

11.2.2004

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IN THE GRAND COURT OF THE CAYMAN ISLANDS

(Crim)

CAUSE NO. 10 OF 2003

IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL
PURSUANT TO THE **PROCEEDS OF CRIMINAL CONDUCT LAW**
(2001 REVISION)

AND IN THE MATTER OF PIERRE FALCONE (DEFENDANT)

Appearances:

On behalf of the APPLICANT: - Ms. C. Richards
(the Attorney General)

- Ms. S. Lookloy

On behalf of the RESPONDENT: - Mr. A. Akiwumi, Hunter & Hunter

Heard:

December 11, 2003



JUDGEMENT



Henderson J.

Acting on behalf of France, the Attorney General applied for a restraint order to restrain any dealing in funds deposited in certain accounts in the name of Pierre Falcone and others. This application was made in an attempt to assist in the enforcement of an external confiscation order. Mr. Falcone is under active investigation in France for several serious offences, but has not yet been charged formally there. He is also alleged to have been involved in money laundering in the Cayman Islands but has not been charged with any offence in this jurisdiction.

In my oral ruling given December 2, 2003, I determined that I was without jurisdiction to grant the restraint order. Part three of the *Proceeds of Criminal Conduct Law (2001 Revision)* governs the enforcement of external confiscation orders. Section 31 (1) and a Schedule to the Law describe the steps that must be taken in designated countries to establish that criminal proceedings have been instituted there. I found that the proceedings have not progressed far enough in France to qualify, under our Law, as having been “instituted”.

The present application dealt with costs. Mr. Falcone says that, as the successful party on the jurisdictional issue, he is entitled to costs. Costs usually follow the event. Mr. Falcone says there is no good reason to depart from that usual rule in this case.

The Attorney General’s liability to an award of costs is provided for expressly in section 24 (5) of the *Judicature Law* (as amended by the *Judicature (Amendment) (Costs) Law 2001*) in these terms: “Costs, including wasted costs, may be awarded to or against the Crown.”

Order 62 of the *Grand Court Rules, 1995 (revised)* sets out (in rule 4 (2)) that the “overriding objective” of the Order is “that a successful party to any proceeding” should recover his costs from the opposing party. The clear goal of this provision is to provide an indemnification to the successful party for the expense he has necessarily incurred in bringing or defending the proceeding.

Rule 6 of the Order refers to a number of special cases in which costs do not (ordinarily) follow the event. No mention is made in this rule of the Attorney General. In ordinary civil litigation, the Attorney General is treated as a party like any other.

In the case of an application for enforcement of an external confiscation order, the Attorney General is not seeking to enforce any right or assert any financial interest on behalf of the Cayman Islands Government. Rather, he is acting in fulfillment of his international obligation to assist a foreign government in the enforcement of its own domestic law. That is true, also, of the Attorney General's involvement in applications to obtain evidence for use in foreign proceedings. It is clear that the court has jurisdiction to award costs against the Attorney General in these sorts of cases if the circumstances justify it. The authorities contain several instances of such an award.

In *Re McCorkle and McCorkle* [1998] CILR 224, the Cayman Islands Court of Appeal affirmed a decision of this court to discharge a restraint order under the *Proceeds of Criminal Conduct Law*. The original order had been obtained in response to a request for assistance from the United States under the Mutual Legal Assistance Treaty; the purpose of the original order was to aid in the enforcement of an external confiscation order. Having affirmed the discharge of the restraint order for lack of jurisdiction, the Court of Appeal (at page 242) awarded the successful respondents 50% of their costs against the Attorney General.

In Re a Request for International Judicial Assistance from the Canton of Berne [1996] CILR 179, Murphy, J. of this court dismissed an application for an order under the *Evidence (Proceedings In Other Jurisdictions) (Cayman Islands) Order 1978* for the production of documents to be used in a Swiss proceeding. He characterised the application as an abuse of process and awarded costs to the respondents against the Attorney General.

In Re a Request for International Judicial Assistance from a Tribunal of Enquiry (Dunne's Payments) [1997] CILR 330, Patterson, Ag.J. refused an application for an order under the same legislation for the production of evidence to be used in Ireland. He awarded costs to the successful respondent.

In this very proceeding (Cause no. 10 of 2003) Harrison, Ag.J. awarded costs thrown away to Mr. Falcone and the other respondents after an abortive earlier application (see his Minute of Order dated November 13, 2003).

In cases involving the enforcement of domestic confiscation orders in conjunction with a local prosecution, the Attorney General's liability to pay costs is also well established: *In Re Euro Bank Corporation (In Liquidation) and in Re Crystal Limited*, PCCL 1/99, Cause 379/99, PCL 2/02, April 25, 2003, per Kellock, Ag.J.; and *in Re Donald Fraser and others*, PCCL 1/99, April 10, 2003, per Henderson J.

Nevertheless, the fundamental principle is that all awards of costs are in the discretion of the court: *Judicature Law (1995 Revision), as amended*, section 24 (1). The discretion is a broad and equitable one to be exercised with due regard to all of the circumstances in which the proceedings are brought.

In my view, some regard must be had to the fact that in applications like the present one the Attorney General is applying “on behalf of the government of a designated country”: *Proceeds of Criminal Conduct Law (2000 Revision)*, section 32 (1). He does not have the same free hand that he would have in the case of a domestic prosecution, because requests for assistance from foreign governments should be honoured if at all possible. It is not open to the Attorney General to refrain from proceeding with such requests to avoid exposing himself to the risk of a large costs award. In this respect, applications for restraint orders in support of external confiscation orders differ from applications in connection with domestic proceedings.

Moreover, the proceeds of a domestic confiscation will ordinarily benefit the treasury of the Cayman Islands and, for that reason, the Attorney General can be said to be pursuing a financial interest in the litigation, a circumstance which makes his role more closely analogous to that of a private litigant. The opposite is true in cases of requests for foreign assistance; the proceeds of any confiscation in the Cayman Islands will be remitted to the foreign government.

In The Matter Of A Request For International Judicial Assistance From The Sandefjord Court Of Examining And Summary Jurisdiction [2002] CILR Note 7, Cause 171/01, February 12, 2002, Sanderson J. of this court refused to award costs against the Attorney General after an unsuccessful application by him for the production of documents to be used in a criminal prosecution in Norway. Mr. Justice Sanderson said (at page 2) that the central issue was “whether or not the Attorney General was reasonable in bringing the application before the court.” He continued:

“It seems to me that unless it is plain that the application will probably be unsuccessful the Attorney General should proceed with it. Put another way, if there is a prima facie case of entitlement to the order then the Attorney General ought to bring the application.

While I ruled against the Attorney General on the application itself, I am satisfied that he had a reasonable belief that there was a prima facie case of entitlement. It was obviously not a certainty and obviously not without doubt but the Attorney General followed the proper course and brought the matter before the court for determination.

The Attorney General should not be sending applications back to foreign courts or foreign countries because he thinks it [sic] might be unsuccessful. His job is to vet and return applications which are obviously defective. In this case, the application was not obviously defective, and accordingly the application by the AALL Foundation for costs is dismissed.”

On the present application, counsel to the Attorney General presented her argument in a concise and efficient manner. No time was wasted in the proceedings before me. The point was a relatively simple one; I was able to dispose of it with an oral ruling given on the same day it was argued. Although the Attorney General’s argument was ultimately unattractive, it was not bound to fail.

justifiable criticism if he had said to the French Government that he was refusing to bring the application.

These are matters which I can and should take into account when exercising my discretion on the subject of costs. When acting at the behest of a foreign government, the Attorney General is not "a litigant like any other." Like Sanderson, J. in *Re Sandefjord Court*, (*supra*) I have concluded that it would be inappropriate to award costs against the Attorney General on the present application.

The application for costs by Mr. Falcone is dismissed.

Dated this 11th of February 2004.

Henderson, J.

Henderson, J.
Judge of The Grand Court

