

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

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CIV-2019-485-315  
[2022] NZHC 2966**

IN THE MATTER OF      Part 14 High Court Rules 2016

BETWEEN                QUENTIN STOBART HAINES  
                                 First Applicant

                                 BPE TRUSTEES (NO 1) LIMITED  
                                 Second Applicant

                                 QUENTIN HAINES PROPERTIES  
                                 LIMITED  
                                 Third Applicant

AND                        HARRY MEMELINK and LYNX  
                                 TRUSTEES LIMITED  
                                 First Respondents

                                 ROY WILLIAM BASSETT-BURR  
                                 Second Respondent

Hearing:                10 November 2022

Counsel:                Q S Haines in person  
                                 J D Dallas for Applicants  
                                 D G O Livingston for Respondents

Judgment:              11 November 2022

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**JUDGMENT OF CHURCHMAN J  
[Non-party costs]**

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[1] The applicants have applied on notice for a costs award against Mr Bassett-Burr, a non-party to litigation between interests associated with Q S Haines and Harry Memelink, Lynx Trustees Limited and the Link No.1 Trust.

[2] The matter has a long and somewhat convoluted history. As long ago as May 2019, Mr Bassett-Burr caused five notices of statutory demand for various sums ranging from \$140,816.78 to \$421,327.05 to be served on the applicants.

[3] The first two of the notices of demand were signed by Mr Bassett-Burr solely, representing that he was signing on behalf of Lynx Trustees Limited. The other three notices were signed by Mr Bassett-Burr and his brother-in-law, Mr Memelink.

[4] Mr Bassett-Burr was the sole shareholder and director of Lynx Trustees Limited which, in turn, was (along with Mr Memelink) a trustee of Link Trust No.1.

[5] Promptly upon receipt of the notices of demand, Mr Haines advised Mr Bassett-Burr of an intention to apply to have them set aside and seek an uplift of costs to reflect the abuse of the statutory demand process. Mr Bassett-Burr was given an opportunity to withdraw the notices. He chose not to do so. The applicants were therefore left with no option but to formally apply to set the notices aside. In a decision dated 30 August 2019,<sup>1</sup> I set aside the notices and awarded costs against Mr Bassett-Burr personally.

[6] Mr Memelink and Lynx Trustees Limited appealed the non-party costs award to the Court of Appeal. The Court of Appeal removed Mr Memelink and Lynx Trustees Limited as parties to the appeal and substituted Mr Bassett-Burr as the appellant.<sup>2</sup> The Court of Appeal declined to strike the appeal out but did note that its merits were weak.<sup>3</sup>

[7] In the subsequent substantive decision, the Court of Appeal, on a narrow procedural point, allowed the appeal and set aside the order for costs against Mr Bassett-Burr holding that, before costs were awarded against a non-party, an application on-notice should be made against that party. The Court found insufficient notice had been provided to Mr Bassett-Burr.<sup>4</sup>

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<sup>1</sup> *Haines v Memelink* [2019] NZHC 2169.

<sup>2</sup> *Memelink v Haines* [2020] NZCA 205 at [13].

<sup>3</sup> At [19].

<sup>4</sup> *Bassett-Burr v BPE Trustees (No 1) Limited* [2020] NZCA 457 at [12].

[8] The Supreme Court granted an extension of time to apply for leave to appeal the Court of Appeal's interim decision,<sup>5</sup> but then dismissed the application for leave to appeal against both the interim and substantive decision.<sup>6</sup>

[9] The Supreme Court accepted that it was arguable whether the Court of Appeal was correct in holding that the High Court has no jurisdiction to make a costs order against a non-party in the absence of a formal application. However, they found that the issue of whether Mr Bassett-Burr had been given adequate notice was a question of fact and did not merit the granting of leave in respect of the substantive decision.<sup>7</sup>

[10] The Supreme Court specifically noted that the applicants had the alternative avenue of redress of making a formal application for non-party costs against Mr Bassett-Burr in the High Court.<sup>8</sup>

[11] In response to that indication, the applicants, on 24 August 2022, filed an application for non-party costs against Mr Bassett-Burr. That application sought the same amount of costs and disbursements that I had ordered against Mr Bassett-Burr in the original judgment,<sup>9</sup> namely costs of \$21,689.25 and disbursements of \$1,230. The costs were calculated on a 2B basis with a 50 per cent uplift.

### **The current application**

[12] Unsurprisingly the applicants rely on the grounds for an award of costs against Mr Bassett-Burr personally that provided the basis for my decisions of 30 August 2019 and 13 May 2021. They also note that Mr Memelink remains an undischarged bankrupt with the Official Assignee not having paid any dividend to creditors; that Lynx Trustees Limited is in liquidation with the liquidators having incurred significant costs of some \$879,726 (which they are trying to recover from the receivers of Link Trust No.1) without realising any funds for creditors; and that the Link Trust No.1 is in receivership and that based on the first report of the receivers it seems there will be not enough assets to cover the Trust's liabilities. The applicants also note that the costs

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<sup>5</sup> *Haines & Ors v Memelink and Forester* [2021] NZSC 14 at [7].

<sup>6</sup> At [10].

<sup>7</sup> At [17].

<sup>8</sup> At [15].

<sup>9</sup> *Haines & Ors v Memelink & Anor* [2019] NZHC 2169 and in the subsequent decision of *Haines & Ors v Memelink & Anor* [2021] NZHC 1063.

and disbursements award in the decision of 13 May 2021 against the Link Trust No.1 has never been paid.

[13] The applicants also note that Mr Bassett-Burr has a direct financial interest in the litigation involving Link Trust No.1 as he is a substantial creditor of that Trust.

[14] Mr Bassett-Burr opposes the application. Much of the information put before the Court on his behalf is irrelevant to the application for non-party costs and the submissions made were at times difficult to follow. However, the essence of Mr Bassett-Burr's position seems to be that he did nothing more than act as a "reader/writer" for Mr Memelink and his involvement was limited to typing out the statutory demands. Counsel acknowledged that Mr Bassett-Burr had in fact signed the statutory demands as the director of Lynx Trustees Limited which was a co-trustee of the Link Trust No.1.

[15] It was also argued that either Mr Bassett-Burr could not act unilaterally without the consent of the co-trustee, Mr Memelink, or that at all times what Mr Bassett-Burr did was simply to follow instructions from Mr Memelink.

[16] None of these arguments is tenable. As the sole director of a trustee of the Link Trust No.1, Mr Bassett-Burr was obliged at all times to act in accordance with the responsibilities of a trustee. He was not entitled to abrogate those responsibilities to Mr Memelink.

[17] His activities extended far beyond simply being a "reader/writer" for Mr Memelink. As I noted in the 30 August 2019 decision,<sup>10</sup> the first two of the five demands were signed only by Mr Bassett-Burr representing that he was acting on behalf of Lynx Trustees Limited, and the latter three notices were signed by both Mr Memelink and Mr Bassett-Burr.

[18] As recorded at [9] of the 2019 decision, immediately after the five notices of demand had been served, Mr Bassett-Burr emailed Mr Haines and other people associated with him, advising of service.

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<sup>10</sup> *Haines v Memelink*, above n 1, at [4].

[19] Mr Bassett-Burr was promptly put on notice, by email of 24 May 2019 that unless the notices were withdrawn, there would be an application to have them set aside and costs on a 2B scale with an uplift of 50 per cent would be sought.

[20] Mr Bassett-Burr continued to engage in correspondence with Mr Haines and by email of 26 May 2019 sought details of what was said to be wrong with the notices. Mr Haines provided that detail and received an acknowledgement from Mr Bassett-Burr indicating that he would take legal advice. Nothing further was heard from him with the result that it was necessary for the application to set aside the notices to be filed.

[21] My decision of 30 August 2019 details the Court procedures that were required before ultimately the application for the setting aside of the purported statutory demands was granted.<sup>11</sup> All of this could have been avoided had Mr Bassett-Burr acted responsibly and withdrawn the notices which should never have been served.

### **Relevant issues**

[22] A notice of demand should not be served in respect of a debt that is disputed. Mr Livingston, counsel for Mr Bassett-Burr, claimed that the debt was not disputed and refers to a decision of Grice J in respect of issues of liability.<sup>12</sup> However, Mr Livingston's submissions misrepresent what that decision actually decided. Far from confirming that the quantum of the claims was undisputed, the decision held:<sup>13</sup>

I am satisfied that liability has been established and that there is no tenable defence in relation to liability. However, I am not satisfied that the plaintiffs are likely to obtain judgment for a substantial sum. In addition, taking into account the counterclaim that the defendants are entitled to make, I do not think the payment of \$50,000, or any sum, is just. The quantum must be determined at trial.

[23] Mr Livingston conceded that no quantum had yet been determined.

[24] Mr Livingston also advanced an argument to the effect that when there was ultimately a "washup" in respect of all the litigation between the Memelink interests

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<sup>11</sup> *Haines v Memelink*, above n 1, at [13]-[30].

<sup>12</sup> *Memelink and Forster v Haines & Ors* [2021] NZHC 1992.

<sup>13</sup> At [161].

and the Haines' interests, it would be found that the Haines' interests owed the Memelink interests rather than the other way round. He implied that, in this eventuality, there was no basis for an award of costs against Mr Bassett-Burr.

[25] There are a number of problems with this submission. Firstly, the table presented to the Court by Mr Livingston in support of this submission had, as Mr Haines and Mr Dallas pointed out, a number of significant errors. Secondly, the various items of litigation set out in Mr Livingston's table are between different entities. Those entities do not include Mr Bassett-Burr personally. Thirdly, and most importantly, there is no general costs principle that, even in litigation involving the same parties, that it is necessary to wait until all the strands of that litigation are finally concluded before costs can be fixed or become payable.

[26] The costs incurred in this case were in relation to a discrete transaction, namely the improper issuing of notices of demand. The outcome of other litigation including costs awards for or against the Haines' interests have no bearing on whether the costs in respect of this discrete matter should be fixed and enforced.

[27] One of the factors relevant to whether, in this situation, a non-party award of costs should be made is whether or not costs are likely to be recoverable from the entity on whose behalf Mr Bassett-Burr was purportedly acting, namely Lynx Trustees Limited, on behalf of Link Trust No.1.

[28] I am satisfied that the evidence establishes that neither Lynx Trustees Limited (in liquidation) or Link Trust No.1 (in receivership) have any prospect of meeting any award of costs.

[29] I am also satisfied that Mr Bassett-Burr cannot escape responsibility for his actions in improperly issuing the unlawful notices of demand and then failing to promptly withdraw them by hiding behind Mr Memelink. As the director of Lynx Trustees Limited, Mr Bassett-Burr was obliged to act in accordance with the obligations imposed upon directors by the Companies Act, including an obligation to act prudently. As a trustee, he also had an obligation to act in accordance with the law. He demonstrably failed to discharge those obligations.

[30] For the reasons I set out in my decision of 30 August 2019 and added to in the decision of 13 May 2021,<sup>14</sup> this is an appropriate case for an award of non-party costs and for 2B scale costs to be uplifted by 50 per cent to reflect Mr Bassett-Burr's inappropriate conduct.

[31] Mr Bassett-Burr was put on notice, immediately after serving the unlawful notices that this was a likely outcome. He chose to ignore that notice and cannot now complain that he should have no responsibility in costs for needlessly putting the applicants to the expense of a formal Court application.

### **Outcome**

[32] Mr Bassett-Burr is to pay costs of \$21,689.25 and disbursements of \$1,230 personally.

### **Costs on these proceedings**

[33] Normally, a costs application such as this would be dealt with on the papers. However, Mr Livingston, counsel for Mr Bassett-Burr, insisted that an in-person hearing was required in relation to this costs application. Substantial affidavit evidence was also filed by Mr Livingston.

[34] Having succeeded at this hearing, the applicants are entitled to costs in respect of the costs hearing. I invite the parties to settle the question of costs and failing settlement within 14 days, the applicants are to file a memorandum of no greater than three pages in length. Mr Bassett-Burr is to file a memorandum in response of no greater than three pages in length within seven days of service of the applicants' memorandum. I will then determine the matter on the papers.

### **Churchman J**

Solicitors:  
J D Dallas, Wellington for Applicants  
Livingston & Livingston, Wellington for Respondent

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<sup>14</sup> *Haines & Ors v Memelink & Anor*, above n 9.