

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2020-404-001775  
[2022] NZHC 2685**

IN THE MATTER OF      The liquidation of 4468440 Limited  
   (previously known as Optimizer Corporation  
   Limited)

BETWEEN                      SMARTPAY LIMITED  
   Plaintiff

AND                              MANAS DHARMENDRA KUMAR  
   Defendant

Hearing:                      17 October 2022

Counsel:                      DJ Chisholm KC and JD Ryan for Plaintiff  
   No appearance for Defendant

Judgment:                      19 October 2022

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**JUDGMENT OF DOWNS J  
(Quantum of compensation)**

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*This judgment was delivered by me on Wednesday, 19 October 2022 at 12 pm  
pursuant to r 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors/Counsel:  
Claymore Partners Ltd, Auckland.  
DJ Chisholm KC, Auckland.

Copy to: Defendant.

[1] This brief judgment should be read with my interim one of 13 May 2022, knowledge of which is assumed.<sup>1</sup> The remaining issue is compensation under s 301(1)(b)(ii) of the Companies Act 1993. It empowers the Court to order the defendant “to contribute such sum to the assets of the company by way of compensation as the Court thinks just”.

[2] Smartpay contends compensation should be \$850,427.43 (as well as interest under the Interest on Money Claims Act 2016).

[3] This figure is based on the evidence of Aidan Murphy, Smartpay’s chief business officer, and the supplementary evidence of Boris van Delden, liquidator. Taken together, this evidence establishes Smartpay supplied OCL 2161 terminals, of which 1002 were recovered or returned to Smartpay. So, 1159 terminals remain outstanding at a cost of \$345 per terminal—a total of \$399,855. To this must be added two amounts. First, what Smartpay was owed by OCL at the date of its liquidation: \$120,407.43. Second, post-termination fees payable by OCL to Smartpay under the distribution agreement. These come to \$330,165. The three sums total \$850,427.43, a figure the liquidators have accepted.

[4] Mr Kumar did not attend the compensation hearing, about which more shortly. Mr Kumar filed a submission challenging the number of outstanding terminals. He contended this could not be reliably established without analysis of underlying metadata. The short answer to this submission is the evidence of Mr Murphy. Mr Murphy says 1159 terminals remain outstanding, and his testimony is supported by business records exhibited to his brief of evidence. There is no reason to doubt the reliability of this evidence.

[5] Mr Kumar also contended OCL did not cause Smartpay’s loss. Mr Kumar advanced the same argument at the earlier hearing. I rejected it; see [47]–[51] of my earlier judgment. Mr Kumar may not re-litigate the point here.

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<sup>1</sup> *Smartpay Ltd v Kumar* [2022] NZHC 997. I continue to use the same abbreviations.

[6] It is not necessary to address potentially differing approaches to compensation under s 301(1)(b)(ii).<sup>2</sup> On any view, OCL should have compensation of \$850,427.43 (and interest). The amount reflects what OCL owed Smartpay, in circumstances in which OCL was insolvent from near inception.

[7] This leaves Mr Kumar's non-attendance. Mr Kumar sought an adjournment of the compensation hearing on the basis he had already left the country in relation to medical treatment for his daughter. The Civil List Judge, Moore J, declined the application.<sup>3</sup> Moore J said Mr Kumar must attend the hearing "or make arrangements for remote attendance".<sup>4</sup>

[8] On 14 October 2022, the Registrar told Mr Kumar of his ability to appear remotely at the compensation hearing, and by email, attached a link to a Virtual Meeting Room facility for the hearing. Mr Kumar did not avail himself of this facility. Instead, he filed a submission by email, protesting the hearing should not proceed in his absence. Mr Kumar's covering email said, "I am unable to appear by VMR". He did not elaborate.

[9] In his accompanying submission, Mr Kumar argued he had not been given the briefs of evidence for the two witnesses described earlier. I do not accept this contention because Mr Chisholm KC, on behalf of Smartpay, adduced email of 1 and 10 August 2022 to Mr Kumar's lawyers confirming service of the briefs and a related spreadsheet. Mr Kumar's submission implies he received that spreadsheet.

[10] Mr Kumar also argued he did not receive Smartpay's written submission in relation to compensation until 11 October 2022. I do not accept this contention either. Mr Chisholm drew my attention to an email of 22 August 2022 by which that submission was served, on that date, on Mr Kumar through his lawyers.<sup>5</sup>

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<sup>2</sup> See, for example, the discussion in *Yan v Mainzeal Property and Construction Ltd (in liq)* [2021] NZCA 99, [2021] 3 NZLR 598 at [303]–[308].

<sup>3</sup> *Smartpay Ltd v Kumar* HC Auckland CIV-2020-404-1775, 13 October 2022 (Minute of Moore J).

<sup>4</sup> At [6].

<sup>5</sup> As with the earlier August email, this was attached to a memorandum of counsel filed shortly after the compensation hearing.

[11] Perhaps anticipating this reasoning, Mr Kumar filed another submission after the hearing saying his lawyers did not give him the served material. Mr Kumar has not waived legal professional privilege in relation to this contention. In the absence of a waiver, I draw the inference that would ordinarily follow: Mr Kumar’s lawyers gave him the material.

**Result**

[12] Mr Kumar must pay OCL:

- (a) Compensation of \$850,427.43, plus interest on this amount under the Interest on Money Claims Act 2016 from 10 December 2015 to the date of this judgment.
- (b) Costs (and disbursements) on a 2B basis.

[13] I reserve OCL permission, and its liquidators, to re-apply if further claims of creditors are admitted.

**Postscript**

[14] Before this judgment was delivered, Mr Kumar emailed the Registry with this request: “Can you please provide the full minutes and also the transcript of today’s hearing on an urgent basis.”

[15] A transcript of a hearing is not made as a matter of course. I have not directed one be made. I decline to order one or its release. There is no reason to do so. The hearing was short, and unremarkable. The obvious remains relevant too: Mr Kumar chose not to attend.

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**Downs J**