

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

**CIV-2014-463-000201
[2017] NZHC 1183**

UNDER Section 38 of the Trustee Act 1956 and
Part 19 of the High Court Rules 2008

IN THE MATTER OF the Ranolf Trust

BETWEEN RANOLF COMPANY LIMITED (IN
LIQUIDATION)
Applicant

AND ASHOK DENNIS BHANA AND JASU
MATI BHANA
First Respondent

GEYSERLAND LIMITED
Second Respondent

Hearing: 10 April 2017

Appearances: B J Norling and A Cherkashina for Applicants
Second named first respondent in person
No appearance for other respondents

Judgment: 12 June 2017

RE-ISSUED JUDGMENT OF GILBERT J

*This judgment was recalled and re-delivered by me on 12 June 2017 at 1.00 pm
pursuant to r 11.5 of the High Court Rules.*

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Registrar / Deputy Registrar

Solicitors:
Norling Law, Auckland

And to:
Second named First Respondent

Introduction

[1] The applicant, the Ranolf Company Ltd (in liquidation) (Ranolf), claims to have been a trustee of the Ranolf Trust from 25 May 2004 to 22 July 2015. The sole asset of the Trust is a property located in Ranolf Street, Rotorua comprising a block of 12 residential units. This property is subject to a mortgage in favour of ANZ Bank.

[2] Ranolf has brought this proceeding seeking various orders to enable it to have recourse this property to meet the claims of its creditors and the liquidators' costs. It relies on the statutory right of indemnity provided under s 38 of the Trustee Act 1956 and the specific indemnity in the trust deed.

[3] Ranolf was placed in liquidation on 1 August 2014. Damien Grant and Steven Khov were appointed liquidators. Debts due to Ranolf's four creditors total \$128,204.66, including interest calculated as at 28 February 2017.

[4] Despite the small number of creditors and the modest amounts owing, the liquidators claim to have incurred costs of \$502,787.48 as at 3 April 2017.

[5] The first respondents are named as the original trustees of the Trust. The second respondent is named as a subsequent trustee. ANZ Bank has been served with the proceeding but has advised that it does not wish to be heard in relation to it.

[6] Ranolf's claim is technically unopposed because no notice of opposition has been filed. However, Jasu Bhana appeared and made submissions in opposition to the application. Whether opposed or not, the Court is required to scrutinise the application carefully.

The issues

[7] The following issues require consideration:

- (a) Was Ranolf a trustee of the Trust at relevant times?
- (b) Were the debts claimed by the creditors incurred by Ranolf?

- (c) Are the debts covered by the indemnity?
- (d) Are the liquidators entitled to be paid their costs out of trust assets?
- (e) Are the liquidators' costs reasonable?
- (f) What costs should be allowed?

Was Ranolf a trustee of the Trust at relevant times?

[8] The Ranolf Trust was settled by a deed dated 4 June 2003. Stephen Bhana was the settlor. The discretionary beneficiaries included himself, his children and other members of his family. The initial trustees were Ashok Bhana and Jasu Bhana, the first respondents.

[9] The trust deed provides that the settlor has the power of appointment of new trustees and removal of existing trustees during his lifetime. The deed also provides that there must be at least two trustees unless the sole trustee is a company registered under the Trustee Companies Act 1967 or incorporated under the Companies Act 1993. However, the deed also provides that a company incorporated under the Companies Act cannot be appointed a sole trustee if the majority of shares in the company are held by, or one of its directors is, the settlor or a relative of the settlor.

[10] By a deed of variation of trust dated 5 August 2003, the trust deed was varied so that the power of appointment of new trustees and removal of existing trustees was conferred on Jasu Bhana, in place of Stephen Bhana.

[11] By a further deed dated 25 May 2004 between Jasu Bhana as the appointor, Ashok Bhana and Jasu Bhana as retiring trustees, and Ranolf as the continuing trustee, Jasu Bhana purported to appoint Ranolf as sole trustee in place of the original trustees. However, Ranolf could not be appointed as a sole trustee because Jasu Bhana was one of the two directors and the sole shareholder of Ranolf, which was incorporated on 26 May 2004.

[12] This deed was an effective exercise of Jasu Bhana's power of appointment of Ranolf as an additional trustee. It expressly records that the appointment is made in exercise of her powers of appointment of trustees. However, the deed may not have been effective to remove the existing trustees. This is because Jasu Bhana did not purport to exercise her power of removal of trustees. Instead, she recorded their wish to be discharged and her consent to this. There is no evidence that these trustees were formally removed, nor could they be if this left Ranolf as the sole trustee.

[13] Whether or not the other trustees were validly removed, the important point for present purposes is that Ranolf was validly appointed as a trustee of the Ranolf Trust by Jasu Bhana in exercise of her powers of appointment. The appointment took effect when Ranolf was incorporated on 26 May 2004. The evidence establishes that Ranolf conducted the affairs of the Trust from that time onwards.

[14] On 23 July 2013, Jasu Bhana sent a letter to her solicitor, Bharat Parshotam, purporting to remove Ranolf and its directors, Mr Parshotam and herself, as trustees of the Trust. This was odd because Mr Parshotam had never been a trustee of the Trust. Mr Parshotam advised that a new trustee would be required before Ranolf could be removed. Ms Bhana appears to have accepted that advice and Ranolf continued to act as a trustee.

[15] Ms Bhana became the sole director of Ranolf when Mr Parshotam ceased to act as a director on 8 July 2014. She remains the sole shareholder.

[16] On 20 July 2015, Ms Bhana gave notice to Mr Parshotam that she was removing Ranolf as a trustee of the Trust with immediate effect. She also signed a deed dated 22 July 2015 appointing Geyserland Ltd as a new trustee in place of Ranolf.

[17] On the basis of this evidence, I am satisfied that Ranolf was a trustee of the Trust from 26 May 2004 to 22 July 2015.

Were the debts claimed by the creditors incurred by Ranolf?

[18] The liquidators have accepted proofs of debt from four creditors:

(a)	Redco NZ Ltd	\$ 2,053.35
(b)	Rotorua District Council	\$ 6,900.46
(c)	Jaafar Holdings Ltd	\$ 96,055.75
(d)	McDonald Law	<u>\$ 23,195.10</u>
		\$128,204.66

Redco

[19] The Redco debt relates to a seismic evaluation of a property in Fenton Street, Rotorua that was formerly owned by Ranolf as trustee of the Trust. The work was carried out on Ranolf's instructions on 25 October 2013. I agree with the liquidators' assessment that Ranolf incurred this debt as trustee of the Trust. The original invoice was for \$1,368.91. The balance claimed is for collection costs and default interest.

[20] Ms Bhana does not dispute that Ranolf incurred this debt. She advised at the hearing that the invoice was not paid because she obtained a conflicting report. However, there is no evidence of this and it is very unlikely that it could provide a defence to the claim anyway.

Rotorua District Council

[21] The claim by Rotorua District Court against Ranolf is established by a judgment given on 23 November 2012. The liquidators advise that the underlying claim relates to unpaid rates.

Jaafar Holdings

[22] On 17 February 2012, Ms Bhana signed, as a director of Ranolf, a term loan agreement between Jaafar Holdings Ltd as lender and Ranolf, as trustee of the Ranolf Trust, as borrower. She and Stephen Bhana also signed the agreement as

guarantors. The principal sum borrowed was \$1.57 million with repayment due on 17 August 2012. The loan was secured by first registered mortgages over two properties then owned by Ranolf as trustee of the Trust, both in Fenton Street, Rotorua. Further security was given by a general security agreement over all the assets and undertakings of Ranolf.

[23] Ms Bhana disputes that a general security agreement was signed. That is irrelevant, but also incorrect. The liquidators produced the general security agreement. Ms Bhana signed this document in numerous locations and her signature was witnessed by a solicitor.

[24] Ms Bhana also stated at the hearing that Jaafar received repayment of its loan in full after the sale of other properties. She also claims that these properties were sold under value. Once again, there is no evidence to support these claims. The liquidators produced a statement of account showing that the amount outstanding to Jaafar, including interest at the default interest rate of 15 per cent per annum, totalled \$96,055.75 as at 28 February 2017.

McDonald Law

[25] The core amount claimed by Stephen McDonald, trading as McDonald Law, is established by a judgment entered by the Auckland District Court against Ranolf as trustee of the Ranolf Trust on 28 March 2014. This relates to legal services provided by Mr McDonald. He successfully applied to have Ranolf placed in liquidation as a result of this judgment debt not being paid. The balance of Mr McDonald's claim against Ranolf comprises costs and disbursements allowed by Associate Judge Sargisson when making the order for liquidation.

[26] I am satisfied, based on this evidence, that the amounts claimed by the four creditors and accepted by the liquidators are due and owing and were incurred by Ranolf in its capacity as a trustee of the Ranolf Trust for the benefit of the Trust.

Are the debts covered by the indemnity?

[27] The trust deed contains a comprehensive indemnity for trustees against all liabilities, claims, costs and expenses incurred in relation to or arising out of their trusteeship, save where specifically excluded. There is no relevant exclusion of liability. Because all of the debts were incurred by Ranolf in the proper performance of its duties as a trustee of the Trust, I am satisfied that it is entitled to be indemnified out of Trust assets for the purpose of meeting the Trust creditors' claims. Even if there had not been an express indemnity, Ranolf would have been entitled to rely on the indemnity implied under s 38 of the Trustee Act. This indemnity covers all expenses reasonably incurred in the execution of the Trust.

[28] The indemnity is supported by a lien on Trust property which has priority over the claims of beneficiaries of the Trust.¹ This right of indemnity entitles the trustee to have resort to Trust property, but only for the purpose of discharging Trust liabilities.² The indemnity applies not only where the trustee has paid the Trust creditor, it also applies where the debt has been incurred but not paid.³ The right of indemnity continues after a trustee has been removed and survives liquidation of the trustee.⁴

Are the liquidators entitled to be paid their costs out of trust assets?

[29] The liquidators claim that their costs should also be met out of Trust assets. They acknowledge that the trust deed does not contain an express provision for trustee remuneration and they therefore rely on the proviso in s 38(2) of the Trustee Act:

38 Implied indemnity of trustees

- (2) A trustee may reimburse himself or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers; but, except as provided in this Act or any other Act or as agreed by the persons beneficially interested under the trust, no trustee shall be allowed the costs of any professional

¹ *Jennings v Mather* [1901] 1 QB 108; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 (HCA); *Octavo Investments Pty Ltd v Knight* (1979) 27 ALR 129 (HCA); *Re Suco Gold Pty Ltd* (1983) 7 ACLR 873 (SASC).

² *Re Suco Gold Pty Ltd*, above n 1 at 881.

³ *Re Blundell* (1889) 40 Ch D 370 at 376-7.

⁴ *Octavo Investments*, above n 1 at 138.

services performed by him in the execution of the trusts or powers unless the contrary is expressly declared by the instrument creating the trust: provided that the court may on the application of the trustee allow such costs as in the circumstances seem just.

[30] The liquidators also rely on the decision of the (full) Supreme Court of South Australia in *Re Suco Gold* allowing liquidators' costs, expenses and remuneration to be paid out of trust property in similar circumstances to the present. That case also arose out of the liquidation of a trustee company which had no assets to meet obligations it had incurred as trustee. King CJ explained why the liquidator's costs should be met from trust assets in the following passage of his judgment:⁵

There are clearly strong practical considerations in favour of such a course. Unless that course can be followed, the liquidation of a trustee company without assets of its own cannot proceed. It seems to me that that course can be justified by reference to the obligations of the trustee company arising out of the carrying on of the business authorized by the trusts. It is part of the duty of the trustee company to incur debts for the purposes of the trust businesses and, of course, to pay those debts. Upon winding up, those debts can only be paid in accordance with the provisions of the Companies Act. This requires necessarily that there be a liquidator and that he incur costs and expenses and be paid remuneration. Section 292 provides that there be paid the costs and expenses of winding up, the taxed costs of the petitioner and the remuneration of the Liquidator "in priority to *other* unsecured debts" (emphasis mine). The expression "*other* unsecured debts" appears to imply that the costs and expenses of winding up, the petitioner's costs and the liquidator's remuneration are regarded by the statute as debts of the company. As the company's obligation as trustee to pay the debts in carrying out the trust incurred in carrying out the trust cannot be performed unless the liquidation proceeds, it seems to me to be reasonable to regard the expenses mentioned above as debts of the company incurred in discharging the duties imposed by the trust and as covered by the trustee's right of indemnity.

[31] *Re Suco Gold* has been applied in several New Zealand cases.⁶

[32] Ranolf was appointed for the sole purpose of acting as a trustee of the Trust. This was the only activity it performed and its only asset is its right of recourse to Trust assets under the indemnity. I consider that the indemnity is cast in sufficiently

⁵ At 882-883.

⁶ *Re Secureland Mortgage Investments Ltd (No 2)* (1988) 4 NZCLC 64,266 (HC); *Re Francis James Nominees Ltd* (1988) 4 NZCLC 64,279 (HC); *Official Assignee v Smith and Perkins* [2013] NZHC 3217.

broad terms to cover the reasonable costs incurred in enforcing it. The indemnity reads as follows:

TRUSTEES' INDEMNITY The Trustees and their personal representatives and assigns and their estates and effects shall be kept safe harmless and indemnified against all actions liabilities claims damages costs and expenses in relation to or arising out of their Trusteeship except in respect of any matter for which a Trustee's liability is not excluded by the preceding clause and may take security by way of indemnity over the Trust Fund or any part thereof.

[33] It is clear that although the trustees were not entitled to be paid for their services for acting as trustees, they were to be kept whole in so acting. The words "in relation to or arising out of" are of wide import. In my view, they extend to cover the costs reasonably incurred by the trustee in enforcing the indemnity where this becomes necessary to meet Trust debts properly incurred by them. Those costs can fairly be said to "arise out of", or have been incurred "in respect of", the trusteeship. It follows that the indemnity covers not only the debts due to the Trust creditors but also all costs reasonably incurred in enforcing the indemnity to enable those debts to be paid.

[34] Ranolf has been placed in liquidation. That was the likely consequence if it was not placed in sufficient funds to meet the legitimate claims of Trust creditors. The need to enforce the indemnity in such circumstances can only be carried out by the liquidators. Their costs must therefore be within the contemplation of the indemnity given to a trustee company known to have no capital or assets of its own.

[35] The liquidators were appointed by the Court on a Court ordered winding up. The liquidators' principal duty is to take possession of, protect, realise and distribute the assets of the company to its creditors.⁷ The right of indemnity is an asset of the company; indeed, it is the only asset of the company. The costs reasonably incurred by the liquidators in carrying out their obligations are to be paid in priority to the claims of other creditors. Section 312 of the Companies Act requires the liquidators to pay out of the assets of the company the expenses, fees and claims set out in schedule 7 to the Act according to the priorities specified. The fees and expenses

⁷ Companies Act 1993, s 253.

properly incurred by the liquidators in carrying out their duties and exercising their powers and their remuneration are to be paid in preference to all other claims.

[36] In summary, the liquidators' reasonable costs in enforcing the indemnity are covered by the indemnity and should be met from Trust assets. The amounts recovered must be paid by the liquidators in accordance with the priorities set out in the Companies Act.

Are the liquidators' costs reasonable?

[37] Kieran Jones, a senior insolvency manager employed by the liquidators, states in his affidavit that as at 3 April 2017 the liquidators' fees totalled \$502,787.48 (including GST). He states that the liquidators have received \$26,949.79 in part payment leaving a balance outstanding of \$475,837.69. Mr Jones says that the fees fall into seven categories:

(a)	Administration	\$ 18,746.15
(b)	Investigation	\$ 53,273.75
(c)	Asset realisation	\$ 41,699.00
(d)	Legal – claim by Jaafar	\$ 4,226.25
(e)	Legal – this proceeding	\$179,308.00
(f)	Legal – Grant and Khov v Bhana ⁸	\$200,572.08
(g)	Legal – Court of Appeal proceeding ⁹	<u>\$ 4,962.25</u>
		\$502,787.48

[38] In addition, the liquidators have incurred disbursements which Mr Jones categorises as follows:

(a)	Administration	\$ 1,245.86
(b)	Asset recovery	\$ 4,973.54
(c)	Jaafar	\$ 2,991.78

⁸ *Grant and Khov v Bhana* CIV-2014-463-169.

⁹ *Bhana v Grant and Knov* CA544/2016.

(d) Vesting	\$ 4,607.83
(e) Section 261 (169 proceeding)	<u>\$ 4,524.03</u>
	\$ 18,343.04

[39] As noted, Ranolf has only one asset, a right of indemnity. It has only four creditors. As at the date of liquidation, the creditors were owed approximately \$100,000. It seems extraordinary that the liquidators could incur costs exceeding \$520,000 in a liquidation as simple as this one and without yet having succeeded in paying anything to the creditors.

[40] It appears from the time records supplied that 19 individuals have worked on the file clocking up over 1,240 hours at hourly rates ranging from \$120 to \$500 (excluding GST). The average hourly rate charged was approximately \$350 (excluding GST). It is hard to understand why so many people needed to be engaged to work on this liquidation given that there is only one asset that needs to be called in. It is also hard to comprehend why so many hours needed to be spent.

[41] Many of the attendances appear to be hard to justify. For example: more than 35 hours have been charged at rates ranging from \$120 to \$350 per hour for scanning, copying and binding documents; approximately 19 hours were spent analysing billings and preparing billings reports at rates ranging from \$275 to \$400 per hour; 3.3 hours were charged for booking travel and accommodation at rates ranging from \$120 to \$275 per hour. The liquidators also charged \$350 per hour for driving to and from Rotorua. These examples help explain why the costs have risen to such a high level.

[42] The liquidators' approach to the liquidation has also contributed significantly to the costs. Ranolf has a straightforward claim under the indemnity and it appears that the Trust assets are more than sufficient to meet the claims of creditors in full as well as the reasonable costs of enforcing the indemnity. As noted, the creditors' claims totalled approximately \$100,000 at the time of the liquidation. Rather than simply pursuing recovery under the indemnity, the liquidators have chosen to pursue other claims at considerable cost. This means that any payment to creditors is

delayed while these steps are taken. It could even mean that there is nothing left for the creditors after all the liquidators' costs are paid.

[43] The costs of the related proceeding, *Grant v Bhana* CIV-2014-463-169, amount to \$200,572.08. Although the liquidators claim that they are entitled to an order for those costs in this proceeding as well, they no longer pursue this. This reduces the amount claimed in this proceeding to approximately \$300,000 plus disbursements and GST. However, I am not prepared to approve costs at this level because I do not consider that they were all necessarily or reasonably incurred.

What costs should be allowed?

[44] In assessing the costs that would be appropriate, I start by considering the scale costs for this proceeding. This is a category 2 proceeding and band B is appropriate for all steps taken. The scale costs allowed for filing the originating and supporting affidavits, preparing the trial bundle, preparing submissions, preparing for and attending a one-day hearing would be approximately \$11,500. This is intended to provide for recovery of two-thirds of actual costs. On that basis, the indicative reasonable costs amount to approximately \$17,000.

[45] The liquidators took other steps in the proceeding which I have not taken into account because these steps were not appropriate. For example, the liquidators commenced the proceeding on a "without notice" basis seeking an order vesting the Trust assets in Ranolf. It would not have been proper to make such an order because Ranolf had been removed as a trustee long before the proceedings were issued and it was in liquidation. The Trust assets needed to be held by the current trustees and administered by them. Further, there was no urgency or other justification for seeking such an order without notice.

[46] Taking all matters into account, I consider that an appropriate allowance for the liquidators' costs of this proceeding is \$50,000 plus disbursements. If anything, I regard this allowance as generous.

[47] The assessment of reasonable costs of the liquidation to date, excluding the costs of this proceeding and the 169 proceeding, is more difficult. One option would

be to refer the matter to an independent expert to report on the reasonableness of the remuneration claimed. However, such a course is reserved for “rare cases” where there are a large number of documents.¹⁰ It would also add to the costs and place the prospects of recovery to the creditors in further jeopardy. The liquidators have supplied detailed information including fully itemised time records and I consider it appropriate for the Court to make the assessment.

[48] The total costs claimed are summarised in Mr Jones’ affidavit and set out at [37] and [38] above. I have already addressed some of the items falling into the “administration” category. As noted, many of these appear excessive. Of the \$18,746.15 claimed, I consider that a reasonable allowance would be \$10,000. The next item, “investigation” is claimed in the sum of \$53,273.75. Although these costs do not all appear to have been necessary, I allow \$40,000 for this item. The third item, “asset realisation”, is allowed in the sum claimed of \$41,699. The costs incurred relating to the claim by Ranolf against Jaafar appear reasonable and I allow the full sum claimed of \$4,226.25. The legal costs for this proceeding are allowed in the sum of \$50,000. The next item, amounting to \$200,572.08, is for costs of the 169 proceeding and is no longer pursued in this proceeding. The final item, \$4,962.25, concerns the costs claimed for the appeal to the Court of Appeal in the 169 proceeding and should not be awarded in this proceeding. This yields a total of \$145,925.25. In addition, I allow the disbursements set out in paragraph 2.5 of Mr Jones’ affidavit dated 10 April 2017 apart from the last item relating to the 169 proceeding. That gives a total of \$13,819 for disbursements.

Result

[49] I make a declaration that Ranolf Company Ltd (now in liquidation) was a trustee of the Ranolf Trust from 25 May 2004 to 22 July 2015.

[50] I make an order that Ranolf Trust’s fee simple estate held in the name of the first respondents as trustees in Lot 6, Deposited Plan 2850, identifier SA1C/734 and Lot 7, Deposited Plan 2850 identifier SA935/191 is to stand charged with payment

¹⁰ *Re Roslea Path Ltd (in liquidation)* [2013] 1 NZLR 207 (HC) at [159].

of the debts due to the applicants' creditors as set out in [18] above and the liquidators' costs as set out in [48] above.

[51] In the event these sums have not been paid within 30 days of the date of this judgment, I make an order for the sale of the properties and direct that payment of these sums be made to Ranolf out of the net sale proceeds.

[52] I reserve leave to apply for further directions if needed to implement these orders.

M A Gilbert J