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

MISC NO. 90/2010

IN THE MATTER	of Sections 233, 235 and 237 of the Crimes Act 1969
BETWEEN	**NORMAN GEORGE** Applicant
AND	**TIM BUCHANAN** First Respondent
AND	**JOHN WOODS** Second Respondent
AND	**COOK ISLANDS NEWS (2008) LIMITED** Third Respondent

Hearing date:	On the papers
Counsel:	Mr J Samuel for the Applicant (in support) Mr D McLellan for the Respondents (to oppose)
Decision:	12 March 2012 (New Zealand Time)

JUDGMENT OF GRICE J
(Costs on Rehearing Application and related matters)

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[1] This judgment deals with an application for costs by the applicant Mr George relating to an order for re-hearing of a costs award. He also seeks costs in relation to an attachment order application.

[2] The applicant was successful in obtaining an order for rehearing of a costs judgment[1]. A successful party is ordinarily entitled to a costs award but I am of the view that the applicant should not be awarded costs on the relevant applications for the reasons set out below.

Background

[3] A summary of the substantive matter that gave rise to the original costs judgment and rehearing was set out by Hugh Williams J in his judgment granting the re-hearing as follows:

> [10] At all times relevant to this proceeding Mr George was a member of the Cook Islands Parliament and a well-known lawyer practising in that jurisdiction.
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> [11] On 17 September 2010, a cartoon which Mr George alleged was libellous was published in the Cook Islands News, the third respondent. The first and second respondents are respectively a cartoonist employed by Cook Islands News and the paper's editor.
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> [12] At the date of publication, the Cook Islands General Election was looming. It was held in mid-November 2010.
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> [13] Incensed by the cartoon, on 29 September 2010 Mr George filed defamation proceedings in relation to it and sought to lay informations in respect of alleged criminal libel under Part IX of the Crimes Act 1969. However, the leave of a Judge of the High Court is required before any criminal libel prosecution can be commenced,[2] and Mr George had not sought leave. Accordingly, the respondents applied to strike out the informations. That application was granted by Savage J following hearings on 13 and 14 October 2010. The respondents sought costs of $1,200 on an indemnity basis but the Judge ordered Mr George to pay costs of $750 inclusive of VAT.[3]
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> [14] Mr George was not done. On 26 November 2010 he filed an application for leave to bring a private prosecution for criminal libel. That application was heard by Grice J on 9 December 2010, with Mr Robert Samuel and Mr George appearing for the applicant and Mr McLellan (by telephone) and Mr Little for the respondents.

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[1] George v Buchanan et ors CKHC 90/2010 28/5/11 (Hugh Williams J).
[2] Section 235(1) [Crimes Act].
[3] Grice, J. said Savage, J directed payment of the costs ordered within 7 days but, while that may have been in the formal order – not in evidence at this hearing – the transcript of the 13 and 14 October 2010 hearings includes no payment timetable.

[15] In a judgment delivered the following day, 10 December 2010, the Judge refused leave for the private prosecution to be commenced.

[16] After dealing with procedural matters including reviewing Savage, J's order, the Judge then noted Mr George's defamation proceeding for publication of the same cartoon with damages of $475,000 and a permanent injunction being sought. She described the cartoon on which the proceedings were based. Noting Mr George's public positions, Grice J recorded he had been successful at the recent election gaining a majority of 45, larger than the majority by which he was elected in 2006. Other factual issues were then canvassed. The Judge then turned to the requirements of Part IX and the legal submissions made to her, including precedents such as *Attorney-General v Pitt*[4] a decision of Greig CJ in the Cook Islands High Court on an application for leave to commence a criminal libel Information. Grice J also carefully reviewed the respondents' submissions and precedent on which they relied.

[17] The Judge's findings were:

(a) She reached the view the cartoon met the test of a clear pima facie case or leave "standing on its own";[5]

(b) She held the libel was not sufficiently serious for the criminal law to be invoked given the factual circumstances and in particular "It is in the context of politics and a politician should expect some robust commentary";[6]

(c) The libel provoked no breach of the peace;

(d) There was no public interest which had led the State to commence a prosecution;

(e) Other remedies were available for interim relief; and

(f) "Lack of resources by the applicant is not a factor to be taken into account in support of granting leave. In fact it may be a factor which impugns his impartiality as a prosecutor."[7]

[4] In the judgment of 10 December 2012 I reserved the issue of costs. Following timetable directions the respondents filed submissions on costs but the applicant did not do so. On 5 March 2011 (NZ time) I delivered a judgment ordering the applicant to pay costs to the respondents (jointly) of an equivalent of 70% of the solicitor/client costs sought by them of $21,631.81, (subsequently adjusted to $19,906.68). The costs award was for $13,934.68.

4 Attorney-General v. Pitt [2005] NZAR 599.
5 At [33](a).
6 At [33](b).
7 At [33](c)-(f).

[5] On 17 March 2011 the applicant applied for orders setting aside that costs judgment and sought a re-hearing. On 28 June 2011 (New Zealand time) Hugh Williams J granted the application in the following terms:

> [68].... The result, therefore, at the end of that consideration, is that a re-hearing should be granted but only to the extent of arguing whether the quantum of respondents' costs should be at an indemnity level, a discounted indemnity level or some other amount.[8]

His Honour also reserved costs on the application for re-hearing to be determined on final determination of the matter[9]. The parties were to advise whether they wished to file further submissions.

[6] Both parties did make written submissions following which I issued a further costs judgment. On 15 September 2011 (NZ time) I ordered the sum of $6,500.00 be paid to the respondents jointly by way of costs. Due to an oversight in the Registry neither party nor their counsel received the costs judgment until about 5 December 2011. Counsel for the respondents in his submissions on costs sought to be heard in relation to the costs incurred in the rehearing and the determination of costs issues. Following a timetable direction both parties filed submissions in relation to this application. The final submissions which were filed on 9 February 2012 (New Zealand time) dealt with additional issues raised for the first time by the applicant in response to the respondent's reply. I refer to those below.

[7] The applicant now seeks costs and disbursements in relation to the re-hearing on the further costs decision dated 15 September 2011 and on an attachment order application sought by the respondents. I deal with the attachment order costs application first.

Attachment order costs

[8] The attachment order was referred to in the judgment of Hugh Williams J as follows:

> [45] Mr McLellan then dealt with the respondents' application for the costs payable to them to be directed to be paid from the sum payable to Mr George following his successful application for costs after his acquittal, $126,206.81, payment of which has been postponed by the necessity to obtain a specific Parliamentary appropriation[10] ...

[8] George v Buchanan et ors CKHC 90/2010, 28/7/11 (Hugh Williams J) at [68].
[9] Supra at [72].
[10] George v Buchanan et ors CKHC 90/2010, 28/7/11 (Hugh Williams J) at [45].

> [72(b)] The respondents sought to attach the amount payable to the order for costs in Mr George's favour made following his criminal acquittal. ....That matter has not been addressed by Mr George but, obviously enough, there are a number of others who would have prior claims on that fund when paid into Court compared with these respondents. The Court is not prepared to make that order[11].

[9] The attachment order application does not appear to have been finally dealt with. In any event it did not occupy much hearing time and was not addressed at all by Mr George. I am not prepared to make any order for costs in relation to the attachment order application. If it comes before the Court and is finally dealt with costs may be considered at that time.

Application for Costs in Relation to Rehearing Application

[10] Mr Samuel counsel for the applicant has not rendered a bill of costs for his services in relation to the rehearing application. The applicant claims $7,626.00 toward Mr Samuel's unrendered costs for the application for rehearing. This figure is reached by multiplying a notional hourly rate for Mr Samuel by the hours he recorded. That amounts to 32.8 hours at $500 an hour, a total of $16,400.

[11] The costs claim is then as follows:

Counsel (Mr Samuel)	32.8 hours @ $500/hr	= $16,400.00
Less	Discount x 46.5%	= $7,626.00

Disbursements totalling $1,464.62 for airfares and accommodation for Mr Samuel are also claimed.

[12] The discount of 46.5% is explained by the applicant as being the percentage discount from actual costs applied in the award to the respondents in my decision of 15 September 2011 (36.5%) plus a 10% uplift. The applicant submits that the uplift is intended to reflect "...a slight increase in cost to cover the additional length and complexity...". In support of that submission he says the judge commented in a minute that the matter might have been too complex to be heard by telephone conference. In the event Mr McLellan did attend by telephone conference as he did on the original application for leave to commence the libel prosecution.

[11] Supra at [72].

[13] A narrated schedule of time cost records and disbursements is annexed to the applicant's submissions. The respondents take issue with some attendances claimed by the applicant. The issues raised are:

[i] No invoices attached to support the applicants costs claim.

[ii] A 10% uplift on the percentage applied to the costs calculation is not justified.

[iii] Mr Samuels has not established that $500 is an appropriate hourly rate for his attendance either by actually invoicing fees at that rate or establishing it is in fact his standard hourly rate.

[iv] Items 1 to 6 in the applicant's schedule predate the preparation of an application for rehearing. This includes work on submissions which were filed late after the original costs judgment. I note that these items total 50 hours.[12]

[v] Items 40, 43, 45, 52 and 53 relate to attendances in connection with the attachment order application. These postdate the decision of Hugh Williams J where that application was mentioned. These items total 12 hours.

[14] The narrations describing the claims of 50 and 12 hours respectively (as noted at (iv) and (v)) are apparently not directly related to the rehearing application. They should not be taken into account and I would have excluded these claims.

[15] Invoices for the disbursements for airfares and accommodation of $1,464.62 are attached to the applicant's submissions. Three nights accommodation are charged to the 29th, 30th and 31st May 2011. The hearing was on 31st May 2011. The airfare is for Auckland to Rarotonga 30th May 2011 (arrive 29th May 2011) and departs 7th June 2011. No issue was taken with the amount of those disbursements by the respondents.

[16] The hearing of the application for re-hearing took place in the Cook Islands. Mr Samuel travelled from New Zealand to appear for the applicant. Mr McLellan, counsel for the respondents, was granted leave to attend by telephone conference. The hearing took somewhere in the region of three hours. The respondents submit the matter could have been more cost effectively dealt with before me in New Zealand. The applicant contends it was appropriately dealt with in the Cook Islands.

[17] The Chief Justice has directed that matters should be dealt with in the Cook Islands unless there are special circumstances.[13] The application was appropriately heard in the Cook Islands.

[12] Some of this work may have been used in the submissions of the Applicant in the filed in support of the application for costs following the rehearing.

It was a matter that could have been handled by local counsel and the cost of airfares and accommodation of New Zealand counsel are not disbursements that I would allow in this case. There is no indication in the judgment that Mr McLellan's attendance by teleconference increased the costs of the hearing. I do not consider the teleconference added significantly to the time of hearing. In his judgment the Judge took the view the matter did not require extensive consideration.[14]

[18] The applicant submits:

> *"3. The costs have been calculated on a cost incurred basis given that no bills of costs have been rendered to Mr George at this juncture but he has a clear liability to pay costs and disbursements..."*

[19] The respondents submit that the applicant has the burden of proving an entitlement to costs and he has not proved it as no bills of cost have been rendered by Counsel for the applicant.

[20] The applicant relies on *R v Rada Corporation Limited* [15] to support his submission that the costs do not need to be rendered. In that case the applicants' costs were paid by their insurer under a policy which covered costs in a criminal action. Justice Barker said:

> *Costs would be disallowed under the Miller approach only if the facts establish a firm agreement, express or implied that in no circumstances could the solicitors seek to obtain payment from the client.*[16]

[21] In that case the judge adjourned the proceedings to allow the applicants a final opportunity to present affidavit evidence in support of the application for costs. This would include exhibiting the bills of costs and providing details of the indemnity arrangements as well as information as to the circumstances in which the costs would be required to be paid by the applicants.

[22] It is well established that no party is entitled to an award of costs that exceeds their actual costs[17]. If I had proposed ordering payment of costs I would have allowed time for the applicant to provide evidence by affidavit of a firm irrevocable agreement, express or implied, that the bills of cost were to be rendered and paid.

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[13] Minute of Weston CJ in *Gun Bo LLC v Asiatrust Limited & Ors* CKHC PI. 14/2010, 4/2/2011

[14] Supra at [46]. He says: "Despite the history of this matter and the extent of the evidence and submissions, the Court takes the view that the matter does not require extensive consideration".

[15] R v Rada Corporation Limited 7 CRNZ 76

[16] R v Rada (supra) at 82.

[17] *Glaister v Amalgamated Dairies et ors* NZCA CA99/03, 1/3/04 (McGrath, Hammond & W Young JJ) Hammond J at [14].

[23] For completeness I deal with the applicant's submission introducing a new point in his reply to the respondents' submissions. The respondent has responded to the issue. The applicant submits that the respondents' solicitor's invoices rendered for costs in the previous costs application were addressed and paid for by the second respondent only and the first and third respondents did not actually pay the legal fees. The respondent replied by confirming that the invoices were paid for by the second respondent as employer or principal of the first and third respondent.

[24] This argument was not raised by the applicant in his submissions on costs when the respondent provided copies of the bills of cost in the submissions at the time of the original costs application nor in submissions at the rehearing of the costs matter. Judgment on that matter has been delivered. In any event the fact that the employer or principal paid the bills of costs in the circumstances would not disentitle the respondents to an award of costs. The applicant in this case has not been billed by counsel so there is no liability by the applicant to pay costs at all. This is not analogous to the respondents' position.

[25] The respondents submit that it would be unjust for any costs to all to be awarded because the applicant's costs and the respondents' own costs arose:

> *(a) the applicant's failure to comply with a direction of the Court to file submissions in relation to costs by 17 December 2010...*
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> *(b) curial error in that Your Honour appears to have disagreed with your earlier judgment on costs;*
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> *(c) the respondents have ultimately succeeded in this proceeding in that:*
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> *(i) they successfully opposed the application to commence a prosecution for criminal libel; and*
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> *(ii) they were awarded costs.*
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> *To reverse or substantially reduce the benefit of that costs order because of procedural error by the applicant or curial error would be a substantial injustice.*[18]

Discussion

[26] The respondents submit that the principles relevant to this application are set out in my judgment of 15 September 2011. The applicant takes no issue with that approach. This matter is within the Court's criminal and inherent jurisdiction. The Court may award costs for such

[18] Respondent's submissions dated 8/2/12.

sum as it thinks just and reasonable but the decision to award costs must be exercised judicially not arbitrarily.

[27] Relevant factors include whether the proceedings are lengthy or complex[19]. The rehearing application was held over approximately three hours. It was not complex and the judge noted it did not require extensive consideration.

[28] Another factor which I take into account in considering costs on the rehearing application is that the applicant failed to comply with the timetable for filing submissions in the original costs application. Despite the applicant's submissions to the contrary, Hugh Williams J came to the conclusion that there was little weight to the excuses offered by the applicant and no reason why submissions had not been filed in the month which elapsed between undoubted service of the respondents' submissions and delivery of my judgment. His Honour was satisfied that the applicant's delay in filing submissions was not excusable in the circumstances:

> *[57] Even if he was confused by the form of paragraph [35] of Grice J's 10 December 2011 judgment, Mr George knew by 8 February 2011 at the very latest that he was facing an application by the respondents not just for costs but for indemnity costs. That fact should have alerted Mr George and Mr Robert Samuel to the necessity to act – and act decisively – to meet the application. It is a stark fact that neither Mr George nor Mr Robert Samuel took any effective action to oppose the costs application. Certainly, as Grice J noted no submissions were filed. There may have been reasons which they viewed as subjectively justifying their inaction, viewed objectively it must be said there is little weight to the excuses offered in the circumstances and, therefore, there can be no reason why submissions were not filed in the month which elapsed between undoubted service and delivery of Grice J's judgment. There was not even any application for extension of time or amendment of the timetable made in that interval. If they applied paragraph [35] of the 10 December 2010 judgment, they knew they had only three days to file their submission but, even if they thought paragraph [35] in applicable, it was plainly important for them to act with celerity to meet the respondents' indemnity costs application.*
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> *[58] The conclusion must be that the delay on Mr George's part and his failure to "appear" by filing submissions in opposition to the respondents' indemnity costs application and full submissions was not excusable in the circumstances.*

[29] The Court found that the applicant had no defence to an order for costs being made[20], but the issue was the quantum. The rehearing application was granted on the grounds that my judgment of 5 March 2011 did not set out the reasoning for a discounted indemnity costs award

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[19] *George v Buchanan* CKHC Misc No. 90/2010, 15/9/11 Grice J at [24]
[20] Supra at [66].

and as the respondent did not contend they would suffer irreparable harm if the judgment was set aside a rehearing was ordered as to quantum and the matter referred back to me.

[30] While it is a matter of supposition if I had had the benefit of submissions by the applicant and so another view before me originally it may well be that no application for rehearing would have been necessary. Following the rehearing I reached a different view on quantum having had the advantage of written submissions by both parties. I awarded costs of $6,500.00 which was less than the original costs award of $13,934.68 (supported by the respondents at the rehearing), but above the amount of $3,600.00 or less which was the amount contended for by the applicant[21]. In his submissions in reply to the respondents' submissions the applicant refers to his contention being "about $1,000.00 to $3,600.00".[22]

[31] The respondents remain the successful party and were entitled to costs on the substantive issue. An award for costs in favour of the applicant on the rehearing application would operate to reduce the benefit of the costs awarded to them following their successful defence of the applicants' leave application. This is not determinative but supports my conclusion here not to award costs.

[32] In summary:

[i] The application for rehearing succeeded on the grounds that the reasons for the increased level of costs awarded were not set out in my earlier judgment. The primary grounds advanced by the applicant in support of the rehearing related to the applicant's failure to file submissions before judgment was delivered. Justice Hugh Williams did not accept the applicant's submissions in support of his failure to file the submissions.23 considerable evidence and submissions24 were related to that aspect which was not successful.

[ii] Due to the applicant's failure to file submissions I did not have his submissions at the time of the original costs determination and therefore the benefit of arguments which may have avoided the need for a rehearing.

[iii] The amount of the award of costs in favour of the respondents was varied and reduced by me following the rehearing to an amount which remained in excess of the

[21] *George v Buchanan* CKHC Misc No. 90/2010, 15/9/11 Grice J at [40].
[22] *Submissions of applicant in reply to submission of respondents in relation to costs* dated 27 January 2012 [4p]
[23] Hugh Williams J at [57] and [58].
[24] Per Hugh Williams J at [46] supra.

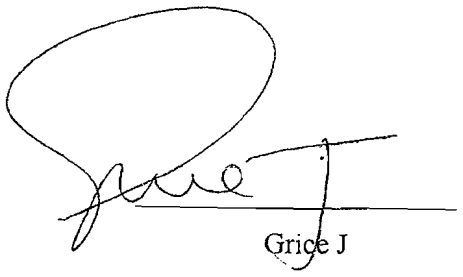
amount of costs submitted as appropriate by the applicant. Both parties were therefore partly successful as a result of the rehearing on costs.

Standing back and looking at the matter as a whole the respondents remain the successful parties on the substantive matter from which the costs and related applications flowed and taking into account the above factors it is just and reasonable that no order as to costs be made on the present application.

[33] I also sought submissions on who should bear the cost of the toll call. The actual costs have not been provided to the parties. It is apparently has not been the usual practice to seek to recover the costs of a telephone conference. Considering the history of this matter I do not wish to prolong matters. I do not consider it appropriate to make any order for the payment of the toll call in this case given the amount is not available. In future cases Counsel should be alive to the possibility that an order for payment of the costs of a telephone conference may be made.

[34] Accordingly, I dismiss the applicant's application for costs on the applications for rehearing, costs application and the attachment order. There will be no orders as to costs.

[35] Given that the matters dealt with in this judgment arose, in part, from the judgment of Hugh Williams J of 28 May 2011, this judgment was referred in draft to that Judge who authorises me to say he agrees with it.



Grice J

12 March 2012

Date