within the Management Committee holding a more qualified position than the monks (T29/32-42).

#### *Election of the Management Committee*

30 The Sixth Defendant submits with respect to the process of electing the Management Committee (in accordance with clause 12) (Submissions [23]-[29]):

- (1) A nomination to the Management Committee must specify the particular office to be contested;
- (2) The nomination process contemplated by clause 12(c) produces candidates for only those offices to which no application has been received;

- (3) An election is required for a particular office or position only if more than one candidate stands for the office or position;
- (4) If at least two persons do not stand for nomination as committee members, the members are to be chosen by monastic members at the general meeting; and
- (5) The electors are the members of the Organisation.

31 The Sixth Defendant submits that the nine lay members are appointed by the office holders as their assistants (that is, assistants to the five monastic members). The lay members are not elected (Submissions [30]-[31]).

## Legal principles

32 Section 26(1) of the *Associations Incorporation Act 2009* (NSW) makes it clear that an association's constitution binds the association and its members to the same extent as if it were a contract between them.

33 In *Faehrmann v Van Vucht* [2018] NSWSC 397 Ward CJ in Eq observed (at [78]):

Furthermore, although the constitution operates (pursuant to s 26(1) of the 2009 Act) as a contract between members of the incorporated association (or is the document by which members of the unincorporated association agree to be bound, as the case may be), its proper construction should be determined by reference to its contents as a whole (not by reference to what someone – the then Membership Officer - may have intended at a meeting held to discuss proposed amendments to the constitution).

34 In *HNA Irish Nominee Ltd v Kinghorn* (2010) 78 ACSR 553; [2010] FCAFC 57 Keane CJ (as His Honour then was), Jacobson and Rares JJ said (at [42])

A corporate constitution has the effect of a contract between the company and each of its members, the company and each director and secretary, as well as the members amongst themselves (s 140(1) of the Act). The range of surrounding circumstances available as aids to the construction of such a contract is perhaps more limited than in other cases. This is because constitutions, and replaceable rules, can be amended at different times and in different circumstances. In addition, the members who are the incorporators at particular times may change. These factors suggest that ordinarily primacy must be given to the objective intention discernable from the language in which the constitution is expressed rather than to other features of the surrounding matrix of fact in which its provisions may have been made.

35 In *Donaldson v Natural Springs Australia Ltd* [2015] FCA 498 Beach J said (at [148]):

There is little doubt (*Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2006] FCAFC 144; (2006) 156 FCR 1 (*Lion Nathan*) at [28], [29], [46] to [59], [97] to [102], [122] to [124], [232], [233], [238], [244], [251] to [257] and *Oil Basins Ltd v Bass Strait Oil Company* (2012) 297 ALR 261; [2012] FCA 1122 at [32]) that:

- the Constitution should be read and construed as a whole;
- *general* principles of construction of commercial contracts (see generally *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 at [35]) are applicable to the Constitution; more particularly, the commerciality of a particular construction may tip the balance in its favour where it is implausible that the parties could be taken to have intended otherwise;
- the Constitution should not be construed narrowly or pedantically;
- words used should usually be given their natural and ordinary meaning;
- a construction of a provision which gives a congruent operation of the various applicable provisions of the Constitution should be preferred to another construction which does not; and

- extrinsic evidence *may* be adduced as an aid to construction, subject to a qualification that I will address in a moment, but only in the *limited* manner envisaged in *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 at [22] and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [35] to [41].

## Consideration

- 36 I will address the questions in due course but it is helpful to discuss a number of provisions of the 1988 Constitution which in my view should not only work together harmoniously but be so construed.
- 37 As a starting point it is important to note that very many of the objects of the Organisation are religious in nature. It is true that the expanded objects which came about as a result of the 1988 Constitution expand the objects well into what might be described as commercially orientated objects. Nothing turns on these developments.
- 38 The primary focus of the Organisation is still that of a Buddhist temple and various activities associated with that.
- 39 Very many of the questions the answers to which are sought are concerned with the way in which the Management Committee of the Organisation comes into being and to what extent the 1988 Constitution provides a regime different from that in the prior Constitution.
- 40 Notwithstanding what changes may or may not have occurred as a result of the 1988 Constitution the Management Committee is clearly as the name would imply the group of people tasked with the day to day management of the Organisation. For example the Management Committee resolves issues of membership, discipline, fees and subscriptions to name some obvious but important functions (clauses 4, 6 and 8 for example).
- 41 The particular provisions which have been the subject of the debate before the Court go to the very heart of how the Management Committee comes into existence and who comprises the membership.
- 42 Pursuant to the 1988 Constitution, clause 9(a) the management of the Organisation is to be vested in the Management Committee. It is to consist of office bearers and two members who are monastic members and 9 other lay persons. The lay persons are referred to in clause 9(a) as “their assistants”. Clause 9(d) makes reference to the sub-committee of lay members and to them being appointed by the Management Committee to assist them in different offices as required.
- 43 Office bearers (clause 10) are effectively defined as consisting of three monks being a President, a Secretary, a Treasurer and two other monastic members as shall be decided by the monastic members at the Annual General Meeting.
- 44 Before proceeding further the better construction of these two provisions leads to the following conclusions in my view.
- 45



First the Management Committee is ultimately to comprise five persons each of whom is a monastic member of the Organisation and nine lay persons. Of the five monastic members, three hold a particular office and hence are office bearers namely the President, the Secretary and the Treasurer. The monastic members appoint the lay persons pursuant to clause 9(d). Again the better view is that the five monastic members for a short time and for the purpose only of appointing the nine lay members comprise the Management Committee.

- 46 However once the lay persons are appointed they together with the five monastic members comprise the Management Committee for the various purposes assigned to that body pursuant to the Constitution. The use of the term “assistants” in 9(a) and “sub-committee” in 9(d) in my view is not intended to relegate the lay persons to a different class of Management Committee member.
- 47 The better view is that this is a reference more to the process by which they are appointed or chosen as it were supposed to their relative status once appointed. In other words once a member of the Management Committee they have equal status to any other Management Committee member save only insofar as there are particular activities to be undertaken by the President, the Secretary or the Treasurer. See for example clause 11 where the President or the Secretary may requisition a Management Committee meeting or alternatively under clause 21 where particular duties are assigned to the Treasurer.
- 48 I should also observe in passing that the 1988 Constitution in identifying who is to comprise the Management Committee and in particular clause 10 insofar as it refers to office bearers is in contrast to clause 10 in the previous Constitution for example.
- 49 The new clause 10 describes the office bearers as the President, a Secretary and a Treasurer holding designated offices. Under the old clause 10 not only was there a President, a Secretary and a Treasurer but an honorary President, Secretary and Treasurer.
- 50 The office bearers which comprised the three nominated offices and the two monastic members are chosen by the members of the Sangha, (a monastic community), pursuant to clause 12(a).
- 51 The choice however to be made by the members of the Sangha will only occur in the event for example that people submit applications to be so appointed to the various respective offices under clause 12(d). However the 1988 Constitution does make provision if that does not occur. For example if no application for the offices are received, the Management Committee can submit up to five names of possible candidates to contest the election of office bearers. This is clearly a reference to the five office bearers referred to in clause 10 namely the President, Secretary, Treasurer and the two other monastic members. In other words the Management Committee is able to ensure by selecting as it were a candidate that each of the five positions if needs be is occupied by the selection of one or more candidates (12(c)).

On the other hand if there is more than one candidate for the election of each of the five positions the person with the majority of votes of the members present at the Annual General Meeting shall decide the issue. In my view the terminology “members present” in clause 12(d) must be a reference to the Sangha.

- 53 Again if more than five persons are nominated for the various positions the outcome is decided by a show of hands (12(e)).
- 54 Save for one provision in the earlier Constitution it is clear that the 1988 Constitution provides a self-contained regime as to who is to comprise the management committee and how they are to be appointed or chosen. When the amendments were made in 1988 to clause 9, clause 9(b) as it then was expressly reserved. It provides that each member of the Management Committee shall be elected annually and shall hold office until the conclusion of the Annual General Meeting following the date of the member’s election but is eligible for re-election.
- 55 On its face this would appear to be inconsistent with clauses 9(d), 10 and 12. As I have already observed each of the latter provisions provides for either the appointment of the lay members of the management committee or a decision by the monastic members at the Annual General Meeting. Either way I do not think it detracts from the construction I have otherwise put on the new provisions for the following reasons.
- 56 To read the 1988 Constitution harmoniously in my view, “elected” in 9(b) means to make a choice in the manner described in 12(a) as opposed to the method of election in the old clause 12, which of course was completely replaced by the new clause 12 as discussed. The old clause 12 of course proceeded upon the election process involving members present at a meeting appropriately called. The new regime firmly places control of the Management Committee and hence the Organisation in initially the hands of the five members of the monastic order and once appointed the nine lay members.
- 57 With these considerations in mind and as I indicated to the parties at the hearing I answered the questions provided in accordance with the construction propounded by the Sixth Defendant.

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Decision last updated: 29 June 2018