IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2012-488-202
[2012] NZHC 688

	BETWEEN	SOUTH PACIFIC INDUSTRIAL LIMITED Plaintiff
	AND	UNITED TELECOMS LIMITED Defendant

Hearing: 4 April 2012

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

Judgment: 13 April 2012

JUDGMENT OF HEATH J

This judgment was delivered by me on 13 April 2012 at 3.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

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The application

[1] South Pacific Industrial Ltd (SPI) seeks a freezing order[1] to restrain United Telecoms Ltd (UTL) from transporting most of its New Zealand assets to India and remitting the proceeds of sale of others to that country. SPI is a medium size engineering company with between 80 and 100 employees, based in Ruakaka. UTL is an Indian company that is the parent of a multi-national group of companies, based in Bangalore.

[2] The proceeding was commenced on 30 March 2012, when SPI sought a without notice freezing order. I declined to make an order on that basis. Perceiving that there was no imminent danger that the relevant assets would be removed from New Zealand, I directed that the papers be served and that UTL have an opportunity to respond. The application was heard, on notice to UTL, on 4 April 2012. UTL opposes the grant of a freezing order and seeks a stay of the proceeding, on the basis that SPI has submitted to arbitration.[2] Both parties agree that there is jurisdiction to grant interim relief of this type, even though UTL has reserved its position to protest to the jurisdiction of the New Zealand courts.

[3] Necessarily, the application comes before the Court in circumstances of some urgency. A number of affidavits have been filed, in support of and in opposition to the application. It is not possible to determine conflicts in the evidence, save to the extent that one version or the other might be supported by contemporaneous documents. I have considered the evidence with those difficulties in mind.

Relevant background

[4] The Marsden B power station was built at Marsden Point, near Whangarei. On 14 October 2008, Mighty River Power Ltd sold most of the assets comprising the plant to UTL. The parties intended that UTL would arrange to have the plant

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1 High Court Rules, r 32.2. A standard form of freezing order is set out in Schedule 1, form G 38: see r 32.6.

2 Arbitration Act 1996, First Schedule, arts 8 and 9. See, generally, *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 (HC).

dismantled, transport the component parts to India for reconstruction in that country and sell any remaining scrap in New Zealand.

[5] UTL entered into a contract with SPI on 14 June 2011. SPI's task was to dismantle the power station and pack the disassembled assets for shipping to India. The written agreement was based on standard terms contained in NZS 3910:2003. The contract price was $9 million, together with agreed extras. At the time the contract was signed, SPI was aware that UTL had no other assets in New Zealand.

[6] The power station comprised an oil fired boiler supplying steam to a steam turbine generator rated at 250MW. The power generating unit weighed 200 tonnes. The building consisted of a boiler, three stage turbine and ancillary equipment. It was about 54 metres high and comprised a 20 metres x 30 metres area, including walkways and platforms. Overall, it covered an area of 2,724 square metres. Around 85,000 friction grip bolts in the building had to be undone as part of the dismantling process. Mr Steenson, a director of SPI, estimates that about 4,000 tonnes of steel was in the structure. Those statistics emphasise the scale of the work to be undertaken by SPI.

[7] The tender documents that preceded the contract between SPI and UTL envisaged the need for SPI to remove some asbestos from the plant structures. SPI commenced its work on 20 June 2011 but only three days later asbestos was located in greater quantities than had been anticipated. The need to deal with the additional asbestos increased the amount of work to be undertaken by SPI. Disputes have arisen over the amount for which SPI should be compensated for that extra work.

[8] The power station has now been dismantled. Those parts that are being transported to India have been moved to North Port to await shipment. Those items will be shipped to India sometime between 1 and 15 May 2012. Mr Steenson believes that approximately 1500 tonnes of material has either been sold or will be sold as scrap. He deposes that the current trade rate for steel scrap material is approximately $330 per tonne. A director of UTL, Mr Rao, has acknowledged that the proceeds of sale of scrap to date have been remitted directly to UTL's bank

account in India. Mr Rao deposes that UTL has no bank account in this country. He has not disclosed the proceeds received to date.

[9] SPI has claimed for additional direct and indirect costs flowing from the need to remove more asbestos than had been contemplated when the contract was entered into. Its current claim stands at approximately $2,500,000. It is common ground that UTL has already paid the contract price of $9 million, direct costs associated with the removal of additional asbestos of $764,845.87 and $82,943, which it claims represents the whole of the indirect costs for which SPI is entitled to claim.

[10] The dispute resolution provisions of the contract contain an arbitration agreement. The freezing order application is designed to prevent UTL from shipping the plant and remitting the proceeds of sale of scrap to India, in order to protect SPI's ability to enforce any arbitral award it may obtain in New Zealand. A freezing order may be made even though disputes are to be resolved by arbitration.[3]

[11] The dispute resolution provisions are extensive but need to be set out in full:

> **SECTION 13 – DISPUTES**
>
> **13.1 General**
>
> **13.1.1** No decision, valuation, or certificate of the Engineer shall be questioned or challenged more than three Months after it has been given or more than one Month after the date on which any relevant Adjudicator's Determination is given to the parties, whichever is the later, unless notice has been given to the Engineer within that time. This subclause 13.1.1 shall not apply to a Progress Payment Schedule.
>
> **13.1.2** Every dispute or difference concerning the contract which is not precluded by the provisions of 12.4, 12.6 or 13.1.1 shall be dealt with under the following provisions of this Section.
>
> **13.1.3** The Principal and the Contractor may at any stage agree to suspend any dispute resolution under this Section 13 due to any Adjudication proceedings, but in the absence of any such agreement the provisions of Section 13 shall continue to apply and neither party shall be entitled to suspend or delay any dispute resolution under this Section 13 due to any Adjudication proceedings.
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> **13.2 Engineer's review**

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[3] *Wilsons (NZ) Portland Cement Ltd v Gatx-Fuller Australasia Pty Ltd* [1985] 2 NZLR 11 (HC) at 22, citing *The Rena K* [1979] 1 All ER 397 (HC)) at 417 and Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (1982) at 301.

13.2.1 Every dispute or difference under 13.1.2 shall be referred to the Engineer not later than one Month after the issue of the Final Payment Schedule or more than one Month after the date on which any relevant Adjudicator's Determination is given to the parties, whichever is the later. The Engineer shall give his or her decision in writing. Except in the case of a decision under 13.2.4 the Engineer may correct or modify his or her decision by a subsequent decision in writing.

13.2.2 The Engineer or the Contractor may before or after the Engineer has given a decision (other than a decision under 13.2.4) ask for a meeting, and in such case the Engineer and a representative of the Contractor shall meet as soon as practicable and endeavour to resolve the dispute amicably.

13.2.3 The Engineer and the Contractor may with the consent of the Principal jointly submit the dispute or any question arising in connection with it to an agreed expert, with a request to make a recommendation to assist them to resolve the matter. The Principal and the Contractor shall each pay one half of the costs of the agreed expert.

13.2.4 Unless the dispute or any question arising in connection with it has been referred under 13.2.3 and is awaiting a recommendation from the agreed expert, the Engineer may, at any time, in respect of any dispute or difference under 13.2.1 give a decision (in this Section called "a formal decision") which states expressly that it is given under this subclause 13.2.4. The Engineer shall give a formal decision on the matter within 20 Working Days of receiving notice in writing from the Principal or the Contractor requiring him or her to give a formal decision and expressly referring to this subclause 13.2.4. Upon making a formal decision the Engineer shall forthwith send copies of it to both the Principal and the Contractor. The Engineer's formal decision shall, subject to 13.3 and 13.4 or any Adjudication proceedings, be final and binding.

13.3 Mediation

13.3.1 If either:

(a) the principal or the Contractor is dissatisfied with the Engineer's decision under 13.2.4; or

(b) No decision is given by the Engineer within the time prescribed by 13.2.4;

Then either the Principal or the Contractor may by notice require that the matter in dispute be referred to mediation.

13.3.2 A notice requiring mediation shall be in writing and shall be given by the Principal or the Contractor to the other of them within one Month after the time prescribed for the giving of the Engineer's decision under 13.2.4.

13.3.3 Where a request for mediation is made and is acceded to by the other party then the Principal and the Contractor shall endeavour to agree on a mediator and shall submit the matter in dispute to him or her. The mediator shall discuss the matter with the parties and endeavour to resolve it by their agreement. All discussions in mediation shall be without prejudice, and shall not be referred to in any later proceedings. The Principal and the Contractor

shall bear their own Costs in the mediation, and shall each pay half the costs of the mediator.

13.3.4 The Principal and the Contractor may at any stage agree to invite the mediator to give a decision to determine the matter. The mediator's decision shall in such case be binding on both parties unless within 10 Working Days either party notifies the other in writing that it rejects the mediator's determination.

13.3.5 If:

(a) Mediation has been requested, but has not been agreed upon within 10 Working Days of the request; or

(b) The parties have agreed upon mediation but have been unable within 10 Working Days of such agreement to agree upon a mediator; or

(c) No agreement has been reached in mediation and no determination has been issued by the mediator within two Months of the request for mediation, or within such further time as the parties may agree;

(d) Either party has within the prescribed time rejected the mediator's determination;

Then either the Principal or the Contractor may by notice require that the matter in dispute be referred to arbitration.

13.4 Arbitration

13.4.1 If either:

(a) The Principal or the Contractor is dissatisfied with the Engineer's decision under 13.2.4; or

(b) No decision is given by the Engineer within the time prescribed by 13.2.4;

Then either the Principal or the Contractor may by notice require that the matter in dispute be referred to arbitration.

13.4.2 A notice requiring arbitration shall be in writing and shall be given by the Principal or the Contractor to the other of them:

(a) Within one Month after the Engineer's formal decision under 13.2.4 or after the time prescribed for the giving of the Engineer's formal decision, whichever shall be the earlier; or

(b) Within one Month after the happening of the event described in 13.3.5 which gives rise to the right to arbitration; or

(c) Where the Engineer has issued a formal decision under 13.2.4, or an event has happened under 13.3.5 which gives rise to the right to arbitration, and a relevant Adjudicator's Determination is subsequently given to the parties, within one Month after any such determination is given.

13.4.3 The dispute shall be referred to a sole arbitrator. If the parties cannot agree upon the arbitrator the provisions of the Arbitration Act 1996 shall apply.

13.4.4 The arbitrator shall have full power to open up, review and revise any decision, opinion, instruction, direction, certificate, valuation of the Engineer or any Payment Schedule and to award upon all questions referred to him or her. Neither party to the arbitration shall be limited to the evidence or arguments put before the Engineer for his or her review or put before a mediator or adjudicator or included in any payment claim or Payment Schedule.

13.4.5 No decision given by the Engineer in accordance with his or her duties under the contract shall disentitle him or her from being called as a witness and giving evidence before any hearing on any matter relevant to the dispute.

13.4.6 Where the matter has been referred to mediation the mediator shall not be called by either party as a witness. No reference shall be made to the determination, if any, issued by the mediator in respect of the matter in dispute.

13.4.7 The award in the arbitration shall be final and binding on the parties.

13.5 Suspension during dispute

13.5.1 No dispute proceeding shall entitle the Contractor to suspend the execution of the Contract Works, except in accordance with the instructions of the Engineer.

13.5.2 No Payment Schedule nor payment due or payable shall be withheld on account of dispute proceedings. Where any item is in dispute, the Engineer shall certify such amount as is properly payable according to his or her view as to the terms of the contract and his or her valuation in accordance with 12.1.4 and include such amount in a certificate in the form of a provisional Progress Payment Schedule and the process under 12.2.1 to 12.2.7 shall apply. No payment due under Section 12 shall be withheld by reason of the existence of any dispute.

13.5.3 Nothing in this clause 13.5 shall affect the Contractor's rights under the Construction Contracts Act 2002.

13.6 Award of Interest

13.6.1 The arbitrator may award interest on the whole or any part of any sum which:

(a) Is awarded to any party, for the whole or any part of the period up to the date of the award; or

(b) Is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.

[12] In accordance with an oral agreement reached between the parties when the additional asbestos was discovered, invoices were issued by SPI in the period between August 2011 and November 2011.[4] SPI's position, with regard to its additional claims, is summarised in Mr Steenson's affidavit:

> **The claim for additional payment and extensions of time**
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> 19. SPI served a disruption claim, VR3a, on 21st December 2011 by handing this to Mr Rao. SPI claimed an extension of time for 83 working days and a payment of $2,208,933.10 for equipment and site overhead time related costs. On 20th January 2012 the Engineer [Mr Rao] responded ... with a nil value against each item and although he agreed there was a variation he said he needed SPI to give him the necessary supporting information so he could make an assessment.
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> 20. SPI undertook further work on the analysis of Claim VR3a and resubmitted it to the Engineer and UTL as a payment claim with supporting information so an assessment could be made. This was served on 9th February .... SPI claimed an extension of time for 105 working days and additional costs of $2,570,216.25.
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> 21. On 27th February SPI received Mr Rao's payment schedule .... Mr Rao agreed to an extension of time of 20 working days and a payment of $82,943. There is no explanation of how his EOT [extension of time] of 20 working days or how the sum of $82,943 has been calculated. However it does demonstrate that the Engineer accepts that there is a valid claim and that both an EOT of some period and for some money is due.
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> **Claim for interest on late payments**
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> 22. In the payment claim served on 9 February 2012 SPI also claimed interest $37,083.91 for interest for late payment of previous payment claims .... This was supported by a statement from SPI's accountant as to the interest rate to be applied .... Nothing was scheduled for payment by the Engineer.

[13] On 14 March 2012, SPI gave a notice of adjudication to UTL, under the Construction Contracts Act 2002. UTL has protested jurisdiction. Having received submissions from the parties, the Adjudicator has reserved his decision on whether he should exercise jurisdiction under that Act. In the meantime, SPI has taken steps to refer its dispute to arbitration, if necessary.[5]

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4 See the extract from the affidavit of Mr Rao set out at para [14] below.

5 See Section 13.4 of the contract between SPI and UTL, set out at para [11] above.

[14] Mr Rao, while a director of UTL, was also appointed to fulfil the obligations of "the Engineer" under the contract.[6] He has been in New Zealand throughout the dismantling process. In his first affidavit, Mr Rao described the work undertaken in relation to the additional asbestos located:

> **Asbestos**
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> 9. *SPI commenced works, pursuant to the Contract, on 20 June 2011. On 23 June 2011 unforeseen asbestos was discovered in certain areas of the power station*. The Agreement between UTL and [Mighty River Power] anticipated the presence of asbestos in specified parts of the power station, and this was reflected in clause 1.5 of the tender specification. However, *the asbestos discovered after SPI commenced works went beyond the asbestos identified in the Agreement and Contract*.
>
> 10. [Mighty River Power], SPI and UTL had a number of meetings to discuss how to manage the asbestos, but were unable to agree who was liable for the additional costs incurred. *In order to prevent the issue holding up the dismantling of the Assets it was agreed that as an interim measure SPI would invoice UTL for the direct costs of managing and removing the additional asbestos, and [Mighty River Power] would reimburse UTL for these costs up to a maximum of US$500,000,* which [Mighty River Power] claimed was its overall cap on liability. *SPI reserved its position to claim its delay and disruption costs later in the project, and UTL and [Mighty River Power] agreed to disagree about the applicability of the US$500,000 cap*.
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> 11. From 4 July 2011, SPI was permitted access to restricted safe areas of the site. From 20 July 2011, SPI had full access to the site.
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> 12. *UTL has paid SPI's direct costs incurred in the removal of the additional asbestos, in the amount of $764,845.87. These costs were invoiced in instalments during the period August 2011 and November 2011, and paid in full by February 2012*.
>
> 13. *On 21 December 2011, SPI served UTL with a disruption claim, VR3a. Pursuant to the claim, SPI claimed an extension of time of 83 working days and a payment of $2,208,933.10 for indirect costs associated with the additional asbestos. A copy of SPI's claim is annexed ... of the Steenson affidavit*.
>
> 14. *On 20 January 2012, I, in my capacity as Engineer, responded to SPI's claim, requesting further information in respect of the claim so that I could make an assessment. A copy of this letter is annexed ... to the Steenson affidavit*.
>
> 15. *On 9 February 2012, SPI served UTL with an updated claim seeking an extension of 105 working days and costs in the amount of*

[6] This includes a role in the dispute resolution processes: see, for example, Section 13.1.1 and 13.2 of the contract, set out at para [11] above.

$2,570,216.25. SPI also claimed interest in the amount of $37,083.91 for late payment of previous payment claims by UTL. A copy of SPI's payment claim is annexed as... to the Steenson affidavit.

16. In order to assist me in my analysis of SPI's claim, I engaged the assistance of Mr Tony Dean, a New Zealand expert on programming and quantum issues in construction claims, to review SPI's claim. Based on Mr Dean's advice to me, and my own assessment of the claim in my capacity as Engineer to the Contract, I considered the claim by SPI to be grossly inflated. *Whilst SPI's work had been delayed, my view is that the majority of the delay was due to SPI's poor resourcing, scheduling and planning, and that regardless of whether asbestos was found, its work would have been completed late. SPI's poor management and lack of planning is evidenced in its project completion schedules sent to UTL which show that SPI continuously changed the end dates by which it would complete tasks and the duration required to complete tasks during the course of completing works under the Contract.*

...

18. *SPI's claim did not prove to either myself or Mr Dean that the additional asbestos had caused most of the delay and disruption they had claimed. Accordingly, on 27 February 2012, I responded to SPI's claim and agreed to a 20 working day extension and a payment of $82,943.00. A copy of the payment schedule is annexed as "JES1", page 240, to the Steenson affidavit.*

19. *The issuing of my payment schedule does not preclude further payment to SPI in respect of their claim in the future, provided that SPI are able to justify to my satisfaction that the sums claimed relate to the management of additional asbestos, and do not simply arise from their own inefficiencies in performance of the original scope of work.*

(my emphasis)

Legal Analysis

(a) General principles

[15] This Court's jurisdiction to make a freezing order[7] is recognised by r 32.2 of the High Court Rules:[8]

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[7] Formerly known as a *Mareva* injunction, derived from *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA). In New Zealand, the jurisdiction is derived from s 16 of the Judicature Act 1908; see also *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104 (HC).

32.2 Freezing order

(1) The court may make an order (a freezing order), on or without notice to a respondent in accordance with this Part.

(2) A freezing order may restrain a respondent from removing any assets located in or outside New Zealand or from disposing of, dealing with, or diminishing the value of, those assets.

(3) An applicant for a freezing order without notice to a respondent must fully and frankly disclose to the court all material facts, including—

(a) any possible defences known to the applicant; and

(b) information casting doubt on the applicant's ability to discharge the obligation created by the undertaking as to damages.

(4) An application for a freezing order must be made by interlocutory application under Part 7 or originating application under Part 19, which Parts apply subject to this Part.

(5) An applicant for a freezing order must file a signed undertaking that the applicant will comply with any order for the payment of damages to compensate the respondent for any damage sustained in consequence of the freezing order.

[16] In *Shaw v Narain*,[9] the Court of Appeal endorsed a number of observations from *Bank of New Zealand v Hawkins*,[10] about the freezing order jurisdiction. It approved the following summary, taken from the headnote to the reported judgment in *Hawkins*:

(1) An applicant for a [freezing order] must show that:

(a) It has a good arguable case on its substantive claim. This threshold requirement is more onerous than that normally applied in the case of interlocutory injunctions of a serious question to be determined.

(b) There are assets of the defendant within the jurisdiction to which the orders can apply. Providing the plaintiff adduces evidence of some assets, if the defendant is not forthcoming by way of disclosure of his assets in New Zealand, the Court may infer that this requirement is met.

(c) There is a real risk that the defendant will dissipate or dispose of assets so as to render himself "judgment proof".

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8 The Rules now contain detailed provisions dealing with such matters as the power to make ancillary orders (r 32.3), orders in respect of judgment debtors, prospective judgment debtors and third parties (r 32.5) and the form and content of orders (rr 32.6–32.8).

9 *Shaw v Narain* [1992] 2 NZLR 544 (CA) at 548.

10 *Bank of New Zealand v Hawkins* (1989) 1 PRNZ 451 (HC).

> Mere assertion of belief that the defendant might dissipate his assets, unsupported by solid ground justifying that belief, is insufficient. On the other hand, affirmative proof of likelihood of dissipation or of nefarious intent, is not necessary.
>
> (2) The [freezing order] remedy is no longer confined to foreigners or to the risk of removal of assets beyond the jurisdiction.
>
> (3) The Court, in dealing with an application for a [freezing order], must consider the overall justice in the circumstances, balancing the need to protect the plaintiff so as to ensure any judgment is not rendered barren against any prejudice or hardship to the defendant and to third parties.
>
> (4) It is important to preserve the flexibility of the remedy.

[17] In *Shaw v Narain*,[11] the Court of Appeal added that the principles were still evolving:

> It is appropriate to emphasise ... the flexibility of the jurisdiction. That also was emphasised by Lloyd LJ in *SCF Finance Co Ltd v Masri* ([1985] 2 All ER 747 (CA)]) at p 750. A recent example of that very flexibility is in *Standard Chartered Bank v Walker* (The Times, 31 January 1992).

The Court of Appeal's emphasis on flexibility reflects the statutory basis for a freezing order (s 16 of the Judicature Act 1908) and the undesirability of any judicial attempt, in advance of a particular set of facts coming before a Court, to circumscribe the nature of the jurisdiction. Section 16 confers on this Court "all judicial jurisdiction which may be necessary to administer the laws of New Zealand".

[18] It is settled law that a freezing order operates *in personam*, not *in rem*. It is not designed to provide an advantage to a claimant over other unsecured creditors, for an alleged debt.[12] The purpose of a freezing order is to protect a claimant's ability to enforce a judgment when there is cause for concern that a justifiable claim might go unsatisfied as a result of the defendant's actions. It does not purport to determine the existence or otherwise of a proprietary remedy.[13]

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11 Ibid.

12 *Mercedes-Benz AG v Leiduck* [1996] AC 284 (PC) at 300 (Lord Mustill) and 306 (Lord Nichols of Birkenhead, who while dissenting as to the result of the appeal, agreed with the majority on this expression of principle).

13 *Zhong v Wang* CA282/05, 5 September 2006 at para [102] (Wild and Heath JJ), with whom William Young P agreed, on this point.

[19] The *Shaw v Narain* approach to the threshold issue ("good arguable case") can be contrasted with the way in which the Court generally approaches that aspect on an application for an interim injunction; "serious question to be tried".[14] It is the draconian nature of a freezing order (one that puts severe restrictions on an entity's right to deal with its own assets before a prospective claim has been heard) that justifies a higher threshold requirement on the arguability of a claim than is applied in determining whether an interim injunction should issue.

[20] In *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*,[15] the Court of Appeal took the view that criteria involving a "serious question to be tried" and "balance of convenience" were no more than useful labels under which to marshal relevant considerations before standing back and determining whether the interests of justice require an interim injunction to issue. In my view, a similar approach should be taken to the *Shaw v Narain* factors. Viewed in the context of an application to restrain use of an entity's own assets pending resolution of claims against it, it is understandable that the strength of a plaintiff's substantive claim and whether there is a risk that the relevant defendant will dispose of assets to defeat a plaintiff's claim will assume importance. That said, they will not necessarily be the only (or determinative) factors in any given case.

(b) Does SPI have "a good arguable case on its substantive claim"?

[21] I have already outlined the respective contentions of SPI and UTL, with regard to the claims for indirect costs allegedly owing to SPI. It is not possible to express any informed view on whether the claims are (or are not) justifiable. Certainly, the evidence adduced by UTL does not, of itself, demonstrate that SPI's claims are unarguable.

[22] The evidence needs to be tested at a full defended hearing. In those circumstances, I take the view that the evidence adduced by SPI is sufficient to

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14 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142.
15 Ibid.

demonstrate a good arguable case on its substantive claim, to the threshold level described in *Shaw v Narain*.[16]

(c) Are there assets of UTL within the jurisdiction to which the orders can apply?

[23] Unquestionably, there are assets owned by UTL within New Zealand on which a freezing order could bite. Those assets consist of the scrap metal that UTL intends to sell in this country and those parts of the dismantled structure that it intends to ship to India.

(d) Risk from dissipation of assets

[24] In the context of this particular case, risks arising from the dissipation of assets assume the most importance. As it is clear that UTL intends to ship most of the property to India and is selling the balance as scrap in New Zealand, a more nuanced question arises: namely, what is the risk against which the Court is being asked to guard by making a freezing order?

[25] While the authorities indicate that risk of dissipation is central to exercise of the freezing order jurisdiction,[17] they express the effect of the risk in different ways. The mode of expression, necessarily, reflects the particular issue before the Court at the time. In many cases, it is seen as the risk that a judgment or award in favour of a claimant may go unsatisfied.[18] However, it has also been described as a risk that the Court's processes may be frustrated.[19] When assessing the former, a Court should consider them in the same way that a prudent or sensible commercial person would do.[20]

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16 *Shaw v Narain* [1992] 2 NZLR 544 (CA) at 548, set out in para (1)(a) at para [16] above.

17 *Z Ltd v A-Z* and *AA-LL* [1982] 1 All ER 556 (CA) (per Kerr LJ at 571), *Tranquil Holdings Ltd v Hudson* (1987) 2 PRNZ 551 (HC) and *Euro-National Corporation v Petricevic Financial Services Ltd* (1989) 2 PRNZ 351.

18 See the authorities collected in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H Und Co. KG; The Niedersachsen* [1983] 1 WLR 1412 (CA) at 1422–1423.

19 For example, *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).

20 *Third Chandris Shipping Corp v Unimarine SA* [1979] 2 All ER 972 (CA) (per Lawton LJ) at 987. See also *Gatx-Fuller Australasia Pty Ltd v Wilsons (NZ) Portland Cement Ltd* [1985] 2 NZLR 11 (HC) at para [22] and *Raukura Moana Fisheries Ltd v The Ship "Irina Zharkikh"* [2001] 2 NZLR 801 (HC) at 827.

[26] The absence of other assets in New Zealand means that UTL (if it were to ship the plant and remit all proceeds of sale of scrap to India) will be rendered "judgment proof" *in New Zealand*. However, the evidence establishes that UTL is a substantial business entity with interests in telecommunications, manufacturing and power industries. It is the parent of a multi-national corporate group. Its audited financial statements for the period ended 31 March 2011 show net assets of Rp 8,901,464,028[21] and a net profit of Rp 5,292,989,641. Converting those sums from rupees to New Zealand dollars, Mr Rao has deposed that the former is equivalent to $116 million and the latter $14 million.

[27] In approaching the effect of removal of assets from the jurisdiction, a number of authorities are helpful. For example:[22]

(a) In *Barclay-Johnson v Yuill*,[23] Sir Robert Megarry VC said:

> Even if the risk of removal is great, no *Mareva* injunction should be granted unless there is also a danger of default. A reputable foreign company, accustomed to paying its debts, ought not to be prevented from removing its assets from the jurisdiction, especially if it has substantial assets in countries in which English judgments can be enforced.

That statement of principle has been adopted in Australia.[24]

(b) In England, the Court of Appeal has expressed the test as whether, "on the assumption that the plaintiffs have shown at least "a good arguable case", the court concludes, on the whole of the evidence then before it, that the refusal of a [freezing order] would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied".[25]

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21 Of which Rp 6,400,290,158 is shown as "Reserves and Surplus".

22 I have been assisted considerably by references to authorities in various jurisdictions that deal with "risk of dissipation" collected in Gee, *Commercial Injunctions* (Thomson-Sweet & Maxwell 5th ed 2004) at 353–358.

23 *Barclay-Johnson v Yuill* [1980] 3 All ER 190 (HC) at 195.

24 See *Hadid v Lenfest Communications Inc* (1996) 67 FCR) at 447 and *Reches Pty Ltd v Tadiran Ltd* (1998) 155 ALR 478 (FCA) at 483.

25 *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft m.b.H Und Co. KG; The Niedersachsen* [1983] 1 WLR 1412 (CA) at 1422. Passages from earlier decisions, including that of Sir Robert Megarry VC in *Barclay-Johnson v Yuill*, are cited to support that proposition at

(c) In Gibraltar, the Court of Appeal upheld a judgment in which Pizzarello AJ had held there was no serious risk of dissipation because the respondent companies were attached to parents which were part of large international organisations. Neill P, for the Court, said:[26]

> 49. ... The question whether a *Mareva* injunction should be granted involves the consideration of whether "on the whole of the evidence then before the court it concludes that the refusal of a Mareva injunction would involve a real risk that a judgment or an award in favour of the plaintiffs would remain unsatisfied": ...
>
> 50. The judge in the present case considered the evidence and came to the conclusion that a serious risk of dissipation had not been proved. He took account of the fact that both companies were members of large groups and that the mere impecuniosity of In-Town at the present time was not determinative of the matter. The financial arrangements, the judge considered, were typical of a project of this kind. Furthermore, as counsel for In-Town pointed out in his skeleton argument, the "asset (or no asset)" position of the two parties was known, understood and bargained for from the outset. In addition, it is relevant to take account of the fact that the project is one which will extend over a number of years and indicates a long-term relationship between the two groups of companies of which the present parties form part.

[28] On the facts of this case, the following factors militate against the grant of a freezing order:

(a) SPI entered into a substantial contract with a company that it knew was incorporated in India and had no other assets in New Zealand.

(b) SPI trusted UTL to pay the agreed consideration of $9 million, plus any extras.

(c) SPI was content to appoint UTL's director, Mr Rao, as "Engineer" under the contract. It also agreed that any disputes would be resolved by a process that culminated in arbitration.

1423–1424. See also *Third Chandris Shipping Corporation v Unimarine SA* [1979] 2 All ER 972 (QBD and CA) at 979 (Mustill J), 984–985 (Lord Denning MR) and 987 (Lawton LJ).

[26] *I Kruger Service (Gibraltar) Ltd v In-Town Developments Ltd* 1999–00 Gib LR 283 (CA) at paras 49 and 50.

(d) SPI did not seek any security for payment on the amounts owing to it. Nor did it require a guarantee from any other entity having assets in New Zealand.

(e) UTL has paid the contract price, as well as significant sums claimed as extras as a result of SPI's additional work.[27]

(f) UTL has substantial assets in India against which an award in arbitral proceedings could be enforced.[28]

[29] There remain, however, some factors which tell in favour of some (perhaps limited) form of freezing order being made. They all relate to UTL's conduct in the period since SPI sought to initiate adjudication proceedings under the Construction Contracts Act and the (significant) increases in costs to SPI in establishing a debt and enforcing payment of it that are likely to result from that conduct. They are:

(a) Without seeking to pre-empt the decision of the Adjudicator on the jurisdictional point, it must, at least, be seriously arguable that UTL consented to invocation of the adjudication regime.[29] Specific reference is made to that remedy in Section 13.1.1, 13.1.3 and 13.2.1 of the contract.[30] No mention was made of this issue in the jurisdictional submissions made on behalf of UTL, though it has been raised by SPI in its submissions in response. I infer the tactical decision to protest jurisdiction was made in an endeavour to delay resolution of the dispute.

(b) It is somewhat disingenuous for Mr Rao to depose, as he has, that the arbitration process should not be commenced before he has given a formal decision as "Engineer" under Section 13.2 of the contract. In two affidavits, Mr Rao has expressed strong views about what he

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27 See para [9] above.

28 India is a party to the New York Convention: see Convention on the Recognition and Enforcement of Foreign Arbitral Awards, set out in Schedule 3 to the Arbitration Act 1996.

29 See s 25(3)(b)(i) of the Construction Contracts Act 2002.

30 See para [11] above. The term "Adjudication" is defined in Section 1.2 of the Contract as an "adjudication under the Construction Contracts Act 2002.

perceives as the lack of merit in the balance of SPI's claims. I infer that he has pre-judged the issue, notwithstanding his continuing role in determining certain disputes under Section 13.2.

(c) The manner in which UTL is dealing with the proceeds of sale of scrap. While it is UTL's right not to give an undertaking to hold the proceeds of sale or disclose how much scrap it has sold and the price obtained, Mr Rao's suggestion (in response to a question I raised at the end of the hearing about the destiny of the proceeds of sale of scrap) that UTL *cannot* provide an undertaking because it does not have a bank account in New Zealand is facile. UTL could easily open a bank account for that purpose. The lack of detail and the specious reason given for not providing an undertaking means that Mr Steenson's evidence of the likely quantity and value of steel scrap material is the only reliable evidence on which I can base any decision.[31]

[30] Given that UTL has been prepared to pay amounts it accepts are owing under the contract, I infer that it is attempting to delay or hinder SPI's prosecution of remaining claims in a manner designed to cause cost and delay to SPI. My view is that UTL regards the remaining aspects of SPI's claims as unjustifiable and, if possible, wishes to avoid the cost of defending them.

(e) Discretionary factors

[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.[32] 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

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[31] See para [8] above. Arithmetically, Mr Steenson's figures give an indicative value of $495,000 for the scrap component of the assets.

[32] Set out at para [15] above.

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.

[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.

[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[33] 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.[34] 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.[35]

[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

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33 See para [29] above.

34 This Court has responsibilities for the enforcement of arbitral awards (Arbitration Act 1996) and adjudications (under the Construction Contracts Act 2002).

35 See paras [15]–[18] and [25] above.

unjustified delays can often result in valid claims being abandoned. The Court must be alive to those practical commercial considerations.

Result

[35] I make interim orders prohibiting UTL (or its agents) from dealing in any way with the scrap material that remains in New Zealand and requiring all proceeds of sale of scrap that have not been remitted to India at the time this judgment is delivered to be paid into the trust account of Kensington Swan, Auckland, as UTL's solicitors. This order will be discharged when the final form of a freezing order is settled.

[36] The application for a freezing order is adjourned for further argument until 3.45pm on 16 April 2012, in Auckland. A draft order shall be filed[36] and served by 10am on 16 April. At the hearing, unless alternative arrangements have been made, I will consider the draft order submitted by counsel for SPI and will hear from counsel on its terms. I indicate that the maximum value of assets to be covered by any freezing order will be $350,000.[37] I adjourn the application for stay to be dealt with at the conclusion of that hearing.

[37] My preliminary view is that costs should follow the event. I indicate (provisionally) that I would be minded to award costs on a 2B basis, together with reasonable disbursements, (both to be fixed by the Registrar) in favour of SPI and to certify for second counsel. I will hear from counsel on whether that or some different order should be made when the applications are called before me on Monday next.

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[36] A copy may be sent to my Associate by email at an address previously provided to counsel.
[37] High Court Rules, r 32.6(2).

[38] I thank counsel for their assistance.

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P R Heath J

Delivered at 3.00pm on 13 April 2012