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

Misc 59/11

CR Nos:

286-289/08, 292/08
739-746/08, 771/08
334-336/08, 257/08
270-271/08,
736-738/08

R

v

NORMAN GEORGE

Defendant

APPLICATIONS FOR AMENDMENT OF COSTS JUDGMENT

TIMOTHY PAUL ARNOLD as counsel in the trial of the Defendant

First Applicant

NORMAN GEORGE

Second Applicant

THE ATTORNEY GENERAL

Respondent

JUDGMENT OF NICHOLSON J

Applicants:	Mr T Arnold in person Mr N George in person
Attorney-General:	Ms C Evans and Mr A Frame
Cook Islands News (2008) Ltd & Ors:	Ms S Inder (watching brief)
Date of Judgment:	18 May 2012 (NZ time)

Introduction

[1] In a lengthy Judge alone criminal trial, which was commonly referred to as the "Operation Slush" trial, I discharged Mr George and the other two defendants on all the charges against them.

[2] On 10 December 2010 (NZ time), in Judgment No. 6, I ordered that the prosecutor pay stipulated costs to Mr George and each of the other two defendants. I assessed the total quantum of Mr George's claim as $189,329.16 and ordered that the prosecutor pay 66.66% of this, viz $126,206.81 to Mr George towards the costs of his defence.

[3] Mr Arnold had charged Mr George $56,475 (including VAT) for acting for him. I assessed the appropriate quantum of Mr Arnold's fee at $24,750 (including VAT) and included this as a component of the $189,329.16.

[4] On 14 December 2010, the Collector of Inland Revenue served notices upon the Commissioner of Police requiring him to deduct from any amount payable by the Police to Mr George, all amounts payable not exceeding in total $176,237.05, and to pay every sum so deducted to the Collector to the credit of Mr George.

[5] On 26 July 2011, Mr Arnold filed an application for rehearing of the costs orders of 10 December 2010 in respect of the part of the order relating to his defence. Mr Arnold sought declarations and, in essence, an amendment to the Judgment to order that the sums attributed to Mr Arnold's defence of Mr George be paid by the Police direct to Mr Arnold.

[6] Mr Arnold's application was opposed by the Attorney-General. I started hearing it on 27 July 2011 but because of insufficient time to complete the hearing and also my concern that the application be also served on the Collector, I adjourned the hearing part-heard and made timetable orders for the filing and service of proceedings and written submissions.

[7] On 2 September 2011, Mr George made a separate application for rehearing of the costs orders relating to him and, in essence, sought an order that the Police forthwith pay the sum of $126,206.81 to the Registrar of the High Court

to be held in trust for the credit of Mr George, with authority to pay those sums out to those persons and in the amounts identified in the Judgment of 10 December 2010.

Claims

[8] Mr Arnold's claim is:

> "FOR A REHEARING of the costs made by this Honourable Court on 10 December 2010, *in respect of that part of the order relating to the Applicant's defence of Norman George,* specifically, for such amendments as may be required to give effect to the true intent of the Court in respect thereof, including but not limited to the following:
>
> A. A declaration that the purpose of making that part of the order relating to the Applicant was to ensure the payment of counsel in respect of a Defendant in criminal proceedings known by the Crown and by the Court to be unable to afford the cost of his own defence, in circumstances that the Crown's own legal aid funds were not available to assist in that payment.
>
> B. A declaration that a payment by the Crown (from MFEM) to the Crown (to the Collector of Inland Revenue) in respect of that part of the costs order was not intended by or within the contemplation of the Court at the time of making the order;
>
> C. An order that the prosecutor forthwith pay the sum of $126,206.81 to the Registrar of the High Court to be held in trust to the credit of Mr George with authority to pay those sums out to those persons and in those amounts identified in the Court's judgment of 10 December 2010 and that sums should be paid direct to Mr George only against his producing to the Registrar evidence of actual payment by him of those sums (or any of them) in which case the Registrar shall be authorized to make reimbursement to Mr George of such sums.

[9] Mr Arnold seeks payment direct to him of $16,498.35, being the component of his costs in the makeup of the $126,206.81 which I ordered the prosecutor to pay to Mr George.

[10] Mr Arnold's basic grounds are that in the circumstances the Court intended that the Arnold component of the costs of $126,206.81 be received by Mr Arnold and that this intent was thwarted by the Collector by interpreting and applying the tax legislation in a manner that abrogated the fair trial rights of Mr George as guaranteed by Articles 64 and 65 of the Constitution of the Cook Islands.

[11] The claims by Mr George and the grounds are substantially the same as those of Mr Arnold except that Mr George applies for the declarations and amendment order to relate to all the allowed elements of his defence, not just the defence by Mr Arnold.

Circumstances

[12] Mr George is a prominent Cook Islands politician and lawyer. Mr Vaile is a prominent Cook Islands businessman. Mr Koronui was the Secretary of the Atiu Island Administration. In March and April of 2008 they were charged with fraud and secret commission offences. The charges, the background circumstances and the history of the judge alone trial before me until the end of the Crown case are described in paragraphs 1-23 of my Judgment No. 4 of 24 February 2010 (NZ time). Included in the circumstances were that Mr George was initially represented by Mr P Davison QC. However, before the end of the Crown Case and before Mr Junior Areai was cross-examined, the trial was adjourned part-heard. When it resumed, Mr George advised that he could not afford to pay for the continuation of Mr Davison as his counsel and he applied for a sufficient grant of legal aid to allow him to do this. Alternatively, he also applied for adjournment of the trial to enable him to raise funds to pay Mr Davison or to instruct other counsel. When the Legal Aid Committee declined to grant the legal aid sought, Mr George applied for review of that decision. In conducting that review, I became aware of a statement by Mr George that his assets were limited to his home and vehicle. I cannot recall him stating that he had substantial debts. Mr George withdrew his application for review when the Legal Aid Committee agreed to pay travel expenses for some witnesses whom Mr George wished to call. I declined to adjourn the hearing of the trial. When the trial resumed, Mr George represented himself and conducted a lengthy and effective cross-examination of Mr Areai.

[13] At the end of the Crown case, each defendant applied for discharge.

[14] In my Judgment No. 4 of 24 February 2010 (NZ time) I discharged Mr Vaile and Mr Koronui on all the charges against them. I discharged Mr George on seven of the 14 charges against him. I ordered that all costs issues were to be dealt with after completion of the trial.

[15] Mr Arnold represented Mr Vaile until he was discharged. When the trial resumed on 24 March 2010, Mr Arnold represented Mr George and called him and 13 other witnesses. On 30 April 2010, I found Mr George not guilty on all the remaining seven charges and dismissed them. By consent, I allowed time for counsel to canvass agreement on costs and I timetabled the filing of written submissions should agreement not be reached. Agreement was not reached and lengthy submissions were filed.

[16] Mr George claimed costs and disbursements totalling $547,754.16. As stated, I ordered that the prosecutor pay $126,206.81 to Mr George towards the costs of his defence. I also ordered that the prosecutor pay specified amounts to Mr Koronui and Mr Vaile towards the costs of their defence.

[17] In paragraph 71 of my Costs Judgment No. 6 of 10 December (NZ time), I said, as was the case:

> "After Mr Vaile was discharged on all charges, Mr George wisely instructed Mr Arnold to act for him during the balance of the trial. This involved the calling of Mr George and other defence witnesses and the preparation and making of final submissions. This was of benefit not only to Mr George but also to the court in enabling the final stages of the trial to be heard on a structured, smooth and less emotional basis."

Pertinent Law

[18] The fundamental pertinent law is provided by three statutory provisions.

[19] First, s 44 of the Judicature Act 1980 – 1981 which states:

> "A Judge may at any time amend any minute or judgment of the Court or other record of the Court in order to give effect to the true intent of the Court in respect thereof or truly to record the course of any proceeding."

[20] Secondly, s 414(3) Crimes Act 1967 which states:

> "(3) Where any person is acquitted by the Court of any offence, the Court may order the prosecutor to pay to that person such sum as it thinks just and reasonable towards the costs of his defence." [Emphasis added]

[21] Thirdly, s 192 of the Income Tax Act 1997 which states:

> "(1) Where any taxpayer has made default in the payment of any income tax payable by the taxpayer for any year of assessment, the Collector may from time to time by notice in writing require any person to deduct from any amount payable or to become payable by that person to the taxpayer such sum as may be specified in the notice, and to pay every sum so deducted to the Collector to the credit of the taxpayer within such time as may be specified in the notice.
>
> (2) This section shall bind the Crown."
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> ...
>
> (7) The sum deducted from any amount pursuant to a notice under this section shall be deemed to be held in trust for the Crown, and, without prejudice to any other remedies against the debtor or any other person, shall be recoverable in the same manner in all respects as if it were income tax payable by the debtor.
>
> (8) Every person commits an offence and shall be liable on conviction to a fine not exceeding $10,000 who –
>
> (a) fails to make any deduction required by a notice under this section to be made from any amount payable by him to a taxpayer;
>
> (b) fails after making any such deduction to pay the sum deducted to the Collector within the time specified in the notice."

[22] Section 25 of the Value Added Tax 1997 states an identical provision relating to deduction for value added tax.

Decision

[23] So far as I can recall, when I decided the costs issues I had no information about any arrangement between Mr George and his counsel, Mr Davison QC and Mr Arnold for payment of each of their fees and disbursements, nor about whether any, part or full payment to either of them had been made. Furthermore, I was of the view that the power to grant costs to an acquitted defendant, given by s 414(3) of the Crimes Act 1967 was limited by its express terms to ordering that the prosecutor pay costs to the acquitted defendant only. There had been no suggestion or submission that the order could and should stipulate payment to any other person. The order which I made in my Costs Judgment No. 6 that the

prosecutor pay $126,206.81 to Mr George towards the costs of his defence gave effect to my true intent.

[24] Accordingly, it would be wrong to exercise the power given by s 44 of the Judicature Act 1980 – 81 to amend the Judgment as requested by Mr Arnold and Mr George, and make any of the declarations which they seek. I therefore dismiss each of their applications.

[25] Even if I had been aware of the possibility of the Collector requiring deduction of outstanding tax from the amount ordered to be paid to Mr George and I had been requested to order payment to a person or persons other than Mr George and I had been satisfied of the factual merit of doing so, in light of the restricted power given by s 414(3) of the Crimes Act 1967, I would not have ordered payment to any person other than Mr George.

[26] Apart from submitting that the provisions of s 192 of the Income Tax Act 1997 and s 25 of the Value Added Tax Act 1997 and their application in this case contravened the constitutional right of a defendant to a fair trial, Mr Arnold and Mr George did not challenge the validity and exercise of the power by the Collector to require deduction and payment in respect of Mr George's unpaid tax.

[27] I do not accept these submissions. It is common for many nations to legislate to give debt priority to collection of tax. To find that tax debt priority legislation or its exercise was invalid because this could prevent a defendant in a criminal trial from paying for lawyer representation and thereby breach that person's constitutional right to a fair trial, is not, in my view, justified, having regard to the role, content and importance of the tax collection legislation and that any causative link between them and an unfair trial is nebulous and remote. An impecunious defendant can still have a fair trial.

[28] I find that the challenged tax legislation and its exercise was valid.

Costs

[29] In the circumstances and having regard to the considerable benefit which Mr Arnold gave not only to Mr George but also to the Court and having regard to the factor that it appears that Mr Arnold will not be paid unless and until Mr George

takes special steps to make payment, I consider that although the Attorney General has succeeded in defeating the applications, it is just that all costs relating to Mr Arnold's unsuccessful application lie where they fall. I so order. As Mr George's application came on Mr Arnold's coat tail and mainly replicated Mr Arnold's material, it is unlikely to have caused counsel for the Attorney General much, if any, extra work and cost. I therefore order that all costs relating to Mr George's unsuccessful application also lie where they fall.

C M Nicholson J