

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

CIV 2009-404-001204

BETWEEN LEEUWENHOEVE INVESTMENTS NZ
 LTD
 Plaintiff

AND NUTRITEK OVERSEAS PTE. LTD
 Defendant

Hearing: 3 June 2009

Appearances: M Peters and Mr Futter for the Plaintiff
 S Barker for the Defendant

Judgment: 3 June 2009

**ORAL JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN**

Solicitors/Counsel:

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[1] By her judgment in this matter dated 14 May 2009 Judge Sargisson entered summary judgment for the plaintiff requiring the defendant to specifically complete its purchase of the plaintiff's shares and to pay the interest costs under the parties agreement, by 27 May 2009. Judge Sargisson also reserved leave to either side to seek further or amended orders in the event of any difficulty in the implementation of the order for specific performance.

[2] The defendant has applied for a variation of the order for specific performance or in the alternative seeks a stay of proceeding pending the hearing of the defendant's appeal against the making of the order for specific performance.

[3] Also in issue between the parties is the defendant's request that a suppression order apply to some parts of Judge Sargisson's judgment which are described as being of a commercially sensitive nature. As to that latter matter counsel advised at the beginning of this hearing that agreement had been reached between the parties. At my suggestion counsel have agreed to provide the Court with a memorandum containing an appropriate form of consent upon which orders can be made.

[4] As to the balance of the issues between the parties namely the variation/stay applications, it is clear that an urgent decision is required. I regret I have no familiarity with this file, it only being made available to me shortly prior to the hearing. What is clear from what I have been referred to by way of affidavit evidence is that there is a complex factual commercial background to the parties' dealings and in particular concerning the defendant's efforts to source funding to complete its purchase obligations.

[5] Having considered the submissions of counsel and having reviewed some of the evidence I too, as does Ms Peters, share a sense of unease concerning the defendant's desire to source funding overseas. Ms Peter's observation that the defendant has many hurdles to cross before it can confirm the availability of funding, is I consider an apt one.

[6] However what the plaintiff presently has is an order for specific performance with the enforcement difficulties that often arise because of such an order. A breach of that order can amount to contempt. However because no order was made for the payment of a certain sum, the usual enforcement options of sequestration and a charging order may be in doubt.

[7] In the outcome it seemed to me the plaintiff and the Court had little option available but to trust to the assurances of co-operation given albeit late by the defendant that funds will be found to ensure obligations are met.

[8] **I direct** there be a variation to the previous order for specific performance permitting the defendant until **30 June 2009** to make compliance with that order previously made. That variation will be subject to **conditions**, namely:

- a) The defendant shall within seven days provide the plaintiff with an appropriate document describing the defendant's assets and liabilities and its security position in relation to those.
- b) The defendant shall keep the plaintiff fully informed of the defendant's attempts to organise finance.

[9] Leave shall be reserved to the plaintiff to apply on 48 hours notice for further orders if the plaintiff shall be concerned about the defendant's willingness to comply with the conditions just imposed.

[10] These orders may not be to the plaintiff's satisfaction but some comfort may be provided for them bearing in mind:

- a) The defendant has an obligation to pay penalty interest;
- b) The plaintiff group now has the ability to provide a copy of Judge Sargisson's decision, albeit edited in a minor way, to give to their financiers.

[11] Costs upon the defendant's application shall be reserved but shall not in any event be payable to the defendant.

Associate Judge Christiansen