IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 111/2018
[2019] NZSC 17

BETWEEN	COMMERCIAL FACTORS LIMITED Applicant
AND	JEFFREY PHILIP MELTZER, LLOYD JAMES HAYWARD AND ARRON LESLIE HEATH Respondents

Court:	William Young, Glazebrook and O'Regan JJ
Counsel:	P J Dale QC for Applicant A C Challis and D P Turnbull for Respondents
Judgment:	27 February 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay to the respondents costs of $2,500.

REASONS

[1] The applicant, Commercial Factors Ltd (CFL), seeks leave to appeal against a decision of the Court of Appeal[1] dismissing its appeal to that Court against a decision of the High Court.[2] The respondents were sued in their capacity as liquidators of Blue Chip New Zealand Ltd (Blue Chip).

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1 *Commercial Factors Ltd v Meltzer* [2018] NZCA 505 (Miller, Clifford and Williams JJ) [*Commercial Factors* (CA)].

2 *Commercial Factors Ltd v Meltzer* [2017] NZHC 3267 (Hinton J) [*Commercial Factors* (HC)].

[2] The background to the application is that CFL entered into an agreement with the liquidators under which CFL advanced $60,000 to enable the liquidators to obtain an opinion from a Queen's Counsel as to the likelihood of success of an action against the directors and auditors of Blue Chip.

[3] There are three provisions of the agreement that are in issue. These are:

(a) Clause 3.2.2, which says that if Blue Chip decides to commence proceedings and gets funding from "another party", then it will procure the funder to repay CFL the amount CFL advanced plus interest.

(b) Clause 3.4, which provides that if proceedings are not commenced and Blue Chip receives amounts from other sources, it will apply those amounts in a particular order which gives preferential status to CFL.

(c) Clause 6.1, which limits the liability of the liquidators personally, providing that they would have no personal liability "except in circumstances where they fail to act in good faith".

[4] The opinion obtained by the liquidators using the CFL funding was positive, and so the liquidators tried to arrange funding but ultimately did not succeed. However, the firm in which the liquidators practised, Meltzer Mason Heath (MMH), provided money to fund the preparation of a statement of claim and the filing of proceedings.[3] In part, this was because the advice that had been received was that there could be limitation issues so the sooner proceedings were filed the better.

[5] Ultimately, when no external funding was obtained the proceedings commenced by the liquidators against the directors and auditors were discontinued.

[6] CFL claimed under cl 3.4 on the basis that proceedings had not been "commenced" and that therefore Blue Chip was obliged to pay to CFL from funds it had obtained from other sources. This required the Court to interpret the word "commenced" as meaning "commenced and continued until trial" or "commenced and

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3 Mr Meltzer and Mr Heath were partners in MMH and Mr Hayward was a consultant.

continued for some time". Both the High Court and Court of Appeal refused to do this. They both found that "commenced" meant "commenced" so cl 3.4 was therefore inapplicable.[4] There is no challenge to that finding now.

[7] The alternative argument was under cl 3.2.2, on the basis that funding had been provided for the proceedings by MMH, MMH was "another party",[5] and therefore Blue Chip had the obligation of requiring MMH to pay CFL the amount CFL had contributed. This was accepted in the High Court[6] but rejected in the Court of Appeal, which found that the MMH partners were, in effect, the liquidators, so there had not been any funding obtained from an external funder but rather the litigation had been funded by the liquidators themselves.[7]

[8] If cl 3.2.2 were interpreted in favour of CFL, the liquidators would be personally liable to pay CFL only if it was found that they failed to act in good faith. Both the High Court and Court of Appeal found there had been no lack of good faith.[8]

[9] The applicant wishes to argue that the Court of Appeal's interpretation of cl 3.2.2 was wrong. We do not consider that this raises any matter of general or public importance or involves a matter of commercial significance. On the contrary, it is a matter that is specific to the facts of the case and the wording of a particular contract. Nor do we see any miscarriage of justice arising from the Court of Appeal's assessment.

[10] We accept there may be an argument about the meaning of good faith (or its obverse, bad faith) in a commercial context, but again the case is very fact-specific. In any event, the point arises only if cl 3.2.2 is interpreted in CFL's favour.

[11] We do not consider that the criteria for the grant of leave are made out. We therefore dismiss the application.

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4 *Commercial Factors* (HC), above n 2, at [37]–[38]; and *Commercial Factors* (CA), above n 1, at [57].

5 Two of the liquidators were partners of MMH, but the third MMH partner was not a liquidator.

6 *Commercial Factors* (HC), above n 2, at [50].

7 *Commercial Factors* (CA), above n 1, at [62]–[66].

8 *Commercial Factors* (HC), above n 2, at [87]; and *Commercial Factors* (CA), above n 1, at [74].

[12] We award costs of $2,500 to the respondents.

Solicitors:
Neilsons Lawyers, Auckland for Applicant
McElroys, Auckland for Respondents