

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

MISC. NO. 9/18

IN THE MATTER of section 50 of the Proceeds of Crime
Act 2003

AND

IN THE MATTER of the Mutual Assistance in Criminal
Matters Act 2003

BETWEEN **SOLICITOR-GENERAL** of the Cook
Islands

Applicant

AND

**CAPITAL SECURITY BANK
LIMITED**, Rarotonga, Cook Islands

First Respondent

AND

**ORA FIDUCIARY COOK ISLANDS
LIMITED**, Rarotonga, Cook Islands

Second Respondent

Date of Hearing: 31 May 2018

Judgment: 7 December 2018

Date of Costs Minute: 7 March 2019

Date of Costs Judgment: 17 June 2019

Counsel: Mr S C Baker, Solicitor-General, for Applicant
Messrs N R Williams and D McNair for Second Respondent

COSTS JUDGMENT OF HUGH WILLIAMS, CJ

[WILL0604.dss]

Introduction

[1] In the substantive judgment in this matter delivered on 7 December 2018 all the Solicitor-General's claims against the second respondent, Ora Fiduciary Cook Islands Limited¹ were dismissed. In this judgment which relates to costs, it would be tedious to summarise the findings in the substantive judgment but they are incorporated in this judgment.

[2] By memorandum dated 21 January 2018 Ora sought costs against the Solicitor-General in the sum of \$175,941.50 plus \$42,226.83 for disbursements.

[3] By memorandum dated 18 February 2019 the Solicitor-General disputed Ora's application.

[4] For the sake of completeness, the following three matters need noting:

- a) Apart from the filing of the applicant's costs memorandum and a number of memoranda relating to confidentiality and distribution of the substantive judgment, the present Solicitor-General, Mr S C Baker, only assumed the office of Solicitor-General at about the time the substantive judgment was delivered so, apart from those exceptions, any references in this judgment to the Solicitor-General refer to Mr Baker's predecessor, Mr D R James.
- b) Although, as is standard in international offshore trusts jurisdictions, Ora's solicitors' and counsel's hourly rates were set in \$US, this being a judgment in relation to the Cook Islands and impacting on the Cook Islands Government's financial affairs, it is considered appropriate that the amounts awarded should, unless otherwise nominated, be in \$NZ, the Cook Islands currency. It is, after all, in that currency that the costs award will be paid.
- c) Though given the opportunity, Capital Security Bank Limited, the first respondent, advised it sought no order for costs in its favour.

Statutory and regulatory basis for claim for costs

[5] Though, as the substantive judgment noted, the issues debated between the Solicitor-General and Ora ranged well beyond the provisions of the Proceeds of Crime Act 2003², it is notable that the amended application filed on 16 May 2018

¹ "Ora"

² "POCA"

seeking a restraining order under POCA against Ora was only for the sum of \$72,244.11.

[6] The dismissal of the Solicitor-General's amended application means the s 104 of POCA is relevant. It provides:

104. Costs – (1) The Court may order the Crown to pay all costs reasonably incurred by a person in connection with proceedings, or a part of any proceedings, if –

- (a) the person brings, or appears at, the proceedings under this Act before a Court:
 - (ii) to prevent a forfeiture order, pecuniary penalty order, an order made under section 23 or a restraining order, from being made against property of the person; or
 - (iii) to have property of the person excluded from a forfeiture order, pecuniary penalty order, an order made under section 23 or a restraining order;
- (b) the person is successful in those proceedings; and
- (c) the Court is satisfied that the person was not involved in any way in the commission of the offence for which the forfeiture order, pecuniary penalty order, order made under section 23 or restraining order, was sought or made.

(2) Any order issued under subsection (1) must specify the costs to be paid to³ the Crown.

[7] Rules 300 and 309 of the Code of Civil Procedure are also relevant. The former gives power to apportion the costs of proceedings “between the parties in such manner as the Court thinks fit, and in default of any special direction such costs shall abide the event of the proceedings” and the latter reads:

309. Novel or important question

In any proceedings in which a Judge certifies that the determination of the question in dispute is of importance to a class or body of persons or involves a novel or difficult question of law, or that the decision of the Court affects issues between the parties beyond those directly evolved in the proceedings or is of general or public interest, he may, whatever the amount of the claim may be, allow such further sum for costs, in addition to the prescribed costs, as he thinks fit.

³ Sic: “by”?

Ora's costs submissions

[8] Ora sought costs and disbursements totalling \$218,168.33 being \$175,941.50 in legal costs and \$42,226.83 for disbursements. Broken down, that appeared to be \$86,625.00 for Mr Williams, (131.25 hours), \$66,968.00 for a Meredith Connell Senior Solicitors, (152.2 hours), and the balance for other counsel's assistance on the file. The disbursements were \$38,247.04⁴ for Mr Krys' affidavit and \$3,979.79 for counsel's travel and accommodation.

[9] Ora noted that scale costs in Cook Islands cases are usually calculated from a starting point of approximately two-thirds of the costs incurred⁵ but in a claim such as this one for increased costs it has been held that the categorisation of claims for increased or indemnity costs in the New Zealand High Court Rules, Rule 14.6, can be referred to. The latter includes increasing costs if the party opposing has contributed unnecessarily to the time and expense of the hearing by taking unnecessary steps or propounding meritless arguments.

[10] Increased or indemnity costs can be awarded against the Crown⁶ including where a respondent enjoyed complete success; the Crown's arguments were wrong but difficult to refute; or the Crown's case was complex.

[11] Costs are reasonably incurred where "a reasonable observer would expect those costs to be incurred"⁷ a test which can be applied if indemnity costs sought but must be determined by reference to actual costs.

[12] Ora's submissions in support of its application for its full actual costs and disbursements relied on s 104 and Rule 309 and made the additional points:

- a) The substantive judgment was the first delivered in relation to a contested restraint application under POCA;

⁴ The amount actually paid.

⁵ *Little & Matysik PC v George* [2013] CKHC 22.

⁶ *Hall v Attorney General* [2013] NZHC 3388.

⁷ *Bradbury v Westpac Banking Corp* (2009) 18 TRNZ 859.

- b) Ora's costs claim did not include correspondence with the Financial Intelligence Unit regarding the provision of voluntary information prior to the proceedings being issued; or
- c) Mr Wichman's time; or
- d) Any costs related to *Plaint 23/18*, an associated proceeding; or
- e) Costs incurred relating to distribution of the substantive judgment.

[13] The submissions also made the point that Ora was not originally named in the proceeding but, because it held funds relating to the matter and therefore had an interest in the property, it filed a notice of appearance on 16 March 2018, following which it was added as a party.

[14] Ora pointed to the voluminous affidavits filed supporting its notice of opposition aimed at demonstrating the funds held by it did not derive from transactions that were alleged to constitute embezzlement by the Russian authorities and that it was following the filing of that material that the then Solicitor-General filed his amended application which radically altered the thrust of the proceeding and, for the first time, claimed Ora itself had committed criminal offences.

[15] Ora then relied on what the substantive judgment described as the "changing course of the application", a phrase designed to encompass the various changes in stance, not always easy to discern, detailed in the judgment itself. This resulted in the parties traversing matters significantly more wide-ranging and discursive than arose from the pleadings themselves.

[16] Ora's submissions emphasised the lack of challenge to the evidence from Mr Kryz demonstrating, in considerable detail, that the funds held by Ora were clean and not the proceeds of an offence, or property used in the commission of the same.

[17] Ora, naturally, submitted its costs were reasonably incurred in connection with the proceeding. The submissions included a summary of the legal work undertaken, a chronology of the case, and, in a second memorandum, details of the

charge out rates utilised. It made the point that, although the burden of proof should have rested with the applicant it was in fact Ora which filed the bulk of the evidence to rebut the applicant's beliefs.

[18] Acknowledging that the costs claim plus disbursements was significantly greater than the amount restrained in the interim order, Ora nonetheless submitted it was reasonable for then to be incurred given there had been serious criminal allegations against it. The nature of the proceeding, it submitted, was a "high stakes" one for Ora.

[19] As to the normal Cook Islands two-thirds starting point, Ora submitted the proceeding should never have been brought, given the significant amount of information it had volunteered to the Solicitor-General and Financial Intelligence Unit. It submitted it had acted responsibly throughout the course of the proceeding, a submission it supported with reference to the substantive judgment and, naturally, its success. They followed the filing of comprehensive submissions and warnings to the Solicitor-General throughout the matter of the possible costs consequences of the course adopted.

Solicitor-General's submissions

[20] Though accepting the terms of s 104 of POCA, Mr Baker, the present Solicitor-General, opposed Ora's application on the basis that the costs claimed were not reasonably incurred and there was no basis for an award of indemnity costs, particularly when the sum sought was over three times the amount restrained.

[21] He stressed that the Cook Islands authorities were under an obligation to act in support of requests for mutual legal assistance concerning international criminal investigations; the domestic investigation remains on foot; and submitted the purpose of the restraint application was as a preliminary measure to ensure assets owned or controlled by a party under investigation were preserved and available for any future forfeiture orders that may be made. He pointed to the very large sums of money that appeared to have passed through the Cook Islands of which the \$72,244.11 was no more than the residue.

[22] Mr Baker cautioned against the wholesale transfer of Rules made in New Zealand for costs in civil cases being utilised in this matter, one dealt with in the Criminal Division. He submitted that the amended application, one in which the substantive judgment was merely one step, did not justify a conclusion that Ora was entirely innocent and “was not involved in any way in the commission of the offence for which the “... restraining order was made”, a submission he supported by reference to the substantive judgment’s discussion of the three offences the Crown finally alleged against Ora.

[23] In relation to whether Ora’s costs were “reasonably” incurred, the Crown submitted the sum claimed was grossly excessive having regard to the nature of a restraint application, the value of the property involved and the public interest factor.

[24] The Solicitor-General conceded that:

31. The Crown acknowledges there are aspects of how the previous Solicitor-General conducted the case that the Court may consider could have been dealt with differently, but they would amount to criticisms that the case was badly argued, rather than anything suggestive of malicious or flagrant conduct. Ora’s response at times veered into trying to run very extensive submissions attempting to clear the third parties’ name, a matter which was not the focus of the restraint proceeding. It was never the Court’s task to determine if the Russian allegations were substantively correct or not, and the Court may consider that a great deal of material put forward was accordingly irrelevant to the restraint issues.

[25] He said it was in the public interest and interests of international comity for requests under the Mutual Assistance in Criminal Matters Act to be taken forward on receipt of a legitimate request.

[26] He noted that the hearing took less than a day and submitted it was needless for overseas counsel to be instructed as local counsel have acted in earlier restraint applications. He concluded that:

43. The Crown also submits that the Court should exercise its discretion on costs cautiously and favourably to the Crown when considering the aspects of the proceeding that originated as a result of the Russian request. The obligations upon the Cook Islands when receiving such

requests are such that it should not be disincentivised from auctioning those types of requests in appropriate cases.

[27] A subsequent submission dealt with matters of timetabling for any costs payment and disclosure to various Government officials of the costs judgment.

Discussion and decision

[28] The main points in favour of Ora's application for costs are that the issues discussed in the substantive judgment were indubitably complex, though made more so by the major change in thrust effected by the filing of the amended application. The application being without precedent – at least on the scale of the matters argued – meant the parties had to deal with it without the assistance of earlier decisions for guidance.

[29] Not only was the matter complex in itself, but was made significantly more so by the lack of focus in the way the claim was presented and argued. As an example, even in the substantive judgment it was noted that the applicant's approach remained unclear as to whether the orders sought against Ora were in its capacity as a defendant or a suspect.

[30] All of that undoubtedly contributed in no small measure to the amount of time Ora's solicitors and counsel were required to devote to rebutting the amended application, a refutation which, in Ora's favour on the costs' application, was complete.

[31] That said – and while acknowledging that the matter was of considerable importance to Ora – it must be said that Ora's "all or nothing" approach may have been more than was required. Its two counsel and the senior solicitor assisting them, expended almost 300 hours – well over seven 40 hour weeks – in dealing with the matter.

[32] It would be going too far to adopt Ora's suggestion that these proceedings should never have been brought; the point that Mr Baker makes that the Cook Islands is duty bound to respond to requests under MACMA and process them

promptly and appropriately is a valid one – but the shifting nature of the former Solicitor-General’s approach undoubtedly complicated Ora’s task and extended the necessity for its lawyers to act in opposition.

[33] It must also be noted that the legal issues raised were novel ones in the Cook Islands context, difficult to argue and decide, but resulting in a judgment which, no appeal being brought, will provide some guidance for the future in relation to claims which it is in the public interest for the Cook Islands’ Government to act upon and pursue diligently.

[34] In light of those remarks, the Court’s view is that Ora’s application for indemnity costs is excessive in the circumstances but it has clearly made out a case for an increased costs award beyond the two-thirds starting point which is the normal commencement point in cases, even those lacking the remarkable features of this.

[35] The costs award must, however, be tempered by the relatively modest amount actually restrained, US\$72,244.11, though, in that regard, by the time the application was brought that sum was, as has been noted, only the residue of possibly large amounts of money which passed through the Cook Islands.

[36] In all those circumstances, it is considered that an award of costs in the region of 75% of those charged would be appropriate.

[37] For all those reasons, the amount to be allowed by way of costs will be \$130,000, calculated as being \$75,000 for Mr Williams, \$55,000 for the senior solicitor who clearly did a lot of the “leg work,” but with no allowance for Mr McNair’s costs as he appears to have played a very minor role in the matter.

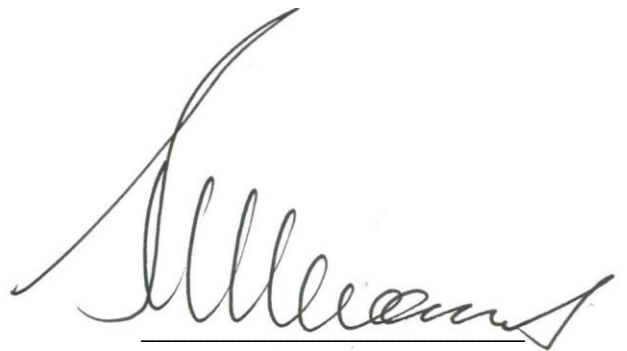
[38] To the order for costs will be added \$42,226.83 for disbursements being the amounts actually paid for Mr Krys’ fees and for counsel’s travel and accommodation.

[39] While wholesale briefing of overseas counsel is not necessarily to be encouraged and while local counsel have handled restraint applications previously, none were suggested as having been on the scale of this one. It is therefore

considered not unreasonable for overseas counsel to be retained, particularly when, had that not been the case, the amount claimed for costs may not have been so very different.

[40] The total award for costs and disbursements, \$182,226.83, will be payable not later than four months from the date of delivery of this judgment.

[41] Unless within 10 working days of delivery of this judgment Ora files a memorandum opposing such a move, this judgment can be made available to those listed in paragraphs 6 and 7 of Mr Baker's memorandum dated 18 March 2019 with the names of those listed in paragraph 7 to be disclosed to counsel for Ora and with counsel discussing and endeavouring to agree on those to whom this judgment can be provided. If the whole or parts of the substantive judgment also need to go to such persons, counsel are also to endeavour to agree on what material needs to accompany this judgment.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, CJ