

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

**CIV 2012-488-202
[2012] NZHC 697**

BETWEEN

SOUTH PACIFIC INDUSTRIAL
LIMITED
Plaintiff

AND

UNITED TELECOMS LIMITED
Defendant

Hearing: 16 April 2012

Counsel: P F Dalkie for Plaintiff
D M Hughes and R J Brown for Defendant

Judgment: 16 April 2012

(ORAL) JUDGMENT (NO. 2) OF HEATH J

Solicitors:

Hazelton Law, PO Box 5639, Wellington
Kensington Swan, Private Bag 92101, Auckland

Counsel:

P F Dalkie, PO Box 392, Shortland Street, Auckland

[1] Following a hearing on 4 April 2012, I gave judgment on South Pacific Industrial Ltd's (SPI) application for a freezing order at 3pm on 13 April 2012.¹ I made an interim order prohibiting United Telecoms Ltd's (UTL) or its agents from dealing in any way with the scrap material that remained in New Zealand and requiring all proceeds of sale of scrap that had not been remitted to India at the time judgment was delivered, to be paid into the trust account of UTL's New Zealand solicitors. I indicated that order would be discharged when the final form of a freezing order was settled. I anticipated that that would be done at the hearing that commenced at 3.45pm this afternoon.²

[2] That hearing has revealed some unexpected developments. In my judgment, I indicated that I would not have been prepared to make an order restraining shipment of the component parts of the power station that were being shipped to India on the basis of the inadequacy of an undertaking as to damages from SPI to meet any losses that would be caused to UTL.³ In that regard, I also had taken account of overseas authorities which suggested that in a case of a reputable foreign company accustomed to paying debts there ought not to be orders preventing removal of assets from the jurisdiction, especially in cases where reciprocal arrangements were in place for enforcement of judgments or arbitral awards.⁴

[3] I was concerned, however, about the conduct of UTL in the period after a dispute arose concerning the present claim of approximately \$2.5 million. The concerns I raised related to the stance taken by UTL on SPI's application for adjudication under the Construction Contracts Act.⁵

[4] Mr Rao, a director of UTL, who was also the engineer under the contract, had indicated a lack of merit in the balance of SPI's claims, even though he suggested that his role in the dispute resolution processes was not complete. Mr Rao had also suggested that UTL could not provide an undertaking in relation to the destiny of proceeds of sale of scrap because UTL did not have a bank account in New Zealand.

¹ *South Pacific Industrial Ltd v United Telecoms Ltd* [2012] NZHC 688.

² *Ibid*, at paras [35]–[36].

³ *Ibid*, at para [31].

⁴ *Ibid*, at para [27](a).

⁵ *Ibid*, at para [29].

I described that evidence as “facile”.⁶ I took the view that those circumstances justified a more modest order in relation to the proceeds of sale of scrap or any scrap that remained in New Zealand and indicated the maximum value of assets to be covered by a freezing order would be \$350,000.

[5] That assessment was made having regard to evidence given by Mr Rao in his first affidavit, in which he deposed in responding to concerns raised by SPI’s director, Mr Steenson, about the lack of assets in New Zealand against which SPI could enforce any award it obtained:

34. *To date, UTL has sold scrap in the amount of approximately \$500,000. It is estimated that there is a further \$100,000 worth of scrap still remaining to be sold. In respect to the portion of the Assets to be shipped to India, while no cargo agreement has been entered into in relation to this cargo, it was anticipated that the remaining Assets would be shipped to India sometime between 1 May 2012 and 10 May 2012. Obviously this timeframe is dependent on the result of SPI’s application. (my emphasis)*

[6] In a second affidavit, filed in response to a specific point raised by me at the hearing, Mr Rao gave evidence about the way in which moneys were being remitted from the sale of scrap:

8. I confirm that the moneys received from the sale of scrap are remitted back to UTL’s bank account in India. UTL does not have a bank account in New Zealand. The funds are held in New Zealand dollars and have generally been used to pay UTL’s costs in New Zealand.

9. *As UTL does not have a New Zealand bank account, it is not in a position to provide an undertaking that it will hold the proceeds of sale of scrap in New Zealand prior to judgment being issued.*

10. Further, UTL is not in a position to provide an undertaking that it will not remove or sell the scrap prior to judgment being issued. UTL’s contractual clean-up obligations with Mighty River Power Limited prevent such an undertaking from being given. If clean-up of the site does not occur within the required timeframe, this will trigger the release of a bond against UTL in the amount of US\$500,000. (my emphasis)

[7] Today, Mr Hughes for UTL, has made available to me an agreement for the sale of goods made between a company called Macaulay Metals Ltd and UTL. The

⁶ Ibid, at para [29](c).

contract was entered into on 13 October 2011. That contract, on its face, suggests that all of the scrap had been sold at that point to Macaulay Metals Ltd. In the absences of schedules to which the contract refers the times agreed for payment are unclear. If that were so the deposition of Mr Rao as to the (then) current status of the metal was inaccurate, to use a neutral term.

[8] I was also provided with evidence to demonstrate that the most recent payments for that scrap were made on 5 April and 13 April 2012. The first two payments, which occurred on 5 April 2012, were made before Mr Rao swore his second affidavit on 11 April 2012 but after the hearing on 4 April 2012. On the face of the document made available by Mr Hughes, a sum of \$107,990 was paid at 2.46pm on 13 April 2012, about 15 minutes before my judgment was delivered. Counsel had been advised the previous day that judgment would be delivered on 13 April 2012.

[9] The additional information provided leaves me with a greater sense of concern about Mr Rao's reliability, if not credibility. I intend to leave open the issue of what further order should be made.

[10] An order may not be necessary if a suitable amount were deposited in the trust account of Kensington Swan pending resolution of the issues. The amount involved would need to be assessed by UTL and I would consider the amount banked in light of other considerations when the case is next called.

[11] If such a course were not adopted by UTL, I would want to hear in person from Mr Rao to explain the discrepancies in his evidence and would arrange a time for him to give evidence before me and to be questioned to the extent necessary. If that were necessary, I leave open the possibility that an injunction would issue to prevent shipment of plant to India until that point had been resolved.

[12] Mr Hughes is to endeavour to contact Mr Rao overnight. Mr Rao has returned to India since his affidavit of 11 April 2012 was sworn. Once instructions are received, he will indicate the stance to be taken by UTL. I will then hear from counsel for SPI and make a decision as to the final form of order to be made.

[13] I make clear two aspects. First, if there were an innocent explanation of the differences between Mr Rao's evidence and the information provided by Mr Hughes today, I do not intend to resile from the maximum amount fixed in my earlier judgment, \$350,000. But, if Mr Rao's credibility and/or reliability were undermined, I would need to consider all issues afresh. A significant error of that type could, conceivably, result in a reappraisal of my "reputable" company conclusion.⁷

Result

[14] The proceeding is adjourned for a conference to be held in Court before me at 10.30am tomorrow, 17 April 2012.

[15] All questions of costs in relation to today's hearing are reserved. The existing interim order stays in place, for what it is worth, and the application for stay will be dealt with when final orders are made.

P R Heath J

⁷ This paragraph has been added to reflect comments made to counsel after I gave judgment orally.