

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

COMPANIES JURISDICTION

Civil Action No. HBC 332 of 2019

BETWEEN

BIJU INVESTMENTS PTE LIMITED a duly incorporated company having its registered office at 1, Valetia Street, Lautoka.

PLAINTIFF

A N D

TRANSFIELD BUILDING SOLUTIONS (FIJI) LTD. a duly incorporated company having its registered office at Lot 19, Wilfred Sugrim Road, Lautoka.

DEFENDANT

Appearance : (Ms) Setaita Ravai for the plaintiff.
Mr. Ashnil Narayan for the defendant.

Hearing : Wednesday, 13th November 2020 at 9.00 a.m.

Decision : Friday, 29th January 2021 at 9.00 a.m.

DECISION

(A) INTRODUCTION

- (01) On 16th December 2019, shortly after the start of legal vacation, Transfield Building Solutions (Fiji) Limited (“**TBSFL**”) served Biju Investment Pte Limited (“**BIPL**”) a statutory demand to the sum of FJ\$115,073.80 (One Hundred Fifteen Thousand Seventy Three Fijian Dollars and Eighty Cents).
- (02) On 20 December 2019, four days after the service of the demand, BIPL filed an urgent ex-parte summons seeking the following orders:

(a) An order setting aside the Statutory Demand issued by Transfield Building Solutions (Fiji) Limited to Biju Investments Pty Ltd dated 16 December 2019

insofar as it is a Statutory Demand not able to be served on the basis, that the debt the subject of the Statutory Demand is genuinely disputed and as such incapable of being relied upon pursuant to Section 515 of the Companies Act.

- (b) An order pending determination of these proceedings that the Defendant not be at liberty to act upon or issue any consequent process on the alleged basis that the Statutory Demand has not been complied with.*
- (c) An order in the circumstances restraining the Defendant from taking any actions to enforce the purported debt subject of the Statutory Demand by issuing a Petition to wind up the Plaintiff.*
- (d) An order that the matter be expedited on the basis that it is a matter occurring in vacation and is requisite of urgent relief in the circumstances.*
- (e) Such further or other relief as may seem fit.*
- (f) Costs, including indemnity costs, be awarded to the Plaintiff.*

(03) The summons is supported by an affidavit of Vijay Chand Naidu, a director of BIPL and a solicitor – and a supplementary affidavit of Mr. Nemia Taginasedrau, a civil engineer. These were both filed within the 21 day period stipulated under section 516 (3) of the Companies Act, 2015.

(04) Hon. J. Tuilevuka granted order in terms of prayer (b), (c) and (d) of the summons and directed the plaintiff to serve the documents on the defendant within 14 days and then adjourned the case to 22 January 2020.

(05) The plaintiff went on to file the following supplementary affidavits:

- (a) of Vijay Chand Naidu sworn on 06 January 2020
- (b) of Vijay Chand Naidu sworn on 12 February 2020
- (c) of Manoj Kumar Sharma sworn on 12 February 2020
- (d) of Vijay Chand Naidu sworn on 03 July 2020
- (e) of Nemia Taginasedrau sworn on 06 July 2020
- (f) of Nemia Taginasedrau sworn on 14 August 2020

(06) The defendant has only filed one affidavit in opposition which is sworn by Viren Kumar on 23 June 2020 and filed on the same day.

(B) THE LAW

(01) Under Section 515(a) of the Companies' Act, 2015, a Company must be deemed unable to pay its debts

- (a) *If a creditor, by assignment or otherwise, to whom the Company is indebted in a sum exceeding \$10,000.00 or such other prescribed amount then due, has served on the company, by leaving it at the registered office of the Company, a demand requiring the Company to pay the sum so due (Statutory Demand) and the Company has, not paid the sum or secured or compounded for it to the reasonable satisfaction of the Creditor within 3 weeks of the date of the Notice.*

- (b)
- (i)
- (ii)

(02) An application under Section 516 to set aside a statutory demand must be made on one or more of the following grounds;

- (i) *That there is a genuine dispute between the Company and the respondent about the existence or amount of a debt to which the demand relates; [Section 517(1)(a)].*
- (ii) *That the Company has an off-setting claim. [Section 517(1) (b)].*
- (iii) *That because of a defect in the demand, substantial injustice will be caused unless the demand is set aside. [Section 517(5)(a)]*

or

- (iv) *There is some other reason why the demand should be set aside. [Section 517(5)(b)].*

(03) An order setting aside the demand will render the demand of no effect.[Section 518].

(C) Consideration and the determination

(01) Counsel for the plaintiff and the defendant have tendered extensive written submissions in support of their respective cases. I am grateful to Counsel for those lucid and relevant submissions and the authorities therein collected which have made my task less difficult than it otherwise might have been.

If I do not refer to any particular submission that has been made, it is not that I have not noted that submission or that submission is not relevant; it is simply that, in the time available, I am not able to cover in this decision every point that has been made before me.

The background to the matter

(02) On or about 2nd July, 2019, the defendant had entered into an agreement with the plaintiff to conduct various civil works on all that piece and parcel of land covered by Crown Lease No. 19843 located at Natabua, Lautoka. A copy of the agreement appears at annexure ‘VCN-1’ of the affidavit of Vijay Chand Naidu sworn on 19th December, 2019.

- (03) The plaintiff had engaged, and it was agreed, that a firm called ‘Cadastrals’ were to be the plaintiff’s principal consultant and certifying officer. The relevant correspondence leading up to the final terms appears at annexure ‘VK-2’ of the affidavit of Viren Kumar sworn on 23rd June, 2020.
- (04) The defendant mobilized on site on or about 1st July, 2019 and proceeded to conduct the required works. Between 1st July, 2019 and 2nd September, 2019 the defendant had submitted three progress claims which were all assessed, verified and certified by the certifying officer. The defendant was paid a cumulative sum of \$397,252.40 for the first three claims. Copies of the first three claims and certifications thereof appear at annexure ‘VK-3’ of the Affidavit of Viren Kumar sworn on 23rd June, 2020.
- (05) The defendant then submitted its fourth progress claim on or about 1st October, 2019 and which was partially certified by the certifying officer on 9th October, 2019 to the extent of \$225,073.80. A copy of the relevant certification appears at annexure ‘VK-4’ of the Affidavit of Viren Kumar sworn on 23rd June, 2020. It is worth noting that the plaintiff has paid a sum of \$110,000.00 against the partial certified sum of \$225,073.80 (See evidence of payment at annexure ‘VK-5’ of the Affidavit of Viren Kumar sworn on 23rd June, 2020). After the part payment, a sum of \$115,073.80 remained certified yet unpaid by the plaintiff and it is the subject of the Statutory Demand that the defendant issued on 16th December, 2019.
- (06) The plaintiff claims that upon becoming aware of the monetary discrepancies as raised by the financier of the project, that is, Westpac, retained an expert (unilaterally) to investigate and provide his opinion as to the standard of all workmanship of the defendant. The plaintiff retained Mr. Nemia Taginasedrau of Engineering Minds Ltd. [See paragraph (08) of the further amended statement of claim].
- (07) It is further claimed that the plaintiff upon being apprised of the report prepared by Engineering Minds Ltd (annexure NT-1 referred to in the affidavit of Nemia Taginasedrau sworn on 19.12.2019 which discovered incomplete, defective and non-compliant works by the defendant) advised the defendant that the work undertaken was both defective and non-compliant and thereby in breach of the agreement and required it to be completed as per the agreement. [See paragraph (09) of the further amended statement of claim].
- (08) The plaintiff claims that as soon as it was armed with the notice of the defective work, it served a notice to complete dated 05.12.2019 on the defendant. [See paragraph (10) of the further amended statement of claim].
- (09) The plaintiff alleges that the defendant did not respond to the notice to complete dated 05.12.2019. The plaintiff further alleges that the defendant had abandoned the site of the project on 08.11.2019 and has not returned since that date. [See paragraph (11) of the further amended statement of claim]

- (10) The plaintiff says that despite service of the notice to complete, the defendant has refused to comply and undertake the rectification of the works. [See paragraph (12) of the further amended statement of claim].
- (11) The plaintiff alleges that by reason of;
- (a) The incomplete and defective workmanship undertaken by the defendant in the performance of the agreement.
- (b) Service of the statutory demand dated 16.12.2019 on the plaintiff.

The defendant has evinced an intention that it no longer seeks to be bound by the agreement and as a result, **the defendant repudiated the agreement.** [See paragraph (14) of the further amended statement of claim].

Whether a genuine dispute is established for the purposes of Section 517(1)(a) of the Companies Act, 2015?

- (12) Section 517(1)(a), of the Companies Act provides that a creditor’s statutory demand may be set aside when the Court is satisfied that there is a genuine dispute about the existence or amount to which that demand relates. The concept of a “genuine dispute” is well established in the case law. That test has been variously formulated as requiring that the dispute is not “plainly vexatious or frivolous” or “may have some substance” or involves “a plausible contention requiring investigation” and is similar to that which would apply in an application for an interlocutory injunction or a summary judgment ¹: In **Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd** ², the Full Court of Federal Court held, a “genuine dispute” must be bona fide and truly exist in fact, and the grounds for that dispute must be real and not spurious, hypothetical, illusory or misconceived”.
- (13) In **CGI Information Systems & Management Consultants Pty Ltd v APRA Consulting Pty Ltd** ³, Barrett J helpfully summarized the principles as follows:

“The task faced by the company challenging a statutory demand on the genuine dispute grounds is by no means at all a difficult or demanding one. A company will fail in that task only if it is found, upon the hearing of its s 459G application, that the contentions upon which it seeks to rely in mounting its challenge are so devoid of substance that no further investigation is warranted. Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine

¹ **Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1999] VicRp 61; [1994] 2 VR 290; (1993) 11**

ACSR 362; Eyota Pty Ltd v Hanave Pty Ltd [1994] 12 ACSR 785 at 787; Re UGL Process Solutions Pty Ltd [2012] NSWSC 1256

² **[1997] FCA 681; (1997) 76 FCR 452 at 464; [1997] FCA 681; (1997) 24 ACSR 353**

³ **[2003] NSWSC 728; (2003) 47 ACSR 100**

dispute must follow. The Court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that on rational grounds indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger.”

- (14) In ***Roadships Logistics Ltd v Tree***⁴, Barrett J similarly observed that:

“Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The Court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor on rational grounds that indicate an arguable case on the part of the company it must find that a genuine dispute exists even where any case, even apparently available to be advanced against the company seems stronger.”

- (15) In ***MNWA Pty Ltd v Deputy Commissioner of Taxation***⁵

*The Commissioner has rights and duties in relation to the recovery of taxation liabilities of taxpayers, including those available under Pt 5.4 of the Corporations Act. But, that does not mean that he is free to resort to those despite having promised, or made representations to, or entered into an arrangement with, a taxpayer that he would proceed differently, as a result of which the taxpayer altered his, her or its position. **The question of whether a contract or an arrangement was made and, if so, on what terms or whether the Commissioner, in fact, acted “in good faith” in accordance with cl 5.3 in the three deeds or for an improper purpose or unconscientiously, in my opinion, was one that, in the circumstances, could only be resolved in other substantive proceedings and not in the applications under s459G.***

[Emphasis mine]

- (16) It is important to remember that the threshold criteria for establishing the existence of a genuine dispute to the debt is a low one.
- (17) In ***Fitness First Australia Pty Ltd v Dubow***⁶, the Court dealt with an application under section 459G of the Corporations Act 2001 (Cth) which is identical in terms to section 516 of our Companies Act 2015. Ward J stated;

.....the court does not determine the merits of any dispute that may be found to exist, but simply whether there is such a dispute and the threshold for that is

⁴ [2007] NSWSC 1084; (2007) 64 ACSR 671

⁵ [2016] FCAFC 154, Rares J

⁶ [2011] NSWSC 531

not high. In *Edge Technology Pty Ltd v Lite-on Technology Corporation* [2000] NSWSC 471; (2000) 34 ACSR 301, Barrett J said at [45]:

The threshold presented by the test to set aside a statutory demand does not however require of the plaintiff a rigorous and in-depth examination of the evidence relating to the plaintiff's claim, dispute or off-setting claim.....Hayne J in Mibor Investments Pty Ltd v Commonwealth Bank of Australia [1994] Vic Rp 61; [1994] 2 VR 290.

- (18) In *Eyota Pty Ltd v Hanave Pty Ltd*⁷, McLelland CJ explained that “genuine dispute” means:

....a plausible contention requiring investigation, and raises much of the same sort of considerations as the “serious question to be tried” criterion which arises on an application for an introductory injunction or for the extension or removal of a caveat. This does not mean that the court must accept uncritically as giving rise to genuine dispute, every statement in an affidavit “however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be not having “sufficient prima facie plausibility to merit further investigation as to its [truth]” (cf Eng Me Young v Letchumanan [1980] AC 331 at 341), or “a patently feeble legal argument or an assertion of fact unsupported by evidence”: cf South Australia v Wall(1980) 24 SASR 189 at 194.

But it does mean that, except in such an extreme case[i.e. where evidence is so lacking in plausibility], a court required to determine whether there is a genuine dispute and should not embark upon an enquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute..... In Re Morris Catering Australia it was said the essential task is relatively simple – to identify the genuine level of a claim...

- (19) In *Fitness First* (supra) at 127, Ward J cited *Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (N.2)*⁸ saying:

*Barret J noted that the task faced by a company challenging a statutory demand on genuine dispute grounds is by no means a difficult or demanding one – a company will fail in its task only if the contentions upon which (sic) seeks to rely in mounting the challenge are so devoid of substance that no further investigation is warranted. The court does not engage in any form of balancing exercise between the strengths of competing contention. **If there is any factor that on reasonable grounds indicates an arguable case it must find a genuine dispute exists even where the case available to be argued against the company seems stronger.***

⁷ (1994) 12 ACSR 785; (1994) 12 ACLC 669

⁸ [2003] NSWSC 896

And later, at 132:

A genuine dispute is therefore one which is bona fide and truly exists in fact and that is not spurious, hypothetical, illusory or misconceived. It exists where there is a plausible contention which places the debt in dispute and which requires further investigation. The debt in dispute must be in existence at the time at which the statutory demand is served on the debtor (*Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* [1997] FCA 681; (1997) 76 FCR 452; *Eyota*).

- (20) What is the basis of the asserted dispute as to the existence of the debt? Vijay Naidu, in his affidavit sworn on 19.12.2019 deposed that; (Reference is made to paragraph (5) and (10) of the affidavit)
5. *THAT in the course of the construction and the undertaking of works by the Defendant, claims were submitted and paid. However, there arose discrepancies and inconsistencies in respect of the presentation of claims and the draw down as against the finance provided, arising in part from and predicated in the main in respect of concerns from Westpac which resulted in an exchange of correspondence which I collectively annex to this my affidavit marked "VCN-2" representing the chain of correspondence on and from the earliest date up to and including 11 December 2019. Where necessary, I have included correspondence with our consulting engineer Mr Nemia Taginasedrau of Engineering Minds Ltd to highlight the disputes that have arisen between the Plaintiff and the Defendant in respect of the Defendant's failure to undertake the work in a competent fashion, resulting in a claim for negligent performance of the works and breach of contract.*
10. *That the plaintiff hereby gives an undertaking as to damages and further in support of the application for Interlocutory Relief by way of an injunction seeks the stay of the Statutory Demand and that it be set aside on the basis of the genuine dispute and that the Plaintiff has and will seek to claim for breach of contract, it having accepted the repudiation of the agreement subject to its claim for not only damages for the quantum of the works said to be defective and requiring rectification, but such further damages by way of completion of the outstanding works, together with consequential losses occasioned by the delay as a result of the breach of contract and that such sums will well exceed any purported claim the subject of the Statutory Demand. A copy of a Valuation Report dated 21st November 2019 for one of the Plaintiff's Lot worth \$1,620,000.00 (One Million Six hundred and Twenty Thousand Dollars) is annexed hereto and marked "VCN-7".*
- (21) **As I understand the plaintiff's affidavit evidence, the following issues were raised by the plaintiff;**

(a) Incomplete works and upgrading of substandard works – damages claimed \$181,000.

(b) Non-delivered items on site for which claims have been made and in respect of which work has been neither provided nor the materials utilized yet claims were made include breach of the Agreement totaling \$64,833.7

(c) Works and items delivered but outside the contract and in respect of which no authorization was obtained totaling \$21,765.37 and

(d) Variation items which were clearly outside of the Bill of Quantities totaling \$148,703.20

(22) All these are denied by the defendant. Viren Kumar, in his affidavit in opposition sworn on 23.06.2020 asserted; (Reference is made to paragraphs 12 to 26 of the affidavit in opposition)

12. *The Plaintiff instead unilaterally engaged an Engineer, Mr Nemia Taginasedrau, to conduct an audit on 25th October, 2019. The engineer in this project was always a company called Engineered Designs. I requested my presence during the audit process so that I could clarify any concerns and/or clarifications that were required since Nemia was never involved in the project nor privy to any discussions. All my requests were ignored, including the request made by the Defendants’ solicitors in their letter dated 12th December, 2019 in response to the Plaintiff’s letter dated 5th December, 2019 (both appearing at annexure “VCN-4” of Vijay’s affidavit)*

13. *In addition to the non-payment of the certified debt, the Defendant also required clarification and directions for the remaining 3-5% of the works that were remaining to be completed but there was no assistance provided by the project manager nor the Plaintiff despite the former advising he would get back to me with the completed drawings for the two crossings and site drainage once obtained” (see annexure VK-6).*

14. *Whilst the Defendant’s request for clarification and payment was being ignored, delayed and/or refused, the Defendant was still incurring costs in having security deployed on site and machines on hire. Due to the lack of instructions and failure to pay on the part of the Plaintiff, the Defendant was thereof compelled to demobilize on or about 8th November, 2019 in an attempt to mitigate any further losses. The Defendant was prevented from further performance and on that basis the Defendant had deemed the contract terminated. I understand the Defendants’ solicitors had also alluded to this in their letter dated 12th December, 2019.*

15. *The certified debt was final and binding. The task of assessing, verifying and certifying progress claims by the project manager and the binding nature of any certifications and/or approvals requiring payment on the plaintiff was acknowledged by the letter. I now produce and annex a copy of the relevant*

correspondence marked as “VK-7”. I note that this was also not disclosed to the High Court when the Plaintiff moved the Court on an ex-parte basis.

16. *Contrary to those representations and the terms of the contract, the Plaintiff neglected, refused and/or ignored to pay the certified debt. I suspect the Plaintiff only did so because it had exceeded its budget and has been unable to pay its debts. I doubt the solvency of the Plaintiff.*
17. *The Plaintiff then employed a tactic to retrospectively show that the claims were, amongst other things, “disproportionate” and otherwise exceeding the purported “lump sum” contract. As will be seen later in this affidavit, this was an afterthought designed to avoid the certified debt on the part of the Plaintiff.*
18. *Firstly, the plaintiff now seems to claim the contract was a “lump sum” or fixed sum contract. I deny this as the contract was always based on a “measure and value” basis. Under the measure and value” basis, a contractor is to measure the works done, and value the works as per the bill of quantities (or more simply, valued by the “rates” provided in the contract). The project manager is then to verify, assess and certify the claim. The first three claims were submitted, assessed, verified and certified on that basis by the project manager. The project manager was in Fiji at the times of submissions of the first three claims.*
19. *Prior to entering into the contract, the project manager expressly advised via email on 24th June, 2019 that the work scope was to be based on the “amended construction drawings on road and drainage.” I confirm I had a discussion with the project manager regarding the amended drawings and the fact that there were a number of items still requiring clarification in terms of the scope of works which prompted the project manager to advise that he will “peruse the amendments with the engineers”. I also wrote to the project manager on 1st July, 2019 advising him, amongst other things, that the contract was to be based on a “measure and value” basis. I now produce the annex copies of the relevant correspondence marked as “VK-8”.*
20. *It was on the basis that the contract stated that the contract sum was for \$511,392.36 VEP “or such sum greater or less, as shall become payable....”The contract was supplied to me by the project manager, who I would assume to have obtained this from the director of the Plaintiff. The director of the Plaintiff through his own admission is a lawyer.*
21. *The reason the estimated contract sum was exceeded was because there were a number of variations to the contract and the drawings in respect of the works once works had commenced. Contrary to the allegations made by the Plaintiff’s director, Nemia and the project manager, the variations were approved from time to time by the project manager and the director of the Plaintiff either in writing or during our onsite meetings. The Plaintiff, its director and project manager was always aware of the variations directed by them to be undertaken by the Defendant. The variations were noted from as early as the second claim submitted by the Defendant. The plaintiff’s director was always provided my claims and the project manager’s certification. In*

fact, the Plaintiff's director himself had authorized a variation even after its bankers raised their concerns about the escalating contract cost! In understand from the advice of the Defendants 'solicitors, that certain allegations by the Plaintiff's director and project manager in their respective affidavits are tantamount to perjury for which I reserve the Defendants right to pursue at a different forum but call on the High Court to enquire into, in respect to the issues calling for determination in the pending applications. I understand these issues will be addressed by the defendants 'solicitors at the hearing of the pending applications. I now produce and annex some of the variations recorded or alluded to marked as "VK-9". I understand the Plaintiff did not disclose these vital facts when it moved this Honorable Court on an ex-parte basis.

22. *As to earlier, Nemia was brought in unilaterally. He was never involved with the works from the date of mobilization to the date the Defendant demobilized. He was not present at any of the site meetings I had with the Plaintiff's director and project manager. As alluded to earlier in this affidavit, my repeated requests to be present at any site inspection(s) were rejected, ignored and/or refused when Nemia was conducting his audit report. In fact, when I tried to access the work site after various allegations were made by the Plaintiff and Nemia, the Defendants' solicitors were advised and put on notice that I was trespassing. I now produce and annex a copy of the relevant correspondence marked as "VK-10". I reject Nemia's report for the reasons provided in this affidavit.*
23. *During the entire period of the contract (prior to the demobilization and deeming the contract terminated by the Defendant). The Defendant was never issued any defects scheduled nor any opportunity to rectify the defective works (if any existed).*
24. *The Plaintiff's witnesses now allege that there was no testing conducted for various components of the works. This is again blatantly false as the tests were conducted and the results were provided to the project manager and the Plaintiff's director as at the time of the submission of claims and certifications thereof. It is shocking to see how disorganized the Plaintiff and project manager's affairs are. I now produce and annex copies of results of some of the Tests conducted marked as "VK-11". Notwithstanding the fact that the Plaintiff's witnesses have been misleading in their respective affidavits, I note with concern that the fact of testing having been undertaken and the results provided to the relevant persons, were also not disclosed to the Honorable High Court when the Plaintiff moved it on an ex-parte basis.*
25. *As I alluded to earlier, there is no dispute as to the certified debt based on which the Defendant caused a statutory demand to be issued against the Plaintiff. The Plaintiff's director and project manager were always aware that the contract was on a "measure and value" basis. Bill of quantities were provided to them. The project manager was provided all the Defendants progress claims on that basis and which was approved including the works which were varied as discussed on site from time to time or otherwise in writing. I admit the project manager had advised at one stage that he was a bit*

unwell and finally up on his feet again, but I was never given any indication of the extent of his health issues nor advised that he was unable to conduct work. He was present in Fiji at all material times the Defendants first three claims were submitted. In fact, if I am not mistaken, I believe the project manager was also in Fiji when I had submitted the Defendant's fourth claim but the certification of it was delayed and which was later approved when he was overseas (at least to the extent of the partial certification). I never applied any pressure on the project manager to approve any certifications. Once the partial certification was issued, the Plaintiff made a part payment of the certified works. The project manager's health did not hinder him from exercising his duties as he would be on site for our regular meetings and clearly active via communication through emails. The project manager would also consume grog and socialize with the Plaintiff's director and I whenever he was in Fiji including on one occasion on site sponsored by me.

26. *The Plaintiff's attempt at showing there is a 'dispute' as to the certified debt is misleading and clearly an afterthought given the matters I have already alluded to in this affidavit. It seems to me that the Plaintiff is attempting to go back in time to the period when the contract was signed to vary the terms retrospectively which was previously agreed and reduced to writing. It also seems to me that the Plaintiff's complaints are really against the project manager and not against the Defendant. The Plaintiff owes the Defendant far greater than the certified debt sum which I understand from the legal advice provided to me, will be the cause of a separate claim. The Plaintiff's allegations are misleading because it is clear that both the Plaintiff and its project manager have completely mismanaged their budget and project in general. Purely for formalities sake, I now produce and annex correspondences in response to the project manager and Nemia marked as "VK-12".*

(23) In reply, Vijay Naidu states (Reference is made to paragraph (08) to (24) of the affidavit in reply sworn on 03.07.2020)

Paragraph 12

8. *I join issue with the Defendant and its witness Mr Kumar, and deny any inability to allow him to engage in the audit process thereby being undertaken.*

Paragraph 13

9. *The contents of this paragraph are objected to on the basis that the evidence as given is not in a form that is admissible concerning conversations with myself, and I will not respond to these matters in the form as deposed by the Defendant and its Manager; suffice to say that the Plaintiff does not accept the lack of assistance being provided, or for that matter that the Plaintiff was in error in neglecting to undertake the works as required. This is denied as a breach of the Plaintiff's obligation on whatever basis they are seen to be deposed to by Mr Kumar.*

Paragraph 14

10. *The contents of this paragraph are denied and in the absence of any evidence as to the alleged expenses, or for that matter the incurring of costs in the deployment of security, this paragraph is not admitted and, more importantly, denied on the basis that there is no evidence.*
11. *Further, paragraph 14 is objected to on the basis that the phrase “attempt to mitigate any further losses” is a question of law for this Honorable Court and not for this deponent to give an opinion on in the absence of any expertise, it being ultimately a legal issue which is solely within the cognizance of this Honorable Court as to the jurisdiction to so decide. Further, the phrase “the Defendant had deemed the contract terminated” is again an objectionable matter. In my capacity as an attorney, I take issue with the resort to this phrase as it is a question of law for this Honorable Court.*
12. *Further, the phrase “the Defendant had deemed the contract terminated” is again an objectionable matter. In my capacity as an attorney, I take issue with the resort to this phrase as it is a question of law for this Honorable Court.*

Paragraph 15

13. *Similarly, the assertion that the “certified debt was final and binding” is, with respect a nonsense emanating from this witness with no expertise professed either on the face of the affidavit or at all and, equally, is a question of law if at all for this Court and objected to as a matter to be deposed. The balance of the paragraph is objected to and any issue as to non-disclosure is denied.*

Paragraph 16

14. *The contents of this paragraph are denied and the last sentence is objected to on the basis that it is conjecture and/or speculation is utterly inadmissible in the manner it is deposed. I refuse to join issue with such a matter in the form that it is included within this affidavit. The final sentence as to doubting the solvency of the Plaintiff is also a matter of conjecture and, as such, inadmissible.*

Paragraph 17

15. *This paragraph is objected to as a matter that is not capable of disclosing a basis for disputation of the Plaintiff’s assertion that the work is defective and, as such, reveals an issue enabling a dispute to be found and for the demand to be set aside. Further, the paragraph as deposed to is in conjectural form and objected to on the basis that it is clearly indicative of inadmissible material and will be objected to at the hearing of the matter.*

Paragraph 18

16. *This paragraph is also objected to on the basis that what, if anything, the contract is a question of law, and not a matter for this witness to assert and determine in the absence of a ruling by this Honorable Court. The basis upon which the paragraph has been deposed to is, again, infected with conjecture and regrettably but respectively not requisite of a reply on account of its inadmissible form lacking any evidential basis.*

Paragraph 19

17. *This paragraph denied and the assertion as to the nature of the contract will be a matter for argument, not an assertion based on an ill-informed witness (with no disrespect intended) who has no professed expertise in terms of the assertion as to the nature of the agreement, when the agreement in writing speaks for itself.*

Paragraph 20

18. *This paragraph is objected to on the basis that it does not assert matters in an admissible form and as such is not responded to on account of the inadmissibility of the matters deposed to with respect to matters such as “.....who I would assume to have obtained this from the Director of the Plaintiff”- clearly a matter of conjecture – and more importantly when Mr Kumar rightly acknowledges that the Plaintiff’s Director was a lawyer and, as such, speaking from a position of expertise.*

Paragraph 21

19. *The deponent’s statement that:*

:....I understand from the advice of the Defendant’s solicitors that certain allegations by the Plaintiff’s Director and Project manager in respect of affidavits are tantamount to perjury for which I reserve the right to pursue at a different forum but call on the High Court to inquire into, in respect of the issues calling for determination in the pending applications”

is a scandalous statement and equally a waiver of legal professional privilege requisite of the Defendant being required to produce the legal advice that was given.

20. *Further, how it is that the Defendant through its Manager can assert that on legal advice, he has been informed that the Plaintiff and its witnesses have committed perjury is not only a matter of the utmost concern as to the manner in which it has been alleged, but appearing in an affidavit such as it does is of itself a gross abuse of process. It is a matter that requires this Court’s concerned consideration of the matters under which such a grave proposition could be advanced in respect of a civil dispute where the matters have neither been tried nor for that matter determined, and are being based upon an opinion given by legal advisors clearly as a waiver of the legal professional privilege attaching to the same.*

Paragraph 22

21. *The retention of my consultant engineer, Mr Nemia, was requisite to attend to the defective works. Bearing in mind that the Defendant had sought to terminate (without right) the contract, it had no further right to be on the premises and was, as asserted, a trespasser and not entitled to be there without the permission of the Plaintiff as the registered proprietor. In that regard, the paragraph is objected to on the basis of any assertion that the exclusion of the Defendant and its servant and agents was otherwise lawful.*

Paragraph 23

22. *The only time that the defects were discovered was after the contract had been terminated (purported by the Defendant which is not admitted, but rather it is asserted it was repudiated), and therefore any opportunity for rectification did not arise. In any event, on account of the gross and serious defects that have become apparent, there could be no trust given or confidence taken in the Defendant, its servants and agents undertaking the required rectification that has been at great cost to the Plaintiff.*

Paragraph 24

23. *This again is a matter of objection as to the matter in which it has been deposed, replete as it is with inadmissible evidence. In the circumstances, the Plaintiff says that there was no non-disclosure as there could be no disclosure until the matters were discovered. As to any “misleading” in the affidavits as filed, in the absence of the Defendant particularizing the matters in which these affidavits are misleading, this clearly objectionable statement is refuted and considered unfit to be responded to in the manner that it has been deposed. There can only be non-disclosure if the matter was capable of being disclosed. There have been numerous affidavits filed and there will be further material filed indicative of the defective workmanship of the Defendant, its servants and agents.*

Paragraphs 25 – 27

24. *These paragraphs are objected to as to the admissibility of the matters deposed to therein, and will be undertaken at the hearing of this matter.*

The subject of the statutory demand

- (24) Let me go back in time for a moment, as noted, on or about 2nd July, 2019, the defendant had entered into an agreement with the plaintiff to conduct various civil works on all that piece and parcel of land covered by Crown Lease No. 19843 located at Natabua, Lautoka. A copy of the agreement appears at annexure ‘VCN-1’ of the affidavit of Vijay Chand Naidu sworn on 19th December, 2019.

The plaintiff had engaged, and it was agreed, that a firm called ‘Cadastrals’ were to be the plaintiff’s principal consultant and certifying officer. The relevant correspondence leading up to the final terms appears at annexure ‘VK-2’ of the affidavit of Viren Kumar sworn on 23rd June, 2020.

The defendant mobilized on site on or about 1st July, 2019 and proceeded to conduct the required works. Between 1st July, 2019 and 2nd September, 2019 the defendant had submitted three progress claims which were all assessed, verified and certified by the certifying officer. The defendant was paid a cumulative sum of \$397,252.40 for the first three claims. Copies of the first three claims and certifications thereof appear at annexure ‘VK-3’ of the Affidavit of Viren Kumar sworn on 23rd June, 2020.

(25) The defendant then submitted its fourth progress claim on or about 1st October, 2019 and which was partially certified by the certifying officer on 9th October, 2019 to the extent of \$225,073.80. A copy of the relevant certification appears at annexure ‘VK-4’ of the Affidavit of Viren Kumar sworn on 23rd June, 2020. It is worth noting that the plaintiff paid a sum of \$110,000.00 against the partial certified sum of \$225,073.80 (See evidence of payment at annexure ‘VK-5’ of the Affidavit of Viren Kumar sworn on 23rd June, 2020). After the part payment, a sum of \$115,073.80 remained certified yet unpaid by the plaintiff and it is the subject of the Statutory Demand that the defendant issued on 16th December, 2019.

(26) The statutory demand is confined to what was assessed, verified and certified to be paid by the certifying officer Mr. Manoj Kumar. The defendant claims the balance sum due on Certificate of Payment for Provisional workers claim No: 11 of 09.10.2019 namely the fourth progress claim.

(27) Counsel for the defendant submits in paragraphs 2.9 of the written submissions filed on 13.11.2000;

“The final and binding nature of the certifications were acknowledged by the director of the plaintiff (see annexure VK-7 of the affidavit of Viren Kumar sworn on 23.06.2020)”

(28) On the other hand, the plaintiff argues that there remains a genuine dispute as to the subject of the statutory demand. Counsel for the plaintiff submits in paragraph 34 (2), (3) and (4) of the written submissions filed on 04.12.2020.

(2) *“The certification by the certifying officer of the plaintiff Mr Manoj Kumar Sharma is clearly not in circumstances where it can be taken that the certification was able to be relied upon as a document beyond dispute i.e. the certification. In that regard, neither Mr Kumar nor for that matter the Defendant’s legal representatives deal with Mr Sharma’s affidavit sworn 12 February 2020 and in particular paragraphs 18-21, which deal with the certification of the claims and more importantly in circumstances where Mr Sharma was suffering from a life-threatening renal condition and did not inspect the matters under consideration but rather relied on Mr Virend*

Kumar's insistence that the matter was in order and that Mr Kumar was "...badgering me incessantly, despite my ill health," As deposed to in paragraph 19. Virend Kumar does not even address these matters in his "concise" affidavit. In that regard, the "certification", for what it is worth is neither helpful but more importantly does not constitute a material non-disclosure. Equally, in item 2 as to non-disclosure, the Defendant and importantly its legal representative make the following submission:

"On a side note, the plaintiff, through its witnesses have also misled the Court and perjured themselves when they maintained no variations were approved by them and then later retracting that statement (after the Defendant has closed the variations) to say that other than that variation which the Defendant disclosed, there were no other variations approved!"

*To assert that people perjure themselves is not only an outrageous but equally disturbing allegation to be made by a legal practitioner in the absence of cross-examination but clearly infringes ethical rules of and concerning matters where findings of fact as to fraud, misconduct and more importantly, perjury are asserted in the absence of cross-examination: see, on this **Bradley v Matloob [2015] NSWCA 239**, where the court dealt with the finding of lying without putting it to a witness is a matter that cannot be so found. The ease with which the Defendant's legal representatives assert people perjured themselves is a very disturbing submission to be made, as it has been in this case.*

- (3) *With respect to item 3 as to non-disclosure, this is again explained by Mr Manoj Sharma in his affidavit sworn 12 February 2020 and does not bear, or for that matter have the imprimatur that it is inalienable in terms of the certification. It discloses a failure to appreciate that there is a dispute as to the factual basis upon which this certification was made and clearly was able to be the subject of a dispute and more importantly a claim sounding in the Notice to Complete and its abandonment by the Defendant.*
- (4) *As to item 4 of the material non-disclosures when one looks at VK-7, it can be readily seen that Mr Naidu says, and more importantly asserts contrary to what has been submitted, that:*

"Please be assured that I have full confidence in Mr Manoj Sharma, our Project Manager, and his decisions on these matters will be final and binding on me.

Westpac, the financier of this project will only action the claims against his own check and balances for obvious financial accountabilities."

Clearly, it was Sharma and ultimately what Sharma said that Naidu was minded to be guided but equally, Naidu also made it certain, in terms of giving Kumar Naidu's understanding as to the "finality" of the certification that Westpac were also, as the financier of the project, requiring their own

certification. It was Westpac that raised the financial irregularity that resulted in the questioning of the alleged partial certification and in that regard Manoj Sharma has already deposed in his affidavit, paragraphs 18-9 that he was overseas and could not, on account of his acute ill-health, certify what was to be undertaken and relied on Mr Kumar and when it became apparent that what Kumar had told him was not correct, that certification, albeit partially, as undertaken, had to be questioned and set aside.

In short, there was and remains a genuine dispute.”

I lay stress on the plaintiff’s words “*In short there was and remains a genuine dispute*”.

- (29) As distinct from a genuine dispute under section 517 (1) (a) of the Companies Act, 2015, the plaintiff alleges that by reason of;
- (c) The incomplete and defective workmanship undertaken by the defendant in the performance of the agreement.
 - (d) Service of the statutory demand dated 16.12.2019 on the plaintiff.

The defendant has evinced an intention that it no longer seeks to be bound by the agreement and as a result, the defendant repudiated the agreement. [See paragraph (14) of the further amended statement of claim].

Does the conduct of the defendant amount to repudiatory breach of contract? The term repudiation is used in different senses. First, it may refer to conduct which evinces unwillingness or an inability to render substantial performance of the contract. This is sometimes described as to conduct of a party which evinces an intention no longer to be bound by the contract or to fulfill it only in a manner substantially inconsistent with the party’s obligations. See; **Laurinda Pty Ltd v Capalaba Park shopping Centre Pty Ltd**⁹.

It may be termed as renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it. See; **Laurinda** (supra)¹⁰.

Secondly, it may refer to any breach of contract which justifies termination by the other party. See; **Carter, Breach of Contract, second edition**¹¹.

- (31) The defendant says; (reference is made to paragraph 14 of the affidavit in opposition of Viren Kumar sworn on 23.06.2020)

⁹ (1989) 166 CLR 623 at 634 per Mason CJ

¹⁰ at 659

¹¹ [1991] at 217

14. *Whilst the Defendant's request for clarification and payment was being ignored, delayed and/or refused, the Defendant was still incurring costs in having security deployed on site and machines on hire. Due to the lack of instructions and failure to pay on the part of the Plaintiff, the Defendant was thereof compelled to demobilize on or about 8th November, 2019 in an attempt to mitigate any further losses. The Defendant was prevented from further performance and on that basis the Defendant had deemed the contract terminated. I understand the Defendants' solicitors had also alluded to this in their letter dated 12th December, 2019.*
- (32) It would be irrational and unjust to bind the defendant to an ongoing contractual relationship notwithstanding the plaintiff's default to pay the certified sum. To be a case of repudiation in the sense of evincing an intention not to be bound, the case had to fall within what was described by Mason CJ, in *Laurinda* (supra), as "evincing an intention to carry out a contract *only* if and when it suits the party to do so". The question is whether, defendant, by its conduct, evinced an intention to perform the agreement only in a manner that suited it and no other way? What a reasonable person in the position of the plaintiff would have taken to be the intention of the defendant?
- (33) The principle that parties should ordinarily fulfill their contractual obligations not only underpins the law of contract, but comprises a basic assumption on which our society and its economy and well – being depend. It would be destructive of that assumption if one of the parties to an agreement could terminate it with relative ease. It is for that reason that strong grounds are needed to support unilateral termination of a contract. As professor Kevin Gray said, "Without something resembling rules of property and contract, the daily competition for the goods of life would readily descend into an orgy of seizure and violence". See; **Professor Kevin Gray, "There's no place like home"**¹² at 73.
- (34) As I said before, it would be irrational and unjust to bind the defendant to an ongoing contractual relationship notwithstanding the plaintiff's default to pay the certified sum. I seriously doubt that the conduct of the defendant, i.e issuing a statutory demand and leaving the site, amounted to a serious departure from the defendant's obligations under the agreement, as to be "sufficient to amount to repudiation".
- (35) It is important to remember that, significantly as I believe, the essence of the allegation made is that there is a dispute as to the factual basis upon which the certification was made.
- (36) The fourth claim submitted by the defendant on 01.10.2019 is in the sum of \$354,127.34. The project Manager, Mr. Monoj Kumar on 09.10.2019 issued a partial certification (annexure VK-4). It is reproduced below in full.

¹² [2007] 11 Journal of south Pacific Law, 73

CADASTRALS

Surveyors Planners & Project Managers

75 Drasa Avenue, Lautoka, Fiji. Ph: (679) 666 0988 Fax: (679) 666 2447 Email: cadsurvey01@gmail.com
Email: cojsharma@gmail.com

9th October 2019
Progress Payment-011/1115BUU/Transfield

To: The Accounts Manager
Westpac Banking Corporation
Vitogo Parade
Lautoka
Attention: Mr Anil Kumar

CERTIFICATION OF PAYMENT 11 – 9th October 2019

Re: **Biju Investments LTD Subdivision**
Lot 4 ND 5022 LD 4/7/1995 – SL 11610

In lieu of Civil Works carried out by Transfield Building Solutions (Fiji) Ltd:

To progress Claim 4 (Transfield) as at 3rd October 2019 pertaining to the supervised construction works as specified in the approved Engineering Plans of EDL per SL11610, with due reference to the attached Schedule of Prices and Payments.

Payments certified to date:

Total Contract Claims Certified for payment @ 9/10/2019	\$607,384.55
Value Added Tax:	(+)54,664.60
Gross Sum claimed to date:	\$662,049.15
Less 6% Retention:	(-)39,722.95
SUBTOTAL:	\$622,326.20 (vip)
Less Amount claimed/ paid previously:	\$397,252.40
Amount Payable as at 9/10/19	\$ 225,073.80 (vip)

Claim No 11 for Transfield Bid Solutions (Fiji) Ltd \$225,073.80 (vip)
Payable to Transfield or Mr Vijay C Naidu for disbursement

I hereby certify that the above claim above has been examined and verified as correct and due for payment in accordance with the provisional engineering requirements on Biju Investments Ltd Industrial subdivision and refers thus as Provisional Works Claim No. 11.
Manoj K Sharma
PROJECT MANAGER



- (37) I lay stress upon the words “I hereby certify that the above claim has been examined and verified as correct and due for payment in accordance with the provisional engineering requirements on Biju Investments Ltd Industrial subdivision and refers this as Provisional Works Claim No.11”
- (38) Following that part certification, the plaintiff without any marked reluctance, acted on it and paid a part payment in the sum of \$110,000.00 to the defendant. After the part payment, a sum of \$115,073.80 remained certified yet unpaid by the plaintiff which is the subject of the statutory demand.
- (39) Now the plaintiff turns around and disputes the certificate alleging that there is a dispute as to the factual basis upon which the certification was made and raised the following issues;
- (e) *Incomplete works and upgrading of substandard works – damages claimed \$181,000.*

- (f) *Non-delivered items on site for which claims have been made and in respect of which work has been neither provided nor the materials utilized yet claims were made include breach of the Agreement totaling \$64,833.7*
- (g) *Works and items delivered but outside the contract and in respect of which no authorization was obtained totaling \$21,765.37 and*
- (h) *Variation items which were clearly outside of the Bill of Quantities totaling \$148,703.20*

(40) Annexed to Viren Kumar's affidavit in opposition is a copy of an email from Mr. Vijay Naidu, dated 12. 10. 2019 (VK-7). The email is reproduced below in full;

Sat, Oct 12, 2019 at 11.07am

Vijay Naidu vijaynaidu48@gmail.com
To: Viren Kumar viren@transfeld.com.fj
Cc: Manoj Sharma nojisharma@fmail.com, Sharon@vijaynaidu.com, Anil Chand AChand@westpac.com.au

Dear Viren,

Your email is kindly noted.

Your workmanship and indulgences are greatly appreciated and my concerns of the escalating variations does not impact in any way whatsoever on my respect and trust in your efforts to complete the contracted works.

Please be assured that I have full confidence in Mr Manoj Sharma, our Project Manager, and his decisions on these matters will be final and binding on me.

Westpac, the financier of this project, will only action the claims against its own chek and balances for obvious financial accountabilities.

*Vinaka and kind regards,
Vijay Naidu*

*Principal
1 Valetia Street,
P.O. Box 971,
Lautoka,
Fiji Islands.*

[Emphasis added]

(41) On the hearing of the summons, a vigorous attempt was made by the plaintiff to throw off the shackles which Cadastrals stamped on them. Counsel for the plaintiff submits in paragraph 34 (4) of the written submissions that;

“Naidu also made it certain, in terms of giving Kumar Naidu’s understanding as to the “finality” of the certification that Westpac were also, as the financier of the project, requiring their own certification. It was Westpac that raised the financial irregularity that resulted in the questioning of the alleged partial certification....”

- (42) There is a fallacy involved in that argument. I turn to the contract in this case. What do I find? The contract says;

*“Payments shall be made by the principal on a monthly basis upon full satisfaction and certification of all claims submitted by the contractor for the requisite civil works carried out for that month. **All certification of claims shall be made by the principals consultant “Cadastrals”.**”*

[Emphasis added]

- (43) There are strong reasons why the Westpac cannot vitiate the certificate. I may point out that according to the contract; the only certifier to certify the claims on whom the parties have agreed is Cadastral. Manoj K Sharma is the principal of Cadastrals. The parties have not agreed on any other certifiers. Therefore, according to the Contract, Westpac cannot be reasonably allowed to place their certification. There is no contractual term allowing Westpac to make a certification. There is no provision in the contract for certification by the Westpac. Therefore, Westpac cannot seek to trespass upon the Cadastral’s territory. The certification is entirely within the province of Cadastrals because the parties have so provided. Therefore, Westpac cannot vitiate the certification of Cadastrals. The parties are bound by the certification of Cadastrals in absence of fraud or dishonesty on the Cadastrals part. Fraud or collusion unravels everything. The plaintiff does not allege fraud or dishonesty against Cadastrals. That being so, in the eye of the law, there is an obligation to pay the balance certified sum.

The effect of the contractual provision set out in paragraph (42) above is that the Cadastrals must be satisfied as to the quality of all materials and the standard of all workmanship and form the opinion that they confirm to those required by the contractual terms. For example, the Cadastrals must be so satisfied before it certifies a payment and issues a certificate under the clause mentioned in paragraph (42) above. In so far as approval of the quality of any of the materials or of the standards of any of the workmanship is inherently a matter for the opinion of Cadastrals.

When parties have agreed that the Cadastrals shall decide matters between them, they are not allowed to in the absence of fraud to go behind the decision of the Cadastrals upon such matters merely because they are dissatisfied with it.

There are no contractual duty, express or implied , owed by the defendant to Westpac in respect of the quality of materials and the standard of all workmanship.

In this case, I am satisfied that the amount certified by Cadastrals as payable, in Certificate of Payment for Provisional Workers Claim No-11 of 09.10.2019, namely the fourth claim of the defendants, is conclusive as to the quality of materials or the standard of works. I venture to say that the plaintiff is not entitled any abatement of the certified sum and is not entitled to rely in any of the matters raised in the plaintiff’s statement of claim and set-off. I venture to say that the each of the matters raised by the plaintiff (see paragraph 39 above) are inherently matters for the opinion of the Cadastrals and Ms. Ravai, counsel for the plaintiff did not make any submission to the contrary. In my judgment, therefore, the Certificate of Payment for Provisional Workers Claim No-11 of 09.10.2019 is conclusive as to each of those issues raised by

the plaintiff. The plaintiff is not entitled to any abatement of the sum certified by Cadastrals and is not entitled to rely on any of the matters raised in the statement of claim or set-off. I am satisfied that there is no genuine dispute or set –off to the amount certified in the fourth certificate and the amount certified shall become a debt payable by the plaintiff to the defendant. The court is precluded from going behind the certificate to consider the nature of the dispute or to form a view on whether the dispute is genuine. The works have to be carried out by the defendant to the satisfaction of Cadastrals and accordingly Cadastrals must give or withhold its expression of satisfaction. Cadastrals may notify defects and require them to be made good. If in the contracts such as this the parties agree that the Cadastrals certificate shall be conclusive evidence on certain matters there is no any invasion of the courts Jurisdiction. The court’s function in a civil case is to adjudicate between the parties, and if they have agreed that a certain certificate shall be conclusive evidence the court can admit the evidence and treat it as conclusive. It is a question of construction in each case to determine whether it was intended that a particular certificate should be conclusive upon the matter with which it purports to deal. ¹³

- (44) In my view, Westpac cannot vitiate the certification of Cadastrals in the absence of fraud or collusion. The task of certification is expressly given to Cadastrals by the parties. The court cannot rewrite the Contract. The court should not wear blinkers. Cadastrals is appointed by the plaintiff. There is a general rule that a person employed to perform duties of a professional character is liable in damages if he causes loss to his employer by failure to take due care or to exercise reasonable professional skill in carrying out his duties.

That is, indeed, the theme that runs throughout the speeches in Sutcliffe v Thackrah¹⁴.

- (45) Cadastrals should use reasonable care in issuing certificates in respect of work performed by the Contractor i.e. the defendant. Being employed by and paid by the plaintiff, Cadastrals has in diverse ways to look after the interests of the plaintiff. The Cadastrals owed a duty to its employer, the plaintiff, to exercise care and skill in giving certificates. The plaintiff became obliged under the building contract to pay the amount that its certifier certified. The Cadastrals duty is to act fairly when exercising its professional skill in considering whether work done satisfied the contract requirements as to work to be done. If Cadastrals by negligence, issues a certificate for far more than the proper amount, and thereby causes its client, the plaintiff a serious loss, is there any reason why Cadastrals should not be liable to its employer, the plaintiff for negligence and duty of care?
- (46) As I understand the affidavit evidence of Manoj Kuamr Sharma, he had not supervised the execution of the work of the defendant and improperly allowed certain items in blinkers or in a vacuum and had consequently certified for a larger amount than he ought to have done. The negligence being that he had not supervised the

¹³ See; (1) Keating’s Building Contracts, 5th Edition, 1991, p107. (2) Jones and Bergman, A Commentary on the JCT Intermediate Form of Building Contract, 2nd Edition, 1990, p 220.

¹⁴ (1974) A.C. 727

execution of the work with proper skill and diligence, and had improperly certified for a larger amount than he ought to have done. He was employed and paid by the plaintiff as his agent to certify to him whether the contract work was properly done, and the contract price of it had therefore been earned. The action against the certifier, Cadastrals is for negligence. The alleged negligence being that Cadastrals had certified for;

(A) Incomplete work

(B) Non-delivered items on site

(C) Works and items delivered outside the contract

(D) Variation items which were clearly outside the Bill of Quantities

From which damages ensued to its principal, the plaintiff. Cadastrals would be prima facie liable to an action for negligence for negligent measuring up the work and certifying causing damage. That being so, there is an obligation to pay the balance, sum due on Certificate of Payment for Provisional Works Claim No. 11 of 09-10-2019. No legal basis was articulated on which the alleged incomplete, non-delivered variations, and set off invalidated any obligation of the plaintiff to pay the balance sum due on final and binding effect of Certificate of Payment for Provisional Works Claim No. 11 of 9.10.2019. That might, in some circumstances, occur when there was a total failure of consideration under the contract; when there was a case to set aside the contract for fraud is established; or where the court can grant relief setting aside the relevant contractual obligations under the misleading and deceptive conduct provisions. However, (Ms) Ravai did not submit that the Company relied on any such cause of action.

- (47) Cadastrals partially certified the fourth claim of the defendant with the knowledge that its certification in relation to the execution of the work of the defendant is to determine the amount to be paid for the execution of the work under contract and is liable to be sued if it makes its certification negligently.
- (48) Cadastrals may be sued for negligence if its negligence certification has caused loss to the plaintiff. Certain duties of care in relation to the certification were incumbent on Cadastrals. Just consider what Cadastrals, the certifier of the plaintiff, is called upon to do, what were their legal obligations in that regard. The Cadastrals undertook to measure up from time to time the work done for its principal by the contractor, and to certify the amount in money the work represented, and in particular on completion of the work to certify the balance payable. For this work, Cadastrals was to be paid by its principal. It would follow that, if in doing that work, for which Cadastrals was to be paid by its principal, it was guilty of negligence by measuring the work in an incorrect manner, thereby issues a certification for far more than the proper from which damage ensued to its principal, it would be prima facie liable.

- (49) Their failure to carry out those obligations has caused loss to the plaintiff. Cadastrals has a duty to act with care with regard to the plaintiff. It appears to me that there is a breach of that duty causing loss to the plaintiff. Public policy in general demands that such loss should be made good to the party to whom the duty is owed by the person owing the duty.
- (50) I entertain no doubt that, that in this case, the certifier, Cadastrals may be sued for negligence if its negligent certification has caused loss to the plaintiff.
- (51) As I said in paragraph (43) and (44), the parties were contractually bound by the Certificate issued by the agreed certifier, the Cadastrals, which had been acted on by both parties and in the absence of proof of fraud or dishonesty on the Cadastrals part, the certificate is final and binding. It is important to remember that the plaintiff does not allege fraud or dishonesty against the Cadastral. In the current climate, I fail to see how the offset and the discovery of subsequent breaches of contract enable the plaintiff to depart from the final and binding effect of the certification? Of course, I am not blinkered and bridled by the decisions of other jurisdictions addressed to the issue of setoff and breach of contract. All I am saying is that the final and binding nature of the certification should at least be given its proper operation to achieve its apparent purpose and allow the defendant to come at justice. These are commercial transactions negotiated by parties at arm's length. It is extremely unlikely that the defendant would have agreed to anything unless it was deemed favorable to its financial interests. With respect, to suggest that, "the offset and the discovery of subsequent breaches of contract enable the plaintiff to depart from the final and binding nature of the certification", would stretch the judicial imagination quite unreasonably. I intend no disrespect, if I say that, I find it difficult to visualize such a case in practice. It is better to go as far as possible towards justice than to deny it.
- (52) In the result, it is difficult for me to resist a conclusion that, there is no plausible argument to be made for the plaintiff's contention against the partial certified sum of \$225,073.80. I am not satisfied that there is a genuine dispute between the plaintiff and the defendant about the existence or amount of the debt to which the demand relate. The amount of \$115,073.80 is due and payable and there is no genuine dispute about the existence or amount of the debt.
- (53) It follows from the foregoing that the defendant is entitled to give a statutory demand pursuant to Section 515 of the Companies Act for the balance sum due on certificate of payment for provisional works claim no. 11 of 09.10.2019 and if the plaintiff fails to satisfy the demand, to present a petition for the Winding up of Biju Investments PTE Limited.
- (54) That being so, the order of Tuilevuka J granting an injunction restraining the presentation of a Wing up petition cannot be allowed to stand and should be dissolved.

ORDERS

- (1) The application to set aside the creditor's statutory demand is declined.
- (2) The ex-parte interim injunction granted on 23.12.2019 is set aside.
- (3) I award costs of the application to the defendant summarily assessed in the sum of \$2,000.00.

.....
Jude Nanayakkara
[Judge]

High Court - Lautoka
Friday, 29th January 2021.