

**IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY**

CIV 2009-488-566

UNDER Arbitration Act 1996

IN THE MATTER OF an arbitral award

BETWEEN TGB HOLDINGS LIMITED
Applicant

AND BFP TRUSTEES NO 1 LTD AND BFP
TRUSTEES NO 2 LTD AND OTHERS
Respondents

Hearing: 25 and 28 February 2011 (by telephone)

Counsel: W W Peters for Applicant
A Gilchrist for Respondents

Judgment: 1 March 2011

JUDGMENT OF HEATH J

This judgment was delivered by me at 10.00am on 1 March 2011 pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
W W Peters & Associates, Whangarei
Dyer Whitechurch, Auckland
Counsel:
A Gilchrist, Auckland

Introduction

[1] TGB Holdings Ltd applies for a freezing order to restrain BFP Trustees No 1 Ltd and BFP Trustees No 2 Ltd (the BFP companies) from disbursing funds totalling about \$120,000 to professional advisors in relation to the preparation for trial of this proceeding. The advisors are the BFP companies' solicitors, counsel and an expert witness. I do not know the likely actual (and reasonable) costs of trial preparation.

[2] Trial of a claim brought by the BFP companies, as trustees of the Birches No 1 Trust, is scheduled to begin before Venning J on 4 April 2011. I am aware that the Judge has already refused one application for an adjournment.

[3] The evidence indicates that the property from which the proceeds came (one situated at Three Mile Bush Road, near Whangarei) is the sole remaining asset of the BFP companies available for execution, if TGB were successful in defeating the claim. The reason why execution is relevant is that TGB already has a judgment in its favour (arising out of a share-milking arbitration) in respect of which approximately \$310,000 has been paid into Court.

[4] I heard from counsel at telephone conferences held on 25 and 28 February 2011, both on a *Pickwick* basis. Although some evidence has been filed on behalf of the BFP companies and their advisers (against whom orders are also sought)¹ I deal with the application as one made without notice.

Analysis

[5] In broad terms, if the BFP companies were entirely successful in their claim they would receive something in the order of \$200,000, after taking into account the moneys currently held by the Registrar in respect of TGB's judgment. If TGB were

¹ Mr Gilchrist, as counsel for the BFP companies, is one of the advisers against whom an order is sought. Nevertheless, because of the urgency of the application, I permitted him to appear for all parties.

successful, it would be entitled to receive moneys paid into Court, plus a sum of about \$145,000.

[6] The present timetable requires the BFP companies to serve briefs of evidence by 4 March 2011, with TGB responding by 28 March 2011.

[7] The grounds on which a freezing order may be made are set out in r 32.2 of the High Court Rules. For the purposes of the present application the more relevant provision is r 32.6(3):

32.6 Form and further terms of freezing order

...

(3) The freezing order must not prohibit the respondent from dealing with the assets covered by the order for the purpose of—

- (a) paying ordinary living expenses; or
- (b) paying legal expenses related to the freezing order; or
- (c) disposing of assets, or making payments, in the ordinary course of the respondent's business, including business expenses incurred in good faith.

....

[8] The competing interests are:

- (a) the right of TGB to be assured that proceeds of sale of the one remaining asset are available for execution and not distributed to professional advisors solely for the purpose of exhausting funds to which TGB may otherwise be entitled; and
- (b) the need for the BFP companies to progress their litigation and to prepare adequately for it.

[9] I am in no position to make any assessment about the prospects of success of either party; particularly whether either TGB or the BFP companies will be the net benefactor of any judgment given after a defended hearing of the BFP companies' claims.

[10] In my view, the application should be declined. In progressing *bona fide* claims through the Courts (and I can make no finding on bad faith on the information available to me), I consider the BFP companies are making payments in the ordinary course of its business, in terms of r 32.6(3)(c). Only if there were a deliberate (bad faith) attempt to divert assets to advisors to prepare for litigation that a claimant knew was unlikely to succeed would the r 32.6(c) exception not apply.

[11] In any event, any legal expenses relating to the freezing order application would be payable under r 32.6(b). Given that Mr Peters has indicated that he will proceed on behalf of TGB to seek a freezing order on notice, thereby putting the substantive fixture in jeopardy, the legal costs in relation to defence of such an application would be covered.

[12] I have dealt with the present application on a *Pickwick* basis. If TGB wishes to pursue its application, it should do so on notice. An application of that type should be made to the trial Judge, Venning J. He would be able to deal also with any cross-application for adjournment.

Result

[13] The application is dismissed. Costs are reserved, to be dealt with by the trial Judge in due course.

P R Heath J

Delivered at 10.00am on 1 March 2011