

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

CR NO. 522/92

BETWEEN GRAEME CLIVE STACE

Appellant

A N D NGATUNANE MAXIMUS
PIERRE of Takuvaine,
Rarotonga, Public Servant

Respondent

A N D MICHAEL CRAWFORD
MITCHELL of Arorangi,
Rarotonga, Solicitor

Respondent

Mr Holmes for the Appellant
Mr Arnold for N.M. Pierre, Respondent
Mr Mitchell representing himself as a separate Respondent

Date of Judgment : 5th MARCH 1993

JUDGMENT OF DILLON J.

The Appellant swore to an information under the Criminal Procedure Act 1980-81 on 9 April 1992 against both Respondents separately alleging as to Mr Pierre that he :

"... did conspire with the Government of the Cook Islands to either obstruct, or alternatively to prevent, or alternatively to pervert, or alternatively to defeat the course of justice in that he :

Acting as the Receiver of Marine Resource (Cook Islands) Limited (In Receivership) unlawfully agreed to withhold his consent to certain existing and any subsequent appeals or proceedings lodged against the Government of the Cook Islands by the Directors of Marine Resources (Cook Islands) Limited (In Receivership). (Section 127 Crimes Act 1969)."

and alleging as to Mr Mitchell that he :

"... did conspire with NGATUNGANE MAXIMUS PIERRE of Takuvaine, Rarotonga, Public Servant to either obstruct, or alternatively to prevent, or alternatively to pervert, or alternatively to defeat the course of justice in that he :

Acting as the Solicitor General of the Government of the Cook Islands executed a deed by which the Government of the Cook Islands in consideration of NGATUNGANE MAXIMUS PIERRE (acting as THE RECEIVER OF MARINE RESOURCES (COOK ISLANDS) LIMITED (IN RECEIVERSHIP)) agreed to indemnify the said NGATUNGANE MAXIMUS PIERRE against all costs, claims, actions, proceedings, damages, losses and other like matters arising out of or incurred consequent on the said NGATUNGANE MAXIMUS PIERRE withholding his consent. (Section 127 Crimes Act 1969)."

Both informations came before Justices of the Peace on 30 July 1992 and were "struck out". No reasons were given by the Justices and there is no formal decision or judgment setting out why this course of action was taken.

The Appellant now appeals against that decision in respect of both Respondents, upon the grounds that :

- l. "a) the decision was made with ^{out} jurisdiction;
(b) the decision was wrong in law."

THE BACKGROUND

It is necessary to traverse very briefly some of the background to lengthy civil litigation which has involved the Appellant and the Cook Islands Government over a number of years. This litigation was referred to by Counsel. It involved the original Hearing in the High Court lasting 14 days; there were subsequent High Court hearings; and there were hearings before the Court of Appeal. That was all

nine years ago. It is following those civil proceedings that the Appellant has now launched these criminal proceedings - one against Mr Pierre who was the Receiver of Marine Resources (Cook Islands) Limited, having been appointed to that position by the Cook Islands Development Bank; and the other against Mr Mitchell who was the Solicitor-General for the Cook Islands.

THE APPELLANT'S COMPANY

The Appellant was a director of Maritime Services (N.Z.) limited (hereinafter called "The N.Z. Coy"), a company incorporated in New Zealand and with a registered office in New Plymouth.

He was also a director of Marine Resources (Cook Islands) Limited (hereinafter called "The Cooks Coy", a company incorporated in the Cook Islands and with a registered office in Rarotonga.

The Cook Islands Development Bank (hereinafter called "the Bank") advanced the Cooks Coy certain funds which funds were secured by a debenture in favour of the Bank. The Bank, pursuant to its powers under that debenture, appointed Mr Pierre the Receiver of the Cooks Coy. This then was the legal position prior to the first High Court hearing before the Chief Justice in 1983.

THE DEED OF INDEMNITY

On 25 August 1983 and prior to the first High Court hearing later in that year, the Appellant entered into a Deed of Indemnity with the Bank and Mr Pierre as receiver of the Cooks Coy to guarantee them in respect of costs that may be incurred in the pending litigation. This guarantee was given by the N.Z. Coy and by the Appellant personally.

It is clear from this Deed that both the Bank and the Receiver sought this guarantee firstly because the Directors of the Cooks Coy, including the Appellant, had commenced litigation in the High Court against the Government of the Cook

islands without the consent of the Receiver; and secondly because the Receiver had estimated an assets realisation of \$12,000 while the then current costs of the Receivership were of the order of \$26,000 - most of which was owed to the Bank itself.

The Appellant executed that guarantee on behalf of the N.Z. Coy and also personally.

THE LITIGATION

The initial High Court proceedings took 14 days; the Cooks Coy claimed \$1,737,000 from the Cook Islands Government; the claim was disallowed; the Cooks Coy appealed; security for appeal was fixed and the Cooks Coy applied for leave to appeal against that decision; leave to appeal was refused and the Cooks Coy then applied for leave to appeal against that refusal.

All these appeals were decided by the Court of Appeal on 12 September 1984, effectively reducing the security to be paid by the Cooks Coy to the sum of \$7,000.

In the course of these proceedings, submissions were made by both Counsel on the position of the receiver and the fact that he was unwilling to grant his consent to the bringing of the appeal - pages 11 and 12 of the Court of Appeal decision record those submissions as follows :

"Both Counsel asked that in hearing argument on the appeals which we have already discussed, we should also hear argument on the question of whether, in face of the opposition of the receiver of the appellant company, the appeal is properly constituted. We were told that two of the three directors of the appellant company have authorised the bringing of the appeal. The third is overseas and cannot be located. However, the receiver is unwilling to grant his consent to the bringing of the appeal. Mr Holmes wishes to avoid having the evidence taken on the hearing of the substantive proceedings transcribed

and the Case on Appeal prepared when, if Mr Mitchell's contention that no appeal lies because of the receiver's refusal to consent is correct, the appeal may be struck out without the merits of the case ever being considered. We can understand the justifiable concern of both counsel over this matter, but as we informed them at the hearing, we cannot entertain argument on this point when there is no application or supporting affidavit before the Court which puts it in issue.

Under RR.27 and 29 of the Court of Appeal Rules an appellant has an obligation to lodge the record with the Registrar and it is only after this has been done that the Registrar will set the appeal down for hearing. The observance of such procedure would require the appellant to have all the evidence transcribed - which is the very step which Mr Holmes understandably wishes to avoid in the meantime. There is, however, one way of meeting the problem. If the appellant files a motion and supporting affidavit which raises the point which Counsel now wish to argue as a preliminary issue, and applies under the Rules for a waiver of compliance with them, we will, if counsel are now agreed, accede to the application and give our judgment on this point. We have intimated to counsel that we are prepared to have the argument on the point placed before us in written form.

Then there is the question as to what is to happen to the security if the appeal does not proceed. We record that counsel are agreed that in that event the \$7,000 is to be returned to the appellant, or security to be provided for it released to it and not the respondent. But we leave the final resolution of this matter until the preliminary point has been determined."

It is clear that Mr Holmes, who was Counsel for the Cooks Coy before the Court of Appeal and represents the appellant now in these proceedings, was fully aware of the receiver's stance; and his unwillingness to grant consent to the bringing of the Appeal; and the full disclosure of his attitude to the Court of Appeal as recorded in its Judgment.

THE INDEMNITY

A Deed of Indemnity dated 5 September 1984 between the Cook Islands Government and Mr Pierre has been produced in the course of these proceedings and is relied upon by the Appellant as the basis for the criminal charges which have been laid. The Deed is as follows :

"THIS DEED made this 5th day of September 1984

BETWEEN THE GOVERNMENT OF THE COOK ISLANDS of the one part ("Government") AND NGATUNGANE MAXIMUS PIERRE receiver for the Cook Islands Development Bank of the company MARINE RESOURCES (COOK ISLANDS) LIMITED (IN RECEIVERSHIP) ("The Receiver")

WHEREAS

- A. Government wishes the Receiver to withhold his consent to certain appeals lodged against Government by the directors of the above company in the Court of Appeal of the Cook Islands.
- B. The Receiver agrees to so withhold his consent provided he is indemnified against any subsequent action taken by members, directors or other creditors of the said company.

NOW THEREFORE THIS DEED WITNESSETH AS FOLLOWS THAT

1. IN consideration of the Receiver at the request of Government withholding his consent to the appeal aforementioned to be heard in Wellington, New Zealand Tuesday next (11 September 1984, New Zealand time) and to any subsequent appeals or proceedings arising out of the civil action MARINE RESOURCES (COOK ISLANDS) LIMITED vs M.C. MITCHELL Government HEREBY AGREES to INDEMNIFY the Receiver against all costs claims actions proceedings

damages losses and all other like matters or things arising out of or incurred consequent on the Receiver withholding his consent as aforesaid and whether brought against him by the members (or any of them) of the Company or the directors (or any of them) of the company or the creditors (secured or unsecured) (or any of them) and whether creditors of the company or of the Receiver.

IN WITNESS WHEREOF THESE PRESENTS HAVE BEEN EXECUTED
THE DAY AND YEAR FIRST HEREINBEFORE WRITTEN

SIGNED for an on) M.C. Mitchell
behalf of Government) Solicitor General
before me :) Rarotonga

Witnessed by : T. Arnold, Solicitor, Rarotonga

SIGNED by the) N. Pierre
Receiver before me :)

Witnessed by : T. Arnold, Solicitor, Rarotonga

It is noted that this Deed is dated 5 September 1984; it is executed in anticipation of the Court of Appeal sitting fixed for 11 September 1984; it is an indemnity by the Government of the Cook Islands in favour of Mr Pierre for withholding his consent as receiver; and disclosure of such decision was made to the Court of Appeal and acknowledged by Counsel for the Cooks Coy who is also counsel for the Appellant in these proceedings. Of course, it is relevant to refer to the Court of Appeal's invitation to Counsel for the Cooks Coy to file "... a motion and supporting affidavit which raises the point which Counsel now wish to argue as a preliminary issue ...". Thus not only was their disclosure, but Counsel were invited

to accept the opportunity of preliminary proceedings before any substantive Court of Appeal hearing.

It is on the basis of that Deed of Indemnity entered into by Mr Pierre that these criminal charges are now laid; and it is on the basis that Mr Mitchell has signed that Deed of Indemnity as Solicitor-General on behalf of the Cook Island Government that he now faces criminal charges.

THE INFORMATIONS

The allegations against both respondents are that they did conspire with each other :

"... to either obstruct
or alternatively to prevent
or alternatively to pervert
or alternatively to defeat the Course of Justice"

There is an interesting difference in the informations. The one against Mr Mitchell alleges that he agreed to indemnify Mr Pierre against all costs etc. The signing of a Deed of Indemnity in those terms cannot of course denote a criminal intent and none is alleged in the information.

On the other hand in the information against Mr Pierre there is in fact an allegation that he "unlawfully" agreed to withhold his consent. The question as far as Mr Pierre is concerned is whether in agreeing to withhold consent to the issue or continuation of Court proceedings (which he is entitled to do as receiver) and to arrange for his indemnity for exercising such a decision, is he guilty of obstructing or perverting the course of Justice.

Both informations allege a conspiracy between both Respondents. That conspiracy was to either obstruct, prevent, pervert, or defeat the course of Justice. The conspiracy is based on the Deed of Indemnity dated 5 September 1984. The unwillingness of the receiver Mr Pierre "... to grant his consent to the bringing of

the appeal" was disclosed to the Court of Appeal hearing a week later on 12 September 1984. The Court at that hearing, and because of the receiver's attitude as disclosed to the Court, offered the Cooks Coy special procedural proposals for preliminary determination of any difficulties arising before the substantive appeal hearing.

Can all of this be stigmatised as a conspiracy by these two Respondents; can it be said that their acts were done in pursuance of a criminal purpose held in common between them?

The Respondents are charged with the serious offence of conspiring to pervert the course of Justice. The offence is based solely on the Deed of Indemnity. Mr Pierre, a Cook Islands Government servant, signed that Deed as the Receiver appointed by the Cook Islands Development Bank. Mr Mitchell, the Cook Islands Solicitor-General, signed that Deed on behalf of the Government. The Deed of Indemnity referred specifically to the Receiver withholding his consent to any appeals provided he was indemnified by the Cook Islands Government. The receiver had originally required a normal guarantee and indemnity prior to the High Court proceedings instituted by the Coy without the receiver's prior approval. This guarantee and indemnity had been given by the Appellant and his N.Z. Coy. Prior to the Court of Appeal hearings 12 months later the Receiver entered into a further indemnity, on the basis that he would withhold his consent to any appeals. But most importantly and critical to this issue was the disclosure to the Court of Appeal that :

"... the Receiver is unwilling to grant his consent to the bringing of the Appeal."

It is now alleged as the basis of these proceedings that the indemnity signed by the Receiver constitutes a conspiracy; and that Mr Mitchell having signed the indemnity on behalf of the Cook Islands Government that employed him is the other party in this conspiracy.

The law relating to conspiracy does not support such an allegation. It is unnecessary to refer to authorities. No criminal intent is evidenced; nor does this Deed of Indemnity constitute a criminal conspiracy to obstruct, prevent, pervert or defeat the course of Justice. The information against Mr Pierre alleges that he "unlawfully agreed" to withhold his consent which stance was fully disclosed to the Court of Appeal. The information against Mr Mitchell alleges that he on behalf of the Cook Islands Government "agreed" to indemnify the Receiver. Nothing unlawful is alleged against Mr Mitchell - nor can there. The only "unlawful" action is alleged against Mr Pierre. Of course one person alone cannot be guilty of conspiracy.

CONCLUSION

I do not propose to traverse the many technical points raised by all Counsel. I am satisfied that these proceedings brought by the Appellant living permanently outside this Court's jurisdiction and some nine years after his unsuccessful civil proceedings against the Cook Islands Government are contrived and could easily be classified as an abuse of the process of this Court. As stated in the House of Lords case of Connelly v D.P.P. 1964 AC 1254

"The power (which is inherent in a Court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice."

The informations against both Respondents are dismissed. There will be a permanent order for the suppression of both their names. Leave is granted to either party to make application on the question of costs if considered necessary.


