IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2012-488-202
[2012] NZHC 777

BETWEEN	SOUTH PACIFIC INDUSTRIAL LIMITED Plaintiff
AND	UNITED TELECOMS LIMITED Defendant

Hearing: 23 April 2012

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

Judgment: 26 April 2012

JUDGMENT (NO. 4) OF HEATH J

This judgment was delivered by me on 26 April 2012 at 2.30pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Hazelton Law, PO Box 5639, Wellington
Kensington Swan, Private Bag 92101, Auckland
Counsel:
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The application

[1] This is a reconsideration of an application for a freezing order, in unusual circumstances.

Background

[2] By an agreement dated 14 October 2008, United Telecoms Ltd (UTL) purchased most of the assets comprising the Marsden B power station from Mighty River Power Ltd. The power station was located at Marsden Point, near Whangarei. UTL, a company incorporated in India, intended to disassemble the plant and transport its component parts to India for reconstruction in that country. Remaining scrap metal was to be sold in New Zealand.

[3] SPI was contracted to dismantle the power station and to pack the component parts for shipping to India. Its work began on 20 June 2011 but stalled some three days later when a greater quantity of asbestos was located in the building. After a while, under arrangements reached between the contracting parties on the ground, the work continued. The parts are now ready to be shipped to India.

[4] Disputes have arisen between SPI and UTL as to the amount that the former should be paid for additional work undertaken following the discovery of more asbestos than had been expected. Some of the extra costs have been paid but there remains a claim for about $2,500,000. That claim is likely to require resolution either through an adjudication process under the Construction Contracts Act 2002 or by arbitration.

[5] On 30 March 2012 SPI sought a without notice freezing order to restrain UTL from removing any of the assets from New Zealand or otherwise disposing of them in this country. SPI was directed to proceed on notice. The application was heard, on a defended basis, on 4 April 2012. I reserved judgment.

[6] No interim orders were made at the conclusion of the hearing because UTL's evidence satisfied me that the assets could not be shipped to India before a judgment was given and additional scrap metal was available in New Zealand on which any order could bite. In short, I trusted UTL not to deal with assets in New Zealand while the application remained to be determined. That trust was based on the content of an affidavit from one of its directors, Mr Rao.

[7] In a judgment given on 13 April 2012,[1] I indicated that an order preventing shipping of the component parts to India would not be made because SPI's undertaking as to damages was insufficient to protect losses that would be caused to UTL.[2] However, I indicated that I would make an order, to a maximum sum of $350,000, against scrap metal remaining to be sold or its proceeds of sale.[3] An interim order was made prohibiting UTL or its agents from dealing in any way with scrap metal remaining in New Zealand and requiring any proceeds of sale of scrap not remitted to India to be paid into the trust account of UTL's Auckland solicitors.[4] The application was adjourned until 3.45pm on 16 April 2012 for a draft order to be prepared and approved.[5] My approach was based on my assessment that "UTL appears to be a reputable company with substantial assets".[6]

[8] When the application was called on the afternoon of 16 April 2012, I was informed that certain evidence about the dealings with scrap metal contained in Mr Rao's affidavit was inaccurate. I was presented with a copy of an agreement for the sale of goods between UTL and Macaulay Metals Ltd, dated 13 October 2011, by which all of the scrap had been sold to Macaulay Metals Ltd. That was at odds with the evidence given by Mr Rao.

[9] I observed, in a judgment given on the afternoon of 16 April 2012, that the "additional information provided [left] me with a greater sense of concern about Mr Rao's reliability, if not credibility".[7] I indicated that if a "suitable amount" were

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1 *South Pacific Industrial Ltd v United Telecoms Ltd* [2012] NZHC 688.
2 Ibid, at para [31].
3 Ibid, at paras [31] and [36].
4 Ibid, para [35].
5 Ibid, at para [36].
6 Ibid, at para [32].
7 *South Pacific Industrial Ltd v United Telecoms Ltd* [2012] NZHC 697 at para [9].

deposited in the trust account of the Auckland solicitors of UTL it may not be necessary to take matters further; otherwise, a further explanation from Mr Rao was required.[8] I made it clear that if Mr Rao's credibility and/or reliability was undermined, I would need to consider all issues afresh. I added:[9]

> [13] ... A significant error of that type could, conceivably, result in a reappraisal of my "reputable" company conclusion.

[10] I adjourned the application for a further hearing on 17 April 2012.

[11] A draft affidavit from Mr Rao, then in India, was made available to me on 17 April 2012. I expressed "some reservations about the explanations that Mr Rao [had] given and whether they [were] truly credible". Further, I said:[10]

> [2] ... In the absence of some very clear explanation that is credible, I am losing trust in UTL's evidence which is likely to have a significant impact on any final decision I make in relation to the form of a freezing order to be made.

[12] By this stage, I was of opinion that steps should be taken to prevent assets being removed from the jurisdiction until I had had an opportunity to consider additional evidence to be sworn and filed on behalf of UTL, primarily from Mr Rao. I made an order preventing shipment of any goods that had been dismantled from the Marsden B power station to India, pending further order of the Court. I made orders as to costs against UTL and received an undertaking from Mr Hughes, for UTL, that a sum of $350,000 that had been paid into his firm's trust account would not be disbursed, pending further order of the Court.[11]

[13] A telephone conference was held on 23 April 2012, while I was sitting in Rotorua. Further affidavits had been sworn and filed. I indicated, at that conference, that I proposed to reconsider the order that I would have been prepared to make on 13 April 2012 had I been in possession of all material facts at that time. That means taking account of the explanations provided by Mr Rao in subsequent affidavits, as well as affidavits filed by a director of Macaulay Metals Ltd, Mr Stevenson.

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8 Ibid, at paras [10]–[12].
9 Ibid, at para [13].
10 *South Pacific Industrial Ltd v United Telecoms Ltd* [2012] NZHC 711 at para [2].
11 Ibid, at paras [5]–[9].

[14] Although I have previously indicated that it might be necessary for Mr Rao to give oral evidence before me, so that I might test his explanations, I concluded on 23 April that nothing would be gained from that process. My interim order preventing UTL from removing any of the assets from New Zealand remains in force. I indicated that I would give a judgment today, given the likely timing of shipment being between 1 and 15 May 2012.

Sale of scrap Part 1: The original evidence

[15] The initial evidence about the scrap metal was contained in Mr Rao's response, in his first affidavit, to evidence given by SPI's director, Mr Steenson, about the lack of assets in New Zealand against which SPI could enforce any award it might obtain. Mr Steenson had expressed the view that UTL was in the process of selling or had sold the scrap which it has decided not to ship and was concerned that once all of the scrap had been sold there would be no assets in New Zealand against which any award could be enforced.

[16] In response to that evidence, Mr Rao responded:

> 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)

[17] Further evidence was given by Mr Rao in a second affidavit, in which he responded to a particular point raised by me at the hearing about the way in which moneys were being remitted from the sale of scrap. He deposed:

> 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.
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> 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)

[18] Mr Rao was held out to me as the director who represented UTL's interests in New Zealand, for the purpose of the Marsden B project. He had also been appointed as "Engineer" under the contract between SPI and UTL.[12] In his first affidavit, Mr Rao described UTL and his role as follows:

4. UTL is a large multi-national company incorporated in, and carrying out its business in, India and in some other overseas states. Its business primarily involves the manufacturing of telecommunications equipment. It has also recently diversified into the construction and operation of power generation facilities in India. As a director of UTL I am responsible for the activities of UTL's recently established 'power division'. Annexed hereto and marked 'PR1' is UTL's company profile.

[19] I was left with the impression that Mr Rao was an experienced engineer, familiar with the type of disputes that could arise in contracts of the type reached between SPI and UTL. That impression has proved incorrect. In his fourth affidavit, sworn in Bangalore on 19 April 2012, Mr Rao deposed:

My Background

2. *I am a graduate engineer* from PESIT College in Bangalore, and *graduated from college in the year 2007.* I have since worked in United Telecoms Limited ("UTL") as a Director looking after business development, in particular Power Generation.

3. *The UTL Group is a closely held family run business*, which started as a telecom ancillary equipment manufacturer in the year 1983 from modest beginnings in a garage in Bangalore.

4. Our chairman, Mr C Basavapurnaiah and Managing Director Dr P Rajamoham Rao, founded the UTL Group in 1983.

5. The UTL Group had begun actively looking for options for diversification into the Power Sector in the year 2007.

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12 See *South Pacific Industrial Ltd v United Telecoms Ltd* [2012] NZHC 688 at para [14]; his obligations as Engineer included a role in the dispute resolution processes through the adoption of standard terms contained in the adopted NZS 3910:2003. See also paras [5], [11], [12] and [14].

6. *As a fresh graduate I was introduced into the family business in the year 2007 and asked to assist the group by learning and taking responsibility over the proposed Power Projects that the group intended to establish.*

7. I am currently a Director of UTL as is evidenced by Form 32 annexed hereto and marked '4PR1'.

8. UTL Group are currently implementing two power projects, one is a thermal power plant where the dismantled assets from the Marsden B Power Station are to be used, and another is a Wind Farm, being established by UTL's wholly owned subsidiary company Betul Wind Farms Limited ('BWFL').

9. BWFL is implementing a 49.5 MW Wind Farm in Madhya Pradesh, which is a project worth approximately NZD81.5 million dollars. The transmission line and sub station works have commenced, and the works related to erection of wind turbines are scheduled to begin from 30 April 2012. I am also a director of BWFL As is established by Form 32 annexed hereto and marked '4PR2'. As such, I am currently dealing with a number of large scale projects simultaneously.

10. *In my capacity as a Director of UTL or otherwise, I have never had to give evidence in court proceedings in the past, and to have found myself in the middle of three parallel legal processes including an adjudication brought against UTL by South Pacific Industries Limited ('SPI') and these proceedings, has been more stressful than I had been prepared for.* (my emphasis)

[20] From that evidence, it seems that a relatively "fresh graduate", inexperienced in the dispute resolution tasks that he was intended to fulfil, has been left to deal with New Zealand companies with which UTL contracted in relation to the Marsden B project.

Sale of scrap Part 2: The additional evidence

[21] In his third affidavit, also sworn in Bangalore on 19 April 2012, Mr Rao said:

5. In my first affidavit, I deposed that:

> To date, UTL have 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.

6. As at 3 April 2012, I can confirm that approximately $500,000 worth of scrap had been sold and that there was a remaining $100,000 to be sold and paid for. Annexed hereto and marked '3PR1' is a copy of the contract between United Telecoms Limited and Macaulay Metals Limited ('Macaulay Metals'), the purchaser of the scrap metal.

7. The practical way in which the contract with Macaulay Metals worked was that SPI would move identified scrap metal and place it in a designated area. Once the metal was placed in this designated area it was deemed sold to Macaulay Metals although title did not pass until it was paid for. The reality is that the scrap metal was not sold to Macaulay Metals until it was placed in the designated area. As at the date of swearing my First Affidavit it was my understanding that there was still approximately $100,000 worth of scrap metal to be sold to Macaulay Metals.

8. Pursuant to the contract, Macaulay Metals was to remit the amount due for scrap taken from the Friday of the previous week to the Thursday of the current week on the Friday of the current week, based on the actual value of the goods removed during the week.

9. It is my understanding that metal continued to be removed from the site up to and including 12 April 2012, which was the date that the site was "handed" back to Mighty River Power Limited ('MRP').

10. At the conclusion of the hearing on 4 April 2012 I was advised by Kensington Swan that UTI was free to continue with its business, but it did so at its risk. My concern was to have the site free of all metal by 15 April 2012 to prevent UTL from being in breach of its contractual obligations with MRP.

11. With the benefit of hindsight, I should have annexed the contract between UTL and Macaulay Metals to my First Affidavit. However, my understanding of SPI's application from reading the papers was that it was about SPI trying to prevent removal of the substantive power station. To be frank, I did not turn my mind to the position with Macaulay Metals at this time. The scrap metal was being sold to Macaulay Metals and would continue to be sold to allow for handover.

12. I also note that there was a very short turnaround for the preparation of my First Affidavit. I gave instructions to Kensington Swan to oppose the application for a freezing order on Monday 2 April 2012. On this date, I instructed Kensington Swan to pull together the relevant documents and I organised to meet with them on Tuesday 3 April 2012 at 10.30am to make my affidavit. I then spent four hours drafting and finalising my affidavit which was sworn at approximately 3.00pm on Tuesday 3 April 2012 and filed shortly thereafter in accordance with the Court's timetable. I did the best that I could in the short timeframe I had available to me.

[22] Although I have been provided with a written contract between Macaulay Metals Ltd and UTL, Mr Rao's additional evidence suggests that there was no real compliance with its terms. Nevertheless, I am satisfied that when Macaulay Metals Ltd acquired the remaining scrap and paid for it from the date on which the first hearing took place (4 April 2012) Mr Stevenson, as director of Macaulay Metals Ltd,

had no notice of the fact that the order had been sought. I accept Mr Stevenson's evidence that his company dealt with UTL honourably.

[23] The concerns about UTL's conduct in relation to the sale of scrap revolve around Mr Rao's inaccurate characterisation of the true position in his first and second affidavits[13] and the following payments that were made to UTL by Macaulay Metals Ltd on 3 and 16 April 2012. Those payments totalled $343,585.62. The payments were received by UTL after it was on notice of SPI's application for a freezing order. Indeed, the payments received on 3 April 2012 were made on the same day as Mr Rao swore his first affidavit in opposition to the application.

[24] The amount received by UTL from Macaulay Metals Ltd for the scrap totalled $988,049.87. That contrasts with earlier evidence given by Mr Rao that the total value realised and/or realisable from scrap would be approximately $600,000. Mr Rao sought to explain this in his fourth affidavit:

> 27. ... I sincerely submit to the honourable Court that this information was in no way submitted to mislead the Court. Rather, the under quote of the total amount was more of an oversight on my part by not getting the relevant information from my accounts department and publishing it in my affidavits as I have done so this time.
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> 28. UTL had two employees on site, being Mr Kodendera Karambiah Appiah and myself. Mr Appiah was mainly brought in [to] supervise packing, and assisting in transportation logistics which was in UTL's scope.
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> 29. Neither Mr Appaiah nor myself have kept detailed records of the scrap generated on site, and we would only file those dockets that were submitted to us. Due to the paucity of UTL resources on site, and our trust of MM, we never verified the dockets against actual remittances made.
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> 30. None of the information collected on site by us was sent to UTL head offices in Bangalore that received payments for the sale of scrap to enable them to cross verify, as this was a very small component of an already complex project.
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> 31. In hindsight, at paragraph 34 of my first affidavit where I have stated that *'it is estimated that there is a further $100,000 worth of scrap still to be sold'*, it would have been clearer if I had said that there was a further $100,000 worth of scrap to be removed from site by MM and to be paid to UTL.

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[13] See paras [16] and [17] above.

> 32. I do accept all criticisms levelled against myself for making the statement as above, but would like to clarify that I had intended to mean that the $100,000 worth of scrap was not sold yet, as it was still in the designated area as per UTL's contract with MM. As MM had neither paid for the scrap yet, nor moved the scrap from the designated area, the scrap still belonged to UTL.

How does the additional evidence affect my assessment of risk?

[25] The principles that apply to the determination of applications for freezing orders were discussed in my first judgment.[14] I do not repeat that analysis.

[26] I took the view that the evidence adduced by SPI was sufficient to demonstrate a good arguable case on its substantive claim.[15] I approached my assessment on the basis that there were two components to assets owned by UTL within New Zealand to which any freezing order could apply; scrap metal and those parts of the dismantled structure to be transported to India.[16] As it transpires, the former did not exist but the latter did.

[27] In assessing "risk of dissipation", I accepted that the risk that an award might go unsatisfied encompassed the risk that a Court's processes might be frustrated.[17] After discussing authorities dealing with the effect of removal of assets from the jurisdiction by what appeared to be a reputable off-shore company[18] and identifying factors for and against the grant of a freezing order,[19] I concluded that while UTL had been prepared to pay amounts it accepts are owing under the contract it was attempting to delay or hinder SPI's prosecution of remaining claims in a manner designed to cause cost and delay to SPI. My view was that UTL regarded the remaining aspects of SPI's claims as unjustifiable and, if possible, wished to avoid the cost of defending them.[20]

[28] In discussing discretionary factors, I said:

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14 *South Pacific Industrial Ltd v United Telecoms Ltd* [2012] NZHC 688 at paras [15]–[20].
15 Ibid, at paras [21] and [22].
16 Ibid, at para [23].
17 Ibid, at para [25], citing *Patrick Stevedores Operations No 2 Ltd v Maritime Union of Australia* (1998) 153 ALR 643 (HCA) at 658 (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).
18 *South Pacific Industrial Ltd v United Telecoms Ltd* [2012] NZHC 688, at para [27].
19 Ibid, at paras [28] and [29].
20 Ibid, at para [30].

> [31] UTL has raised a concern about the value of SPI's undertaking as to damages. Such an undertaking is required by r 32.2(5) of the High Court Rules. *I accept that, if UTL were prevented from transporting the plant to India the undertaking would (by a significant margin) be insufficient to meet losses that would be caused to UTL, both in relation to the cost of arranging shipment and otherwise. I am not prepared to make a freezing order in respect of those assets. However, the same concern does not apply to the scrap being sold in New Zealand. In my view, having regard to SPI's disclosed financial position, the undertaking would be adequate for that purpose.*
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> [32] The circumstances I have described indicate the desirability of standing back to determine whether, and if so to what extent, a freezing order should be made. *In this case, it is likely that if an adverse award were made against UTL it would (ultimately) be paid. UTL appears to be a reputable company with substantial assets. It could be embarrassed by an apparent inability to meet payment of a relatively modest sum to a small New Zealand company. From a reputational perspective, it is unlikely to allow its name to go before the Indian courts and risk public knowledge that it has not met a debt arising out of an arbitral award.*
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> [33] On the other hand, UTL does not seem to be averse to taking steps to "burn-off" SPI's claims, at a relatively early stage. Understandably, it would prefer not to have to pay the costs of defending SPI's claims and any award that may later be made against it. The factors that I have identified as supporting some form of freezing order indicate that some protection is needed to meet the risk that UTL's post-dispute conduct might frustrate, to SPI's detriment, the processes agreed by the parties to resolve their disputes. That type of approach is consistent with the breadth of this Court's jurisdiction under s 16 of the Judicature Act and the need for flexibility in the determination of freezing order applications articulated by the Court of Appeal in *Shaw v Narain*. It does not conflict with the express terms of r 32.2 of the High Court Rules.
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> [34] *The risk that a justifiable claim may go unsatisfied does not arise only from an inability to enforce a judgment or an award. The identified risk may result in an inability for SPI to recover due to the costs and delays inherent in determining any amount owing and enforcing it, in circumstances where UTL is frustrating lawful processes to achieve those ends. Justice delayed can be justice denied. The cost of unjustified delays can often result in valid claims being abandoned. The Court must be alive to those practical commercial considerations.* (emphasis added)

[29] The additional evidence of Mr Rao causes me to reassess the risk that UTL's attempts to delay or hinder SPI's prosecution of remaining claims could deprive it of an ability to obtain payment of what is properly due and owing. The fact that Mr Rao has described UTL as a "family company" puts reputational issues at a lower level than I originally assessed. The fact that the UTL board has assigned a director without adequate knowledge and experience in commercial dispute resolution of this nature is also likely to present greater risks to SPI in resolving disputes adequately.

That view is reinforced by the disingenuous stance taken by Mr Rao for the dispute to be determined by him as "Engineer" even though he had been dismissive of the claim on its merits in his first affidavit.[21]

[30] My original assessment of risk was, having regard to Mr Rao's additional evidence, too favourable to UTL. The inconsistencies in the evidence of Mr Rao mean that I cannot rely on his evidence in relation to UTL's intentions. While I absolve Mr Rao from any suggestion that he has deliberately lied to the Court, his lack of experience and inattention to the type of information that a Court must have to deal with issues of this type adequately means I am not prepared to take his other evidence at face value.

[31] It transpires that there is no scrap metal left in New Zealand against which a freezing order could be directed. Nor is there any scrap metal that I could order not be disposed of, pending determination of the arbitration. The only assets are those that remain to be shipped to India. My view is that SPI requires greater protection for its risks than was the case originally. The assets to be shipped clearly have a significant value. I consider that the maximum sum to be protected as $1,000,000.

[32] My assessment of $1,000,000 as the maximum amount takes account both of my view that SPI has an arguable case for determination at arbitration and also my (unarticulated in my first judgment) assessment that the current claim is likely to be exaggerated, particularly having regard to the significant payments that have already been made in respect of additional work. In my view, an order that would prevent UTL from removing from New Zealand component parts to the value of $1,000,000 would be an adequate response to the risks.

Result

[33] Currently, there is a sum of $350,000 held in the trust account of UTL's solicitors. It will be necessary to formulate a freezing order and to ascertain a method of valuation of items that are to be shipped to India. That means the order cannot be articulated at this stage.

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21 Ibid, at para [29](c).

[34] I adjourn the proceeding for a telephone conference before me at 3.45pm on 30 April 2012. If, by that time, a further sum of $750,000 has been deposited in UTL's solicitors' trust account or a bank bond has been given to the satisfaction of the Registrar in respect of the balance of $750,000, there will be no need for a further order to be made. For the avoidance of doubt, my interim order restraining removal of the parts to India remains in force.

[35] I will hear from counsel at the telephone conference as to the form of any order that might need to be made.

[36] Costs are awarded in favour of SPI on a 2B basis together with reasonable disbursements, both to be fixed by the Registrar, in relation to preparation for and appearances at the telephone conference held on 23 April 2012 and the one to be held on 30 April 2012.

[37] I thank counsel for their assistance.

P R Heath J

Delivered at 2.30pm on 26 April 2012