

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 146/2023
[2024] NZSC 57

BETWEEN

QUENTIN STOBART HAINES
First Applicant

BPE TRUSTEES (NO.1) LIMITED
Second Applicant

QUENTIN HAINES PROPERTIES
LIMITED
Third Applicant

AND

ROY WILLIAM BASSETT-BURR
Respondent

Court: Glazebrook, Ellen France and Kós JJ

Counsel: J P Dallas for Applicants
D G O Livingston and R M Lee for Respondent

Judgment: 14 May 2024

Reissued: 15 May 2024

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicants must pay the respondent costs of \$2,500.**
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REASONS

[1] This application for leave to appeal concerns costs ordered against a non-party. The Court of Appeal concluded they should not have been ordered.¹ The applicants seek leave to appeal.

¹ *Bassett-Burr v Haines* [2023] NZCA 380 (Miller, Moore and Palmer JJ) [CA judgment].

[2] The essential circumstances are set out at the start of the judgment challenged:²

[1] This is an appeal from a High Court decision awarding costs against the [respondent] as a non-party to a proceeding in which statutory demands issued under s 289 of the Companies Act 1993 were set aside.

...

[2] The statutory demands were ... issued by the trustees of the Link No 1 Trust. One of the trustees was Harry Memelink, whose family trust it was. The other was Lynx Trustees Ltd, a company owned and directed by the [respondent], Roy Bassett-Burr. He signed all the demands, and immediately after service he emailed a number of parties, including the debtors.

[3] The debtors named in the statutory demands were Quentin Haines, formerly Mr Memelink's solicitor but no longer practising, the QSH family trust, and the second and third [applicants], both of which are companies associated with Mr Haines. The sums claimed in the demands were sums payable under loan obligations assumed by the Haines interests to financiers which had assigned their interests to the Link No 1 Trust. The loans were secured by a mortgage over a lifestyle property at Manakau, Levin. It appears that Mr Memelink and the Link No 1 Trust had guaranteed the loans and took the assignment after Mr Haines defaulted.

[3] After correspondence relating to a dispute over the debts underlying the demands, Mr Memelink appeared in person in the High Court and withdrew the demands. He had earlier acknowledged they had never been properly served in the first place, and it seems Mr Bassett-Burr relied on that acknowledgment in not participating further.

[4] The Court of Appeal judgment continues:³

[16] Churchman J set the demands aside, noting that the first two had not been issued against a company as required by s 289 of the Companies Act and that the purported debts on which they all were based were clearly disputed. The Judge also rejected as untenable Mr Memelink's claim that the application had never been opposed. He awarded costs against Mr Bassett-Burr personally, finding that he had improperly issued the demands and had failed to respond to the invitation to withdraw. He noted that Mr Bassett-Burr is the brother-in-law of Mr Memelink and found that the two had acted in concert in a vendetta against Mr Haines.

[5] The Court of Appeal (in another, prior decision) had set that costs order aside on the basis there had been no proper application, and Mr Bassett-Burr was not on

² Footnotes omitted.

³ Footnotes omitted.

notice.⁴ Formal application was then made, and Churchman J reimposed (and later enlarged) his non-party costs order against Mr Bassett-Burr.⁵

[6] In the meantime, however, Grice J had held that Mr Haines was in fact liable to the Link No 1 Trust on the debts (rejecting his claims that the debts had not been assigned, and had been discharged).⁶ Mr Bassett-Burr appealed the non-party costs orders to the Court of Appeal.

[7] The Court of Appeal held the statutory demands were misconceived so far as they were directed to non-companies. But the demands were not an abuse of process: Mr Haines was in fact indebted to the Link No 1 Trust, as Grice J's judgment established.⁷ It was premature to describe the demands as an abuse:⁸

... the demands were prima facie justified, though susceptible to being set aside if the Haines interests could persuade the Court that there was a counterclaim, set-off or cross-demand that ought to be brought into account.

Mr Haines relied on a cross-claim for fees for that purpose, but had been found guilty of disgraceful and dishonourable conduct due to overcharging.⁹ For these reasons, the Court said, there was a basis for the demands to have been issued (albeit they had been withdrawn).¹⁰ There was no impropriety on Mr Bassett-Burr's part.¹¹ The non-party costs order was set aside.

[8] The Court of Appeal subsequently declined to recall its judgment.¹² In doing so it noted that:¹³

The unsatisfactory character of the recall application is nicely illustrated by Mr Livingston's point that Mr Dallas identifies not one document that could not be located at the time and might have affected the outcome.

⁴ *Bassett-Burr v BPE Trustees (No 1) Ltd* [2020] NZCA 457, (2020) 25 PRNZ 509. Leave to appeal to this Court was declined: *Haines v Memelink* [2021] NZSC 14.

⁵ *Haines v Memelink* [2022] NZHC 2966.

⁶ *Memelink v Haines* [2021] NZHC 1992 at [112] and [185]–[186].

⁷ CA judgment, above n 1, at [27]–[29].

⁸ At [30].

⁹ At [30]; and see *National Standards Committee (No 1) v Haines* [2022] NZLCDT 10 at [104].

¹⁰ At [32].

¹¹ At [35].

¹² *Haines v Bassett-Burr* [2023] NZCA 591 (Miller, Moore and Palmer JJ). Leave is also sought to appeal against this judgment.

¹³ At [5].

Proposed Appeal

[9] The applicants seek leave to appeal. They assert that the Court of Appeal's substantive decision has "created confusion" and that this Court should now "provide certainty to the commercial community by setting out the proper and improper use of statutory demands". They further submit the Court of Appeal's reliance on the decision of Grice J offended s 50 of the Evidence Act 2006, and that the Court of Appeal should have recalled its judgment because of the existence of fresh and cogent evidence put to it.

Our assessment

[10] The criteria for leave are not met. The applicants rely on s 74(2)(c) of the Senior Courts Act 2016: "the appeal involves a matter of general commercial significance". We consider however that the proposed appeal turns almost wholly on its own facts. The principles relating to non-party costs are tolerably clear in the authorities and there is no need for this Court to reconsider them. Nor does the judgment challenged create "confusion" as to when a statutory demand will be lawfully in issue. The demands themselves, having been withdrawn, were not in issue. All that was in issue was whether Mr Bassett-Burr had acted improperly in issuing them along with Mr Memelink.

[11] The s 50 point is similarly misconceived. Section 50 of the Evidence Act does not preclude the Court of Appeal relying on the judgment of Grice J to the effect that Mr Haines was indebted to the Link No 1 Trust. To the extent that judgment dealt with issues between the same parties, s 50(2)(b) applies in any event; the debt issue cannot be relitigated in a dispute over costs.¹⁴ The fact in issue on the costs application and appeal was whether Mr Bassett-Burr had acted improperly. In reaching its assessment on that, the Court of Appeal was not required to revisit the determined issue of whether Mr Haines was a debtor to the Trust.

[12] As to the recall point, the appropriate process to follow in this Court will, in almost every case, be an application for leave to appeal against the substantive

¹⁴ See *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 40–41.

judgment, rather than an application for leave to appeal against the recall judgment.¹⁵ The applicants have provided no exceptional reason justifying departure from that approach. Nor have the applicants persuaded us there was any underlying error in the Court of Appeal's assessment of the immateriality of the further evidence.

[13] Accordingly, we are not satisfied that it is necessary in the interests of justice for the Court to hear and determine the appeal.¹⁶

Result

[14] The application for leave to appeal is dismissed.

[15] The applicants must pay the respondent costs of \$2,500.

Solicitors:
J P Dallas, Wellington for Applicants
Livingston & Livingston Ltd, Wellington for Respondent

¹⁵ *Rae v Commissioner of Police* [2023] NZSC 156, [2023] 1 NZLR 579 at [24]–[25].

¹⁶ Senior Courts Act 2016, s 74(1).