

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

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

**CIV-2019-485-315
[2019] NZHC 2169**

IN THE MATTER OF section 290 Companies Act 1993

BETWEEN QUENTIN STOBART HAINES
 First Applicant

AND BPE TRUSTEES (NO 1) LIMITED
 Second Applicant

AND QUENTIN HAINES PROPERTIES
 LIMITED
 Third Applicant

AND HARRY MEMELINK and LYNX
 TRUSTEES LIMITED as Trustees of the
 LINK TRUST NO 1
 Respondents

Hearing: 30 August 2019

Counsel: Q S Haines in person
 J D Dallas for Second and Third Applicants
 H Memelink in person

Judgment: 30 August 2019

JUDGMENT OF CHURCHMAN J

[1] Mr Q S Haines and Mr H Memelink were once friends. Mr Haines also acted as a legal advisor to Mr Memelink and the two were involved in a number of business transactions.

[2] Their personal and business relationships have now completely disintegrated and there is considerable acrimony between them. This application to set aside five

demands purportedly made pursuant to s 289 of the Companies Act 1993 (the Act) is yet another example of the animosity between the two.

The application

[3] This is an application to set aside five notices of statutory demand served on the applicants:

- (a) a notice addressed to BTE Trustees (No 1) Limited as trustee of the QSH Family Trust, undated, demanding \$421,327.05;
- (b) a notice addressed to BTE Trustees (No 1) Limited as trustee of the QSH Family Trust, undated, demanding \$343,692.51;
- (c) a notice addressed to QSH Family Trust and Quentin Stobart Haines (as both trustee of QSH Family Trust and in his personal capacity as loan guarantor) dated 20 May 2019 in the sum of \$421,327.05;
- (d) a notice to QSH Family Trust and Quentin Stobart Haines (as both trustee of QSH Family Trust and in his personal capacity as loan guarantor) dated 20 May 2019 in the sum of \$343,692.51; and
- (e) a notice addressed to Quentin Haines Properties Limited and Quentin Stobart Haines (as both director and shareholder of Quentin Haines Properties Limited and in his personal capacity as loan guarantor) dated 20 May 2019 in the sum of \$140,816.78.

[4] The first two demands were signed by Mr Roy Bassett-Burr only and he was represented as signing on behalf of Lynx Trustees Limited. The latter three notices were signed by both Mr Memelink and Mr Bassett-Burr.

[5] Although the notices purported to represent that Fintan Devine Lawyer of Devine Law Legal [sic] had some involvement in their preparation, from the content of the notices such a representation is clearly false.

[6] Evidence of the lack of legal involvement in the preparation includes the facts that the first two notices were undated and although all five of the notices purported to make a statutory demand under s 289 of the Act, the third and fourth notices were not directed to a company at all, but to “QSH Family Trust and Quentin Stobart Haines (as both trustee of QSH Family and in his personal capacity as loan guarantor).”

[7] It is elementary that notices of demand under s 289 can only be issued against a company. Section 289 of the Act says:¹

A statutory demand is a demand by a creditor in respect of a debt owing by a company made in accordance with this section.

[8] Mr Bassett-Burr who is the sole director and shareholder of Lynx Trustees Limited which is in turn a trustee of Link Trust No 1, is also Mr Memelink’s brother-in-law. He appears to have become Mr Memelink’s willing acolyte in his feud with Mr Haines.

[9] 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.

[10] In response to that email, Mr Haines emailed Mr Bassett-Burr on 24 May 2019 advising that the entities that were the recipients of the notices intended to apply to have them set aside. It also indicated that if an application was necessary, costs would be an issue and would be sought on a 2B scale with an uplift of 50 per cent to reflect the abuse of the statutory demand process. An opportunity was extended to Mr Bassett-Burr to withdraw the notices.

[11] By email of 26 May 2019, Mr Bassett-Burr enquired from Mr Haines what he thought was wrong with the purported notices of statutory demand. Mr Haines promptly responded to that, receiving an email of acknowledgement from Mr Bassett-Burr who indicated that he would take legal advice. Nothing further was heard from.

[12] Mr Haines, who has previously practiced as a lawyer, has deposed that he was aware of the content of s 290(5) of the Act which says:

¹ Companies Act 1993, s 289(1).

A demand must not be set aside by reason only of a defect or irregularity unless the Court considers that substantial and justice would be caused if it were not set aside.

[13] In the absence of a response from Mr Bassett-Burr, Mr Haines felt that he had no option but to apply to the Court to have the notices set aside and did so on 31 May 2019.

[14] On 17 June 2019, Mr Memelink sent Mr Haines an email which said:

We have taken legal advice and immediately withdraw the statutory demands served on: Quentin Haines Properties Limited; QSH Family Trust; BPE Trustees (No 1) Limited and Quentin Haines personally.

We reserve the right to re-serve the Statutory Demands and/or take other remedies to chase the moneys owed.

We reserve the right to produce this email in Court should you apply and serve to set aside the Statutory Demands, and we will make a [sic] application as to costs against you.

[15] No notice of opposition or memorandum of counsel was filed in relation to the application to set aside the notices. That application was called in the Judge's Chambers List on 1 July 2019 for a first call.

[16] A minute of Cull J dated 2 July 2019 records that:

Mr Memelink, however, appeared in person to advise that he opposed the application and that counsel representing the Lynx Trustees Limited was unable to appear today, due to a prior engagement, which had been notified to the Court.

[17] The minute also records that Mr Haines, Mr Dallas and Mr Memelink, agreed that this matter should be set down for a one-hour hearing. Cull J made timetable orders requiring the respondents to file a notice of opposition by 16 July 2019, and submissions three clear working days before the scheduled hearing.

[18] The respondents failed to comply with that timetable direction.

[19] On 28 August 2019, a solicitor acting for the respondents, Mr Kevin Smith, filed a memorandum seeking that the hearing of the application set down for today, be

adjourned. He claimed only to have been instructed that morning. He sought to be excused on the basis that he had another obligation in the District Court on 30 August.

[20] The minute of Cull J of 2 July 2019, recorded Mr Memelink as having advised the Court on that occasion that counsel representing Lynx Trustees Limited “was unable to appear today, due to a prior engagement.” The counsel that Mr Memelink was referring to was clearly Mr Kevin Smith who, on 1 July 2019 representing Lynx Trustees Limited in the case of *Lynx Trustees Limited v Body Corporate 68792*.²

[21] After having reviewed Mr Smith’s memorandum, the Court refused to grant the adjournment sought setting out its reasons for doing so in a minute dated 29 August 2019.

[22] At 10.45 pm on Thursday 29 August 2019, Mr Memelink emailed the Court a quantity of documentation consisting of affidavits he had filed in other proceedings and memoranda and decisions from other Court cases.

[23] At 2.06 am on Friday 30 August 2019, Mr Memelink emailed the Court a further quantity of documents including a affidavits filed by Mr Bassett-Burr in other proceedings and a large quantity of exhibits.

[24] None of this material appeared to be relevant to the two matters before the Court this morning namely the application to set the five notices of statutory demand aside and the application by the second and third applicants for a costs order against Mr Bassett-Burr personally.

[25] No application had been made for leave to file documents out of time, and I decline to admit them as evidence.

[26] At the hearing, Mr Memelink represented himself in his capacity as a trustee of the Link Trust No 1. Mr Bassett-Burr did not appear and was not represented, and neither was Lynx Trustees Limited.

² *Lynx Trustees Limited v Body Corporate 68792* [2019] NZHC 152.

[27] In the course of his oral submissions to the Court, Mr Memelink claimed that Cull J, in her minute of 2 July 2019, had misrepresented his position. He denied that he told the Court on that occasion that he opposed the application to set aside the notices. This claim is simply not credible. If Mr Memelink had not opposed the Court setting aside the notices, there would have been no need for him to have explained to the Court that the lawyer for Lynx Trustees Limited was engaged in another Court, and unable to appear in the Judge's Chambers List. Mr Memelink could simply have informed the Court that there was no opposition and the notices could have been set aside there and then.

[28] Likewise, the only explanation for the Judge recording the agreement of Mr Haines, Mr Dallas and Mr Memelink that the matter should be set down for a one-hour hearing, was if Mr Memelink had conveyed to the Court that the application was opposed.

[29] Equally, there would have been no need for the Court to have made a timetable order for the filing of the notice of opposition and submissions, unless the application was to be opposed. There would have been no need for Kevin Smith to file a last-minute request to adjourn the hearing of the application of the hearing on 30 August, or indeed for Mr Memelink to attempt to file the quantities of documentation that he emailed the Court overnight on 29/30 August 2019. I reject Mr Memelink's claim that, on 1 July 2019, Cull J in any way misunderstood the respondent's position.

[30] During the course of the hearing, Mr Memelink claimed that the respondents had never opposed the setting aside of the orders. Given the overwhelming evidence to the contrary, as detailed above, I reject that submission.

[31] When I asked Mr Memelink directly whether or not the respondents still opposed the making of orders setting aside the purported statutory demands, he replied by saying that they did not.

[32] I therefore grant the application setting aside the purported statutory demands.

[33] Quite independently of the concession made by Mr Memelink at the hearing, I am satisfied that the statutory demands should not have been issued. The purported debts upon which they are based are clearly disputed with the applicants referring to the effect of s 102 of the Property Law Act 2007, and the fact that in respect of the claimed transfer of the mortgage, the relevant certificate of title records that the mortgage in question has been discharged rather than transferred.

Costs

[34] Having granted the application to discharge the five notices of statutory demand, all that remains is for the Court to consider the question of costs.

[35] The second and third applicants pursue a costs application only against Mr Roy William Bassett-Burr personally. The reason for that is that Mr Memelink is an undischarged bankrupt and neither Lynx Trustees Limited or the Link Trust No 1 appear to have any assets.

[36] Mr Haines represented himself and did not make any application for costs. However, in view of the fact that two of the purported notices of statutory demand served on him were a nonsense as s 289 of the Companies Act only relates to companies, he was never at risk personally. As a result of his past experience as a practicing lawyer, he would have been well aware of that.

[37] However, the position is different in relation to the second and third applicants. They were potentially at risk, particularly given Mr Memelink's equivocating about whether or not the notices were withdrawn, and whether they might be revived in the future.

[38] Given the failure of Mr Bassett-Burr to respond to the invitation to withdraw the notices, it was appropriate that the second and third applicants formally apply to the Court to set them aside. Mr Bassett-Burr was also clearly put on notice that he risked a costs application against him personally.

[39] In circumstances where statutory notices of demand have been improperly issued and have been set aside by the Courts, there have been cases where a third party

who has caused the notices to be issued, has been held liable for costs personally. That occurred in the case of *ETB Realty Limited v Eastlight Asset Trading No 3 Limited*.³ In that case, a director of Eastlight, Mr Kooiman, had prepared the notice on behalf of Eastlight, and arranged for its service. Mr Kooiman subsequently received legal advice and immediately instructed his lawyer to withdraw the statutory demand.

[40] The company upon which the notice was served, pursued an application for increased costs, namely a 50 per cent uplift on 2B calculations. The order was sought against both Eastlight and Mr Kooiman, as a non-party.

[41] The Court held that the statutory demand was appropriately categorised as being “ill-advised”. The Court said that justified an increase in costs. The Court relied on the decision in *Norwich Properties Limited v Mark Gray Architects*, where the Court had said:⁴

[31] It is not uncommon for this Court, when considering an uplift over scale costs, to order a 50 per cent uplift on a 2B calculation. The Court views such an approach as fitting well with the intention of the Rules Committee, when the daily recovery rates of the High Court Rules are revised, to reflect approximately two-thirds of what might be considered a reasonable fee between solicitor and client.

[42] The Court determined that the uplift sought was appropriate.

[43] In relation to the claim against Mr Kooiman, the Court noted the general discretion as to costs contained in r 14.1 of the High Court Rules which permitted the Court to award costs against non-parties to litigation.⁵

[44] The Court also noted the authorities that support an award of costs against a non-party who might be the “real party” to litigation, particularly where a company litigant is insolvent, or the claim is hopeless or pursued improperly.⁶

³ *ETB Realty Limited v Eastlight Asset Trading No 3 Limited* [2016] NZHC 609.

⁴ *Norwich Properties Limited v Mark Gray Architects* [2015] NZHC 994, at [31].

⁵ See *Erwood v Maxted* [2010] NZCA 93, (2010) 20 PRNZ 466 at [18].

⁶ See *Carborundum Abrasives Limited v Bank of New Zealand (No 2) Limited* [1992] 3 NZLR 757; *Kidd v Equity Realty (1995) Limited* [2010] NZCA 452; *Dymoocks Franchise Systems (NSW) Pty Limited v Todd (No 2)* [2004] UKPC 39; [2005] 1 NZLR 145.

[45] The Court noted Mr Kooiman's potential financial interest in the outcome. The second and third applicants have submitted that in the present case, Mr Bassett-Burr has a potential financial interest in the outcome being a shareholder and director of a company that is a significant creditor in Mr Memelink's bankruptcy.

[46] Notwithstanding the fact that, unlike Mr Bassett-Burr in the present case, Mr Kooiman, immediately upon receipt of legal advice, withdrew the notice of statutory demand, the Court ordered both him and Eastlight jointly liable for the applicant's costs.

[47] I am satisfied that, on the same basis that the Court found an order for personal liability justified in the case of *ETB Realty Limited*, that it is appropriate for a costs order to be made against Mr Bassett-Burr personally.

[48] Mr Bassett-Burr issued the demands improperly. Notwithstanding the attempt to represent in the notices that a solicitor had been involved in their preparation, clearly no legal advice was taken in advance. Mr Bassett-Burr ignored the opportunities made available to him to withdraw the notices, forcing the second and third applicants to go to the expense of applying to the Court for them to be set aside.

[49] Mr Bassett-Burr has clearly acted in concert with his brother-in-law, Mr Memelink in pursuing the latter's vendetta against the first applicant. He has to accept responsibility for the prolonging of this matter by not ensuring that it was disposed of on 1 July 2019 when it first became before the Court, and attempting to get the hearing scheduled for this morning adjourned.

[50] As well as the case law referred to above, there are a number of other cases where, in an instance of misuse of a statutory demand, the Courts have awarded 2B costs, plus a 50 per cent increase.⁷

⁷ See *Four Avenues Property Group Limited v Higgs Construction Limited* [2016] NZHC 1202; *Summer Construction Limited v Leon Bakker & Deirdre Bakker* CIV-2006-485-1499 HC Wellington, 10 November 2006.

[51] This is an appropriate case for the award of costs against Roy William Bassett-Burr personally. I approve costs on a 2B basis with a 50 per cent uplift in accordance with the schedule filed by counsel for the second and third applicants this morning.

Churchman J

Solicitor:
j d Dallas, Lawyer, Wellington for Second and Third Applicants

cc Q S Haines
H Memelink