IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU0019 OF 2023
[Lautoka Civil Action No: HBM 63/20]

BETWEEN : **RAJEND INVESTMENTS LIMITED**

Appellant

AND : **RAJENDRA PRASAD BROS PROPERTIES LIMITED**

Respondent

Coram : **Qetaki, JA**
Morgan, JA
Andrews, JA

Counsel : **Mr C.B. Young for Appellant**
Ms S. Devan for Respondent

Date of Hearing : **15 May, 2024**

Date of Judgment : **30 May, 2024**

JUDGMENT

Qetaki, JA

Background

[1] In this appeal, the appellant, Rajend Investments Limited,[1] is seeking to set aside the ruling of Seneviratne, J delivered on 10 March 2023 at the High Court, Lautoka in Companies Action No.63 of 2020 *("the ruling*").

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[1] For ease of reference, where it is not apparent from the context that "appellant" refers to Rajend Investments Ltd, and "respondent" refers to Rajendra Prasad Brothers Properties Ltd, the parties will be referred to by their names, rather than by their status at the various stages of the proceedings.

[2] Approximately 5 years prior to the ruling, the respondent, Rajendra Prasad Bros Properties Limited, as plaintiff in Civil Action No.183 of 2018 at the Lautoka High Court, issued proceedings against Rajend Investments Limited based on a Deed of Covenant dated 30 June 1980 ('the Deed') for which it sought specific performance of an agreement, or alternatively damages for breach of agreement. In a judgment delivered on 25 May 2020, Justice Ajmeer ordered:

> *"1. There shall be an order against [Rajend Investments] for specific performance of the Deed dated 30 June 1980.*
>
> *2. [Rajend Investments] shall do all things necessary to perform Clause 2 of the Deed dated 30 June 1980 within 2 months from the date of this judgment.*
>
> *3. [Rajend Investments] shall pay [Rajendra Prasad Bros] the summarily assessed costs of $2,500.00 within 2 months from the date of this judgement.*
>
> *4. [Rajend Investments'] counterclaim is dismissed."*

[3] Subsequent to the above judgment, on 6 November 2020 the respondent was served with a statutory demand issued by the appellant demanding the sum of <u>$64,350.93</u> purportedly paid by the appellant for the respondent for city rates and ground rental up to end of 2020.

[4] In response, the respondent filed an application for setting aside the statutory demand in the High Court at Lautoka (Companies Action 63 of 2020), where the ruling now being appealed against, was handed down on 10th March 2023 in which the learned judge, Seneviratne, J ordered:

> *"1. The Statutory Demand dated 6th November2020 is set aside.*
>
> *2. [Rajend Investments] is ordered to pay [Rajendra Prasad Bros] $5000.00 as costs*."

[5] Not being happy with the said order, the appellant, on 28/03/23 filed a notice of motion and grounds of appeal seeking an order that the judgment be set aside to allow it to file

its application to wind-up the respondent, pursuant to the statutory demand issued under section 515(a) of the Companies Act 2015, upon the grounds set out below:

[6] **Grounds of Appeal**

1. *The learned Judge erred in law and in fact when His Lordship held in paragraph 10 of the judgment that the Appellant (Respondent in the High Court below):*

   "failed to comply with the terms and conditions in the Deed and [Rajendra Prasad Bros] filed a civil action in the High Court and obtained a judgment against [Rajend Investments]. In the said judgment the High Court made the following orders:

   (1) There shall be an order against [Rajend Investments] for specific performance of the Deed dated 30 June 1980.
   (2) [Rajend Investments] shall do all things necessary to perform clause 2 of the Deed date 30 June 1980 within 2 months from the date of this judgment.
   (3) [Rajend Investments] shall pay [Rajendra Prasad Bros] the summarily assessed costs of $2,500.00 within two months from the date of this judgment.
   (4) [Rajend Investments'] counter claim is dismissed."

   when this was not so.

2. *The learned Judge erred in law and in fact when His Lordship held in paragraph 11 of the judgment:*

   "[Rajend Investments] without complying with the orders made by the court against him served the statutory demand claiming $64,350.93 as city rates and ground rental."

   when the Respondent (the Applicant in the High Court below) was contractually obligated to pay city rates and ground rental for occupation and use of that part of the land comprised in State Lease No. 831649 (previously Crown Lease No.26318) when it was bound to do so pursuant to the Deed of Covenant dated 30 June 1980 and Sublease executed by [Rajend Investments] pursuant to the Deed of Covenant and sent to [Rajendra Prasad Bros'] solicitors on 24 July 2020 for [Rajendra Prasad Bros'] execution.

3. *The learned Judge erred in law in failing to address both the written and oral submissions of the Appellant (the Respondent in the High Court below) made before His Lordship.*

<u>Case for the appellant</u>:

[7] At the outset, as an overriding submission, the appellant submits that it cannot discern how the learned judge arrived at the conclusion that it had failed to comply with the terms and conditions of the Deed, and more particularly, the doing of things that ought to be done by it under the Deed, as stated in paragraphs [10] and [11] of the impugned judgment. He referred to correspondence between the parties' solicitors following the judgment of Ajmeer J on 25 May 2020. I refer further to this correspondence, below.

[8] The appellant submits that the learned Judge thought it was "*absolutely clear that there is a genuine dispute as to the amount of the debt claimed.*" It follows, that the only issue, is whether clause 2 of the Deed was complied with, as the learned judge did not address any other issues in setting aside the demand notice.

[9] Additionally, the appellant submits**,** clause 2 of the Deed obligated it to:

> *… grant a fresh sublease for Lot 1 section 13 to the Respondent for the period of the extended or renewed lease less one month and upon other like terms and condition as are contained in that extended or renewed lease except rental which shall be apportioned between Lots 1 and 2 equally or in such other proportion as the parties may agree between them.*

[10] The original lease, acquired by the respondent on 18 April 1979, is for a period of 72 years from 1st January 1943 lease No. 26318 which expired on June 2015 (page 24-29 of Vol.1 High Court Record ("Record") ; the sublease No. 28651 over lease 26318) (See Record v1 p33], expired on 31st day of December 2015. The appellant submits that the obligation that it had to comply with was the issuing of a new sublease over the new lease No.831649 (page 37-42 of v.1 Record).

[11] Focusing specifically on <u>Grounds 1 and 2,</u> the appellant referred to various letters and email communications, to demonstrate that it had complied with the obligations in clauses 2 and 3 of the Deed. These include:

(i) Letter dated 29 June 2020 from Young & Associates to Neel Shivam Lawyers [pages 117-119 of Vol 1 Record];

(ii) Letter dated 6 July 2020 from Young & Associates to Neel Shivam [page 120 of Vol.2 Record];

(iii) Email correspondence dated 6 July 2020 to Neel Shivam and the reply from Shoma Dewan of Neel Shivam dated 8 July 2020 [page 121 of Vol.1 Record];

(iv) Letter dated 20 July 2020 from Young & Associates to Neel Shivam [page 122 of Vol.1 Record];

(v) Letter dated 24 July 2020 from Young & Associates to Neel Shivam [page 123 of Vol.1 Record];

(v) Sublease duly executed [page 124-130 of Vol.1 Record];

(vi) Letter dated 24 July from Neel Shivam to Young & Associates [page 131 of Vol.1 Record];

(vii) Letter dated 24 July 2020 from Young & Associates to Neel Shivam [page 137 of Vol.1 Record];

(viii) Letter dated 27 July 2020 from Young & Associates to Neel Shivam [page 132 of Vol.1 Record];

(ix) Letter dated 20 November 2020 from Neel Shivam to Young & Associates. [page 83 of Vol.1 Record];

(x) Letter dated 26 November 2020 from Young & Associates to Neel Shivam. [page 133-135 Record].

[12] The appellant submits that this communications/correspondence and the affidavit evidence before the High Court establish that the respondent:

(i) does not deny being liable for its share of the city rates and ground rental, and

(ii) has not denied receiving the sublease (within 2 months of the High Court Judgment dated 15 May 2020), which was executed by the appellant in compliance with the Deed and the judgment for specific performance.

[13] The appellant submits that the above factors were ignored by the learned judge when he came to the conclusion that that it did not comply with the terms and conditions of the Deed and the judgment. Further, it submits that the learned judge gave no explanation or reasons for coming to that conclusion.

[14] The appellant submits that the respondent:

(a) does not dispute the amount set out in the Schedule of the statutory demand as it did not offer any credible evidence that the amount claimed was excessive and/or incorrect;

(b) accepted that it had received the Sublease already executed by the appellant and has not disputed the contents of the Sublease, nor even asserted that any part of the Sublease was not in *"like terms and conditions as are contained in the extended or renewed lease."*

(c) It further submitted that the lease No.26318 obligated the lessee to pay all town rates and ground rental owing in respect of the property and before the proceedings in the High Court Civil Action No. HBC 183 of 2018 filed by the respondent against the appellant, the appellant had been paying its portion of town rates and rental up to 2016.

[15] The appellant submits that clause 9 is a relevant term and condition in Lease No.831649, and states:

> *9. The lessee shall bear, pay and discharge all rates, taxes, assessments, duties, impositions and out goings whatsoever which may be imposed or charged now or in the future upon the demised land or the buildings to be erected thereon or payable by either in respect thereof.*

[16] Further, the appellant submits that part of the recital of Lease 831649 made reference to the covenants and powers implied under the Land Transfer Act, and the Property Law Act. Section 90 of the Property Law Act provides:

> *90. In every lease of land there shall be implied the following covenants by the lessee, for himself, his personal representative, transferees and assigns with the lessor and his personal representatives and transferees:*

(a) *that he or they will pay the rent thereby reserved at the time therein mentioned.*

[17] The appellant submits that the High Court Judge did not consider any of its submissions to the High Court in relation to the application to set aside the statutory demand dated 3 February 2021 (page 491-529 v.2 Record) and submissions dated 10 February 2023. (pages 638-667 v.2 Record).

[18] It further submitted that it had complied with the requirements under sections 516 and 517 of the Companies Act, and that Grounds 1 and 2 have been made out.

[19] On Ground 3, the appellant relied on **Wrigley v Holland** [2002] NSWCA 109 where Justice Handley at paragraph 16 explained the obligation of a judge in dealing with the counsel's argument:

> *16. The Judge, in exercising his discretion, was bound, as a matter of law, to take into account the claim advanced by the worker's counsel in argument, and if he decided to disregard that claim and award substantially more, he was bound to give adequate reasons for doing so. He either failed to take this consideration into account or failed to give his reasons for disregarding this submission and on either view he erred in law. See Australian Wire Industries Pty v Nicholson (1985) 1 NSWCCR 50 at 56-7 per McHugh JA. This Court should assume that the Judge has complied with his duty to give reasons, and if he has not referred to a material matter, the Court should conclude that he did not consider it was material. See Sullivan v Department of Transport (1978)20 ALR 323, 353 per Fisher J; Baldwin Francis Ltd v Patents Appeal Tribunal (1959) AC 663,693 per Lord Denning*

[20] This case was cited with approval in **Airports Fiji Limited v Permanent Secretary for Labour, Industrial Relations & Productivity** [2009] FJCA 61; ABU0070. 2007. Similar sentiments have been expressed by the Supreme Court in Fiji in **New Zealand Pacific Training Center Ltd v Training & Productivity Authority of Fiji** [2011] FJSC 3; CBV0016.2008 at paragraph 3.9 and 4.0 of the judgment.

[21] In concluding, the appellant asks that the ruling under appeal should be set aside, that the respondent is to pay for the costs of the appeal of $3000.00 (as per security for costs paid)

and the costs of the High Court below of $2,500.00. It further asks that the matter be reverted to another Judge to hear the application for winding up (which Rajend Investments is to file and serve within 28 days from the date of the judgment of the Court in this appeal).

[22] At the hearing, counsel for the appellant confirmed that the Deed is relevant to the dispute; and that clause 2 is central to the appellant's case. He submits that the appellant complied with the Court Order and refutes the claim that it had breached the order of the Court. Counsel submits that the respondent did not complain about the conditions of the new sublease. He submits that the appellant had been paying the city rates all the time, and that the city rates and ground rental apply to both Lots 1 and 2 and need to be apportioned.

[23] Counsel submits that the calculation of the city rates and ground rental cannot be discredited. He submits that the respondent has not shown that there is a genuine dispute in the 'debt' and asks, if there is such a dispute, what is it? If it is the amount that is incorrect, what can be done to address that?

[24] Counsel for the appellant tendered the appellant's written reply to the respondent's submissions at the end of his oral submissions at the hearing. This will be considered later in this judgment.

Case for the Respondent

[25] On the other hand, in its written submissions the respondent submits as follows:

On Ground 1, the respondent submits that the relevance of the Deed made on 30 June 1980 is of material consideration for establishing whether there is a genuine dispute about the existence of the '*debt'* claimed in the statutory demand. The Deed's relevance arises from the fact that the sum of $64,350.93 claimed by the appellant in the statutory demand is for city rates and ground rental arrears *"pursuant to the Deed of Covenant dated 30 June 1980 for Lot 1 in Lease No.831649."*

[26] Clause 2 of the Deed states:[2]

> *The second transferee hereby agrees and undertakes that in the event of sublease 28651 expiring before the issue of a direct and a separate new lease for Lot 1 to the first transferee obtaining an extension or renewal of Lease 23618 for Lots 1 and 2 then the second transferee shall grant a fresh sublease for Lot 1 Section 13 to the first transferee for the period of the extended or renewed Lease except rental which shall be apportioned between Lots 1 and 2 equally or in such other proportion as the parties may agree between them.*

[27] The respondent submits that, as deposed by Ashniel Sandeep Chand by Affidavits dated 27 November 2020 and on 5 July 2022 (Refer pages 17 to 110 v. 1 Record, and pages 556 to 618 v. 2 Record), the respondent has explained in detail the relationship and dealings between the appellant and the respondent. That is, the Deed:

(a) was made because both the appellant and respondent had a vested legal interest in the respective lots that they occupied and used. Both the parties anticipated that at some point the head lease No. 26318 would expire and it became critical that both companies' interest in their respective lots remain secured;

(b) after the Deed Rajendra Prasad, Director of the appellant executed a transfer of Lease No.26318 in favour of the appellant on 30 June 1980 which transfer was registered on 19 September 1980 with the Office of the Registrar of Titles;

(c) the appellant proceeded to obtain a fresh head lease on 2 August 2016 from the Director of Lands in respect of Lots 1 and 2, Section 13, legally described as State Lease 831649;

[2] There was no dispute that the "first transferee" in the Deed referred to the respondent in this appeal, and the "second transferee" referred to the appellant in this appeal.

(d) having obtained a fresh head lease, the appellant failed to comply with the covenants of the Deed, in that it did not issue a separate lease or a sublease to the respondent over Lot 1; and

(e) the respondent then filed legal action (Civil High Court Action No. HBC 183 of 2018) seeking an order for specific performance of the Deed. (Refer page 57-77, v.1 Record).

[28] The respondent submits that the High Court, after a full trial, gave orders for specific performance of the Deed. The respondent noted that the appellant did not give any evidence at the trial as noted by the trial Judge (page 58, v.1 Record).

[29] The respondent submits that the learned judge did not make an error in holding, in the ruling on the respondent's application to set aside the statutory demand, that there was non-compliance with the Deed by the appellant. The respondent submits that it would appear that the appellant is suggesting that, there was compliance (by the appellant) with the Deed after the High Court judgment dated 25 May 2020, thereafter a right to demand city rates and ground rental was justified. The respondent submitted that clause 2 of the Deed holds the key to the dispute.

[30] The respondent submitted that clause 2 of the Deed:

(i) required the appellant to take steps to cause a direct and separate new lease to be issued for Lot 1 issued to the respondent; and

(ii) did not specify in any detail how parties were to be responsible for any city rates or ground rents accrued for Lot 1 and Lot 2. However, it did say ground rental was to be apportioned between Lot 1 and Lot 2 equally or in such other proportion as the parties may agree between them.

[31] Ashniel Chand indicated in his Affidavit that no apportionment had taken place between the parties nor any agreement was arrived at as to what proportion each

party would pay for ground rental, and that the appellant, not having complied with the judgment and the Deed, was not in a legal position to make a demand that city and ground rental from 2016 onwards be paid by the respondent.

[32] The respondent also contends that the affidavit of Ashniel Chand in reply contained a detailed account of the correspondence and liaisons between the parties, post judgment. (paragraph 4 of affidavit in reply- page 300-302 v.1 Record). As well, on 10 June 2020, a letter was sent to the appellant's solicitors requesting that a survey be proceeded with for the subdivision of the State Lease No.831649, and to apply for separate leases for both the lots.

[33] The respondent argues that since both the appellant and the respondent had exclusive use of their respective lots, it only made commercial sense that each had their own separate lease. It submits that it had undertaken consultation with the Director of Lands to apply for a separate lease and had received an offer for separate lease over Lot 1.

[34] Finally, the respondent submits that the statutory demand was issued by the appellant while correspondence between the parties on a leasing arrangement was still continuing.

Defects in the Statutory Demand dated 6 November 2020

[35] Numerous alleged defects of the statutory demand have been identified by the respondent as listed in paragraphs 5.13(ix) to (xvi) of the respondent's submissions. These include the following:

(a) anomalies or defects found in the schedule to the statutory demand which failed to provide any detail on payments that were actually made by the respondent;

(b) the schedule failed to provide a breakdown of the specific components of the $64,350.93 in terms of amount owed for city rates, and ground rental

allegedly paid by the appellant with respect to Lot 1, bearing in mind that the appellant is aware that the respondent does not use or occupy Lot 2.

[36] The respondent submits that prior to the High Court judgment granting specific performance in Civil Action No. HB183 of 2018, the appellant had never demanded payment of city rates or ground rates to be paid by the appellant. It submitted that this brought into question the appellant's conduct and intention in so far as the compliance of the Deed was concerned.

[37] The respondent refers to Ashniel Chand's statement in his affidavit, that the reason for the appellant not demanding city rates or ground rental prior to the High Court judgment aforesaid was clear, as any payments by the respondent in relation to the property outgoings would have given rise to a legal interest for the respondent, something which the appellant was avoiding.

[38] The respondent submits that Ashniel Chand's said affidavit provided documentary evidence for payments that the respondent undertook for city rates and ground rental for both the Lots prior to the expiry of the head lease and the lease No. 28651. It noted that Ashneil Chand had deposed that an amount of $38,210.22 for both the lots had been paid from around 1998 until 2012, and in the circumstances, the respondent was entitled to a set off.

[39] The respondent submitted that the appellant needed to comply with the judgment for specific performance, and the terms of the Deed, and the apportionment of ground rental (if any) would be a process that would subsequently follow. How the apportionment or the agreement would be reached will be a matter for the parties and not for the Court to enforce: the respondent referred to **Litigation Insurance of Pty Limited v Australian Insolvency Group Pty Limited** [2017] NSWSC 334, and **Panel Tech Industries v Australian Skyreach 9 (No.2)** [2003] NSWSC 896 at page 17-18 and submitted that they are authority for the proposition that the Court is not required to engage in a rigorous or detailed exercise pf examining the

evidence relating to the claim in the demand. The Court is required to determine whether there is factual evidence that may require further enquiry to establish the truth of the demand.

[40] **Ground 3:** The respondent submits that the principle established in the case **Britten-Norman Pty Limited v Analysis & Technology Australia Pty Limited** [2013] NSWCA 344 at paras. 30-36 applies in this case;

> *…that there must be evidence that satisfies the Court that there is a serious question to be tried , or an issue deserving of a hearing , or a plausible contention requiring investigation of the existence of either a dispute as to the debt or an offsetting claim.*

[41] The respondent submits that the lower Court was entitled to rely on the affidavit evidence before it and not just rely on submissions which, it submits, were ornate; that the learned judge had before him comprehensive affidavits which described in great detail the material facts showing that there was a genuine dispute between the parties.

[42] The respondent submits that the learned judge was satisfied on the affidavit evidence that a genuine dispute on the debt has been established.

[43] The respondent further submits there was no miscarriage of justice or error in law committed by the learned High Court judge given the judicial task he was required to undertake in so far as the application of section 516 of the Companies Act is concerned.

The Law

[44] **Court of Appeal Act-Section 12 (1) states**:

> *(1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal-*
> *(a) from any decision of the [High Court] sitting in the first instance, including any decision of a judge in chambers;*
> *(b) ……………………….*

(c) On any grounds of appeal involves a question of law only, from any decision of the [High Court] in exercise of its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal.

[45] **<u>Section 13- Powers of Court of Appeal in civil appeals</u>**

For all the purposes of and incidental to the hearing and determination of any appeal under this Part and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the [High Court] and such power and authority as may be prescribed by rules of Court.

[46] **<u>Companies Act 2015</u>**: Division 2 of the Act applies to cases in which a company may be wound up by court, and Division 3 to applications to set aside a statutory demand. The relevant sections are as follows:

<u>Section 515 Definition of inability to pay debt</u>

Unless the contrary can be proven to the satisfaction of the court, a company must be deemed to be 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 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; or…………

<u>Section 516 Company may apply</u>

(1) A company may apply to the court for an order setting aside a statutory demand served on the company.
(2) An application may only be made within 21 days after the demand so served.
(3) An application is made in accordance with this section only if, within 21 days-
(a) an affidavit supporting the application is filed with the court; and
(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company.

Section 517 Determination of application where there is a dispute or offsetting claim

(1) This section applies where, on an application to set aside a statutory demand, the court is satisfied of either or both of the following –

(a) 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;
(b) the company has an offsetting claim.

(2) The court must calculate the substantiated amount of the demand.

(3) If the substantiated amount is less than the statutory minimum amount for a statutory demand, the court must, by order, set aside the demand.

(4) If the substantiated amount is at least as great as the statutory minimum amount for a statutory demand, the court may make an order -

(a) varying the demand as specified in the order; and
(b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company.

(5) The court may also order that a demand be set aside if it is satisfied that-
(a) because of a defect in the demand, a substantial injustice will be caused unless the demand is set aside; or
(b) there is some other reason why the demand is set aside.

Section 518 Effect of order setting aside statutory demand

A statutory demand has no effect while there is in force an order setting aside the demand.

Discussion

[47] **Grounds 1 and 2:** These grounds challenge the finding in paragraphs [10] and [11] of the ruling of Seneviratne J, delivered on 10 March 2023. It calls for a close examination of the said paragraphs and their context. In paragraph [10], the learned Judge stated:

> *The respondent failed to comply with the terms and conditions contained in the Deed and the applicant filed a civil action in the High Court and obtained judgment the respondent. In the said judgment the High Court made the following orders;*

1………………………….

2…………………………..

3…………………………

4……………………………….

5. …………………………” (Underlining is for emphasis.)

[48] The learned judge had cast his mind on the statutory demand, especially the schedule to it, and the fact that the applicant (Rajendra Prasad Brothers Limited) had disputed the alleged debt, at paragraph [6] of the ruling. At the end of the paragraph, the learned judge stated:

> *This document does not say exactly the amount claimed to have been paid by the respondent for the allotment of land occupied by the applicant.*

[49] In paragraph [7] of his ruling the learned judge specified the actual claim that the respondent (Rajend Investments Limited) made under the statutory demand. In paragraph [8] of the same ruling, the learned judge made reference to clause 2 of the Deed.

[50] It is safe to infer that paragraph [10], in context, is a reference to the decision of Ajmeer, J in Civil Action No.183 of 2018 brought by the respondent against the appellant in the Lautoka High Court [see pages 57 to 77 v. 1 Record, referred to in the affidavit of Ashniel Sandeep Chand in support of the application to set aside a statutory demand dated 6 November 2020 and for orders for the stay of the proceedings pertaining to the statutory demand).

[51] However, Civil Action 183 of 2018, is an action brought by Rajendra Prasad Bros Properties Ltd (now respondent), against Rajend Investments Ltd (now the appellant) seeking specific performance of an agreement. The decision and orders referred to in the judgment, which was delivered on 25 May 2020, were not appealed against. The Court also dismissed the counterclaim by Rajend Investments in paragraph [56] of judgment, for the reason that it had not presented any evidence, oral or documentary, in support of its counterclaim.

[52] The judgment was delivered well before the appellant issued and served the statutory demand, dated 6 November 2020 on the respondent, and before the respondent filed an

application for setting aside the statutory demand (Companies Action No. 63 of 2020) the outcome of which is the ruling delivered by Justice Seneviratne on 10 March 2023, the subject of this appeal.

[53] Paragraph [11], in context, is a reference to order 2 of Ajmeer, J in Civil Action No.183 of 2018 which states:

> 2. *The defendant shall do all things necessary to perform clause 2 of the Deed dated 30 June 1980 <u>within 2 months</u> from the date of this judgment.*

[54] As of 25 May 2020, the date of delivery of the judgment in Civil Action 183 of 2018, the appellant had not taken steps to "*do all things necessary*" in compliance with clause 2 of the Deed. The statement by Seneviratne, J in paragraph [11] of the ruling that:

> *The respondent without complying with the orders made by the court against him served the statutory demand claiming $64,350.93 as city rates and ground rental*

is in context, and under the circumstances correct, and not mistaken either in law or in fact.

[55] Although Lease 26318 expired in 2015, the appellant did not take steps to issue a new sublease to the respondent until 24 July 2020, which was a day before the "*within 2 months"* ordered by the court, and without prior consultation on its terms and conditions with the respondent. There is no evidence that the new sublease was drawn up after the parties had negotiated and consulted on the terms and conditions of the lease, and it appeared to have been unilaterally drawn up by the appellant in order to meet the timeline set by the court.

[56] Under the circumstances, it would be expected that the respondent would take some time in examining the lease document as to its terms and conditions before committing to add its Director's signature and company seal to the document.

[57] The appellant's contention that the respondent does not dispute the amount set out in the schedule of the statutory demand, on the grounds that the respondent did not offer any credible evidence that the amount claimed was excessive and/or incorrect, is noted. However, as could be concluded from going through the various materials available before the Court, including emails, letters and contents of affidavits, there exists a genuine dispute between the appellant and the respondent about the existence and the amount of the debt.

[58] The appellant's contention that the respondent accepted that it received the sublease already executed by the appellant, and has not disputed the contents of the sublease, nor even asserted that any part of the sublease was not in *"like terms and conditions as are contained in the extended or renewed lease"*, may be justified. However, as could be concluded from going through the various materials available before the Court on this matter, including emails, letters, and contents of affidavits, there is also a dispute between the respondent and the appellant on this aspect. The Case for the Respondent, at paragraphs [32] to [34] above alluded to the issues in question.

[59] The High Court Judge, at paragraph [12] of the ruling under appeal, concluded that it is *"absolutely clear*" that there is a genuine dispute between the parties as to the amount of the debt claimed by Rajend Investments. The written and oral submissions from both sides, and in particular on behalf of Rajendra Prasad Bros, are testament to the existence of a genuine dispute as to the amount of the debt claimed by the appellant. The learned judge recommended that Rajend Investments take action for the recovery of the debt, if any, and not follow the winding up procedure. The Court agrees with that observation. The circumstances have not changed as far as the dispute as to the amount of debt claimed is concerned.

[60] The Court accepted the tendering of the appellant's reply to the respondent's written submissions on the following issues and paragraphs of the respondent's written submissions:

(A) Relevance of the Deed dated 30 June 1980 (pages 6 to 9 Respondent's submissions) - Appellant's replies to paragraphs 5.1 to 5.3; paragraph 5.13(i); paragraphs 5.13 (ii)-(iv); paragraph 5.13 (v); paragraphs 5.13 (vi) and (vii); paragraph 5.13 (viii).

(B) Defects in the Statutory Demand dated 6 November 2020 (pages 6 to 10 Respondent's submissions) - Appellant's replies to_paragraph 5.13 (ix); paragraph 5.13 (x); paragraph (xiii) ; paragraphs 5.13 (xiv) and (xv) ; paragraph (xii) ; paragraph (xiii); paragraph (xiv) ; paragraph (xv) ; paragraph (xvi).

(C) Was the lower Court required to construe and enforce the Deed against Respondent? (pages 10 to 14 Respondent's submissions) - Appellant replies to paragraph 5.15; paragraph 5.16; paragraph 5.20; paragraph 5.22.

(D) Submissions on Ground 3 (pages 14 to 17 Respondent's submissions - paragraph 6.1; paragraph 6.7.

[61] Having read and considered the appellant's replies and the authorities cited therein, while the specific issues addressed by them are much clearer, with the benefit of having the respondent's written submissions on the same issues, the appellant's reply, in my view, does not assist this Court in resolving the basic issue that this appeal is about, that is, whether the "*debt*" claimed, the subject of the statutory demand, is the accurate debt amount, or whether there is a genuine dispute on the existence or amount of debt between the appellant and the respondent to which the statutory demand relates. Also, on whether there is an offsetting claim.

[62] Grounds 1 and 2 are not arguable. They have no merit and are dismissed.

[63] In **Ground 3,** the appellant's contention that the leaned judge erred in law and in fact in failing to address both oral and written submissions of the appellant made before him, when he ought to, relying on the case **Wrigley v Holland** (supra) is probably justified, in that the learned judge may not have given sufficient reasons for holding as he did in the ruling and in arriving at a conclusion which is less favorable to his client. However, the

totality of the evidence leads to the fact that there was a dispute on the amount claimed, and the respondent had clearly articulated on this in its submissions.

[64] The respondent had relied on the case, **Britten-Norman Pty Limited v Analysis & Technology Australia Limited** [2013] NSWCA 344 to the effect;

> *That there must be evidence that satisfies the Court that there is a serious question to be tried, or an issue deserving of a hearing, or a plausible contention requiring investigation of the existence of either a dispute as to the debt or an offsetting claim.*

[65] The lower Court was entitled to rely on the affidavit evidence before it and not just rely on submissions which the respondent submits. The learned judge had before him comprehensive affidavits which described in great detail the material facts showing that there was a genuine dispute between the parties. The learned judge was satisfied on the affidavit evidence that a genuine dispute as to debt has been established.

[66] The observations made in paragraphs [10] and [11] of the impugned judgment, should not be unfamiliar to the appellant and its Counsel. Counsel also represented Rajend Investments Limited (as defendant), and the issues now raised were adequately canvassed by Ajmeer, J in that action, Civil Action No. 183 of 2018, although the focus there was to seek an order for specific performance of the Deed. Ground 3 is dismissed. It has no merit.

Conclusion

[67] The evidence before the High Court shows that there is a genuine dispute on the amount of debt claimed under the statutory demand. There is also an offsetting claim. The appeal has no merit, and is dismissed. Appellant to pay $2,500.00 costs to the respondent, within 21 days of date of Judgment.

Morgan, JA

[68] I have read and concur with the judgment of Qetaki, JA.

Andrews, JA

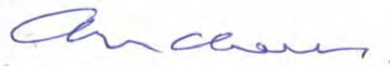
[69] I agree with the reasoning and outcome of the judgment of Qetaki JA.

Order of Court

1. *Appeal is dismissed.*
2. *High Court Judgment of Seneviratne, J is affirmed.*
3. *Appellant to pay $2,500.00 costs to the Respondent within 21 days of the judgment.*

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Walton Morgan
JUSTICE OF APPEAL



Hon. Justice Pamela Andrews
JUSTICE OF APPEAL