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

OA 1/2008
(CA 6/2009)

IN THE MATTER	of AREMANGO SECTION 7A1A2, NGATANGIIA
BETWEEN	**TAAKOKA ISLAND VILLAS LIMITED** of Rarotonga Applicant
AND	**TRAVIS MOORE** Respondent

JUDGMENT OF WESTON CJ AS TO COSTS

Background

[1] On 18 March 2009 I delivered a Judgment in this Court finding that Mr Moore was in contempt of court (the Court of Appeal erroneously said the Judgment was dated 18 September 2009 – see paragraph [1] of its Judgment). Mr Moore appealed from that Judgment. The appeal was heard on 15 June 2010 and a Judgment delivered 18 June 2010. The appeal was successful. Mr Moore now seeks costs in relation to the original hearing in this Court.

[2] On 13 May 2009 I delivered a Judgment in relation to costs. I awarded the applicant $2,500. Mr Vakalalabure had submitted that an appropriate costs award would be $200 to $500. The Deputy Registrar advises me that he distributed this Judgment to Messrs Morley and Vakalalabure on 14 May 2009.

The Judgment of the Court of Appeal

[3] The first ground of appeal was that the High Court had erred in not using criminal procedure to deal with the alleged contempt. At [9] the Court of Appeal concluded:

> *"There is no doubt the appellant was entitled to have the charge of contempt made against him dealt with in accordance with the Criminal Procedure Act 1980-81 and that the common law approach*

(which the respondent sought to employ), is not available in this jurisdiction for an alleged contempt pursuant to section 36(a)."

[4] No express reasons are given for that conclusion, the Court apparently being satisfied that the Criminal Procedure Act governed the allegations. At paragraph [12] the Court restated its conclusion, saying:

"Here, the shortcut approach adopted by the Judge bypasses the provisions of the Criminal Procedure Act."

[5] The appeal, then, succeeded on what is essentially a procedural ground. That is, the Court of Appeal concluded that the procedure adopted by the applicant, and accepted by the High Court, was incorrect. It is not a conclusion that the contempt itself was without foundation. Indeed, at paragraph [5] the Court noted:

"The undisputed evidence is that mining continued for a further seven hours until 9pm."

[6] And, at paragraph [13] the Court said

"It will be for the respondent to decide whether it can start again employing the correct procedure. Irrespective of whether that occurs, this appeal must succeed."

[7] Costs were addressed by the Court at page 6 to the extent that the Court acknowledged that the appellant, appearing in person, was entitled to be paid filing fees and the costs of preparing the record. No other costs orders were made.

Subsequent memoranda

[8] Shortly after receiving the aforesaid Judgment Mr Moore sought further clarification from the Court of Appeal by way of a memorandum dated 23 June 2010. In paragraph 5 of that memorandum he submitted that the question of costs in the High Court should be returned to that Court for determination.

[9] The President of the Court responded on 24 June 2010 saying *"Mr Moore has now no costs liability in the High Court since the Judgment has been set aside."*

[10] Following this exchange, Mr Moore lodged a memorandum in the High Court (dated 6 June 2010 on its face but filed 6 July 2010) seeking to have costs fixed within the Court's civil jurisdiction. Moreover, he sought costs on an indemnity basis. He claimed $14,000. There was no evidence as to what he had been charged by Mr Vakalalabure.

[11] In paragraph 15 of that memorandum Mr Moore submitted:

> *"In this matter the Applicant specifically ignored the clear provisions of sections 36 to 41 of the Judicature Act 1981 on contempt and proceeded down the road of convincing the Court to ignore those provisions and sought a civil contempt fine of $20,000. This was clearly wrong and the Court of Appeal commented that this Court deliberately ignored the statutory scheme of contempt."*

[12] The second sentence in the extract quoted above does not find any support in the Judgment of the Court of Appeal. Mr Moore has subsequently arranged for a transcript of the hearing before the Court of Appeal to be typed back and this has been supplied to the Court. At page 17 of that transcript there is an exchange between Ms Rokoika and Smellie J which is claimed to be the basis for Mr Moore's assertion. If so, it is fair to say that Mr Moore has entirely misread the exchange between Bar and Bench.

[13] The applicant's memorandum in response dated 13 July 2010 submitted that the appeal had been determined and that the issue of costs in both the Court of Appeal and High Court was dealt with consequent upon the President's Minute of 24 June 2010.

[14] There was a further memorandum from Mr Moore dated 15 July 2010 alleging that he had had no notice of the Costs Judgment and therefore had not sought leave to appeal it. He referred to rule 300, Code of Civil Procedure, in support of his application that he was entitled to costs.

[15] The applicant responded on 20 July 2010. It was submitted that the Court of Appeal had fully disposed of the costs issue.

[16] Mr Moore lodged a further memorandum on 3 August 2010 responding to the memorandum dated 20 July 2010. In paragraph 6 Mr Moore repeated his earlier comment viz:

"In fact the Court of Appeal did not mince its words in making it clear that there was a deliberate decision not to follow the Judicature Act".

[17] I repeat what I said at paragraph [12] above.

[18] On 6 August 2010 I issued a Minute having reviewed the various materials so far described (except for the memorandum dated 20 July and the further memorandum dated 3 August – both of which I have since reviewed). In that Minute I invited further submissions on two matters. First, that it was not open to the Court to award costs in its civil jurisdiction. Secondly, as a result of Mr Moore's submission that he was not aware of the costs decision in this Court, and thus did not appeal it, I wanted to be sure he had had every opportunity to address that issue.

[19] There was then a further series of memoranda.

[20] Mr Moore in his memorandum dated 23 August 2010 argued that it had been made clear to the High Court by Mr Vakalalabure that contempt should be dealt with in the Court's criminal jurisdiction. He appended submissions in support of that proposition. I do not accept Mr Moore's submission. At no time prior to 18 March 2009 did Mr Vakalalabure make a submission that the applicant had used the wrong procedure. As this Court's earlier Judgment made clear at [29], there were no submissions from either counsel by reference to the correct procedure to be adopted. The relevant extract from the High Court's Judgment is quoted by the Court of Appeal in paragraph [7]. There is no suggestion in that Court's Judgment that the earlier conclusion of this Court was incorrect.

[21] Mr Moore went on to refer to a subsequent approach made to the learned President in a memorandum dated 18 August 2010. The President replied that the role of the Court of Appeal was now at an end and made the suggestion that Mr Moore could make application to the High Court to reconsider its costs order. Mr Moore did not tell the President he had already made such an application.

[22] There was then a lengthy memorandum from the applicant dated 8 September 2010. Inter alia, counsel explored the proposition that Mr Moore was not aware of this Court's earlier costs decision. In that regard, it seems fairly clear to me that a copy of the costs Judgment was sent to Mr Vakalalabure who was then counsel. But in any event, the question of

costs was clearly treated as being a live issue in Mr Moore's appeal. Certainly, I do not approach the current application for costs on the basis that there was not an appeal in relation to the earlier costs Judgment. Mr Moore seems to think that is the approach being taken by this Court. If so, he is wrong.

[23] For completeness, I also mention a memorandum lodged by Ms Rokoika on 8 September 2010 who appeared for the applicant in the Court of Appeal. She explained what had happened in relation to the earlier Costs Judgment.

[24] Further, lengthy, submissions were submitted on 15 and 21 September 2010. I have already mentioned the transcript of the hearing before the Court of Appeal and this is attached to Mr Moore's further memorandum of 15 September 2010. I have read both of these memoranda.

[25] On 1 October 2010 (NZT) I issued a Minute seeking submissions on the following proposition: *"In New Zealand, the question of costs in a failed prosecution would be dealt with by reference to the Costs in Criminal Cases Act 1967. There does not appear to be any Cook Island equivalent. The closest statutory provision appears to be section 414(3) Crimes Act."*

[26] Subsequent memoranda supplied by Mr Moore and then the applicant confirmed that proposition.

Discussion

[27] I proceed on the basis that I am able to entertain Mr Moore's application for costs in this Court.

[28] I am satisfied that I do not have jurisdiction to order costs in favour of Mr Moore in the civil jurisdiction of the Court. It would be an odd state of affairs if, Mr Moore having succeeded in arguing that the criminal procedure should have been followed, I should then exercise the Court's civil jurisdiction when it came to costs.

[29] The fact of the matter is that the appeal succeeded on a procedural ground. The Court of Appeal made no conclusions in relation to the substance of the allegations. Indeed, the applicant was invited to come again if it chose to do so.

[30] Consequently, this is a case where (effectively) a criminal prosecution failed because the wrong procedure was used. In New Zealand, there is

jurisdiction under the costs in Criminal Cases Act 1967 to award costs to a successful defendant. The Court is to have regard to various issues specified in section 5 of the Act. The essential question for the Court is sometimes put in terms of whether the prosecution was reasonably and properly brought and pursued. This is a significant standard. There is no equivalent legislation in the Cook Islands except for section 414(3), Crimes Act, which provides that where a person is acquitted the Court may order costs in *"such sum as it thinks just and reasonable"*. Mr Moore was not acquitted and so the provision does not apply.

[31] Nevertheless, and in the Court's inherent jurisdiction, it would seem that I do have jurisdiction to award costs to Mr Moore if I thought it appropriate. I do not believe it appropriate for reasons I now explain.

[32] The contempt action failed because the wrong procedure was used. Mr Moore has not been acquitted. His lawyer did not raise the objection which was ultimately successful only on appeal. These circumstances do not closely approximate the test in New Zealand which it seems, to me, is an appropriate benchmark in the absence of a specific statutory provision.

[33] Although Mr Moore alleges there was a deliberate course of action followed, apparently with the purpose of circumventing the law, there is no foundation in fact for that submission. Indeed, it actively misreads the Judgment of the High Court if, as it appears, Mr Moore is asserting that this Court, with knowledge of the true position, deliberately adopted some other course. I suspect that Mr Moore is making such an allegation. Indeed, at the time of the release of the Judgment I noted that Mr Tupangaia was quoted in the *"Cook Island News"* as making statements along similar lines. At the time, I gave consideration to having the matter referred to the Solicitor-General to investigate whether the statements were in contempt of this Court. Mr Moore is not to be tarred by Mr Tupangaia's brush, but the similarity in the assertions is significant.

[34] I mention all of this because I think that Mr Moore is alleging bad faith both on the part of the applicant and this Court. Certainly, he appears to be doing so on the part of the applicant. I believe any such submission to be entirely misplaced.

[35] There is no basis upon which I would or should make an order of costs in Mr Moore's favour. In so concluding, I am exercising the Court's criminal jurisdiction.

[36] For the avoidance of doubt, I make it clear that the communication from the President referred to at paragraph [21] above is regarded as having no formal standing. Indeed, as the President himself noted, at that point the Court of Appeal was *functus officio*.

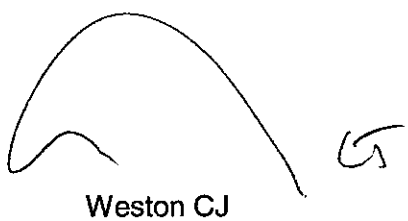
[37] For the further avoidance of doubt, I do not make any formal determination in relation to Mr Morley's submission that the question of costs in this Court was fully and completely determined by the President in his Minute dated 24 June 2010. That is because a formal decision is not required, bearing in mind my conclusion as above. However, I make two observations. First, the President's response to Mr Moore's request, whereby the President simply stated that Mr Moore had no costs liability in the High Court, is consistent with my view that that was as far as the matter could or should be taken. There was no proper basis to go further and order costs to be paid to Mr Moore and the most that need to be done in the circumstances was to set aside the earlier Costs Order.

[38] My second observation is that there appears to be considerable substance in what Mr Morley submits. That is really another way of stating the first observation set out above. However, my preference has been to address the question of costs raised by Mr Moore rather than to exclude it entirely on the basis that the Court of Appeal itself had finally determined all cost issues. While I suspect that that was its intention, my preference has been to give Mr Moore the benefit of the doubt.

Conclusion

[39] Mr Moore's application for costs in the High Court is dismissed. Although Mr Morley sought costs on this application, in the event it was dismissed, I make no order in favour of the applicant.

Dated 22 October 2010 (NZT)



Weston CJ