

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

**CIV-2014-463-169
[2016] NZHC 2352**

BETWEEN DAMIEN GRANT AND STEVEN KHOV
AS LIQUIDATORS OF RANOLF
COMPANY LTD (IN LIQUIDATION)
Applicants

AND STEPHEN BHANA
First Respondent

JASU MATI BHANA
Second Respondent

Hearing: 9 March and 22 April 2016
Applicants' submissions: 11 May 2016
Respondents' submissions: 23 June 2016 (not filed)
Reply: 1 July 2016 (not required)

Appearances: B J Norling and A Cherkashina for Applicants
First and Second Respondents in person

Judgment: 4 October 2016

JUDGMENT OF BREWER J

*This judgment was delivered by me on 4 October 2016 at 3:00 pm
pursuant to Rule 11.5 High Court Rules.*

Registrar/Deputy Registrar

Solicitors: Waterstone Insolvency (Auckland) for Applicants
(Copy to Respondents in person)

Background

[1] Mr Bhana and Ms Bhana are brother and sister. They have for some time been pursued by Mr Grant and Mr Khov (as liquidators) for information as to the affairs of Ranolf Company Ltd and an associated trust, the Ranolf Trust.

[2] On 25 November 2014, Woolford J made orders against each of the Bhanas compelling them to produce documents and provide information. The Bhanas did not comply with Woolford J's orders.

[3] On 16 July 2015, Mr Grant and Mr Khov ("the applicants") applied on notice for orders that the Bhanas be held in contempt of Court, fined and imprisoned unless they comply with Woolford J's orders. The application was called before me for hearing on 21 October 2015. There was no appearance by or on behalf of the Bhanas. I found the Bhanas to be in contempt of Court for deliberately disobeying Woolford J's orders.¹

[4] I directed that a warrant for the arrest of the Bhanas be issued, but stipulated that it lie in Court for a period to enable the Bhanas to take palliative steps. I said I would set a date for a penalty hearing once the period for the arrest warrants to lie in Court had expired.

[5] On 2 November 2015 (one hour before the expiry of the said period), the Bhanas filed a joint affidavit. I recorded the situation in my Minute of 2 November 2015 and made further directions:

[3] I now have a joint affidavit of the respondents filed in the Court at 1:55 pm today. There are two aspects to it which need addressing:

- (1) The respondents say they were never advised of the 21 October 2015 Court hearing date. The applicants filed affidavits of Sharon Dingwall sworn on 14 October 2015 deposing to service on the respondents. As I noted, however, the affidavits did not have as exhibits copies of the documents actually served. I relied on advice from one of the counsel appearing for the applicants, Ms Cherkashina, that she gave the Court service copies to the office administrator for service and so there was no reason to

¹ *Grant & Khov as liquidators of Ranolf Co Ltd v Bhana* [2015] NZHC 2596 at [8].

suspect that the documents served did not contain the date of the hearing.

- (2) The affidavit does not explain why the order of Woolford J was not complied with, but contains information said to “address the contents” of the order.

[4] I now make the following directions:

- (1) The order for the arrest of the respondents is to continue to lie in the Court pending further order of the Court.
- (2) The case will be called at 9:00 am on 5 November 2015. The purposes of the call will be:
 - (a) to determine whether the respondents were served with the date of the 21 October 2015 hearing; or for the making of directions as to how that matter is to be determined;
 - (b) to decide whether Woolford J’s order has now been complied with;
 - (c) to schedule a penalty hearing for the contempt of Court;
 - (d) to make any ancillary or additional orders as may seem necessary.

[6] Justice Keane presided at the call of the case on 5 November 2015. His Honour recorded that the Bhanas continued to deny they had been served with the application that they be held in contempt and maintained that they were unaware of the 21 October 2015 hearing.

[7] As to whether the Bhanas remained in contempt of Woolford J’s orders, Keane J noted that the Bhanas in their affidavit of 2 November 2015 say that the liquidators already have, in related proceedings, the most significant documents and that they have no others. Justice Keane made the following directions:

[13] The Bhanas are to file and serve by 3 pm on 19 November 2015 a further affidavit stating, as to each category of document in paragraph 2.16 of the Jones affidavit, whether such documents:

- (i) are in their control and in that case disclosing them; or
- (ii) have been but are no longer in their control, and when they ceased to have control and who then assumed control; or
- (iii) have never been in their control and who may have control.

[8] The Bhanas did not comply with those directions.

[9] The next call of the case was 4 December 2015. I summarised the situation and made further directions in my Minute of 4 December 2015:

[9] I have tried, quite vigorously, this morning to impress on Mr Bhana and Ms Bhana the stark fact that orders of the Court are to be obeyed or there are consequences. To this point, Mr Bhana and Ms Bhana have taken the view, in my opinion, that so long as they are doing things in the background then whether or not they obey Court orders is up to them. In this case, Mr Bhana has told me that the reason why they did not obey the order of Keane J is because they were having settlement negotiations with the applicants and in his view a settlement has been reached. Mr Norling responds that this is a different matter and that the written advice from his office to the Bhanas was that it has no impact on the situation which Keane J was dealing with.

[10] Prima facie, therefore, Mr Bhana and Ms Bhana are in further contempt of the Court through disobedience of the order of Keane J.

[11] I understand that the applicants and Mr Bhana and Ms Bhana are due to appear in this Court again at 2:15 pm on 8 December 2015 on a related matter. Since that means that all parties will be before a Judge of this Court on that date, I make the following directions:

- (a) The applicants are to file and serve a memorandum by 8 December 2015, or perhaps conveniently at the hearing on 8 December 2015, advising the Court whether a hearing will be required to establish whether or not Mr Bhana and Ms Bhana were served with the notice of application for a hearing to determine the contempt for failing to comply with Woolford J's order. If the applicants do want such a hearing, I ask the presiding Judge to establish a timetable for it.
- (b) Mr Bhana and Ms Bhana have until the hearing at 2:15 pm on 8 December 2015 to comply with the direction of Keane J which I have just quoted. If they do comply with it, the presiding Judge can decide whether there are issues of costs or contempt that need to be resolved. If Mr Bhana and Ms Bhana have still not complied with Keane J's order, the presiding Judge can decide whether to deal with the dereliction as a matter of contempt or direct a further hearing in that regard.

[10] On 8 December 2015, the matter was called before Gilbert J. His Honour recorded that the applicants wished to pursue their contempt application and made timetabling directions. These included:

- (c) The hearing, which will deal with both the issue of contempt and the question of any penalty or sanction, will be held at 10:00 am on 9 March 2016 before Brewer J.
- (d) The deponents who have provided affidavits for the purposes of the application are to be available at the hearing for cross-examination.

[11] The hearing commenced as scheduled on 9 March 2016 and continued on 22 April 2016, on which day the evidence was concluded. I made a timetable order for the filing of submissions.

[12] The applicants did not comply with the timetable order and the Bhanas applied for more time. I extended the timetable by Minute of 14 June 2016. It expired on 1 July 2016.

Issues

[13] Against this quite messy background, I find I must decide the following issues:

- (a) Did the Bhanas have notice of the 21 October 2015 hearing?
- (b) Should my finding of contempt for non-compliance with Woolford J's order stand?
- (c) If the answers to (a) and (b) are "yes", should I now fix penalties?

Was there notice of the 21 October 2015 hearing?

[14] The evidence for the applicants comes from Ms NCE Johnson and Ms S Dingwall.

[15] Ms Johnson works for Scope Investigations Ltd (Scope). In her affirmation of 4 November 2015 (read and confirmed at the hearing), Ms Johnson said:²

On 25 September 2015, Waterstone Insolvency Limited ("Waterstone"), on behalf of Damien Grant and Steven Khov, instructed Scope to personally serve the following documents on Stephen Bhana and Jasu Mati Bhana:

² Affidavit of Nicola Claire Elizabeth Johnson, dated 4 November 2015, at para 4.

- a. Interlocutory application on notice for contempt of court dated 16 July 2015 (“the Interlocutory Application”); and
- b. Affidavit of Kieran Michael Jones in support of interlocutory application on notice for contempt of court dated 15 July 2015.

(“Together referred to as “the documents”)

[16] Ms Johnson goes on:

6. I confirm that a copy of the Interlocutory Application sent to Scope by Waterstone recorded the hearing date and time as being 21 October 2015 at 10.00 am. A copy of the Interlocutory Application received by Scope from Waterstone is attached and marked “02”.
7. On or around the same day, I posted a copy of the documents to Sharon Dingwall, our agent in Rotorua, with instructions to serve the documents on Mr and Mrs Bhana.

[17] The annexure marked “02” is a copy of the application, date stamped by the Court registry 20 July 2015, and containing the date and time of the hearing.

[18] Ms Dingwall’s evidence begins with her affidavits of 14 October 2015 in which she deposes to service on each of the Bhanas of:

- (a) Interlocutory application on notice for contempt of Court dated 16 July 2015; and
- (b) Affidavit of Kieran Michael Jones in support of interlocutory application on notice for contempt of Court dated 15 July 2016.

[19] Ms Dingwall did not keep copies of the documents she says she served. However, I am satisfied beyond reasonable doubt that Ms Dingwall received from Ms Johnson for the purpose of service on the Bhanas a copy of the interlocutory application containing the date and time for the hearing of the application. The issue remaining is whether the application was served on Mr Bhana and/or Ms Bhana.

[20] The Bhanas each gave evidence and each denied that they were served with the application. The onus is on Messrs Grant and Khov to prove otherwise and that task depends on the evidence of Ms Dingwall.

[21] Ms Dingwall confirmed her affidavit that on 29 September 2015 at 8:40 am she served Mr Bhana with the documents at 46 Devon Street, Glenholme, Rotorua. She said Mr Bhana accepted the documents and:³

I believe that it was the first respondent that I served because the first respondent acknowledged that he is the first respondent.

[22] Ms Dingwall, in identical terms, confirmed that on 26 September 2015 at 9:15 am she served Ms Bhana with the documents, also at 46 Devon Street, Glenholme, Rotorua.

[23] In her oral evidence-in-chief, Ms Dingwall told me that she had had dealings with Mr Bhana in the past:⁴

A. Well we served him a lot of documents over the past two or three years and each time has been the person of Stephen Bhana that I have served.

Q. All right. I understand.

A. He has identified himself and we know him.

Q. And is he in Court today?

A. Yes he is.

[24] Similarly, Ms Dingwall said that she had served Ms Bhana with documents on a number of occasions and she recognised Ms Bhana in the courtroom.⁵

[25] Ms Dingwall was cross-examined first by Mr Bhana. Mr Bhana appeared to accept that Ms Dingwall had served him with documents previously:⁶

Q. Are you aware that from the past that you do know me by Stephen and you have had some documentation served on me personally by yourself, why did you need to ask the question, as you have said, that, "Are you Stephen?"?

A. Because we have to identify you professionally.

³ Affidavit of Sharon Dingwall confirming service, dated 14 October 2015, at para 3.

⁴ Notes of evidence taken before Hon Justice Brewer, at 3.

⁵ At 4.

⁶ At 6.

Q. But don't you know me from the – from the –

A. Yes but –

Q. – past?

A. – we still, we still identify you Stephen.

[26] Mr Bhana suggested to Ms Dingwall that she could have confused him with his brother, Ashok. Ms Dingwall did not accept that suggestion.

[27] Ms Dingwall was next cross-examined by Ms Bhana. Ms Bhana's questions were, like Mr Bhana's, predicated on acceptance that Ms Dingwall had served her with documents on a number of occasions. Her criticisms of Ms Dingwall's evidence were that she could not say positively that the documents she served were the documents she described in her affidavit (because Ms Dingwall did not read the documents nor keep copies) and that she had not got Ms Bhana to sign a receipt for them.

[28] In his evidence, Mr Bhana said that he had not been served with the application and the affidavit. He clarified that he was not saying that service had been effected but the application did not contain the date and time of the hearing.⁷ He pointed to his record of taking Court proceedings seriously and said he would not neglect such a serious matter.⁸

[29] Ms Bhana gave evidence also. She denied being served with the documents. Ms Bhana said that the last document with which she was served by Ms Dingwall was a bankruptcy notice. Indeed, Ms Bhana, having been shown the application while in the witness box, said that was the first time she had seen it.

[30] The evidence before me is to the effect that a document service company was instructed by Messrs Grant and Khov to serve the Bhanas with the notice of application and supporting affidavit. The notice of application had the date and time of the hearing. The document service company in turn instructed Ms Dingwall, an experienced process server, to serve the documents. Ms Dingwall had served documents previously on both Mr Bhana and Ms Bhana. Her instructions included

⁷ At 91.

⁸ At 95.

an address to go to. It is not suggested that the address was one not frequented by the Bhanas. Ms Dingwall gave evidence that she served Ms Bhana with the documents on 26 September 2015 and Mr Bhana on 29 September 2015. It is clear on the evidence that she was sufficiently familiar with them through prior dealings to recognise them.

[31] Against that, the Bhanas deny ever receiving the documents. They raise a suggestion that there might have been a confusion – Mr Bhana’s brother might have been mistaken for Mr Bhana; Ms Bhana said her older sister looks like her.

[32] I find to the criminal standard of beyond reasonable doubt that the Bhanas were served with the documents and they either overlooked the hearing date or chose not to attend. My reasons are:

- (a) Ms Johnson and Ms Dingwall simply did their jobs. The only possibility for service not being effected is if Ms Dingwall served the wrong people.
- (b) Ms Dingwall had served each of the Bhanas before. She recognised them. Mistaken identity is not a reasonable possibility.
- (c) Ms Dingwall would have had to have twice made a mistaken identification. The Bhanas are brother and sister. They are both respondents. They have both been the subjects of this litigation and both are active in defending it. If one had been served and the other not, then the one served would have told the other.
- (d) There is no criticism of the suitability for service of the address Ms Dingwall went to. That means that if Ms Dingwall did, on two occasions, mistake relatives of the Bhanas for them, then each such relative failed to pass the documents on to the respective Bhana.
- (e) Neither Mr Bhana nor Ms Bhana is a credible witness. They are emotionally invested in this litigation to a very great extent. They do

not comply with directions of the Court with which they do not agree and they refuse to accept the fact of their non-compliance when such is unmistakable.

[33] My answer to this issue is that the Bhanas did have notice of the 21 October 2015 hearing.

Should my finding of contempt for non-compliance with Woolford J's order stand?

[34] In my Judgment of 21 October 2015, I held:⁹

[8] In reliance on the affidavits filed by the applicants, I am satisfied beyond reasonable doubt that the respondents are in contempt of Court. That is to say, they have deliberately disobeyed the orders of the Court made by Woolford J on 25 November 2014. Those orders are unambiguous in their terms and are binding upon the respondents. The respondents knew about the orders, were reminded of the orders and failed/refused to act on them.

[9] Where there has been a deliberate defiance of a Court order, a mere declaration that the respondents have acted in contempt of Court will not be sufficient. Rather, a penalty should be imposed. As the Supreme Court in *Siemer v Solicitor-General* observed:

The objective of the summary process in contempt of court proceedings is to protect the ability of the courts to exercise their constitutional role of upholding the rule of law. Effective administration of justice under our constitution requires that the orders of the courts are obeyed unless properly challenged or set aside. Public confidence in the administration of the law, also necessary for its effective administration, requires that there is a strong expectation that those who ignore court orders are quickly brought to account.

[35] I have found that the Bhanas were served with notice of the 21 October 2015 hearing. They had the opportunity to attend and be heard. There has been no breach of natural justice.

[36] Further, the Bhanas' compliance or otherwise with the orders of Woolford J (and Keane J) occupied the majority of the hearing. I am satisfied beyond reasonable doubt that the finding of contempt made by me in my Judgment of 21 October 2015 is correct.

⁹ *Grant & Khov as liquidators of Ranolf Co Ltd v Bhana*, above n 1 (footnotes omitted).

[37] My finding of contempt for non-compliance with Woolford J's order will stand.

Should I now fix penalties?

[38] I will not fix penalties in this Judgment. The Bhanas have not had the opportunity to be heard on penalties. Further, I do not know whether in the period between the hearing and the present the Bhanas have done anything to purge their contempt.

[39] I direct Messrs Grant and Khov to file and serve submissions on penalties by 14 October 2016. They need not be lengthy.

[40] The Bhanas may respond if they wish, but no later than 25 October 2016.

[41] I direct the registry to schedule a penalty hearing before me commencing at 8:30 am during the weeks of 7 and 14 November 2016. I allow one hour.

[42] The Bhanas should recognise that contempt can be punished by fines or imprisonment, or both. They would be well advised to instruct counsel to represent them.

Brewer J