IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) **PLAINT NO. 1/2012**

LITTLE & MATYSIK PC

(Plaintiff)

v

NORMAN GEORGE

(Defendant)

Date of Hearing: 21 March 2013

Counsel: Ms J Wi-Kaitaia for the Plaintiff
Mr N George in person, Defendant

Judgment: 28 March 2013

JUDGMENT OF HUGH WILLIAMS J

INTRODUCTION

[1] On its face, this is a conventional claim by the Plaintiff firm of solicitors for $12,175.88 for legal fees which the Plaintiff firms says was incurred by the Defendant at a time when he was one of their clients.

[2] The claim, however, has some unusual features which provide a background to the litigation and the way in which it was conducted.

[3] The Defendant, Mr George, is a Cook Islands lawyer of long standing. In addition, he has, for a considerable number of years, been a member of the Cook Islands Parliament and has, on occasions, been a Minister.

[4] However, in the circumstances briefly outlined at the commencement of his judgment ((No.4) delivered on 4 February 2010), Nicholson J outlined the

circumstances which led to Mr George and two others being charged with a number of offences. Mr George faced 14 charges.

[5] That lead to a judge alone trial before Nicholson J which commenced on 13 October 2008. The Crown called 63 witnesses and closed its case on 2 October 2009. All three accused applied for discharge and in the judgment mentioned, Nicholson J granted the applications in part.

[6] The trial recommenced in the sense of dealing with the submissions and in a judgment delivered on 30 April 2010 by Nicholson J, Mr George (and his fellow accused) were all acquitted on all the counts they faced.

[7] All accused had indicated their intention to apply for costs in the event of their being discharged and it is with that aspect of the matter that this judgment is principally concerned.

FACTS

[8] The Plaintiff firm of solicitors prides itself on its efficient and effectual representation of its clients and, perhaps for that reason or perhaps for the personal reasons outlined in evidence, Mr George approached Little & Matysik to act on his behalf in dealing with his application for costs. Mr Little of the Plaintiff had misgivings about accepting because of what he had heard and experienced as to Mr George's ability to pay his debts timeously, but nonetheless decided to accept the instructions.

[9] Little & Matysik claim the contract of retainer was entered into with Mr George on or about 27 April 2010. It says Mr George contracted for their legal services which were to be paid for at the firm's standard rate for principals and experienced solicitors of $250 per hour plus VAT plus disbursements.

[10] Mr George, who acted for himself at this hearing and who provided an affidavit but called no evidence, endeavoured to suggest in cross-examining the Plaintiff firm's principals that their instructions to act came somewhat later than they claim. However, the likelihood of Mr George being discharged in the criminal trial had been earlier flagged and having regard to that and the proximity of Little & Matysik's claim as to the date for the contract of retainer and the date of Nicholson,

J's judgment of 30 April 2010, the Court accepts 27 April 2010 as the date on which the contract was entered into. The matter was, in any case, put beyond doubt by the fact that Mr George, in his Statement of Defence in these proceedings, admitted that the date of the contract of retainer was 27 April 2010.

[11] Between the date of the contract and what would appear to have been early May 2011 the firms acting for the former Defendants worked energetically, against timetables set down by Nicholson J, on preparing, filing and following-up on their submissions in support of their clients' costs applications.

[12] It is the Plaintiff firm's practice to render accounts to their clients on an approximately monthly basis depending on the work undertaken and by the end of May 2011 all the invoices which are the subject of this claim had been sent to Mr George. They were (all figures quoted inclusive of disbursements and VAT):

a) Invoice 6348 dated 31 May 2010 for $1,906.95

b) Invoice 6471 dated 30 June 2010 for $1,968.89

c) Invoice 6562 dated 31 July 2010 for $6,395.71

d) Invoice 6668 dated 31 August 2010 for $317.86

e) Invoice 7026 dated 17 December 2010 for $315.04

f) Invoice 7126 dated 14 February 2011 for $286.93

g) Invoice 7219 dated 28 February 2011 for $641.33

h) Invoice 7508 dated 31 May for $343.17

Total claimed: $12,175.88.

[13] It can be seen from that recital that by far the major proportion of the costs claimed by the Plaintiff was in the May-July 2010 period, the period by which Nicholson J's timetable orders required the cost submissions to be lodged.

[14] At this hearing, Mr George's defence accepted that $250 per hour was "not unreasonable". It also accepted the correctness of the invoices "but disagreed with

the rates charged". Despite those admissions, he cross-examined the principals of the Plaintiff firm in a way designed to show that some of the items detailed in some of the invoices were inflated in terms of the time claimed to have been spent, some were needless or repetitious and some were "phantom".

[15] The Court declines to accept Mr George's criticisms in cross-examination of the entries on the invoices on which the claim is based. The reasons for that include:

a) The Court accepts that, until this hearing, Mr George never complained to the Plaintiff firm about any of the detail in any of the invoices he received month after month. He had ample opportunity to do so if he had genuine concerns about what he was being charged.

b) his assertions were vigorously refuted by Messrs Little and Matysik in cross-examination and were not supported by any evidence from Mr George.

c) More generally, Mr George's cross-examination was directed to such matters as the Plaintiff firm's repeated use of the terminology that it "reviewed" the file before drafting some email or other document relating to it. He suggested that was superfluous, but lawyers understand that it is almost invariably necessary to refresh the memory as to the present details of any file before taking the next step. Such measures are prudent to ensure accuracy Mr George's criticisms were unfounded..

[16] Then , Mr George endeavoured to suggest that he (and other lawyers acting for other defendants) provided all the material Little & Matysik required so that all that was required of them was simply to assemble the material and include it in the submissions.

[17] The Court does not accept that suggestion. Mr George's trial -:Operation Slush"- had been the longest criminal trial in Cook Islands history. It was obviously a matter of great length and complexity with the detail relevant to any cost application needing to be identified, located, evaluated and then incorporated in the costs submissions. Diligent solicitors would do nothing less.

[18] Further, Mr Little said the Plaintiff required additional material from Mr George such as supporting invoices for the figures claimed by him in his material. Such additional material needed to be included in a costs submission, but the need for it had to be ascertained in order for the additional documentation to be requested.

[19] Thirdly, claims for costs in criminal matters are by no means straightforward – as Mr George suggested – and certainly not in the situation in which Mr George found himself, a situation which was unique in the Cook Islands. Although the criteria by which such applications are customarily judged is usefully collected in the Costs in Criminal Cases Act 1967 (NZ) the applicability of those criteria to the Cook Islands had to be researched to be demonstrated and the voluminous material needed to buttress the submissions marshalled, and arranged to Mr George's best advantage.

[20] The fact that the submissions filed by the Plaintiff firm in support of Mr George's application for costs stretched to 27 pages, some 11 of which were the submissions, testifies to the difficulty and complexity of the matter, as does the fact that the submissions filed by other Defendants and the Crown were substantially longer.

[21] Little & Matysik also embarked on some innovative procedures to assist in Mr George's cost application such as filing an Official Information Act request to obtain the costs charged by Crown Law, so those costs could be used as something of a guideline for Mr George's claim.

[22] A telling measure of the effectiveness of the submissions filed by the Plaintiff firm on Mr George's behalf is that the costs judgment (No. 9) of Nicholson J delivered on 10 December 2010 is a 24 page judgment which granted Mr George's application by awarding him two-thirds, $126,206.81, of the costs actually incurred by him.

[23] 10 December 2010, the date of the costs judgment, would seem to have been the high point of the matter from Mr George's perspective. Thereafter, matters started to go downhill for him.

[24] In the first place the amount of the costs award to Mr George and his fellow defendants was such that the Cook Islands government first had to decide whether to

appeal and then, when they decided against that course, find the money to pay the award. That took time, at least from December 2010 until about May 2011. That delay occurred despite efforts being made by the Plaintiff firm and the solicitors acting for the other defendants to accelerate payment.

[25] The second major misfortune suffered by Mr George was that by about June 2011 the Ministry of Finance and Economic Management ("MFEM") was claiming a very large proportion of the costs award in Mr George's favour for unpaid income tax penalties and interest owing by him.

[26] Though not given in evidence, as the Court understood it from Mr George's elaboration in Court, ultimately MFEM recouped something in excess of $80,000 of the costs award for tax unpaid by him plus penalties and interest. The balance, Mr George said, was paid to him but he chose – he may have thought he had little option – to utilise almost all of that in staving off a mortgagee's sale of his family home. He personally received only what would seem to have been about $5,000, but chose to pay nothing from that sum to the Plaintiff or to any other creditors.(Given the Plaintiff firm was known to be acting for Mr George, it might be thought the costs award would have been paid to them for their client, but such, according to Mr George, did not occur. However the diversion occurred, it seems the money was paid to Mr George personally.)

[27] As Mr Little accepted in cross-examination the terms of the contract of retainer were varied during the course of the Plaintiff firm acting for Mr George. At the outset, Mr Little's understanding was that Mr George, like any other client, would meet the monthly accounts when rendered. In fact, later Press publicity suggested that Mr George was impecunious at the date of the contract of retainer through meeting the costs of his trial counsel as far as he could, but Mt Little was unaware of that at the time.

[28] The contract of retainer later changed to repeated promises of the Plaintiff firm being paid when the costs award was paid. In fact, no part of even the small sum received by Mr George personally from the costs award was paid to the Plaintiff firm and nothing has been paid on account of the firms invoices before or since, despite the firm receiving numerous promises of payment by Mr George, pressing

him to settle his account and endeavouring to get him to sign documents which might have given the Plaintiff firm a prior charge on the costs award.

[29] Had Mr George paid his taxes as they fell due and MFEM not intervened, the likelihood is that Mr George- or somebody on his behalf - would have been paid the whole of the costs award in his favour, would have paid Little & Matysik and perhaps other creditors and this case would never have been brought. As it is, Little & Matysik have been paid nothing for their legal services in the nearly three years since the accounts were incurred.

[30] Mr George said his professional practice has been seriously damaged despite his acquittal and that, from his incomes as a lawyer and an MP, he remains unable to pay the Plaintiff firm's invoices, certainly in one lump sum.

RESULT

[31] In the result, the Court finds all the matters raised by Mr George in cross-examination to be of no weight as far as the Plaintiff firm's claim is concerned. They do nothing to undermine Little and Matysik's claim. There will accordingly be judgment for the Plaintiff against the Defendant for the full amount claimed, $12,175.88.

[32] Mr George asked the Court to be lenient as regards interest.

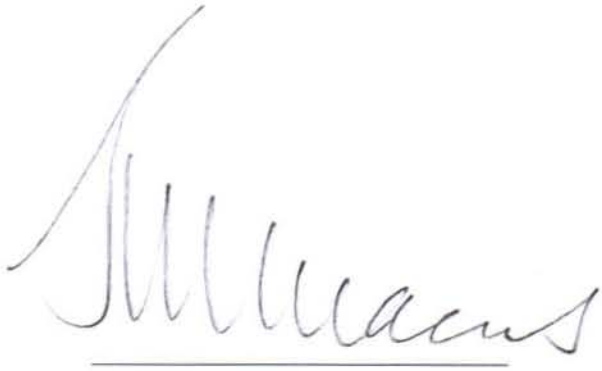
[33] Any award of interest must follow accepted principles. The Plaintiff firm's invoices do not claim interest by default and although interest is included in the Plaintiff firm's standard form of the terms and conditions on which they agree to act, no such form was signed by Mr George.

[34] Although the invoices all fell due for a payment 14 days after being rendered, the Plaintiff firm did nothing to enforce their entitlement until these proceedings were issued in February of last year. They are therefore only entitled to interest on the amount of the judgment at the rate under the Judicature Act 1980-81 from the date of commencement of the proceedings.

[35] Therefore, to the sum for which judgment has been entered, $12,175.88, there will be added interest at the rate of 8% from 1 February 2012 to the date of judgment and from the date of judgment to the date of payment.

[36] The Plaintiff firm is also entitled to the disbursements relating to the litigation.

[37] Mr George asked the Court to give him time to reach an arrangement for payment with the Plaintiff firm over a period, or to stay the issue of any execution process. The former is a matter for negotiation between the parties to this unfortunate litigation and the matter is a matter for consideration on due application should execution be sought.



Hugh Williams, J