

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

**CIV-2014-463-169
[2016] NZHC 2755**

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: 8 November 2016

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

Judgment: 17 November 2016

JUDGMENT OF BREWER J

*This judgment was delivered by me on 17 November 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)

Introduction

[1] In my Judgment of 4 October 2016,¹ I confirmed that Mr Bhana and Ms Bhana are in contempt of Court because they have deliberately failed to comply with the orders made by Woolford J on 25 November 2014. On 8 November 2016, I convened a penalty hearing. Having heard the submissions of counsel for the applicants and the submissions of Mr Bhana and Ms Bhana, I reserved my decision on the appropriate penalty. This Judgment sets out the penalties I impose for the contempt.

[2] First, I record that I dismissed the application by Mr Bhana and Ms Bhana that I stay execution of my Judgment and postpone fixing a penalty pending determination of their appeal to the Court of Appeal against my Judgment of 4 October 2016. The appeal is against my finding that Mr Bhana and Ms Bhana were served with the notice of the contempt of Court hearing scheduled for 21 October 2015 and I have to deal here with the underlying contempt. In any event, I am not going to impose sentences of imprisonment.

The purpose of penalties for contempt of Court

[3] The purpose of the Court's jurisdiction to punish for contempt in civil proceedings is two-fold. It coerces compliance with Court orders for the benefit of a private party. It also serves the public interest by ensuring the administration of justice is maintained. As was said by Lord Diplock in *Attorney-General v Times Newspapers Ltd*:²

There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.

[4] A recent statement on the purpose of imposing a penalty for contempt of Court is given in *Solicitor-General v Krieger*:³

The purpose of punishment for contempt was explained in *Solicitor-General v Siemer*:

¹ *Grant and Khov v Bhana* [2016] NZHC 2352.

² *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (HL) at 308.

³ *Solicitor-General v Krieger* [2014] NZHC 172 at [59].

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 law, also necessary for its effective administration, recognises that there is a strong expectation that those who ignore Court orders are quickly brought to account.

Hence, the main purpose of a punishment for contempt is upholding the rule of law. Deterrence, therefore, is an important consideration. I must also consider the objective seriousness of the relevant conduct, the personal culpability of the defendant, his means, and any personal aggravating or mitigating factors.

[Footnotes omitted]

Contempt for breach of discovery by companies in liquidation

[5] I have considered relevant cases involving contempt for breach of discovery orders by companies in liquidation.

*Grant and Khov v Grewal*⁴

[6] In this case, four companies known collectively as the “Masala” group were placed into liquidation. Following their appointment, the liquidators took orthodox steps to obtain records of each company so that they could ascertain the respective assets and liabilities. The liquidators obtained a court order requiring the four respondents to produce to the liquidators all books, records and documents relating to the business accounts and affairs of the companies in liquidation. The respondents failed to comply and were ultimately found in contempt. But when Heath J came to fix penalties the respondents had complied and had therefore purged their contempt.

[7] In relation to one respondent, Mr Grewal, Heath J was satisfied beyond reasonable doubt that he had deliberately decided either not to comply with the order, or to delay, in order to frustrate the liquidators in the exercise of their statutory duties. His conduct was the most serious of the respondents. Justice Heath ordered that he pay a fine of \$10,000. A fine of that amount was required to denounce the conduct, to hold Mr Grewal accountable for bringing the administration of justice

⁴ *Grant and Khov v Grewal* [2016] NZHC 1564.

into disrepute, and to deter others from acting in this way. It also took account of the nature of the orders in issue and the need for the Courts to support liquidators in their endeavours to obtain information about a company's affairs.

[8] Justice Heath ordered that the fines be apportioned as to 50 per cent each between the Crown and the liquidators.

*Rai v Chapman*⁵

[9] In that case the defendant was fined \$2,000 for failing to provide all books, records and documents of a company in liquidation as he was required to do. The Court found that the defendant's culpability was low because he made attempts to comply with the Court order, but neglected to provide all documents required by the Court order. Associate Judge Bell, after reviewing *Siemer v Solicitor-General* and *Solicitor-General v Miss Alice*, said:⁶

Taking those cases as guidance, I regard Mr Chapman's conduct as far less culpable than those cases. In this case, there was an attempt to comply. Regrettably, he held back key documents of importance to the liquidators and the creditors. To that extent, he is at fault and it is a fault that is serious enough to require some punishment, more than simply admonishment by the Court. In my view, it would be met by a fine of \$2000.

[10] I have looked also more generally to cases where fines have been imposed for civil contempt.⁷ I take from them that in assessing the amount of a fine, account should be taken of the seriousness of the contempt and the damage done to the public interest. I agree with the remarks of Heath J in *Grant v Grewal*:⁸

It is often difficult to determine the level of fine that should be imposed, in the event that a contempt deserving of such a penalty is proved. In *Queen Elizabeth the Second National Trust v Netherland Holdings Ltd*,

⁵ *Rai v Chapman* HC Auckland, CIV-2010-404-2300, 17 December 2010.

⁶ At [9] referring to *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 and *Solicitor-General v Miss Alice* [2007] 2 NZLR 783 (HC).

⁷ *Queen Elizabeth the Second National Trust v Netherland Holdings Ltd* [2014] NZHC 1094, [2015] NZAR 1815; *Director of the Land Transport Safety Authority v McNeil* HC Auckland N509-IM/99, 20 December 2000; *Television New Zealand Limited v NewsMonitor Services Limited* (1997) 12 PRNZ 168 (HC); *Norbrook Laboratories Limited v Bomac Laboratories Limited (No 7)* HC Auckland CIV-2002-404-1732, 18 December 2003; *Ferrier Hodgson & Anor v Siemer & Ors* HC Auckland CIV-2005-404-1808, 16 March 2006; *Solicitor-General v Krieger*, above n 3.

⁸ *Grant and Khov v Grewal*, above n 4, at [19].

Dunningham J considered a range of authorities on this topic.⁹ Fines in excess of \$5,000 seem to be reserved for cases involving persistent intentional breaches of an order, or engaging in conduct that amounts to a “systematic campaign” to breach an order in a manner designed to bring a party to civil litigation into disrepute.

[11] As to imprisonment, the term cannot be longer than three months in a summary process such as this.¹⁰ The cases that have involved imprisonment recently have been for such matters as breaching injunctions or where, because of bankruptcy, fines would serve no purpose.¹¹

Circumstances of the contempt

[12] Mr Bhana and Ms Bhana, as controllers of the company in liquidation and an associated Trust, have responsibilities to provide the liquidators of the company with documents and information. The purpose of a liquidation is to realise the assets of the company and to distribute the proceeds to the creditors. Anything left over goes to the shareholders. This cannot be done conveniently unless there is co-operation by those who controlled the company which has gone into liquidation. A lack of co-operation usually means greatly increased costs and therefore less money to be returned to those who are entitled to it.

[13] I will not go into the complex background of this case. There is a related case before this Court and my view is that Mr Bhana and Ms Bhana want the related case to be resolved while keeping the current case in abeyance.

[14] Mr Bhana and Ms Bhana have consistently acted to frustrate the liquidators. There have been numerous appearances by them and always they deny any obstruction on their part, point to the actions of others and, not infrequently, fail to abide by directions of the Court. They have never taken responsibility for anything at all.

⁹ *Queen Elizabeth the Second National Trust v Netherland Holdings Ltd*, above n 7, at [38].

¹⁰ *Siemer v Solicitor-General*, above n 6, at [67].

¹¹ *Ferrier Hodgson v Siemer*, above n 7; *Siemer v Solicitor-General*, above n 6; *Isis Group Seminars Ltd v Hauwai* HC Auckland CP 1987/89, 6 March 1990; *Attorney-General v Pickering* HC Hamilton CP 24/98 21 September 2001; *Auckland City Council v Finau* [2003] DCR 286.

[15] The background to the position as at 25 November 2014 is set out in Woolford J's teleconference minute. Justice Woolford then made the following orders:

[6] Accordingly, I am satisfied the application should be granted. I therefore make the following orders:

- (a) The respondents produce to the applicants:
 - (i) All books, records and documents relating to the company and the Ranolf Trust in their possession or control including, but not limited to, the trust deed for the Ranolf Trust, board meeting minutes, board resolutions, financial statements, financial records, sale and purchase agreements, property valuations, and all documents relating to the assets of the company and the Ranolf Trust or any other trust that the company has been a trustee for; and
 - (ii) Copies of all documents that relate to the outstanding debtors of the company.
- (b) The respondents provide the applications (sic) with the following information:
 - (i) Identification of the current trustees of the Ranolf Trust;
 - (ii) Identification of the past trustees of the Ranolf Trust;
 - (iii) Details of the assets of the Ranolf Trust.

[16] Neither Mr Bhana nor Ms Bhana took any steps to comply with those orders. What happened subsequently is set out in the "background" portion of my Judgment of 4 October 2016. In short, there was a finding of contempt, the Bhanas insisted they had never been served with notice of the contempt hearing, Keane J directed that they file an affidavit answering the specific concerns of the liquidators, there was a further contempt hearing and findings adverse to the Bhanas.

The Bhanas' position

[17] Mr Bhana's submissions were given orally. They go largely to the merits of the case and there is no acceptance of any failure to comply with any order of this Court, save that Mr Bhana apologises for the lateness of any documents filed after expiry of deadline.

[18] Mr Bhana submits that Woolford J's orders have been complied with and dismisses any suggestion to the contrary.

[19] Mr Bhana says that he is willing to pay a fine, under protest, but also says that he is in a difficult financial position. No details were given.

[20] Ms Bhana's submissions were given orally also and are to the same effect as Mr Bhana's. Ms Bhana would pay a fine but gave me no details of her financial position other than to say it is limited.

[21] In my view, the contempt of Court exhibited by Mr Bhana and Ms Bhana should properly be dealt with by a fine. There is not, in their behaviour, the sort of blatant defiance of Court orders which has in more recent times been met with a sentence of imprisonment. I think that Mr Bhana and Ms Bhana have convinced themselves of the righteousness of their cause and justify in their own minds not responding to Woolford J's orders. They have obfuscated and delayed rather than blatantly defied. They are stubborn and dogged in the maintenance of their position.

[22] There are some mitigating factors. They have had to deal with the illness and the death of their mother. This has affected particularly Ms Bhana who tells me that she resigned her job as a school teacher to care for their mother and is now caring for a disabled sibling.

[23] In addition, I accept what they say about the distraction of the related proceeding into which they have put their primary efforts.

[24] I will not give them credit for ignorance of their obligations because of their status as lay litigants. On more than one occasion in their appearances before me, I have been deliberately blunt in my explanations of their obligations and the likely consequences of failing to meet them.

[25] The liquidators seek fines in the range of \$25,000 - \$50,000. They submit that I should be guided by sections in the Companies Act 1993 which provide for

penalties for failure to comply with notices from liquidators or failure to identify and deliver property to liquidators.¹²

[26] I do not agree that the Court should derive guidance from these provisions. Imposing a penalty for contempt of Court is about maintaining the authority of the Court. The Companies Act regime is for a different purpose. Further, breaches of the Companies Act sections can lead to imprisonment for a term not exceeding two years. Imprisonment for contempt of Court, on a summary level, is limited to a maximum of three months' imprisonment.

[27] I have the clear view, having observed them in Court on more than a few occasions, that Mr Bhana is the driving force of the pair, although Ms Bhana certainly has a mind of her own. I will impose a fine on Mr Bhana of \$8,000 and on Ms Bhana of \$5,000. I do not think their conduct is quite up to that of Mr Grewal in the *Grant and Khov v Grewal* case.

[28] The liquidators also submit that 90 per cent of the fines should be paid to them. That is because they are performing a statutory function and are ultimately pursuing matters on behalf of the creditors. It is in the public interest that neither the liquidators nor the creditors bear the costs of the conduct of Mr Bhana and Ms Bhana.

[29] There is precedent for an apportionment in these percentages. It is the apportionment that Dunningham J ordered in *Queen Elizabeth the Second National Trust*. But that Trust was a statutory body funded by the Crown and by public donations. This is a very different situation and I prefer the apportionment ordered by Heath J in *Grant and Khov v Grewal* where the fine was apportioned equally between the liquidators and the Crown.

¹² Companies Act 1993, ss 261(6A), 274(2) and 373(3).

Decision

[30] Mr Bhana is fined \$8,000 and Ms Bhana is fined \$5,000. The fines are to be paid to the registry and the registry will distribute one half to the liquidators and one half to the Crown.

Costs

[31] I award costs of this proceeding to the liquidators on a party and party basis. These are, of course, to be actual and reasonable. The liquidators may file and serve a memorandum setting out their claimed costs, and the basis for them, by 2 December 2016. The Bhanas, if they wish to, must respond by 16 December 2016. I can indicate that I would anticipate “actual and reasonable” to be around 2B plus 50 per cent.

Brewer J