IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-1398
[2017] NZHC 30

BETWEEN	COMMERCIAL FACTORS LIMITED Plaintiff
AND	JEFFREY PHILIP MELTZER LLOYD JAMES HAYWARD AND ARRON LESLIE HEATH Defendants

Hearing: 30 November 2016

Appearances: E Telle for Plaintiff
A Challis for Defendants

Judgment: 27 January 2017

JUDGMENT OF ASSOCIATE JUDGE R M BELL

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*This judgment was delivered by me on **27 January 2017** at **12:00pm***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Neilsons Lawyers (E Telle), Onehunga, Auckland, for Plaintiff
McElroys (A Challis), Auckland, for Defendants

[1] Commercial Factors Ltd is a litigation funder. Under an agreement of 24 August 2009 it paid Blue Chip New Zealand Ltd (in liquidation) $67,750 for the liquidators to obtain a legal opinion as to potential proceedings against Blue Chip's directors and others. It sues to recover that payment plus a further sum called "additional funding". The liquidators have applied for strike-out and summary judgment. They say that under the agreement the terms for repayment have not been triggered.

Facts

[2] Blue Chip New Zealand Ltd went into voluntary liquidation in early 2008. The defendants were the liquidators not only of Blue Chip New Zealand Ltd but also 20 other Blue Chip companies. They were interested in taking proceedings against the directors and others. While they had received some assistance from a grant from the Liquidation Surplus Account, that did not provide them with enough to obtain a full opinion or to fund proceedings. A Queen's Counsel was retained to provide an opinion. That would cost $50,000. The liquidators approached Commercial Factors Ltd for initial funding for the opinion. Commercial Factors Ltd carries on business in debt factoring and finance, including providing funds for litigation.

[3] The parties to the "Agreement Relating to Funding of Legal Opinion" of 24 August 2009 are Commercial Factors Ltd, Blue Chip New Zealand Ltd (in liquidation) and the liquidators. The agreement provided that Commercial Factors Ltd would provide funding up to a sum of $60,000 plus GST for advice as to possible claims against directors and professional advisors. That payment was to cover the liquidators' costs of obtaining the opinion and the costs of preparing the agreement.

[4] These are the relevant parts of the agreement:

> **3.0 Additional Sum and Repayment**
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> 3.1 The Company (through the Liquidators) must pay CFL an additional amount of $18,000 or 24% per annum (calculated daily and compounding annually), whichever is greater, at the time of repayment of the Funding.

3.2 If the Liquidators decide that as a result of the Advice they will endeavour to obtain funding for proceedings against the parties identified in the Advice as having liability to the Company, the Company and the Liquidators will give CFL the first option to provide that funding on terms determined by the Liquidators. If CFL within 10 days of receiving notice of the funding requirements chooses not to fund the proceeding or does not respond:

3.2.1. The Company will not enter a funding agreement with another party on any less favourable terms without first re-offering the funding opportunity to CFL; and

3.2.2. If another party agrees to fund the proceedings, the Company will procure that funder to repay to CFL the Funding and the Additional Sum before the proceedings are filed or any funding for the proceedings is made available to the Company or the Liquidators.

3.3 If proceedings are commenced, whoever funds the proceedings, the Company will pay CFL 2.5% of net proceeds received from or on behalf of the defendants to those proceedings (whether those proceeds are received by way of settlement, by reason of a Court ordered judgment or otherwise) within 10 working days of receipt of the proceeds by the Company or the Liquidators.

3.4 If proceedings are not commenced and the Company receives any amounts from other sources (other than funds directly obtained for the purposes of funding investigations, legal advice or Court or other proceedings), the Company will apply those amounts in the following order:

3.4.1 to meet the Company's obligations to any party who funded the obtaining of those amounts, and to reimburse the Liquidators' remuneration, costs and expenses in obtaining those amounts to the extent they were not funded;

3.4.2 towards repayment to CFL of the Funding and Additional Sum;

3.4.3 to meet any other obligations of the Liquidators, and outstanding costs and expenses of the Liquidators, in connection with the liquidations of the Company and its subsidiaries (to the extent that no other funds are available for this purpose); and

3.5 For the avoidance of doubt, the Company's only obligation to repay to CFL the Funding and any Additional Sum are set out in clauses 3.1 to 3.5 inclusive. If following receipt of the Advice the Company (through the Liquidators) decides not to proceed further or the Company is unable to obtain funding to proceed further, the Company has no obligation to repay the Funding or make any other payment to CFL except as set out in clause 3.4 (specifically clause 3.4.2).

> **4.0** ***Liquidators' Decision Following Receipt of Advice and in Relation to any Proceedings***
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> 4.1 CFL acknowledges that any decision to issue proceedings as a result of receipt of the Advice is that of the Liquidators in their absolute discretion. The Liquidators on behalf of the Company have the right to direct, conduct and conclude in such manner as they consider appropriate any proceedings that may be issued following receipt of the Advice.
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> 4.2 The liquidators agree to regularly consult with CFL as to progress of obtaining the Advice and, if the proceedings are subsequently issued without funding from CFL, to keep CFL informed as to the progress of the proceedings.
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> …
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> **6.0** ***Exclusion of Personal Liability of the Liquidators***
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> 6.1 The parties acknowledge that the Liquidators are entering into this Agreement in their capacity as joint and several liquidators of the Company. The Liquidators will have no personal liability under or in connection with this Agreement except in circumstances where they fail to act in good faith.

[5] The QC gave his opinion in September 2010. It indicated available claims against a number of directors of Blue Chip and related companies and against auditors. Commercial Factors Ltd paid the liquidators for the fee for the opinion but also indicated that it was not interested in funding the proceeding. That was a notice under cl 3.2 of the agreement. The liquidators also invoiced Commercial Factors Ltd for $11,500 (including GST) for their work in relation to the opinion. All up Commercial Factors Ltd paid the company $67,500 under the agreement.

[6] The liquidators looked for other sources of funding for the proposed proceeding. On 30 November 2011 they began a proceeding against the directors and auditors although they had not at that stage obtained funds from a litigation funder or equivalent source. The liquidators continued to seek litigation funding, but were unsuccessful. In February 2013 the liquidators announced that in the absence of funding they would discontinue the proceeding. They made their final report in the liquidation on 10 October 2014.

[7] The liquidators explain that they began the proceeding against the directors and auditors even though they had not arranged litigation funding. Instead they used

funds from other realisations. The QC's opinion warned that their claims risked becoming time-barred, so they filed ahead of the time limit. They also wanted to signal to the defendants that they were serious about the claim. They continued to seek funding and had positive indications from one funder. That changed when some of creditors of the company applied to replace them as liquidators. The funder lost interest. Not being able to fund the claim, they had no choice but to discontinue.

[8] During the liquidation, total realisations came to $525,350.44. Most of that has gone in liquidators' remuneration, expenses and legal fees. None of it has gone towards repaying the advance by Commercial Factors Ltd. Mr Haydon, a director of Commercial Factors Ltd, has examined the liquidators' reports filed under the Companies Act[1] to work out when the liquidators received various realisations. Relevantly he has noted that the liquidators received an inter-company distribution of $27,757.99 in the period up to 15 October 2010. That was before the liquidators started their proceeding against the directors and auditors. In the period between 15 October 2011 and 15 April 2012 they received $158,389.17, the proceeds of other litigation in which the company had been involved before liquidation. That was in the period when the liquidators started the proceeding. Between 16 April 2012 and 15 October 2012 they received $149,572.02, as further proceeds of that litigation. That was after they had started the proceeding and before they withdrew it. Between 15 April 2012 and 15 October 2013 they received GST refunds of $51,534.67. During that period they withdrew the proceeding. It is not possible to tell the actual dates of receipt because Mr Haydon only had the six-monthly reports to work from. The liquidators have not contested this part of Mr Haydon's evidence and have not provided the actual dates of receipt.

Preliminary matters

[9] While the liquidators have applied for strike out and summary judgment, Ms Challis advised that she was arguing only for summary judgment. I therefore do not need to deal with strike out considerations. The Court of Appeal's statement of

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[1] Companies Act, s 255(2)(c) for the first report and s 255(2)(d) for the following six monthly reports.

principles in defendants' applications for summary judgment in *Westpac Banking Corp v MM Kembla New Zealand Ltd* remains authoritative.[2]

[10] No party suggested that any question of validity or legality arose on the ranking of payments under clause 3.4 of the agreement. Commercial Factors Ltd's claim against the company is for a post-liquidation debt which ranks as a liquidator's expense under the Companies Act 1993, Schedule 7, cl 1(1)(a). It was open to the parties to agree as to their relative priority.

Interpretation of the contract

[11] The claim turns on Commercial Factors Ltd being able to show that it was entitled to be paid under the terms of the agreement of August 2009. It has no claim outside the agreement – see clause 3.5. The parties differ on its interpretation.

[12] The principles on contractual interpretation are well established and were re-stated in the majority judgment in *Firm PI 1 Ltd v Zurich Australian Insurance Company Ltd*:[3]

> …It is sufficient to say that the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
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> The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.
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> It should not be over-looked, however, that the language of many commercial contracts will have features that ordinary language (even a

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2 *Westpac Banking Corp v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298(CA) at [60]-[64].

3 *Firm PI 1 Ltd v Zurich Australian Insurance Company Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]-[63].

> "serious utterance") is unlikely to have, namely that it will result from a process of negotiation, will attempt to record in a formal way the consensus reached and will have the important purpose of creating certainty, both for the parties and for third parties (such as financiers). The fact that parties are aware their contract might be relied upon by a third party may justify a more restrictive approach to the use of background in some instances, the parties' awareness being itself part of the relevant background. In *Re Sigma*, where the interpretation of a security trust deed was in issue, Lord Collins said that the background was not relevant "except in the most generalised way" and went on to say:
>
> > Where a security document secures a number of creditors who have advanced funds over a long period it would be quite wrong to take account of circumstances which are not known to all of them. In this type of case it is the wording of the instrument which is paramount. The instrument must be interpreted as a whole in the light of the commercial intention which may be inferred from the face of the instrument and from the nature of the debtor's business. Detailed semantic analysis must give way to business common sense … .
>
> To some extent, then, the scope for resort to background is itself contextual. We also note at this point that Lord Collins' reference to "business common sense" is one that is echoed in many interpretation cases…
>
> While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.
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> (Citations omitted)

The majority emphasised the modern trend to elucidate the commercial purpose of a contract and as between competing interpretations to select the meaning which best serves the commercial purpose of the contract as perceived by the court.[4] In relation to arguments based on commercial absurdity, they concluded:[5]

> All this means that where contractual language, viewed in the context of the whole contract, has an ordinary and natural meaning, a conclusion that it produces a commercially absurd result should be reached only in the most obvious and extreme of cases.

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4 At [77]-[78].

5 At [93].

[13] Contextual matters include these:

[a] Commercial Factors Ltd was a commercial funder. It advanced funds for the purpose of meeting the QC's opinion on the basis that while it might not be the ultimate funder and proceedings might not be issued it expected to be repaid. While there would be risk in the transaction, it was not speculative and it was not throwing its money away. It was not giving money for the QC's opinion because it intended to be public-spirited or generous.

[b] The liquidators had good reason to obtain a fully-considered opinion as to the viability of a claim against the company's directors and auditors.

[c] The company in liquidation had insufficient funds to pay the costs of the opinion or any subsequent proceeding. It was reliant on outside funding.

[d] The liquidators were agents of the company. As such they could bind the company but were not personally liable for contracts made in the name of the company. While the liquidators were willing to commit company assets to repay Commercial Factors Ltd, they wished to limit their personal liability.

[14] Both sides understood these positions and negotiated with regard to them. The context suggests that the agreement should be read as setting out the circumstances under which Commercial Factors Ltd was to be repaid and the sources of payment, but it would be contrary to its purpose, commercial funding, to assume that Commercial Factors Ltd was not to be repaid if funds were available.

[15] Clause 6.1 is a fairly standard provision used by liquidators to limit their personal liability. While it may limit their liability under the contract, they may face liability for breaches of other duties as liquidators, for example, for misapplying

company assets, as by paying themselves instead of creditors.[6] Because the liquidators' personal liability is generally limited, Commercial Factors Ltd's recovery is limited to the assets of Blue Chip, unless the proviso in clause 6.1 is triggered or the liquidators breach some other duty.

[16] In broad terms the scheme for repayment under the agreement is as follows:

[a] If the liquidators obtain funding earmarked for litigation, it is to be used first to repay Commercial Factors Ltd under clause 3.2. The time of receipt does not matter. The liquidators cannot apply that funding for other purposes until they have first paid Commercial Factors Ltd.

[b] Under clause 3.3 Commercial Factors Ltd receives a success fee from the proceeds of litigation. That is in addition to other payments under the agreement.

[c] Under clause 3.4 if the liquidators receive other funds in the liquidation, they are to be applied in repayment under the formula in clauses 3.4.1 - 3.4.3.

[d] If no funds are received in the liquidation and the liquidators act in good faith, Commercial Factors Ltd cannot expect to be paid.

The uncertainty comes with how clauses 3.4 and 3.5 work in the circumstances of this case.

[17] The liquidators started a proceeding, but withdrew it without any recovery. No-one else agreed to fund the proceeding. They say that in those circumstances no repayment obligation arose. In particular clause 3.4 was not triggered because it applies only "If proceedings are not commenced…" If that argument is correct it has exposed a gap in the agreement. It does not provide for payment if the liquidators start a proceeding without litigation funding but then withdraw it, even though the

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[6] See *Commissioner of Inland Revenue v Robertson* [2017] NZHC 31 at [70-73] and [77] for a discussion of liquidators' liability for misapplying assets when making distributions.

company has to repay under clause 3.4 if they do not sue at all. They say that this argument applies even if they obtain funds from other realisations in the liquidation.

[18] I assume in favour of the liquidators that they abandoned the proceeding for the reasons they explained in paragraph [8] above. If they issued the proceeding and discontinued it simply as a device to avoid liability to Commercial Factors Ltd, they accept that they could not escape liability. That would be an act of bad faith under clause 6.1. The interpretation question needs to be decided on the basis that the proceeding was properly commenced for the purpose of the agreement. I have made this assumption because the liquidators' case is that this application can be decided solely on the basis of clause 3 of the agreement and they do not need to invoke clause 6.1. They accept that allegations of bad faith under clause 6.1 may not be resolved in a summary judgment application.

[19] The argument overlooks one matter, the $27,757.99 received before the start of the proceeding. That was within clause 3.4: the funds were not earmarked for the litigation but were received as part of the liquidation generally. The proceeding had not started. That triggers the duty to pay under the clause. The matter is assessed at the time the circumstances occurred, not later. That is, the fact that a proceeding was started and abandoned later does not take away the right that had already accrued under clause 3.4. There are no divesting provisions in the agreement. In the period up to 15 October 2010 when the liquidators received the inter-company distribution of $27,757.99, they charged remuneration of $945.50. It is unlikely that all of that was required to arrange the payment. The amount the liquidators are entitled to deduct under clause 3.4.1 may not be much. It appears that Commercial Factors Ltd is entitled to the bulk of the distribution under clause 3.4.2. The amount has still to be calculated.

[20] That is enough to dispose of the summary judgment application because the liquidators have not established that the whole of the cause of action is bound to fail. The parties' submissions focussed more on the interpretation in the circumstances of the gap alleged by the liquidators and accordingly I deal with that also.

[21] Commercial Factors Ltd referred to clause 3.2.2 as allowing it to claim when "any funding for the proceeding" is made available. It says that as the clause is not time-specific, the requirement to repay may arise at any time. On that basis the company received funds from which it could be paid. It relies on Mr Haydon's findings as to funds available to pay it.

[22] The argument does not work because the clause does not apply generally to all funds the company receives. "Funds for the proceeding" means money earmarked for litigation. The context supports that. The rest of the clause deals with money received from another litigation funder. In contrast clause 3.4 deals with other funds that are not earmarked for a proceeding: "any amounts from other sources (other than funds directly obtained for the purposes of funding investigations, legal advice or Court or other proceedings)". Clause 3.2.2 cannot help Commercial Factors Ltd as no funds within it were received.

[23] It may be noted that there is a slip in clause 3.2.2 (if only to show that it is necessary to read matters in to work out the meaning). The first part provides that the company will procure the other litigation funder to repay Commercial Factors Ltd. The second part simply says: "or any funding for the proceedings is made available to the Company or the Liquidators" without stating that those funds must be used to repay Commercial Factors Ltd. Something has gone wrong with the language but it would not make sense to ignore the words altogether. Clearly the clause means that any other funds earmarked for the proceeding are to be used to repay Commercial Factors Ltd, even if it does not say so expressly.

[24] Instead of clause 3.2.2, another avenue is clause 3.5. The second sentence provides that if following the receipt of advice the liquidators decide not to proceed further or the company is unable to obtain funding to proceed further, the company has no obligation to repay Commercial Factors Ltd except as set out under clause 3.4. It follows the provision that the only repayment obligations are under clauses 3.1 to 3.5. The liquidators' submission relies on a literal construction to say that the gap has not been closed. Any repayment obligation under clause 3.5 arises only through clause 3.4 and that is subject to the requirement that no proceedings are commenced. As there was a proceeding clause 3.4 does not apply.

[25] While that result is available on a literal construction of "If proceedings are not commenced", it does not serve the business purpose of the agreement very well. It leaves a gap which the liquidators can use when they withdraw a proceeding even if they come into funds from which they could repay the advance. Their submissions did not suggest any commercial reason for the gap.

[26] Another interpretation is available. The second sentence in clause 3.5 imposes a repayment obligation, even though it is expressed negatively – "has no obligation to pay…except as set out in clause 3.4…" That is also apparent from the first sentence which recognises that clause 3.5 has repayment obligations: "The Company's only obligation to repay… are set out in clauses 3.1 to 3.5 inclusive." The obligation to repay under clause 3.5 arises if, following the advice, the liquidators decide not to proceed further or the company is unable to obtain funding. This is the only provision in the agreement that expressly deals with the circumstances in this case, the liquidators' decision not to proceed further in the absence of funding. Under clause 3.5 a decision to proceed no further includes discontinuing even if a proceeding has been started after the advice has been received. The fact that it applies when the liquidators decide not to sue at all after receiving advice does not bar it from also applying to later decisions to give up. In short the circumstances in this case arguably come within clause 3.5.

[27] That leads to the repayment obligation under clause 3.4. The liquidators' argument is that clause 3.4 is not triggered because it applies only if proceedings are not commenced. That applies a literal construction: a proceeding is commenced once a notice of proceeding and statement of claim are filed in court.[7] What happens after that is irrelevant. But that is not the way "proceedings are commenced" is used in this agreement. It has a wider meaning that covers later events. In some contexts it means starting and carrying on. This use of "commence" can be seen in r 19.5(1) of the High Court Rules:

> The court may, in the interests of justice, permit any proceeding not mentioned in rules 19.2 to 19.4 to be commenced by originating application.

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7 As under High Court Rules, r 5.25.

When the court gives leave under this rule, the applicant can not only start the proceeding by originating application but it can carry on through to hearing using the application.[8] "Commenced" extends more widely than the initial filing, even though on a literal construction it applies only to that first step. The reference to one part, the commencement, indicates the entire proceeding.[9] In clause 3.3 "if proceedings are commenced" applies to proceedings that are taken to a successful conclusion, by settlement, court judgment or otherwise. It would not make sense if it applied only to the initial filing. Here is a paraphrase of clause 3.3 using the liquidators' narrower meaning of "commenced":

> If proceedings are started but not continued, … the Company will pay CFL 2.5% of net proceeds received from or on behalf of the defendants to those proceedings (whether those proceeds are received by way of settlement, by reason of a Court ordered judgment or otherwise)….

Accordingly "If proceedings are commenced" in clause 3.3 does not apply to a proceeding that starts but does not go on.

[28] Clause 3.3 could have been drafted without using "if proceedings are commenced". It does not add anything to the clause. Instead its purpose is to draw a contrast with the next clause which begins "If proceedings are not commenced". There is no gap between a proposition and its negative. The negation means that clause 3.4 applies in circumstances where clause 3.3 does not. As clause 3.3 applies to proceedings that run on to a successful conclusion, the negative covers not only the absence of proceedings but also proceedings (including discontinued proceedings) that do not end with proceeds from which a success fee can be paid. With that there is consistency with clause 3.5. A claim for repayment under clause 3.5 where liquidators decide not to proceed further is not barred under clause 3.4 because the discontinuance falls outside the extended meaning of "If proceedings are commenced" under clause 3.3. The proceeding does not go on in the sense required in clause 3.3. Accordingly a claim for repayment is available once the extended meaning of "proceedings are commenced" is appreciated. For

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8 Subject of course to any direction for a statement of claim under r 19.5A.

9 This wider meaning of "commence" may be a form of synecdoche, a figure of speech used where a part refers to a whole or a whole refers to a part. It is a shorthand expression. Stock examples are "All hands on deck." and "How many head?" (as in a cattle tally).

that matter, the obligation under clause 3.5 may be seen as only a particular case of the general repayment obligation under clause 3.4.

[29] Given that the purpose of the agreement was the advance of funds and their repayment if funds were available, it is not businesslike to construe the agreement so as to leave a gap under which Commercial Factors Ltd is not repaid at all, even though the company comes into funds. The uncommercial interpretation is to be avoided if another is available. In this case it is not appropriate to apply the narrower, more literal meaning of "If proceedings are commenced" because in context the words apply more widely. Correspondingly the negation in clause 3.4 does not bar the claim. Clauses 3.4 and 3.5 require repayment when the company receives other funds, even if it has started and later discontinued a proceeding.

Application of the obligation in clauses 3.4 and 3.5

[30] The obligation to repay under the clauses was triggered when the liquidators withdrew the proceeding at the beginning of February 2013.[10] It is not clear what funds were in hand then, but Mr Haydon's analysis shows that at 15 October 2012 the liquidators had funds in hand of $37,443.10 and in the period to 15 October 2013 they received the GST refund of $89,372.37. It is arguable for Commercial Factors Ltd that after the liquidators withdrew the proceeding the liquidators had or received funds from which payments could be made under clause 3.4, in particular 3.4.2. How much is a matter for trial. If the liquidators have dispersed funds instead of accounting to Commercial Factors Ltd that may arguably make them liable for misapplication of funds and expose them to personal liability under clause 6.1 or at common law.

Outcome

[31] The liquidators have not satisfied me that Commercial Factors Ltd's cause of action is bound to fail. Accordingly its summary judgment application fails.

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[10] It was arguably suspended while the proceeding was pending. I do not have to decide that for this application.

[32] For completeness I add that Commercial Factors Ltd also supported its case with arguments as to implied terms, but I have been able to decide the case without dealing with those. It also adduced evidence as to the parties' negotiations, including drafts of the agreement. I have not taken those into account. They are not relevant and can be a distraction.[11] There is a risk of being diverted by the parties' subjective views.

[33] While the general practice is to reserve costs on a plaintiff's unsuccessful summary judgment application,[12] that is not necessarily the case with a defendant's application. The court is reluctant to order costs against an unsuccessful plaintiff because of the difficulty in assessing the ultimate merits of the case at the summary judgment stage. In some cases, defences raised at the summary judgment stage may be shown later to have no foundation. In such cases it would be wrong to award the defendant costs on dismissing the summary judgment application. On the other hand, a defendant is usually able to assess the strength of its case before applying for summary judgment. The usual consequence of costs following the event may apply. That is the case here, where the matter in issue was the interpretation of a written agreement.

[34] I make these orders:

[a] The application for summary judgment and strike out is dismissed;

[b] The defendants will pay the plaintiff costs on the application. If counsel cannot agree, memoranda may be filed and I shall decide costs on the papers;

[c] The Registrar is to allocate a first case management conference.

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Associate Judge R M Bell

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[11] This is the third of Lord Hoffmann's principles in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL). See also "The Interpretation of Contracts" 6th ed Sir Kim Lewison Thomson Reuters sections 3.07 Draft agreements 3.09 Pre-contractual negotiations.

[12] *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).