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

PLAINT NO. 23/18

IN THE MATTER of section 50B Judicature Act 1980-81, and the High Court's equitable jurisdiction

AND

IN THE MATTER of an application for judicial review of a decision under the Mutual Assistance in Criminal Matters Act 2003

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

Applicant

AND **ATTORNEY-GENERAL** of the Cook Islands

First Respondent

AND **FINANCIAL INTELLIGENCE UNIT** of the Cook Islands

Second Respondent

Date of Hearing: 31 May 2018

Date of Judgment (No.1): 6 December 2018

Date of s 61 Judgment: 11 March 2019

Counsel: Mr S C Baker, Solicitor-General and Ms Kathy Bell for Attorney General and the Financial Intelligence Unit
No appearance for First Respondent in Misc No. 9/18
Messrs N R Williams and D McNair & Ms Olivia Klaassen for Ora Fiduciary Cook Islands Limited

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JUDGMENT OF HUGH WILLIAMS, CJ
(Re. s 61 of the Mutual Assistance In Criminal Matters Act 2003)

Introduction

[1] The substantive judgment in Misc. 9/18 was delivered on 6 December 2018. Distribution and confidentiality of the judgment were directed to be dealt with subsequently and, since that time, the parties have been mired in a dispute concerning to whom, beyond a largely-agreed limited distribution list, the judgment, in full and unredacted form, should be available, having regard to the provisions of s 61 of the Mutual Assistance in Criminal Matters Act 2003[1] and, to a less pressing extent at the present time, s 23 of the International Trusts Act 1984.

[2] This judgment deals solely with the impact of the interpretation of s 61 on distribution and availability of the substantive judgment – subject to redactions – in Misc. 9/18. It says nothing about the continuing impact of the confidentiality orders which are in place in relation to both these proceedings, or about any ultimate publication of the judgment. And, because the parties wish to deal with those issues on a piecemeal and staged basis, a cautionary approach has been adopted: i.e. redactions are proposed in the form of the substantive judgment to be distributed in accordance with this judgment when, ultimately, other, or no, redactions might be directed from the form of the substantive judgment to be published at the end of this process.

[3] The current distribution list of the substantive judgment is as set out in Minute (No.2) of 18 December 2018, expanded on in a further minute of 21

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[1] "MACMA".

December 2018 (NZDST), commented on in the Court's further minute of 20 January 2019 (NZDST) and is also the subject of the minute of 31 January 2019[2].

[4] The nub of the dispute was summarised in paragraph [9] of the 31 January 2019 minute which said:

> a) What material could be provided by the Cook Islands' authorities to the Russian authorities (as described in the substantive judgment).
>
> b) What material can be provided to Mr Leontiev – whose actions and those of his associates, trusts and companies were the focus of Misc.9/18 – and to his American counsel, Mr Reich, and his American solicitors/attorneys, Messrs Kobre & Kim;
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> c) Given all parties request for confidentiality, what redactions to the full substantive judgment should be made prior to publishing the same generally.

[5] This judgment relates to issues (a) and (b). Issue (c) will be dealt with subsequently but Mr Williams, leading counsel for Ora Fiduciary Cook Islands Limited[3] was right to note that under s 23(3) of the International Trusts Act 1984 the presumption is that hearings affected by that section are in camera but decisions will be published, in both cases unless ordered otherwise. Matters which may be taken into account in that regard include that, as far as is known, the substantive judgment is the first detailed judicial consideration of the issues it discusses, and, the Solicitor-General having advised the judgment is not to be appealed, it may have some precedental value.

Section 61 of MACMA

[6] The starting point for consideration of the present issues between the parties concerning distribution of the substantive judgment must be s 61 of MACMA which reads:

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[2] The Court notes the satisfaction of para [4] of the 31 January 2019 minute, in para [43] of the Solicitor General's memorandum of 1 February 2019; Mr John Evans is nominated as CSB officer and that paras [6] and [7] are now agreed.

[3] "Ora"

> 61. Requests for international assistance must not be disclosed - (1) Subsection (2) applies to a person who, because of his or her office or employment, has knowledge of -
>
> (a) the contents of a request for international assistance made by a foreign country to the Cook Islands under this Act; or
> (b) the fact that a request has been made; or
> (c) the fact that a request has been granted or refused.
>
> (2) The person must not intentionally disclose those contents or that fact unless-
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> (a) it is necessary to do so in the performance of his or her duties; or
> (b) the Attorney-General has given his or her approval to the disclosure of those contents or that fact.
>
> (3) A person who contravenes subsection (2) is guilty of an offence punishable by-
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> (a) if the person is a natural person, a fine of up to $10,000 or a term of imprisonment of up to 2 years, or both; or
> (b) if the person is a body corporate, a fine of up to $50,000.

[7] None of the terms in s 61 are defined, but s 7 of MACMA, providing for the receipt of requests by foreign countries for international criminal assistance, says such are required, by subs. (2), to include the following content:

> (2) A request must be in writing or by email and must include, or be accompanied by, the following information:
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> (a) the name of the authority concerned with the criminal matter to which the request relates;
> (b) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;
> (c) a description of the purpose of the request and of the nature of the assistance being sought;
> (d) any information that may assist in giving effect to the request.

[8] It follows that the protection afforded by s 61(1)(a) must extend at least to the information prescribed by s 7(2).

[9] To possibly clear away one aspect of the dispute immediately, para [2] of the substantive judgment said the request for assistance had been received from the Investigative Committee of the Russian Federation, and then described the three documents comprising the request with the names of the signatories.

[10] That material was included to provide assurance that the request complied with s 7 but, should the identification of the signatories and the description of the documents be considered to contain sensitive material, the Court, acting under its power to recall its judgments for special reasons, would be prepared to recall the judgment, delete the names of the signatories[4] and describe the documents as being "a formal request to the Attorney-General dated in mid-July 2017 from authorities in Russia, the content of which complied in all respects with s 7 of the Mutual Assistance in Criminal Matters Act 2003 (and in relation to which there was no ground to refuse or postpone the request under s 9 of that Act)"[5]. Given the rest of the substantive judgment with its frequent – and necessary – references to Russia, redaction of the foreign country's name would be artificial, but, apart from that, such a recall would not materially alter the substance of the judgment,

Submissions

[11] The Solicitor-General's submissions noted the formal request sought confidentiality[6] and explained the approach taken to date by Mr Baker and his predecessor. That led to the former producing his attachments B, C and D, B being a general anonymised undetailed summary of the judgment and the "content of Russian MACMA request" including page 1 of the judgment and paras [1] to [5] and C being a brief summary of the judgment's comments about the contents. His request at this stage was to do no more than provide that material to the Russian authorities to seek their reaction and ascertain if they proposed redactions from the substantive judgment before distribution and any publication.

[12] Mr Baker made the point that the Russian authorities, of course, are already aware of the contents of the MACMA request, so he submitted there was no issue with them seeing Attachment C.

[13] He proposed that Messrs Leontiev and Reich and Kobre & Kim should receive a judgment redacted as in his Attachment D. He submitted they and other third parties should not see Attachment C as it would give them information relating to the contents of the MACMA request.

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[4] And footnote 6.

[14] Turning to the text of s 61, Mr Baker noted the evidential and procedural antecedents to the hearing which led to the substantive judgment, particularly the supporting affidavit of Detective Inspector Ingaua and the information that provided to Ora as to confidentiality. He submitted all those involved in the proceedings, including the parties, their counsel and the Court had an obligation to comply with s 61, the parties because of the knowledge of the request's contents gained through service of the documents, and counsel by dint of their being instructed. He submitted that if Ora were correct that s 61 had no application beyond the making of the request "this would mean that as soon as anyone was told of the fact or content of a MACMA request, and despite their attention being drawn to s 61 and also the duty to keep confidentiality being set out, they could simply disclose it further at their own discretion". He submitted that s 61 extended to those involved with an initial request, including the Court.

[15] Mr Williams' submissions commenced by relying on the Constitution's affirmation of the rights of freedom of speech and expression which encouraged the reporting of Court decisions, something, he emphasised, which supported Ora's restricted interpretation of s 61 as applying only to persons who by virtue of office or employment know of requests and their fate. Details of the request, he submitted, were already in the public arena and had been litigated publicly in other jurisdictions; the Attorney-General, through the former Solicitor-General, had already widely distributed details of the request domestically and internationally; and the Financial Intelligence Unit[7] had gone so far as to direct Ora, by its letter of 25 October 2017 (extensively discussed and, in its entirety, appended as Schedule 2 to the substantive judgment) to notify the contents, including such details of the request as it contained, to others, particularly to Mr Leontiev, and his father, mother, wife and son.

[16] Ora's submissions then drew attention to what it asserted was widespread disclosure of the request which has already occurred, referring to disclosure to the first respondent in Misc.9/18, the Liechtenstein application by the FIU which forms

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[5] The date of the judgment, if so recalled, would remain the same.
[6] For the reasons set out in para 2.
[7] FIU.

part of Plaint 23/18, the US decision in *Deposit Insurance Agency v. Leontiev*[8] and a Google search relating to Mr Leontiev and the Russian authorities' actions against him.

[17] Mr Williams then referred to a number of New Zealand cases under that country's MACMA, but as that Act contains no general secrecy or confidentiality provisions, the impact of that statute on the present dispute is limited.

[18] Mr Williams submitted s 61 was directed to Crown Law and FIU staff and did not effect suppression of the judgment details. He pointed to what he submitted was the circularity of s 61(2)(a) in that, to apply for a restraint, it was necessary for the applicant to disclose the MACMA request, that effectively being a pre-condition and a necessity of the Russian authorities making the request and for the Solicitor-General to apply for the original restraint order.

Discussion and Decision

[19] To begin, it is useful to note the limits of s 61 and what clearly lies beyond its reach. The persons within the ambit of s 61 will be considered later in this judgment.

[20] The section does not apply to anything in either of these proceedings which does not mention the contents of the request for assistance made by the Russian authorities and its outcome, those contents being, at a minimum, the detail set out in s 7(2). Apart from that, everything in both these files is covered by the existing confidentiality orders, but not by s 61. Distribution and unlimited publication of Court judgments is the norm, and s 61 and the confidentiality orders are the only bases which can limit realisation of that norm in this case.

[21] It must follow that s 61, as it applies to this case, can only limit disclosure of the relatively few passages in the judgment which describe the authority making the request and describe the nature of the criminal matter, plus a statement of the relevant facts or law, a description of the purpose of the request and the nature of the assistance sought and "any information that may assist in giving effect to the request". Anything beyond that is outside s 61. Seen in that light, the section goes

[8] US District Court, Southern District of New York, Case 17-NC00414, 23 July 2018.

nowhere near creating a blanket prohibition on disclosure, but it warrants noting that the imposition of the bar on disclosure by those within s 61 arises irrespective of the means of their acquisition of requests' contents. The bar is not confined to acquisition as part of litigation.

[22] Applying that analysis of s 61 to Mr Baker's attachment D and the cautionary approach previously mentioned, would result in the following redactions from the form of the substantive judgment to be distributed to those mentioned later as follows:

a) Line 6 of paragraph [1] should be amended to read "requested the Cook Islands Government for international assistance in a criminal matter" with the balance of that paragraph being redacted.

b) Paragraph [2] has already been dealt with.

c) Paragraphs [3], [4] and [5] should be redacted.

d) Because it is fundamental to the application and any reader's understanding of the substantive judgment, the Solicitor-General's amended application quoted in paragraph [13] should remain, apart from the deletion of paragraph (f). The objection to the last two lines of paragraph (e) remaining is dismissed, Mr Leontiev's and Russia's names appearing elsewhere in the substantive judgment

e) Paragraph [19] cites from Mr Hunkin's affidavit and summarises the FIU's response to the request. Thus, it is a disclosure by Mr Hunkin as Head of the FIU and therefore amounts to a disclosure protected under s 61(2)(a). The passage is fundamental to an understanding of the judgment and will remain, as will paragraph [20]. From lines 3-4 of paragraph [25] the words "on the basis of the confidential information" will be redacted.

f) The words "subject to the MACMA request" could be redacted from paragraph [45], but that must be subject to the later decision as to

whether Mr Wichman is subject to s 61. That comment also applies to the section concerning paragraph [50] in attachment D, the objection to which is declined.

g) There is no justification for redacting the last sentence of paragraph [53] as it is a summary of the then Solicitor-General's submissions and it is accepted that the performance of his duties brings that disclosure within s 61(2)(a).

h) There is an argument for redacting the section in dashes in paragraph [69], though it is merely part of the summary of Mr Williams' submission, but that decision is also subject to the later decision as to whether Mr Williams is bound by s 61.

i) There is no basis for the suggestion that paragraph [77] should be deleted as it is no more than a summary of the application – which is to remain in the substantive judgment – and a summary of the evidence.

j) For the reasons already given, there is no basis for redacting paragraphs [150] and [151] since they, too, summarise the elements of the sections relevant to the Solicitor-General's amended application – which, as noted, is to remain in the judgment – and the empowering statute.

k) Similarly there is no basis for redacting any part of paragraph [152].

[23] For completeness, it is noted that Mr Baker does not suggest that the Second Schedule, setting out the FIU's 25 October 2017 letter in full, should be redacted, wholly or in part.

[24] Those redactions are, however, subject to the following section of this judgment, namely to whom does s 61 apply?

[25] In terms of s 61, the restriction on disclosure applies only to persons who because of their "office or employment" come to know the contents of a request for international assistance or the fact a request has been made, granted or refused, and, even for those persons, there is the s 61(2)(a) exception for those who must disclose those contents or facts because "it is necessary to do so in the performance of his or her duties".

[26] In this case, Ora argues for a restricted interpretation of s 61. There is force in that approach in that the section's phrasing is open-ended and contains no limitations either in time or place. On its face, if the section applies, it applies in perpetuity – including well after the request to which it relates has been concluded – and irrespective of whether it is enforceable. Being a request for international assistance, almost certainly the requester will be out of the jurisdiction of the Cook Islands, and in many cases – as in this – some at least of those most concerned will also be beyond jurisdiction of the Cook Islands authorities[9]. Further, if persons outside the Cook Islands become aware – justifiably or not – of a request's contents or disposition, there would appear to be little, if anything, the authorities can do to limit, prevent or punish onward disclosure – justified or not – by those persons. Those observations cut both ways, mandating a cautious attitude to distribution of the substantive judgment, even in redacted form, but a literal interpretation of s 61's terms.

[27] Turning from those general remarks to this case, there was no dispute that s 61(1) applies to the Solicitor General, the head of the FIU, and those in Crown Law and the FIU who have acquired knowledge of the contents of the request for international assistance and the result of the request: those persons have acquired that knowledge through their "office or employment".

[28] To what wider circle, if any, does s 61 apply?

[29] Clearly it applies to the Attorney-General to whom requests for international assistance are formally made, and it has been agreed the section also applies to those whose government office or employment necessitates their being aware of the

[9] Though here, that restriction is minimized by undertakings given by Mr Leontiev and his American legal advisors

request and its contents to enable them to deal with such matters as the financial support for processing the request and, following the dismissal of Misc. 9/18, to deal with the merits and funding of any possible appeal and any application for costs.

[30] Setting the Attorney-General's approval under s 61(2)(b) aside, (as that matter has not yet been addressed), does s 61 bind persons beyond the circle as just defined? In particular, does it bind Capital Security Bank[10], Ora, their employees, those parties' solicitors and counsel and the Court?

[31] As far as CSB, Ora and their employees are concerned, the conclusion is that their knowledge of the contents of the request for international assistance and its fate comes not because of their "office or employment" but because they are parties – or are employed by parties – to these proceedings and are thus required, under the Code of Civil Procedure, to be served with documents which include reference to the contents of the request. While the phrase "office or employment" need not be construed as limited to government offices or employment, s 61(2)(a) makes clear that disclosure can only be excused if it arises in the performance of the duties of the person because of their office or employment, that is to say that s 61 deals with two different phases of requests: acquisition of knowledge of requests' contents and, what must necessarily be later in time, namely the sharing of that knowledge by the respondents. It is noteworthy that the way subs (1) is worded makes subs (2) the governing subsection: performance of the duties of a person's office or employment is the only way by which intentional disclosure can be excused. Put another way, unless the disclosure arises from performance of duties of office or employment, it is prohibited by s 61 (and its heading). The pivotal question therefore is: what are the duties of a person's office or employment in the performance of which disclosure occurred?

[32] In this case, persons, such as the respondents to these proceedings and their employees, have no duties to perform under s 61; their duties are to their employers, the Court and under the Code of Civil Procedure and the requirements of the Court's enabling statutes. The appropriate conclusion is accordingly that s 61 is inapplicable to CSB or Ora or their employees. Alternatively, even if being respondents and being their employees were to be regarded as being an "office or employment", any

sharing of that knowledge would be part of their right to obtain legal advice and defend themselves in Court would be therefore be in their performance of that "office or employment" and thus justified under s 61(2)(a)

[33] The next question is as to whether s 61 applies to the respondents' solicitors and counsel.

[34] Those persons are not covered by s 61 because their clients and they have not been advised of the contents of the request because of their office or employment but because of the factors previously set out. The duties of those parties' solicitors and counsel are to their clients and the Court and arise from their client's choice to retain them. The alternative scenario in [32] also would apply to them.

[35] Similarly, the Court is not bound by s 61. The duties it performs do not arise from its office or employment and its knowledge of requests' contents comes from the evidence the parties choose to put before it, evidence which, as far as the applicant is concerned, amounts to disclosure protected under s 61(2)(a).

[36] Those conclusions largely dispose of the question as to whether the substantive judgment is to be supplied, in full or redacted form, to the Russian authorities and to Messrs Leontiev, Reich and to Kobre & Kim.

[37] Though the Russian authorities are, of course, aware of the contents of their request, all those persons and entities have, naturally a deep interest in these proceedings and their fate. That notwithstanding, procedurally they are third parties in no different position to members of the public. In terms of ss 7 and 61, the only possible restriction on the distribution of the substantive judgment – whether in full or in cautionary redacted form – to those persons is to the extent the judgment recounts the contents of the MACMA request and its outcome, and that has already been dealt with. There can be no justifiable objection to the distribution of the balance of the judgment to them, and even that may, in due course, prove to have been an unduly restrictive approach

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[10] "CSB".

[38] This judgment also contains certain details of the MACMA request and its outcome. The Solicitor-General and the FIU may therefore take the view, despite the Court holding that s 61 does not apply to Court judgments, that it, too, is subject to s 61.

[39] To meet that possibility, and again applying the cautionary approach mentioned above, the parties are directed not to circulate the redacted substantive judgment to those held entitled to it without further order of the Court, to be made following the parties, within 5 working days of receipt of this judgment, filing submissions as to whether this judgment can be distributed to those persons and, if so, whether the distributed version should be complete or also subject to redactions.

[40] It must be acknowledged that there could be an ongoing difficulty arising out of the parties' wish for confidentiality in that any further judgment produced as a result of the procedure set out in [39] will, almost certainly, need to deal, in some way, with particulars of the request so the Solicitor-General and the FIU may take the view that that judgment, too, should be subject to restrictions as to its availability. However, that possibility can be met when and if it arises.

Hugh Williams, CJ