

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 93/2020  
[2021] NZSC 14**

**BETWEEN**

**QUENTIN STOBART HAINES  
First Applicant**

**BPE TRUSTEES (NO 1) LIMITED  
Second Applicant**

**QUENTIN HAINES PROPERTIES  
LIMITED  
Third Applicant**

**AND**

**HARRY MEMELINK AND CISCA  
FORESTER AS TRUSTEES OF THE LINK  
TRUST NO 1  
Respondents**

**SC 93/2020**

**BETWEEN**

**BPE TRUSTEES (NO 1 LIMITED)  
First Applicant**

**QUENTIN HAINES PROPERTIES  
LIMITED  
Second Applicant**

**AND**

**ROY BASSETT-BURR  
Respondent**

**Court: Glazebrook, O'Regan and Ellen France JJ**

**Counsel: J P Dallas for Applicants  
D G O Livingston, M F Moughan and M C R Dunn for  
Respondents**

**Judgment: 1 March 2021**

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**JUDGMENT OF THE COURT**

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- A      The application for an extension of time to apply for leave to appeal against the interim decision is granted.**
- B      The application for leave to appeal against the interim and substantive decisions is dismissed.**
- C      The applicants must pay the respondents costs of \$2,500.**
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## **REASONS**

### **Introduction**

[1] The applicants seek leave to appeal against two decisions of the Court of Appeal. The first is an interlocutory decision which amended the parties to the appeal.<sup>1</sup> The second is a substantive judgment which set aside an order for costs made against Mr Bassett-Burr.<sup>2</sup>

### **Background**

[2] The matter initially concerned five statutory demands which were served on Mr Haines and associated entities by Mr Memelink and Lynx Trustees. Mr Bassett-Burr, in his capacity as a director of Lynx Trustees, signed off on the statutory demands.

[3] The statutory demands were found by the High Court to be improperly issued and hence were set aside.<sup>3</sup> An order for non-party costs personally against Mr Bassett-Burr was made by the High Court.<sup>4</sup>

[4] The decision to award costs against Mr Bassett-Burr was appealed by Mr Memelink and Lynx Trustees. The Court of Appeal issued an interim decision amending the parties to the appeal. Because the appeal was solely about the order awarding costs against Mr Bassett-Burr, Mr Memelink and Lynx Trustees were

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<sup>1</sup> *Memelink v Haines* [2020] NZCA 205 (French and Collins JJ) [interim decision].

<sup>2</sup> *Bassett-Burr v BPE Trustees (No 1) Ltd* [2020] NZCA 457 (Goddard, Ellis and Dunningham JJ) [substantive decision].

<sup>3</sup> *Haines v Memelink* [2019] NZHC 2169 (Churchman J) at [32].

<sup>4</sup> At [47].

removed as appellants with Mr Bassett-Burr substituted in their place.<sup>5</sup> An application to strike out the appeal was also denied at this stage, although the Court said that the merits of the appeal were weak.<sup>6</sup>

[5] The subsequent substantive decision delivered by the Court of Appeal, however, allowed the appeal and set aside the order for costs against Mr Bassett-Burr. This result turned on a procedural point. The Court held that, before costs are awarded against a non-party, an application on notice should be made against that party.<sup>7</sup> The Court found that insufficient notice had been provided to Mr Bassett-Burr and consequently that the High Court did not have jurisdiction to make a costs order against him.<sup>8</sup>

### **Extension of time**

[6] The applicants' application for leave to appeal against the interim decision is out of time.<sup>9</sup> The applicants argue that it was only apparent after delivery of the substantive decision that an appeal against the interim decision would be necessary. They submit that the interim and substantive decisions were contradictory.

[7] As the issues in the interim appeal and the substantive appeal are intertwined, it is appropriate to grant an extension of time to apply for leave to appeal against the interim decision.

### **Interim decision appeal**

[8] The applicants' argument in relation to the interim decision appears to be that the Court of Appeal should not have amended the parties to the proceedings in the absence of an application on notice to do so.

[9] We do not accept that submission. The Court of Appeal can give any direction for the just and expeditious resolution of any matter whether on application by a party

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<sup>5</sup> Interim decision, above n 1, at [13].

<sup>6</sup> At [19].

<sup>7</sup> Substantive decision, above n 2, at [12], applying *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* HC Palmerston North CIV-2008-454-31, 22 December 2011 at [50] per Kós J.

<sup>8</sup> Substantive decision, above n 2, at [16] and [21].

<sup>9</sup> Supreme Court Rules 2004, r 11.

or on the Court's own initiative.<sup>10</sup> Counsel for the applicants and the respondents had the opportunity to address the substitution in their submissions before the Court of Appeal. Indeed, it appears that both counsel agreed during the hearing that Mr Bassett-Burr was the proper appellant in the proceedings.<sup>11</sup>

[10] The application for leave to appeal against the interim decision must be dismissed.

## **The substantive decision**

### *Submissions*

[11] The applicants argue that it was not necessary for Mr Bassett-Burr to have been given formal notice that costs were sought personally against him and that the awarding of costs against third parties is covered by the High Court's inherent jurisdiction.<sup>12</sup>

[12] The respondents argue that requiring a formal application on notice is preferable because it provides commercial certainty.<sup>13</sup> The respondents also refer to a number of cases to support the proposition that non-parties should be properly notified before costs are awarded against them.<sup>14</sup> The respondents say that Mr Bassett-Burr was not given an opportunity to be heard in the High Court.

### *Our assessment*

[13] The jurisdiction to award costs against a non-party arises through the Court's inherent jurisdiction and the discretion afforded under Rule 14.1 of the High Court Rules.

[14] We accept that it is 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

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<sup>10</sup> Court of Appeal (Civil) Rules 2005, r 5(1).

<sup>11</sup> Interim decision, above n 1, at [15].

<sup>12</sup> Citing *ETB Realty Limited v Eastlight Asset Trading No 3 Limited* [2016] NZHC 609.

<sup>13</sup> Therefore, the respondents submit that the *Easton Agriculture* approach should be preferred over *ETB Realty*.

<sup>14</sup> For example, *Cockburn v Kinzie Industries Inc* (1988) 1 PRNZ 243 (HC) and *Poh v Cousins & Associates* HC Christchurch CIV- 2010-409-2654, 4 February 2011.

absence of a formal application. However, natural justice will generally require that the non-parties be given notice of the possibility of a costs order against them and be provided with an opportunity to respond. In the present case, the Court of Appeal held that there had not been adequate notice. This is a question of fact and does not merit the granting of leave.<sup>15</sup>

[15] We note, in any event, that the applicants have an alternative avenue of redress: making a formal application for costs against Mr Bassett-Burr in the High Court.<sup>16</sup> Refusal of leave, therefore, does not result in any prejudice to the applicants.

## **Result**

[16] The application for an extension of time to apply for leave to appeal against the interim decision is allowed.

[17] The application for leave to appeal against the interim and substantive decisions is dismissed.

[18] The applicants must pay the respondents costs of \$2,500.

Solicitors:  
Livingston & Livingston, Wellington for Respondents

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<sup>15</sup> Senior Courts Act 2016, s 74(2).

<sup>16</sup> Substantive decision, above n 2, at [23].