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

CIVIL APPEAL NO. ABU 014 of 2021
[In the High Court at Lautoka Case No. HBC 332 of 2019]

BETWEEN : **BIJU INVESTMENTS PTE LIMITED**

Appellant

AND : **TRANSFIELD BUILDING SOLUTIONS (FIJI) LIMITED**

Respondent

CIVIL APPEAL NO. ABU 041 of 2021
[In the High Court at Lautoka Case No. HBE 07 of 2021]

BETWEEN : **BIJU INVESTMENTS PTE LIMITED**

Appellant

AND : **TRANSFIELD BUILDING SOLUTIONS (FIJI) LIMITED**

Respondent

Coram : **Jitoko, P**
Morgan, JA
Heath, JA

Counsel : **Mr. S. J. Stanton for the Appellant**
Mr. R. Vananalagi for the Respondent

Date of Hearing : **01 July 2024**

Date of Judgment : **26 July 2024**

JUDGMENT

Jitoko, P

1. I am in total agreement with the judgment of Heath, JA and add the following observations.

2. The detailed and comprehensive analysis, carefully crafted by His Lordship, of statutory demands and winding up petitions, and insolvency proceedings, especially under our relatively new Companies Act 2015, is an invaluable tool and a useful guide to both the practitioners and the High Court in interpreting and determining the relevant and proper cause and action to take.

Morgan, JA

3. I have read and concur entirely with the reasoning and conclusions of the judgment of Heath, JA.

4. I also indorse the observations of Jitoko, P above. I add that there appears to be an increase in matters coming before this Court where statutory demands have been used as a debt collection device in circumstances where the debtor is clearly not insolvent. There were two such cases in this session and one in the last.

5. In this regard I urge Practitioners and the High Court to take particular note of Heath JA's statements that a statutory demand is not a debt collection process. Its sole purpose is to create a rebuttal presumption of insolvency. If the creditor knows that the debtor company is not insolvent, it is an abuse of the process to use a statutory demand to obtain payment and creditors who proceed in that way (and possibly, in a clear case its legal advisers) may be at risk of a substantial award of costs to mark the abuse of processes.

Heath, JA

Introduction

6. Biju Investments Pte Ltd (Biju) appeals against orders made by the High Court at Lautoka, on 29 January[1] and 7 April 2021[2] respectively.

[1] ***Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd*** [2021] FJHC 59; HBC 332.2019 (29 January 2021).
[2]***Transfield Building Solutions (Fiji) Ltd v Biju Investments Pte Ltd*** [2021] HBE 07.2021 (7 April 2021).

a. On 29 January 2021, the Court dismissed Biju's application to set aside a statutory demand (the setting-aside application) issued by Transfield Building Solutions (Fiji) Ltd (Transfield) against it. (the statutory demand judgment)

b. On 7 April 2021, the Court dismissed Biju's application for leave to oppose a winding up petition (based on the unsatisfied statutory demand) that Transfield had filed, or to stay the winding up proceedings pending an appeal against the statutory demand and/or judgment. (the winding up judgment)

7. Having dismissed Biju's applications on 7 April 2021, the High Court adjourned the winding up petition for seven days to allow time for Biju to pay the debt on which the statutory demand was based.[3] Prior to the winding up petition being re-listed on 14 April 2021, Biju paid the debt in full. On 14 April 2021, with leave, Transfield withdrew the winding up petition. No creditor sought leave to substitute.[4] On withdrawal of the petition, the winding up proceeding was at an end. The Judge made an order for costs against Biju.

The appeals

8. Biju appeals against both the statutory demand and winding up judgments. Its appeals are premised on the proposition that the High Court was wrong not to set aside the statutory demand because Biju had demonstrated (to the required standard) that it had an offsetting claim equal to or in excess of the amount claimed in the petition.[5] The subsequent decisions to dismiss the application for leave to oppose the winding up petition and/or to issue a stay of the winding up proceeding pending appeal were consequential in nature.

9. Transfield opposes both appeals:

a. First, it contends that the statutory demand judgment and the winding up judgment were both interlocutory in nature. Accordingly, leave to appeal was required. Leave was neither sought nor obtained.

[3] Ibid, at para [9].
[4] Companies Winding Up Rules 2015, r 16.
[5] See: Sections 516 and 517 of the Companies Act 2015.

b. Second, it contends that withdrawal of the winding up petition, following payment of the amount alleged to be owing in the statutory demand, has rendered both appeals moot.

c. Third, if the Court were prepared to entertain the appeals, no substantive grounds exist on which the two judgments could be successfully challenged.

Background

10. Biju is the registered proprietor of land situated at Natabua, Lautoka. It obtained approval to subdivide the land. On 2 July 2019, Biju entered into a construction contract (the Contract) with Transfield whereby the latter agreed to carry out certain civil works in consideration of a payment of $511,392.36, plus variations and the like. The contract was for a period of four months, subject to any extensions arising from inclement weather conditions and other unforeseen circumstances.

11. The Second Schedule to the Contract specified the basis on which Transfield would be paid. It stated:

> *"Payments shall be made by [Biju] on a monthly basis upon full satisfaction and certification of all claims submitted by [Transfield] for the requisite civil works carried out for that month. All certifications of claims shall be made by [Biju's consultant] "Cadastrals"."*

12. Work began on 1 July 2019. Between 1 July 2019 and 2 September 2019, Transfield submitted three progress claims, all of which were assessed (and approved) by Cadastrals, as certifying officer. Transfield received a total sum of $397,252.40 in respect of those sums.

13. On or about 1 October 2019, Transfield submitted a fourth progress claim. Cadastrals certified that a sum of $225,073.80 was payable. Biju paid $110,000 to Transfield in respect of that claim, leaving a balance of $115,073.80.

14. To put the progress claims into perspective, if the 1 October claim had been paid in full Transfield would have received a sum of $622,326 for work undertaken between 1 July and 1 October 2019 (three months) compared with the contract price of $511,392.36 (which was payable for an expected period of four months' work).

15. Biju declined to pay the balance of $115,073.80 because of (what it considered) was a genuine dispute about whether that sum should be paid. Biju alleged that Transfield had undertaken some of the work incompetently. The dispute was raised after Biju had obtained an independent assessment of the quality of the work from an independent consulting engineer, Mr. Nemia Taginasedrau, of Engineering Minds Ltd. According to an affidavit that he swore on 19 December 2019 (as part of the statutory demand proceeding) the amount that Transfield was estimated to owe for remedial works was in the vicinity of $300,000.

16. Transfield was served with a Notice to Complete on 5 December 2019. Despite service of that Notice, Transfield has not undertaken any of the remedial work. Substantive proceedings are now pending in relation to Biju's claim against Transfield on its claim for damages for defective work. Damages are sought against Transfield in the sum of $411,802.27, together with interest. Mr. Stanton, for Biju, confirmed at the hearing that no attempt was being made to recover discretely the sum of $115,073.80 that had been paid to dispose of the winding up petition. That sum will be set off against any judgment obtained. The defective work proceeding is yet to be determined.

The High Court judgments

(a) The statutory demand judgment

17. Transfield issued its statutory demand on 16 December 2019, 11 days after the Notice to Complete was served. On 20 December 2019, Biju applied, *ex parte*, for an interim injunction restraining Transfield from proceeding on the statutory demand pending

determination of Biju's contemporary application to set aside the demand. Tuilevuka J made an order to that effect on 23 December 2019.

18. Mr. Taginasedrau's affidavit was before the High Court as part of the evidence filed in support of the setting-aside application. In addition, the principal director of Biju, Mr. Vijay Naidu provided an affidavit setting out background to the dispute. As previously indicated, Mr. Taginasedrau had formed an opinion that work undertaken by Transfield was defective and (on my reading) was estimated (conservatively) to cost about $300,000 to remedy. That provided the basis on which Biju contended that it had an offsetting claim that was equal to or greater than the amount claimed under the demand. Although Mr. Taginasedrau filed supplementary evidence, I am content (for the purpose of this judgment) to rely on the initial estimate.

19. The application to set aside the statutory demand came before Nanayakkara J on 13 November 2020. Judgment was given on 29 January 2021. After referring to the evidence and identifying relevant legal principles, Nanayakkara J found that no genuine cross claim existed. As a result, the Judge dismissed the application to set aside the statutory demand and dissolved the earlier injunction.

20. Nanayakkara J took the view that the amount payable under the certificate issued by the certifying officer on 9 October 2019, was final and binding, and was payable irrespective of any claim that Biju might wish to raise. The Judge considered that, if any claim did exist, it ought to be brought against the certifying officer for negligently evaluating Transfield's work for the purpose of certifying that a progress payment should be made.[6]

(b) The winding up judgment

21. On dismissal of the application to set aside the statutory demand, Transfield filed and served a winding up petition against Biju. The petition came before Stuart J on 7 April 2021. Transfield relied on non-payment of the sum of $115,073.80 to support its petition.

[6] The Judge's reasons are set out more fully at para 42 below.

As previously indicated, Biju's preliminary applications for leave to oppose the winding up petition[7] and to stay the petition pending appeal against Nanayakkara J's judgment were both dismissed. The petition was adjourned until 14 April 2021. Prior to that date, Biju elected to pay the principal amount due under the certificate to Transfield.[8]

Should the appeals be entertained?

(a) The issues

22. Two discrete issues arise in relation to the question whether we should consider Biju's appeals on their merits:

    a. Ought leave to appeal to have been obtained?
    b. Are the appeals moot?

(b) Was leave to appeal required?

(i) The statutory demand appeal

23. Mr. Vananalagi, for Transfield, submitted that Biju ought to have obtained leave to appeal from the High Court in respect of both the statutory demand and winding up appeals. In the absence of an order granting leave, Mr. Vananalagi contended that this Court had no jurisdiction to entertain the appeals.

24. Mr. Stanton submitted that leave to appeal against the statutory demand judgment was not required. He referred to s 12(2)(f)(ii) of the Court of Appeal Act 1949, which does not require leave to appeal where an injunction has been granted or refused. Mr. Stanton relied on ***Digicel (Fiji) Ltd v Fiji Rugby Union***.[9]

[7] Leave to oppose is required in any case where the petition is based on non-compliance with a statutory demand and the grounds for opposing the petition were (or could have been raised) on an application to set aside the statutory demand: Companies Act 2015, s 529.
[8] See para 7 above.
[9] ***Digicel (Fiji) Ltd v Fiji Rugby Union*** [2014] FJCA 59 at para [11] (Chandra RJA).

25. While I agree with Mr. Stanton that leave to appeal is not required if an application for an injunction has been refused, I have significant doubts about whether a decision not to set aside a statutory demand can be legitimately equated to the grant or refusal of injunctive relief, at least so far as the scope of section 12(2)(f)(ii) of the Court of Appeal Act is concerned. Although the formal orders of the High Court dismissed the application to set aside the statutory demand issued by Transfield and dissolved the *ex parte* interim injunction granted on 23 December 2019,[10] the grant of the latter was a consequence of the former. The interim injunction was no more than a holding mechanism. The orders made would be spent whichever way the application to set aside the statutory demand was decided.

26. In my view, it is unnecessary to reach a concluded view on whether refusal of the application to set aside the statutory demand can be characterised as an order to which section 12(2)(f)(ii) of the Court of Appeal Act applies. If that provision did not apply, this Court would retain an ability to extend the time to bring an appeal, under s 20 of the Court of Appeal Act. On any view, the general importance of the issues raised on the statutory demand appeal[11] favour an extension of time to appeal.

27. In view of my conclusions on whether the appeal is moot,[12] I assume (without deciding) that leave was required and, on that assumption, would extend time for Biju to appeal against the statutory demand judgment out of time.

(ii) The winding up appeal

28. It is common ground that the winding up judgment was interlocutory in nature. Neither the order refusing leave to oppose the petition nor refusal of the stay had the character of a final order. Leave to appeal has not been sought. Resolution of the appeal against the winding up judgment adds nothing to the issues that arise on the statutory demand appeal.

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[10] ***Biju Investments Pte Ltd v Transfield Business Solutions (Fiji) Ltd*** [2021] FJHC 59; HBC 332.2019 (29 January 2021), Orders (1) and (2).

[11] Generally, see para 35 below.

[12] See para 32 below.

I would not grant leave to appeal out of time and would dismiss the winding up appeal on that basis.

(c) Is the statutory demand appeal moot?

29. In this case, the application to set aside the statutory demand was dismissed. Transfield brought a winding up petition based on Biju's failure to comply with the statutory demand. Biju sought leave to oppose the petition. Leave was refused. The winding up proceeding was at an end when Biju paid the amount claimed in the statutory demand and, in consequence, the Judge granted leave to discontinue the petition.

30. Mr. Stanton suggested that the appeal remained live because the Court could, if the demand were set aside, make an order that Transfield repay to Biju the amount it received on Biju's decision not to risk an order winding it up. I am satisfied that the Court has no jurisdiction to order repayment of a sum that was voluntarily paid by Biju to Transfield. While Biju could have opposed the petition on discretionary grounds (outside of those for which leave to oppose was required) it chose to pay instead. That decision (to avoid the risk that the Court might make a winding up order) was understandable. However, a consequence of the decision to pay (without prejudice to suing to recover the amount in issue) should be taken as determinative. Neither the High Court nor this Court has any jurisdiction to order that the disputed sum be repaid.

31. Mr. Stanton also explained that Biju had real concerns that its fresh action against Transfield[13] might be met with a plea of *res judicata* if the statutory demand were not set aside. For reasons I give later, there is no such risk.[14]

32. The starting point for determining whether an appeal is moot is to ascertain whether there is an existing *lis* between the parties that requires judicial determination. The rationale for that approach was explained by Viscount Simon LC, (giving the principal speech, with

[13] See para 29 above.
[14] See paras 50 and 51 below.

whom the other Law Lords agreed) in ***Sun Life Assurance Co of Canada v Jervis***.[15] His Lordship took the view that it was not the role of the House of Lords to decide "an academic question, the answer to which cannot affect the respondent in any way". Lord Simon considered that, if the House had been prepared to entertain the appeal, "it would not be deciding an existing *lis* between the parties who [were] before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties". Applying those principles, I conclude that the statutory demand appeal is moot.

33. Nevertheless, it is now widely accepted that an appellate court may exercise a residuary discretion, on limited public interest grounds, to hear an otherwise moot appeal. A relatively recent example is the judgment of the Supreme Court of New Zealand, in ***R v Gordon-Smith***.[16] After referring to observations made by Lord Slynn in ***R v Secretary of State for the Home Department***, *ex p Salem*,[17] McGrath J, for the Supreme Court, said:[18]

> *"[16] ... mootness is not a matter that deprives a court of jurisdiction to hear an appeal. Here, as already indicated, Ms Gordon-Smith, like the Crown, was a party to the Court of Appeal's determination of the case stated appeal and has a right to apply for leave to bring an appeal to this Court. That disposes of any issue concerning jurisdiction. The question of whether this Court should hear an appeal which otherwise qualifies under statutory criteria for a grant of leave but is moot, is rather one of judicial policy. In general, appellate courts do not decide appeals where the decision will have no practical effect on the rights of parties before the court, in relation to what has been at issue between them in lower courts. This is so even where the issue has become abstract only after leave to appeal has been given. But in circumstances warranting an exception to that policy, provided the court has jurisdiction, it may exercise its discretion and hear an appeal on a moot question.*
>
> *[17] The approach in Salem was said to be applicable where there is an issue involving a public authority as to a question of public law. It has been applied in New Zealand by the Court of Appeal, however, in a manner that has not been confined to public law. That Court agreed in Attorney-General v David to hear an appeal on a question of*

[15] ***Sun Life Assurance Co of Canady v Jervis*** [1944] AC 111 (HL) at 113–114.
[16] ***R v Gordon-Smith*** [2009] 1 NZLR 721 (SC).
[17] ***R v Secretary of State for the Home Department***, *ex p Salem* [1999] 2 All ER 42 (HL).
[18] ***R v Gordon-Smith*** [2009] 1 NZLR 721 (SC), at paras [16] and [17].

> *employment law of general and public importance, which warranted an early determination from the Court, although there were no longer live issues between the immediate parties.*
>
> *…"*

34. In my view, this is a case in which it is appropriate for this Court to hear the appeal from the statutory demand proceeding. I reach that conclusion based on the observations made in the Supreme Court in *Gordon-Smith*[19] and those of the Court of Appeal of New Zealand in ***Attorney-General v David***.[20] Relevantly, in circumscribing the extent of the discretion to hear a moot appeal, Richardson P, in *David,* said:[21]

> *"[10] ...*
>
> *The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example. . . when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated . . ."*

35. For reasons that will become apparent, I consider there are important questions involved in this appeal about the way in which the High Court of Fiji should approach determination of an application to set aside a statutory demand. The issue of a statutory demand (failure with which to comply creates a rebuttable presumption of insolvency on the part of the debtor) is the first step in initiating a collective insolvency proceeding. It is more than a contest between parties to secure payment of a debt payable by one to the other. That means that a decision on the application has a public interest dimension. In the vast majority of cases, winding up petitions are brought on the basis of non-compliance with a statutory demand. The collective insolvency process provides a public character to the dispute that justifies consideration of the issues notwithstanding that, otherwise, the dispute

[19] Ibid, at paras [16] and [17], set out at para 33 above.
[20] ***Attorney-General v David*** [2002] 1 NZLR 501 (CA).
[21] Ibid, at para [10].

is moot. In ***Sian Participation Corp (in liq) v Halimeda International Ltd***, the Privy Council explained the nature of the collective regime as follows:[22]

> *"32. For present purposes the following aspects of the nature and effect of the process for the initiation of an insolvent liquidation may be said to be common to both the UK and the BVI. First and foremost it is a process which exists for the benefit of a class rather than just the individual applicant (or petitioner). The liquidation that it triggers is a statutory process designed and evolved over more than a century to bring about an efficient realisation of the company's assets and their fair distribution among all its stakeholders, generally pari passu as between unsecured creditors. For that purpose it is accompanied by a stay of individual claims, so as to avoid a rush to judgment or a race by competing creditors to seize or attach assets for payment of their own debts. For the same reason, payment in full of an applicant creditor's debt by the company while the application (or petition) is pending does not necessarily bring it to an end. The court may permit another unpaid creditor to be substituted as applicant or petitioner: . . . Nor is it a private procedure. The rules provide for an application or petition to be advertised before it is heard, so that any stakeholder in the company can attend to support or oppose it:..."*

36. That said, nothing would be achieved by allowing the appeal and granting an order setting aside the statutory demand. Rather, applying the principles set out in *Gordon-Smith*[23] and *David*.[24] I consider it is appropriate for the Court to deal with matters of principle arising out of the statutory demand judgment.

The nature of a statutory demand proceeding

(a) The legislation

37. Sections 515(a), 516 and 517 of the Companies Act 2015 state:

> *"Definition of inability to pay debts*

[22] ***Sian Participation Corp (in liq) v Halimeda International Ltd*** [2024] UKPC 16 at para 32. This was an appeal from the British Virgin Islands. I have omitted references to the statutory provisions that were discussed by the Privy Council. The principles set out in this extract are all applicable to the Fijian regime.
[23] ***R v Gordon-Smith*** [2009] 1 NZLR 721 (SC) at para [17].
[24] ***Attorney-General v David*** [2002] 1 NZLR 501 (CA) at para [10].

515. 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

...

Division 3—Application to Set Aside a Statutory Demand

Company may apply

516.—(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 is so served.

(3) An application is made in accordance with this section only if, within those 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.

Determination of application where there is a dispute or offsetting claim

517.—(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) that 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, substantial injustice will be caused unless the demand is set aside; or
(b) there is some other reason why the demand should be set aside."

(b) The statutory framework

(i) The purpose of a statutory demand

38. As I have said, the issue of a statutory demand is (generally) the first step to commence a creditor's proceeding to have the debtor company wound up, with all the consequences that flow from that.[25] A successful setting aside application denies the creditor the ability to rely on non-compliance to create a rebuttable presumption that the debtor company is insolvent. That is important, in the context of a regime which allows the High Court to put a company into liquidation on the grounds of insolvency. A company is solvent "if, and only if, it is able to pay all its debts as and when they become due and payable".[26]

39. On occasion, a creditor may issue a winding up petition in respect of a debt for which it has not yet obtained a judgment. All that it needs to do is to satisfy the court that it is owed more than the prescribed amount, $10,000. It is open to the debtor company to oppose a winding up application on the grounds that it is solvent. In such circumstances (in the absence of compliance with the statutory demand) the creditor is entitled to rely on the rebuttable presumption. Nevertheless, if the debtor company can adduce evidence to rebut the presumption, no winding up order will be made. Solvency is established by asking whether the debtor is "able" to pay its debts as they fall due; not whether it is "willing" to

[25] See para 35 above.
[26] Companies Act 2015, Sections 513(c) and 514(1).

do so. A creditor met by an unwilling but solvent debtor must exercise remedies of execution to enforce payment of its debt.

40. It is important to appreciate that a debtor company will be prevented from raising any opposition to a winding up petition if it could have had the same issue determined on an application to set aside the statutory demand. That is what happened in this case. Once the High Court Judge had dismissed the application to set aside, Stuart J had no option but to refuse leave for Biju to oppose the petition. Section 529 of the Companies Act 2015 states:

> *"529.—(1) In so far as an application for a Company to be wound up in Insolvency relies on a failure by the Company to comply with a Statutory Demand, the Company may not, without the leave of the Court, oppose the application on a ground—*
>
> *(a) that the Company relied on for the purposes of an application by it for the demand to be set aside; or*
>
> *(b) that the Company could have so relied on, but did not so rely on (whether it made such an application or not).*
>
> *(2) The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the Company is Solvent."*

41. Contrary to what might have been suggested by Amaratunga J, in ***Nawi v PricewaterhouseCoopers***,[27] a statutory demand is not a debt collection process. Its sole purpose is to create a rebuttable presumption of insolvency. If the creditor knows that the debtor company is not insolvent, it is an abuse of the process to use a statutory demand to obtain payment. Should that occur, any creditor that proceeds in that way (and possibly, in a clear case, its legal advisers)[28] may be at risk of a substantial award of costs to mark the abuse of process.

[27] ***Nawi v PricewaterhouseCoopers*** [2019] FJHC 119 at para [26].
[28] ***Harley v McDonald*** [2002] 1 NZLR 1 (PC) at paras [45]–[47].

(ii) Analysis: Did the High Court correctly dismiss the setting aside application?

42. I start by considering the reasons given by Nanayakarra J for refusing to set aside the statutory demand. In doing so, to aid my analysis of the Judge's reasoning, I have added letters in bold to identify particular parts of the judgment to which I will refer. Nanayakarra J said:[29]

> *(50)* ***[a]*** *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),* ***[b]*** *the parties were contractually bound by the Certificate issued by the agreed certifier, Cadastrals, which had been acted on by both parties and in the absence of proof of fraud or dishonesty on Cadastral's 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,* ***[c]*** *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.* ***[d]*** *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 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.* ***[e]*** *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*

[29] ***Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd*** [2021] FJHC 59; HBC 332.2019 (29 January 2021), at paras (50), (51) and (52).

> *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.*
>
> (My additions)

43. First, by reference to **[a]** in para (50), the Judge was wrong to express a view that Cadastrals could be sued in negligence if its certificate had caused loss to Biju. The Judge took that view to provide a rationale for his conclusion that the entity on which liability for any offsetting claim may lie was Cadastrals, rather than Transfield. It is elementary that judges should not make (even provisional) adverse findings of that type about a third party's liability when it has not had an opportunity to be heard.

44. So far as **[b]-[d]** in para (51) is concerned, while the Judge was correct to hold that the certificate was binding as between Biju and Transfield, his observation misses the point. The Second Schedule to the contract did not say that the amount certified was subject to a "pay now, dispute later" arrangement.[30] The fact that the certificate did not remove the will be based on a judgment that a creditor has obtained against the debtor. Plainly, the debtor is obliged to pay any judgment and, if it does not, to face coercive proceedings to recover the amount awarded. Nevertheless, the statutory demand provisions entitle a debtor to raise an "offsetting" claim if available.

45. Although the Fijian legislation does not deal with this point explicitly, most jurisdictions that use the statutory demand procedure work on the assumption that the court will not entertain an offsetting claim that could have been raised in the proceeding in which judgment had been entered. In such a case, it may fairly be said that a claim of that type (which seeks to relitigate a decided issue) is not "genuine". That rationale is consistent with the inability for the debtor to obtain leave to oppose a winding up petition if it could have relied on the offsetting claim to set aside the statutory demand.[31]

[30] The relevant part of the Second Schedule is set out at para 11 above.
[31] Companies Act 2015, section 529.

46. By contrast to a situation in which an offsetting claim might be made when a judgment has been obtained, Biju's decision not to pay the sum of $115,073.80 can be seen as having been made genuinely, on the basis of a dispute for which it had cogent evidence from an independent engineer. This engages **[e]** in para (52) of the judgment. While the sum certified was $225,073.80, Biju paid $110,000 of that sum, leaving $115,073.80 in dispute. The offsetting claim, at the time of the application to set aside was estimated to be about $300,000. If Biju had not been acting genuinely, one would have thought that it would not have paid anything certified by Cadastrals and raised the offsetting claim against the whole of the certified sum.

47. For those reasons, I do not consider that the Judge analysed the issues arising on the setting aside application in an appropriate manner. By failing to do so, he fell into error. The evidence given by Mr. Taginasedrau[32] (taken together with the primary fact evidence of Biju's principal, Mr. Vijay Naidu) provided a solid foundation on which Biju could form a genuine belief that it had an offsetting claim for defective work. Unlike ***Searoad Shipping Pte Ltd v On Call Cranes (Fiji) Ltd***, there was substantial evidence before the Court to support the claim and estimate the likely quantum of any damages that might be ordered.[33] The information before the Court was sufficient to enable the Judge to assess, on a summary basis, whether an offsetting claim existed which would justify setting aside the statutory demand. The question for the Judge was whether, notwithstanding the certificate that Cadastrals had given, there was a genuine basis for an offsetting claim in a sum equal to or in excess of the amount claimed in the statutory demand to be made. The answer, with respect to the Judge, ought to have been clear. Such a dispute did exist.

48. Given the fundamental criticisms that I have made about the High Court Judge's approach, it may be helpful if I were to set out how he should have evaluated the setting-aside application. I do so with the intention of providing guidance for both practitioners and High Court Judges who may be required to deal with such applications in the future.

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[32] See para 13 above.

[33] ***Searoad Shipping Pte Ltd v On Call Cranes (Fiji) Ltd*** [2020] FJHC 1075; HBM 36.2020 (11 December 2020), at para (31).

49. First, the Judge ought to have appreciated that the certified sum set out in the statutory demand could still be challenged on the basis of a genuine offsetting claim. Section 517(1)(b) of the Companies Act 2015 expressly contemplates that situation.

50. Second, even where a setting aside application is refused, the amount claimed is not elevated in status to a debt that is unchallengeable at the hearing of a subsequent winding up petition. In ***Sian Participation Corp (in liq) v Halimeda International Ltd***,[34] the Privy Council (on appeal from the British Virgin Islands) made a number of observations that are equally relevant to the legislative scheme in Fiji. Delivering the judgment of the Board, Lord Briggs and Lord Hamblen said:

> *"33. Secondly the process of seeking and obtaining an order for the appointment of a liquidator (or a winding up order in the UK) does not require or involve any pursuit or adjudication of the applicant's claim to be a creditor, either as to liability or quantum. Thus for example the court's order creates no res judicata as between the applicant and the company: see In re Vitoria [1894] 2 QB 387, p 392 (a bankruptcy case, but reflecting the applicable general principle). The successful outcome of a winding up petition is not a judgment which can be executed: In re A Company (No 000928 of 1991), Ex p City Electrical Factors Ltd [1991] BCLC 514, 517. The liquidator is free to reject the applicant's proof of debt, in part or in whole: In re Menastar Finance Ltd [2002] EWHC 2610 (Ch); [2003] BCC 404, paras 44 to 45. If the debt is disputed by the liquidator that dispute may be referred to court or to arbitration: Tanning Research Laboratories Inc v O'Brien [1990] HCA 8; (1990) 169 CLR 332, pp 342–343."*

51. For the reasons given by the Privy Council, no estoppel by way of *res judicata* arises. Biju can continue its separate action against Transfield without any fear that its payment of the debt with reservation of the right to sue to recover could be met by such a plea. To the extent that this Court may have suggested to the contrary in ***Nand v Khan***,[35] I would distinguish it. The issue in *Nand* was whether an appeal right had been lost because a judgment debt had been paid. It did not consider the point with which I am presently concerned.

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[34] ***Sian Participation Corp (in liq) v Halimeda International Ltd*** [2024] UKPC 16 at para 33.
[35] ***Nand v Khan*** [1997] FJCA 26; Abu 0066u.95s (14 August 1997).

52. Third, it is necessary to keep in mind that non-compliance with a statutory demand creates a presumption of insolvency only. As I have already said, a statutory demand is designed to start a collective insolvency procedure. Its sole purpose is to create a rebuttable presumption of insolvency. If the creditor knows that the debtor company is not insolvent, it is an abuse of the process to use a statutory demand to obtain payment.[36]

53. Fourth, it is necessary to consider whether the "offsetting claim" qualifies as such under the legislation. The starting point is s 517(1) and (2) of the Companies Act 2015.[37]

54. In the context of the analogous personal bankruptcy jurisdiction in New Zealand, the Court of Appeal has held that the question whether a genuine cross-claim exits should be answered by asking: "Has the debtor raised a claim of true substance which [it] genuinely proposes to pursue".[38]

55. The term "offsetting claim" is not defined in the Companies Act 2015. However, s 517(1) and (2) are based on ss 459G and 456H of the Corporations Act 2001 (Cth). In Australia, the court must, if it finds that there is a genuine offsetting claim, calculate the amount that would be payable by one party to the other if the offsetting claim were brought to account. The same approach is reflecting in s 517(2) of the Companies Act 2015.

56. Different wording is used in New Zealand. Section 290(4)(b) of the Companies Act 1993 (NZ) states that the court may set aside a statutory demand if it were satisfied that "the company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off or cross-demand is less than the prescribed amount". Although a New Zealand court is not expressly required to undertake the type of calculation envisaged in the Fijian legislation, the need to do so is

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[36] See para 41 above.

[37] Set out at para 37 above.

[38] ***Sharma v ANZ Banking Group (NZ) Ltd*** (1992) 6 PRNZ 386 (CA). I note that the analogy does not exist under Fijian law: there is no similar provision in relation to the setting aside of bankruptcy notices under ss 4 and 7 of the Bankruptcy Act 1945.

implicit. Only if an amount of or in excess than the prescribed amount is payable after the offsetting claim is taken into account will the statutory demand be set aside.

57. Unlike the Companies Act 2015, section 459H (2) of the Corporations Act 2001 (Cth) sets out a formula. The formula also defines the terms "admitted total", "offsetting total", and "offsetting claim". Section 459H provides:

> ***"459H Determination of application where there is a dispute or offsetting claim***
>
> *(1) This section applies where, on an application under section 459G, 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) that the company has an offsetting claim.*
>
> *(2) The Court must calculate the substantiated amount of the demand in accordance with the formula:*
> *where:*
>
> *"admitted total" means:*
> *(a) the admitted amount of the debt; or*
> *(b) the total of the respective admitted amounts of the debts;*
> *as the case requires, to which the demand relates.*
>
> *"offsetting total" means:*
>
> *(a) if the Court is satisfied that the company has only one offsetting claim--the amount of that claim; or*
> *(b) if the Court is satisfied that the company has 2 or more offsetting claims--the total of the amounts of those claims; or*
> *(c) otherwise--a nil amount.*
> *....*

> *"offsetting claim" means a genuine claim that the company has against the respondent by way of counterclaim, set - off or cross - demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates)."*

58. It is inappropriate for the Court to embark upon a mini trial (without cross-examination) to determine whether "an offsetting claim" is available, and if so in what sum. All that the Court is required to do is to consider evidence adduced in support of the application by the debtor and in opposition from the creditor and assess, on a summary basis, whether a genuine claim on substantial grounds exists. Notwithstanding the way in which different legislation is expressed in common law jurisdictions, the test of "genuine claim on substantial grounds" seems to be a fair articulation of the underlying concept.

59. In discussing the analogous situation in which an offsetting claim is raised at the petition stage to avoid a winding up order, the Privy Council (considering laws in force in the United Kingdom and the British Virgin Islands) said that any disputed debt "must be the subject of genuine dispute on substantial grounds". If it is, the petition will generally be dismissed unless a substitute petitioner or applicant with an undisputed debt can carry it forward.[39]

60. The need to avoid a "mini trial approach" was emphasised by the Federal Court of Australia, in ***Quadrant Constructions Pty Ltd v HSBC Bank Australia***.[40] In pithy terms, Finkelstein J said:[41]

> *4. . . . a statutory demand . . . can be set aside in the case of a genuinely disputed debt, where there is an "offsetting claim" . . . which can be set-off against an admitted debt, if the demand itself is defective or for some other good reason. All a company has to show in respect of the first two grounds is a bona fide dispute about the debt or the existence of an offsetting claim. While the nature*

[39] ***Sian Participation Corp (in liq) v Halimedia International Ltd*** [2024] UKPC 16 at para 67.

[40] ***Quadrant Constructions Pty Ltd v HSBC Bank Australia*** [2004] FCA 111. While it is rare to do so, the Court does have a residual discretion, when a petition for winding up is before it, to hear evidence and determine the amount payable (if any) to a creditor: see ***Bateman Television Ltd (in liq) v Coleridge Finance Co Ltd*** [1971] NZLR 929 (PC) at 923 (Lord Upjohn, for himself, Lord Hodson, Lord Guest, Lord Donovan and Sir Gordon Willmer).

[41] Ibid, at para 4.

of the dispute must be exposed the court will not deal with the merits. That is, nothing of substance is decided.

(Emphasis added)

61. Because of the summary nature of the determination (which should be held as soon as practicable after its filing, so that drastic consequences to other creditors do not flow from a belated winding up order were it unsuccessful) it is necessary to take a robust approach to determination of whether a genuine and substantial offsetting claim exists. Ultimately, as Finkelstein J said in *Quadrant Constructions,* nothing of substance is decided. The dispute is not addressed on its merits. As to evidential issues, I adopt what was said by the Court of Appeal of New Zealand, in ***Robertson v ASB Bank Ltd***,[42] said:

> *"[32] ... the summary nature of the procedure is wholly unsuitable for the determination of disputed questions of fact . . . However, in assessing the strength of a claim the Court need not accept uncritically evidence that is inherently lacking in credibility; for example, where it is inconsistent with contemporary documents or inherently improbable…."*

62. Taking that approach, I consider that the outcome on the setting aside application would have been determined as follows:

a. There was an admitted certified debt of $115,073.80 payable after Biju had paid $110,000 on account.

b. There was an asserted cross claim of about $300,000. On the evidence, that was a reliable and conservative estimate.

c. If the offsetting claim were, in due course, justified, Transfield would be obliged to pay a net sum to Biju.

[42] ***Robertson v ASB Bank Ltd*** [2014] NZCA 597 (Miller, Heath and Dobson JJ). More generally, see ***Eng Mee Yong v Letchumanan*** [1980] AC 331 (PC) at 341.

d. Because the evidence was sufficient, on a summary assessment, to establish a genuine claim of substance, the statutory demand ought to have been set aside.

63. As to outcome, I propose that the winding up appeal be dismissed for lack of jurisdiction and the statutory demand appeal be dismissed as moot. Although, on my analysis, an order setting aside the statutory demand ought to have been made, I do not consider that any order as to costs should be made because the appeal is moot. The Court has only considered the appeal for public interest reasons.

Orders of the Court:

1. The statutory demand and winding up appeals are both dismissed.
2. No order as to costs.

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Hon. Mr. Justice F. Jitoko
PRESIDENT COURT OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice W. Morgan
JUSTICE OF APPEAL

.....
Hon. Mr. Justice P. Heath
JUSTICE OF APPEAL

Solicitors:

Vijay Naidu & Associates for the Appellant
A K Lawyers for the Respondent