

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA503/2019
[2020] NZCA 457**

BETWEEN	ROY BASSETT-BURR Appellant
AND	BPE TRUSTEES (NO. 1) LIMITED First Respondent
AND	QUENTIN HAINES PROPERTIES LIMITED Second Respondent

Hearing: 2 September 2020

Court: Goddard, Ellis and Dunningham JJ

Counsel: D G O Livingston for Appellant
D G Dewar for First and Second Respondents

Judgment: 29 September 2020 at 11.00 am

JUDGMENT OF THE COURT

- A The appeal is allowed.**
 - B The order for non-party costs made against the appellant is set aside.**
 - C There is no order as to costs.**
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REASONS OF THE COURT

(Given by Dunningham J)

[1] On 30 August 2019, Churchman J made an award of costs against the appellant, Mr Bassett-Burr, in respect of a successful application by the respondents to set aside

five statutory demands served on them by the trustees of Link Trust (No. 1) (the Trust).¹

[2] Mr Bassett-Burr was not a party to the application to set aside, but was pursued for costs as a non-party, having signed the statutory demands in question in his capacity as a director of a corporate trustee of the Trust.

[3] An appeal of the decision to award costs against Mr Bassett-Burr was filed by the trustees of the Trust, being Mr Harry Memelink and Lynx Trustees Ltd. However, following a decision of this Court on 2 June 2020, they were removed as appellants and substituted with Mr Bassett-Burr.²

[4] The appeal from the decision to award costs against Mr Bassett-Burr was advanced on a range of grounds including:

- (a) the failure to serve submissions in respect of the costs application on Mr Bassett-Burr, in breach of the principles of natural justice;
- (b) the absence of evidence to suggest the Trust had no assets and was unable to meet a costs award;
- (c) Mr Bassett-Burr was only involved with the service and subsequent recall of the statutory demands as a “reader-writer” for Mr Memelink who suffers from dyslexia and other physical impairments; and
- (d) Mr Bassett-Burr was acting in his capacity as a trustee of the Trust and not for personal gain or interest.

[5] On 31 August 2020, shortly before the hearing of the appeal, this Court issued a minute³ which referred the parties to the decision in *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council*, where it was held that before costs are awarded against a non-party an application on notice should be made against that

¹ *Haines v Memelink* [2019] NZHC 2169 at [47].

² *Memelink v Haines* [2020] NZCA 205.

³ *Bassett-Burr v BPE Trustees (No 1) Ltd* CA503/2019, 31 August 2020 (Minute of Goddard J).

party.⁴ It was pointed out that no such application appeared to have been made in this case. Counsel were asked to address that point in their oral submissions.

[6] In the end, this point proved pivotal to the appeal.

Principles applying to the award of costs against non-parties

[7] The Court has jurisdiction to order a non-party to pay costs.⁵ The general approach to the exercise of that jurisdiction was set out in the judgment of Lord Brown in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* as follows:⁶

Although costs orders against non-parties are to be regarded as “exceptional”, exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such “exceptional” case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.

[8] A non-party costs award may be made against directors of companies (such as Mr Bassett-Burr) although, because of their duty to the company, the court may require an additional element such as impropriety or bad faith.⁷

[9] However, the courts have emphasised that the non-party should be put on notice of an intention to seek costs from them. Indeed, in *Poh v Cousins & Associates*, Associate Judge Osborne said:⁸

[27] There has been some emphasis in case law on the importance of the giving of notice to non-parties, before litigation is commenced, if there is later to be an application for costs to be paid by a non-party. ...

⁴ *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* HC Palmerston North CIV-2008-454-31, 22 December 2011 at [50].

⁵ *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)* [1992] 3 NZLR 757 (HC); *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145; and pursuant to the discretion in High Court Rules 2016, r 14.1.

⁶ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)*, above n 5, at [25(1)].

⁷ See, for example, *de Vries v Queenstown.com Ltd* HC Invercargill CIV-2003-425-86, 23 December 2004.

⁸ *Poh v Cousins & Associates* HC Christchurch CIV-2010-409-2654, 4 February 2011.

[10] Whether or not there has been advance notice, the judgment of Kós J in *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* squarely identified the need for an application to be made on notice to the potentially liable non-party, saying the following:⁹

[49] There are in this case two reasons to pause before reaching a conclusion on the issue of whether the receiver of the second plaintiff should wear costs.

[50] The first is that an application on notice to the receiver needs to be made for that purpose. It seems to have been assumed here (by all parties) that such costs can be dealt with in the context of the current inter-party costs application. That is not so. That approach fails to recognise the special position in which non-parties stand. An application on notice is necessary to subject them to the Court's jurisdiction in this proceeding. And the non-party is entitled to respond and be heard. The Court cannot simply assume that the second plaintiff is attending fully to the receiver's interests, despite the inherent likelihood that this is so.

(Footnote omitted.)

[11] In that case, Kós J simply reserved leave to the successful party to apply subsequently, and formally, for costs against the receiver of the second plaintiff (the non-party).¹⁰

[12] The requirement for formal service of an application on the person against whom it is made is fundamental. The jurisdiction of the High Court to enter a money judgment against a person is dependent on service on that person of proceedings in an appropriate form notifying them of the claim.¹¹ The Court can no more make an order requiring a non-party to make a payment without proper service of notice of that claim on the non-party than it could make such an order against a defendant without proper service of the relevant proceedings on that defendant. And whether a claim is made against a party or a non-party, basic principles of natural justice require that the person be given proper notice of the claim against them, including the grounds of that claim, the steps they must take if they wish to oppose the claim, and the time within which they must take any such steps before being exposed to the risk of an order being made against them in default of appearance.

⁹ *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council*, above n 4.

¹⁰ At [54].

¹¹ See, albeit in a different context, *Cockburn v Kinzie Industries Inc* (1988) 1 PRNZ 243 (HC) at 245–246.

The application for non-party costs

[13] The respondents' intention to seek costs against Mr Bassett-Burr personally was set out in a memorandum of counsel for the second and third applicants (the first and second respondents in this proceeding) dated 26 June 2019. The memorandum said:

5. Counsel also seeks an order for costs against Mr Roy William Bassett-Burr, as a third party pursuant to general discretion of the Court pursuant to HCR 14.1. It is respectfully submitted that Mr Bassett-Burr is much more than just the director of Lynx Trustees and he has taken an active part in these causing the wastage that the applicant companies have incurred as a result of these meritless and disputed demands. ...

[14] No formal application for costs against Mr Bassett-Burr was filed. Nor was there any evidence that this memorandum was served on Mr Bassett-Burr.

[15] However, Mr Dewar argued that in the circumstances, the application had been brought to Mr Bassett-Burr's attention, by reference to the following documents:

- (a) an email dated 21 June 2019 to Mr Bassett-Burr where Mr Haines, one of the applicants in the application to set aside, advised Mr Bassett-Burr that:

... I am instructing the companies (sic) lawyer to seek an uplift in 2B costs by 50%, as set out in my email 24 May. I am also instructing the companies (sic) lawyer to seek those costs against you personally as a third party, pursuant to the High Court Rules.

- (b) submissions on behalf of the applicants seeking costs against Mr Bassett-Burr, which were provided to Mr Kevin Smith, who was instructed late in the piece to represent the respondents in the application to set aside (indeed so late he sought an adjournment on 28 August 2019 for the hearing of the setting aside proceedings on 30 August 2019). Mr Dewar submitted that these submissions provided notice of the application for costs to Mr Bassett-Burr via Mr Smith, who was acting for Mr Bassett-Burr. The submission that Mr Smith

was acting for Mr Bassett-Burr was made in reliance on the following passage in Mr Bassett-Burr's affidavit dated 27 September 2019:

6. I am Mr Memelink's brother-in-law and until recently a trustee of Link Trust No. 1, via my company Lynx Trustees Limited, which is now in liquidation due to the fact that my lawyer Mr Smith, did not argue the case correctly and failed to point out to the court that the two points the case was lost on were in fact incorrect, highly disputed and proven (sic).

(c) emails sent on 27 June 2019 and 10 July 2019 where Mr Bassett-Burr was copied in to communications between Mr Memelink and the High Court Registry regarding the forthcoming hearing of the application to set aside.

[16] However, we are not satisfied that any of these steps, either individually or in combination, were sufficient to bring the non-party costs application (and the grounds for it) to Mr Bassett-Burr's attention or to signal to him what steps he needed to take if he opposed the application. They did not provide a basis for the exercise of jurisdiction to make an order against him personally, and they did not meet the requirements of natural justice.

[17] The email of 21 June 2019 does no more than warn Mr Bassett-Burr that such an application may be made. It cannot comprise notice that such an application has been made. It did not set out the grounds of the application, or identify the steps that must be taken to oppose the making of such an order.

[18] Mr Bassett-Burr's passing reference to Mr Smith as "my lawyer" in the context of other proceedings did not, without more, indicate that Mr Smith was authorised to accept service of a non-party costs application against Mr Bassett-Burr in the present proceedings, or to represent him in respect of such a claim. It is evident from the balance of Mr Bassett-Burr's affidavit that Mr Smith was appointed to act for the trustees of the Trust on the application to set aside and there is no suggestion he had broader instructions.

[19] Copying Mr Bassett-Burr into emails with the High Court Registry is also plainly insufficient to constitute proper notice to Mr Bassett-Burr that costs are being

sought against him personally and to alert him to the need to respond, and of the timeframe within which he must do so.

[20] Perhaps unsurprisingly in these circumstances, Mr Bassett-Burr was not represented at the hearing on the issue of costs on 30 August 2019 at which an award was made against him. Nor, again unsurprisingly, had he filed any documents addressing a claim for costs against him personally. In his affidavit of 27 September 2019, Mr Bassett-Burr says:

44. I was very much surprised to see the Judgment of Churchman J, 30 August 2019 and even more surprised to be served with a bankruptcy notice by Mr Haines on 13 August demanding payment for the full amount ordered plus costs.

45. I was perplexed as to how this situation had come about and why I was unaware that Mr Haines was pursuing costs against me personally.

[21] While we put limited weight on Mr Bassett-Burr's untested evidence, the fact remains that the respondents did not properly notify Mr Bassett-Burr of the application against him and the grounds on which it was being advanced, nor was he given a timeframe for responding to it, or a date for hearing. Accordingly, we consider that the court lacked jurisdiction to make an order against him at the hearing on 30 August 2019. We also consider that there was a breach of the requirements of natural justice.

[22] The appeal is therefore allowed, and the order for non-party costs set aside.

[23] It remains open to the respondents to make a formal application for costs against Mr Bassett-Burr in the High Court.

Costs

[24] At the hearing of this appeal we indicated the likely outcome and, in light of that, heard submissions from the parties on costs. This issue was complicated by:

- (a) the convoluted history of these proceedings on appeal, where they have been the subject of an unsuccessful strike out application, and where

the proper party to the appeal was not identified until this Court's decision on 2 June 2020; and

- (b) the fact that the ground on which this appeal has been determined was not identified by Mr Bassett-Burr (save for a generalised reference to a breach of natural justice because submissions were not served on him). Nor were the submissions and evidence focused on it, until the minute issued on 31 August 2020.

[25] In these circumstances, the respondents argued that this was not a case where costs should follow the event. The respondents have simply responded to an appeal where:

- (a) it was brought by the wrong parties;
- (b) the respondents “stumbled at the last hurdle” on a point not previously taken; and
- (c) it was the respondents' application to strike out the appeal which brought some order to the file and established the correct parties to the appeal.

[26] In addition, the respondents submit that it would be inappropriate for Mr Bassett-Burr to be awarded costs for steps taken before he was a party to the appeal.

[27] Mr Livingston, for Mr Bassett-Burr, however, argued that the appeal succeeded on a point which had been raised in their grounds of appeal (being the breach of natural justice) and costs should follow on a standard basis for both this appeal and on the application to strike out (where costs had been reserved).

Discussion

[28] We are satisfied that this is a case where it is proper that costs in this Court should lie where they fall. The identity of the appellants has changed since the

proceedings were filed, at this Court's instigation, to remedy a serious defect in the way in which the appeal had been framed. We do not consider the original appellants are entitled to costs when they had no right of appeal. Mr Bassett-Burr did not become the appellant until after the Court's decision dated 2 June 2020. It would be inappropriate for him to be awarded costs for the steps which occurred before he was personally involved in the proceedings.

[29] Furthermore, the appeal raised multiple grounds, requiring considerable evidence to be filed which was not, in the end, relevant to the outcome. Mr Bassett-Burr succeeded primarily on a narrow point which was raised by this Court, though he did raise the related question of breach of natural justice. The respondents have been put to considerable expense addressing arguments which in the end were moot, because the fundamental issue of jurisdiction had not been addressed.

[30] Taking all these factors into consideration, we consider costs should lie where they fall and accordingly we make no order as to costs.

Result

[31] The appeal is allowed.

[32] The order for non-party costs made against the appellant is set aside.

[33] There is no order as to costs.

Solicitors:
Livingston & Livingston, Wellington for Appellant
J D Dallas, Wellington for Respondents