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

COMPANIES JURISDICTION

HBM ACTION NO. 19 OF 2020

IN THE MATTER of a Statutory Demand dated 21st April, 2020 taken out by Trade Air Engineering Pte Limited ("the Respondent") against Permal Construction Pte Limited ("the Applicant") and served on the Applicant on 22nd April, 2020.

AND

IN THE MATTER of an application by the Applicant for an Order setting aside the Statutory Demand pursuant to Section 516 of the Companies Act 2015.

BETWEEN: **PERMAL CONSTRUCTION PTE LIMITED** a limited liability company having its registered office at Lot 9, Lalita Bhindi Street, Vatuwaqa, Suva.

APPLICANT

A N D: **TRADE AIR ENGINEERING PTE LIMITED** a limited liability company having its registered office at Jaylal & Co, Tui Street, Lautoka.

RESPONDENT

Appearances	:	(Ms) Kritika Singh for the applicant Mr. Chen Bunn Young for the respondent
Hearing	:	Thursday, 16th July 2020 at 2.30 p.m.
Decision	:	Wednesday, 02nd September, 2020 at 9.00 a.m.

DECISION

[A] INTRODUCTION

(01) By application filed on 12-05-2020, the applicant, Permal Construction PTE Limited **(PC)** seeks to set aside a Creditor's Statutory Demand issued by Trade Air Engineering PTE Limited **(TAE)** dated 21-04-2020. The Demand stated that the 'PC' owed "TAE" the amount of $188,240.46 described as follows;

'the sum of $188,240.46 being final claim 4 (dated 22nd November 2019) for supply and installation and commissioning of Toshiba conditioning equipment delivered to the company pursuant to Purchase Order No. 15855 dated 10th December, 2018."

(02) The **'PC'** contends that there is a genuine dispute as to the relevant debt for the purposes of Section 517(1)(a) of the Companies Act 2015 and also relies on a off-setting claim for the purposes of Section 517 (1)(b) of the Companies Act for the application to set aside the Demand.

(03) The application is opposed by the Respondent Company.

(04) The parties have filed three (03) affidavits for consideration. They are;

(A) *The affidavit of Mr Praveen Permal, the director of the applicant company in support, sworn on 11.05.2020* ***(Praveen's affidavit in support)***

(B) *The affidavit of Mr Nitendra Singh, the director of the respondent company in opposition, sworn on 16. 06. 2020* ***(Nitendra's affidavit in opposition)***

(C) *The affidavit of Praveen Permal in reply, sworn on 22. 06. 2020.* ***(Praveen's affidavit in reply)***

[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 (a)].

(ii) That the Company has an off-setting claim. [Section 517(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

(1) The applicant, **"PC"** is a company incorporated in Fiji and is engaged in the business of general building and contractors, commercial and industrial construction and industrial maintenance and renovation works.

(2) The **"PC"** had appointed the respondent, **"TAE",** based on the respondent's tender offer document dated 29.10.2018 as the mechanical services contractor for the project pertaining to the "Research and Development Centre" at the Fiji National University, Derrick Campus, Suva. The applicant is the principal of the contract and the respondent is the mechanical service contractor employed by the applicant.

(3) The relevant terms of the respondent's tender offer document are as follows;

(i) The equipment that was to be provided was to be a Toshiba VRF system.

(ii) Under the heading price summary the price quoted as $423, 792 VIP.

(iii) Under the heading "Payment and Indent" it is stated:

"We need initial 30% deposit with order on acceptance of our offer. Balance payments to be claimed on site progress basis."

(iv) Under the heading "Exclusions" it is stated;

"Our price excludes the following costs:

(a) *Builder's works, penetrations to wall, roof, making good to penetrations, water proofing and plinth for outdoor units.*

(b) *Electrical power supply to mechanical switchboard*

(c) *Digging and preparing of trench works if required*

(d) *Site storage, security, access, site services such as water, toilets, electricity by others."*

(v) Under the heading "programme", it is stated;

"We shall follow builders programme on site to meet all critical deadlines & date".

(4) The tender price in the tender offer document was reduced from $423, 792.00 to $393,792.00 (VIP).

(5) Upon the respondent's tender offer document being accepted, the applicant issued a Purchase Order no: - 15855 on 10. 12. 2018. The purchase order stated;

"Mechanical services works for above mention project for the sum of $393, 000 VIP as per tender document".

I am surprised that there is no contract document executed between the applicant and the respondent defining the; (A) scope of work (B) working procedure of the contract (C) specifications of materials (D) payment basis (E) contract laws (G) time frame for the completion of the work.

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

(6) 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

[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**

exist in fact, and the grounds for that dispute must be real and not spurious, hypothetical, illusory or misconceived.

(7) In ***CGI Information Systems & Management Consultants Pty Ltd v APRA Consulting Pty Ltd*** [3], Barrett J helpfully summarized the principle 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 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."*

(8) 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 indicates 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."*

(9) 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]

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[3] **[2003] NSWSC 728; (2003) 47 ACSR 100**
[4] **[2007] NSWSC 1084; (2007) 64 ACSR 671**
[5] **[2016] FCAFC 154, Rares J**

(10) It is important to remember that the threshold criteria for establishing the existence of a genuine dispute to the debt is a low one.

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 these [sic is such a dispute and the threshold for that is 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.*

(11) 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]" (cfEng Me Young v Letchumanan [1980] AC 331 at 341], or "a patently feeble legal argument or an assertion of fact unsupported by evidence": cfSouth 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 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....*

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[6] **[2011] NSWSC 531**

[7] **(1994) 12 ACSR 785; (1994) 12 ACLC 669**

(12) 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.***
>
> *[Emphasis mine]*

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).*

(13) What is the basis of the asserted dispute as to the existence of the debt? Mr.Praveen Permal in his affidavit in support deposed that; (Reference is made to paragraph (27) and (28) of the affidavit)

> *27. THAT the Applicant had progressively paid the Respondent the outstanding sum as part of the works carried out on the project, except for the costs associated for the poor workmanship and damaged works and consequent costs for repairs, liquidated damages, cost associated with the delay in the works carried out by the Respondent for the project. True copies of the Tax invoices issued by the Respondent and the Payment Vouchers made by the Applicant in respect of this are annexed hereto and marked as* ***"G"***
>
> *28. THAT the Respondent is also claiming excess funds that is not subject to the figure agreed by the Applicant and Respondent at the time at contracting for the project. The Respondents amount as purportedly claimed in the Statutory Demand is in excess of the amount that remains under genuine dispute by the Applicant. A true copy of the payments, retentions and balance sum in relation to the project prepared by the Applicant is annexed hereto and marked as* ***"P"***

[8] **[2003] NSWSC 896**

(14) In reply, Mr. Nitendra Singh deposed in his affidavit in opposition; (Reference is made to paragraph (29) of the affidavit)

> 29. *As regards paragraph 27 of Permal's Affidavit the Applicant has not paid progressively to the Respondent. Annexed hereto and marked with the letter "NS-15" is a summary of claims made by the Respondent and payments made by the Applicant. The document Progress Claim 04 dated 22nd November 2019 (dated 22/1/10) was sent to the applicant who never queried the contents sets out the following details.*
>
> *The document refers to:*
>
> *(a) $393,000.00 as a contract price:*
>
> *(b) (i) ECAL Levy – indoors*
> *(ii) ECAL levy – outdoors*
> *(ii) ECAL levy – fresh air units*
>
> *ECAL were environmental levies implemented from on or about August 2019 by the Fiji Government payable by the Applicant.*
>
> *Claim 1 was for the amount of $97, 200. 00 to which the Applicant paid only "$50, 000 gross VIP" which $42, 706 was the net amount paid and for which $5, 000 was being 10% of the retention was set aside by the Applicant with another 5% as provisional tax of the Respondent.*
>
> *Claim 2 was for $70,000 gross VIP and similar allocations for 10% retention and 5% provisional tax were made.*
>
> *Claim 3 was for $100, 000 gross VIP and similar allocations for 10% retention and 5% provisional tax were made.*
>
> *Hence, by 14th October 2019 the Applicant only paid the Respondent $220, 000. 00*

(15) Mr. Praveen Permal in his affidavit in reply states *"That in reply to paragraph 29 of the affidavit, I reiterate paragraph 27 and 28 of my affidavit in support"*.

(16) Mr. Young, Counsel for the respondent contends that there is no genuine dispute about the existence or amount of the debt.

(17) As adverted to earlier, the contract price was $393, 000. 00. In evidence before me on the present application were copies of three payment vouchers (applicant's annexure "O" and "P") they are;

09.08.2019	-	$42, 706.42
13.09.2019	-	$59, 788.99
12.10.2019	-	$95, 412.84
		$197, 908.25

(18) Mr. Young, Counsel for the respondent submits, and I agree, that according to the applicant's own documents a sum of $195, 091. 75 [$393, 000.00 - $197, 908. 25] is due to the respondent arising out of supply, installation and commissioning of Toshiba conditioning equipment delivered to the applicant pursuant to the purchase order no:- 15855 dated 10. 12. 2018. Therefore, according to the applicant's own documents, there is a debt, that is still owed, payable and about which there is no genuine dispute.

(19) (Ms) Singh, who appears for the applicant company, identifies four areas in which she contends that a genuine dispute is established in respect of the debt claimed by the respondent company against the applicant company. They are;

(A) The costs associated for the poor workmanship and damaged works.

(B) Consequent costs for the repair.

(C) Liquidated damages.

(D) Costs associated with the delay in the works carried out by the respondent for the project.

(20) I do not accept that the above matters would give rise to a genuine dispute as to the obligation to pay the balance due under the tender offer document. No legal basis was articulated on which the alleged poor workmanship, or delay, invalidated any obligation of the applicant to pay the balance due under the tender offer document. That might, in some circumstances occur, when there were a total failure of consideration under the contract; or because a case to set aside the contract for fraud were established; or because the Court might grant relief setting aside the relevant contractual obligations under the misleading and deceptive conduct provisions. However, (Ms) Singh did not submit that the applicant relied on any such cause of action, and I do not consider I can find a genuine dispute to be established on that basis where those matters were not relied upon by (Ms) Singh.

Whether the applicant has an off-setting claim

(21) Off-setting claim means a claim that the applicant company has against the respondent by way of counter-claim, sett-off or cross demand.

The alternative basis for the demand to be set aside or reduced by reason of an off-setting claim involves a different test. The question is not whether there is a genuine dispute against the off-setting claim. The question is rather whether the off-setting claim can be

shown to be "not frivolous or vexatious". **Edge Technology Pty Ltd v Lite on Technology Corporation**[9].

The applicant for its part asserts two off-setting claims against the demand of the respondent. They are set out in paragraphs (18) and (20) of the applicant's affidavit in support. First, there is an amount of $64,866.23 said to arise out of poor workmanship of the respondent. Secondly, there is an amount of $47,500.00 said to arise out of delay in completion of the project.

It must be borne in mind that in an application to set aside the statutory demand, that it is the debt the subject of the statutory demand to which the genuine dispute must relate. However, if in addition, (or instead) an off-setting claim is relied on to reduce or eliminate the amount claimed under the statutory demand, then it is the genuineness of that off-setting claim that matters, not the genuineness of the dispute about that claim.

The raising of an off-setting claim, unlike the raising of a genuine dispute in respect of a debt, does not in any way challenge the existence of the debt, and **in fact concedes it**. A contention that a debt does not exist is not a counter-claim, set-off or cross-demand. Such a contention denies the debt, whereas a counter-claim, set-off or cross-demand **admits it**, but asserts that there is a countervailing liability.

(22) Mr Praveen Permal's evidence is that; (Reference is made to paragraphs 11, 13, 14, 15, 17, 18, 19, 20 and 21 of the affidavit in support sworn on 11-05-2020).

> *(11) That the project was supposed to be completed by **18th July, 2019** and at all material times, it was an implied term of the contractual arrangement that your client would carry out the required tasks diligently and as per standards and that the project would be delivered on time.*
>
> *(13) That the Respondent failed to complete the project within the stipulated timeframe, and the delay by the Respondent was one of the major concerns since commencement of the project. There were several instances whereby the Respondent mislead the Applicant in terms of arrival of AC units for installations as part of the project leading to considerable delays of the overall project leading up to the last critical stages of the project.*
>
> *(14) That the Applicant had on or about **14th May, 2019**, advised the Respondent vide email of the critical stage of the project and their intention to terminate the contractual arrangement due to the delays on the part of the Respondent. A true copy of the email correspondences sent from the Applicant to the Respondent dated 14th May, 2019 is annexed hereto and marked as **"F"**.*

[9] (2000) NSWSC 471.

(15) *That the Respondent had further been notified through email of **5th July, 2019** and **13th September, 2019** of the issues of delay in terms of the service and mechanical issues and advised about the deadline and pressure on the Applicant to deliver the project within the deadline. True copies of the email sent from the Applicant to the Respondent dated 5th July, 2019 and 13th September, 2019 identifying these issues are annexed hereto and marked as **"G".***

(17) *That on or about **5th November, 2019,** the Applicant again sent an email to the Respondent notifying them of the delay and the subsequent liquidated damages suffered by our client as a result of the delay on the part of the Respondent and failing to deliver the project within time as agreed to. A true copy of the email dated 5th November, 2019 sent from the Applicant to the Respondent is annexed hereto and marked as **"H".***

(18) *That there has also been poor workmanship on the part of your clients as a result of which there were several damaged works, particulars of which are as follows:*

Particulars of Damaged Works

	Particulars	**Cost**
(i)	Damages done to the GIB ceiling (approx. 120m2)	$14,400.00
(ii)	Damages done to the Joinery table in the staff room	$ 400.00
(iii)	Damages done to the finished GIB Wall	$ 1,800.00
(iv)	Damages done to 600 x 600 lights	$ 2,600.00
(v)	Damages done to GIB wall due to leakage	$ 4,000.00
(vi)	Damaged suspended ceiling tiles due to removal	$13,320.00
(vii)	Damaged suspended ceiling tiles due to leakage	$ 3,200.00
(viii)	Damages tiles	$ 648.00
(ix)	Stain on new carpet	$ 3,750.00
(x)	Repainting dirty walls after finishing	$ 7,700.00
	Total	**$51,818.00**
	Add Builders Overhead Cost	$ 7,692.30
	Add Vat	$ 5,355.93
	TOTAL	**$64,866.23**

*A true copy of the Report on the Damages done by Trade Air including summary of damaged works dated 12th December, 2019 is annexed hereto and marked as **"I".***

(19) *That due to the poor workmanship on the part of the Applicant has to now engage services of another contractor to carry out the repair works at its own expenses*

and has obtained quotes for rectification of the said repair works which it has to carry out at its own expense. A true copy of the Quotation received from Country Cool Refrigeration & Electrical Services to rectify the repair works dated 8th march, 2020 is annexed hereto and marked as ***"J"***

(20) That the project which the Applicant was supposed to deliver on ***13th September, 2019*** *remains incomplete to date and the Applicant's reputation and standing amongst its peers and clientele has consequently suffered. As a result of the said breaches, the Applicant has also suffered liquidated damages in the sum of* ***$47,500.0.*** *A true copy of the Payment Certificate from Fiji National University outlining deductions from payment for liquidated damages is annexed hereto and marked as* ***"K".***

(21) That in the premise, the Applicant counter claims against the Respondent in the sum of ***$112,366.23 (One Hundred Twelve Thousand Dollars Three Hundred Dollars and Twenty Three Cents)*** *which is inclusive of the liquidated damages suffered and costs pertaining to the damaged works as follows:*

(i)	*Claims for damages for damaged works*	-	*$ 64,866.23*
(ii)	*Claims for liquidated damages*	-	*$ 47,500.00*
	TOTAL	-	***$112,366.23***

(23) Mr Nitendra Singh, the director of the respondent company denies the substance of Mr Permal's evidence and deposed; (Reference is made to paragraphs 25, 26, 26.1, 27, 28, 30, 31 and 32 of the affidavit in opposition sworn on 16-06-2020).

(25) The Respondent denies that it is liable for any delay and further says it was not responsible for any delay and if there was any delay then it was the Applicant itself as main contractor and/or other subcontractors that caused the delay resulting in the claim by Fiji National University, if there was such a claim.

(26) By letter dated 4th October, 2019 written by Fiji National University to the Applicant the completion date was extended from 13th September, 2019 to 11th October, 2019. So, it is misleading of the Applicant to assert that the completion date of the project was 13th September, 2019. This letter was emailed to all the subcontractors by the Applicant on 5th November, 2019.

(26.1) At all material times the Respondent was not aware of the original completion date of the project but only came to know about the "extended" completion date of 11th October, 2019 when it received the email of 5th November, 2019. Annexed hereto and marked with the letter ***"NS-13"*** *is a copy of email dated 5th November, 2019 and Fiji National University letter dated 4th October, 2019.*

(27) In response to paragraph 24 of Permal's Affidavit (annexure 'L' referring to email dated 20th December, 2019, refer Defects Inspection Report with

annexure 'M' being Irwin Alsop Pacific Ltd Inspection Report dated 17th December, 2019 the only items applicable to the Respondent was at pages 6 to 8 under the heading "Mechanical Services". The rest were to do with other subcontractors. The reason why the items at pages 6 to 8 was outstanding was because the Respondent had to link up with the other subcontractor providing fire services. The fire services were supposed to run a cable from the fire panel to the air conditioning controller which the fire services had not done up to that day of the inspection report.

(28) *There was an email report circulated to the other subcontractors which was also copied to me by Ravinesh by email dated 25th February, 2020. This email provides a report done by Gerard young of IAP Consultants dated 21st February, 2020 and it had no works to be rectified or completed that was attributed to the Respondent. The report of Gerard Young referred to electrical, telecommunications, drawings, security with outstanding matters described as "Still pending for review are the Hydraulics and Lift Services" but none that could be attributed to the Respondent. Annexed hereto and marked with the letter* ***'NS-14"*** *is a copy of the email dated 25th February, 2020.*

(30) ***The alleged damages***

The Applicant has listed a Summary of Damaged Works" setting out 10 items with photographs (Annexure '1' of Permals' Affidavit) and the Respondent replies as follows:

(i) *Photograph1 showing two square holes is Item 1. However, it is an old photograph because after that an air conditioning ceiling unit was fitted in it. These holes were actually cut by the Applicant's workers themselves pursuant to arrangements as per our proposal where it include "builder's works".*

Annexed hereto and marked with the letter ***'NS-16A"*** *is a copy of photograph showing the ceiling unit being installed over the gib ceiling where those two space holes were created by the Applicant for the Respondent. This photograph was taken after photograph 1. The other hold is later covered with an access panel to inspect the air conditioning unit.*

(ii) *Photographs 2 and 3 – we accept which is Item 2.*

(iii) *Photograph 4 which shows a wall with a gap as Item 3. That cut out was carried out by the Applicant itself and was not required by the Respondent.*

(iv) *Photographs 5 and 6 is item 4. The roof constructed by the Applicant was not complete and when it rained it leaked and thus*

damaged the wiring and the lights. Besides we did not install the lights and it was not part of our contract. The light could not cost more than $330.00. Annexed hereto and marked with the letter ***'NS-16B"*** *is a copy of a quote I have obtained.*

(v) *Photograph 7 being Item 5 – We accept there was gib wall damaged due to blocked drain. The cost of remedying this is no more than $270.00. Annexed hereto and marked with the letter* ***'NS-16C"*** *is a quotation by Core Builders when it referred to No. 2 as "Repair of Damaged Gib Ceiling Tiles".*

(vi) *Photographs 8, 9, 10 and 11 being Items 6 & 7 - The damage was due to water leakage from roof penetration and not from the air conditioning units or works done by the Respondent to which the Respondent should be responsible for. In any event the Applicant did not provide details on how many tiles were damaged. I* ***estimate from the photographs that no more than six tiles need to*** *be replaced. The quote from Core Builders (annexure 'NS-16C') made a provision for $108.00.*

(vii) *Photographs 12 to 14 being items 8 & 9 – It was evidence that other subcontractors like the electricians were still working on site after the Respondent had completed its work. From the photographs there is no more than ten tiles which need replacement and the Core Builder's quote is $235.00 for ten tiles. (Annexure 'NS-16C).*

(31) *As a further response to paragraph 18 of Permal's Affidavit the Respondent says that these particulars only came by email on 19th February, 2020. This was the first time the Respondent received the so called "12th December, 2019" document.*

Annexed hereto and marked with the letter NS-17A is a copy of the email and damages claimed for the first time on 19th February 2020. However, IAP Consultants did not mention any of these in their report. These defects list from the Applicant came after our several email requests for payments which are; .....

(32) *In response to paragraph 19 of Permal's Affidavit the Respondent refutes the claim on poor workmanship by the Applicant as there was no mention of poor workmanship throughout the project duration by the client (FNU) and Service Engineer (IAP Consultants). Further as stated Country Cool Refrigeration did go to Toshiba NZ who responded to them by saying it would not supply Country Cool Refrigeration and hence, it is not possible for Country Cool to carry out the quote it had submitted. I am informed by the New Zealand supplier (AHI Carrier) and verily believe that it would not supply any of the parts being sought to Country Cool*

*Refrigeration. Annexed hereto and marked with the letter **"NS-18"** is a copy of To Whom It may concern email from AHI Carrier advising that the Respondent is "one of our authorised dealers for the Project Channel for Carrier and Toshiba air conditioner……"*

The first claim for defects for $64,866.23

(24) Mr Praveen Permal's evidence is that; (Reference is made to paragraph (18), (19) and (24) of the affidavit in support sworn on 11-05-2020).

(18) That there has also been poor workmanship on the part of your clients as a result of which there were several damaged works, particulars of which are as follows:

Particulars of Damaged Works

	Particulars	***Cost***
(i)	*Damages done to the GIB ceiling (approx. 120m2)*	*$14,400.00*
(ii)	*Damages done to the Joinery table in the staff room*	*$ 400.00*
(iii)	*Damages done to the finished GIB Wall*	*$ 1,800.00*
(iv)	*Damages done to 600 x 600 lights*	*$ 2,600.00*
(v)	*Damages done to GIB wall due to leakage*	*$ 4,000.00*
(vi)	*Damaged suspended ceiling tiles due to removal*	*$13,320.00*
(vii)	*Damaged suspended ceiling tiles due to leakage*	*$ 3,200.00*
(viii)	*Damages tiles*	*$ 648.00*
(ix)	*Stain on new carpet*	*$ 3,750.00*
(x)	*Repainting dirty walls after finishing*	*$ 7,700.00*
	Total	***$51,818.00***
	Add Builders Overhead Cost	*$ 7,692.30*
	Add Vat	*$ 5,355.93*
	TOTAL	***$64,866.23***

*A true copy of the Report on the Damages done by Trade Air including summary of damaged works dated 12th December, 2019 is annexed hereto and marked as **"I".***

*(19) That due to the poor workmanship on the part of the Applicant has to now engage services of another contractor to carry out the repair works at its own expenses and has obtained quotes for rectification of the said repair works which it has to carry out at its own expense. A true copy of the Quotation received from Country Cool Refrigeration & Electrical Services to rectify the repair works dated 8th march, 2020 is annexed hereto and marked as **"J".***

(24) *That on or about 20th December, 2019, the Applicant further notified the Respondent of the defects in the work carried out and the poor workmanship vide email. A true copy of the email dated 20th December, 2019 sent from the Applicant to the Respondent is annexed hereto and marked as* ***"L".***

(25) Mr Nitendra Singh, the director of the respondent company deposed that; (Reference is made to paragraph (27) and (28) of the affidavit in opposition sworn on 16-06-2020).

(27) *In response to paragraph 24 of Permal's Affidavit (annexure 'L' referring to email dated 20th December, 2019, refer Defects Inspection Report with annexure 'M' being Irwin Alsop Pacific Ltd Inspection Report dated 17th December, 2019 the only items applicable to the Respondent was at pages 6 to 8 under the heading "Mechanical Services". The rest were to do with other subcontractors. The reason why the items at pages 6 to 8 was outstanding was because the Respondent had to link up with the other subcontractor providing fire services. The fire services were supposed to run a cable from the fire panel to the air conditioning controller which the* ***fire services had not done up to that day of the inspection report.***

(28) *There was an email report circulated to the other subcontractors which was also copied to me by Ravinesh by email dated 25th February, 2020. This email provides a report done by Gerard young of IAP Consultants dated 21st February, 2020 and it had no works to be rectified or completed that was attributed to the Respondent. The report of Gerard young referred to electrical, telecommunications, drawings, security with outstanding matters described as "Still pending for review are the Hydraulics and Lift Services" but none that could be attributed to the Respondent. Annexed hereto and marked with the letter* ***'NS-14"*** *is a copy of the email dated 25th February, 2020.*

(26) The applicant's response was at paragraph (20) of the affidavit in reply sworn on 22-06-2020. Mr Praveen Permal deposed;

(20) *That in reply to paragraphs 27 and 28 of the affidavit, I reiterate paragraphs 18, 19 and 24 of my affidavit in support.*

(27) The respondent says in paragraph (31) of the affidavit in opposition that by an email dated 19-02-2020, the applicant for the first time notified the respondent the alleged defects pertaining to the construction and the report dated 12-12-2019 (annexure marked with letter "I" and referred to in the affidavit of Praveen Permal sworn on 11-05-2020) is attached to the email.

(28) The respondent further says in paragraph (31) of the affidavit in opposition that the applicant notified the respondent of defects pertaining to the construction only after the respondent's several email requests for the balance payment due under the tender offer document.

(29) The applicant's response is at paragraph (22) of the affidavit in reply. The applicant deposed;

> *(22) That in reply to paragraphs 30-32 of the affidavit, I reiterate paragraphs 18 and 19 of my affidavit in support and further says that the respondent ought to have exercised due diligence at all material times of the contract. In paragraph (31) of the affidavit, the deponent at lengths cites payment issues, however, no defence or reasons are advanced on the particulars of damaged work.*

(30) In order to show that an off-setting claim is genuine it must be put forward in good faith. **John Shearer Ltd v Gehl & Co**[10]. When an off-setting claim is relied on to reduce or eliminate the amount claimed under the statutory demand, it is the genuineness of that off-setting claim that matters.

(31) As per annexure 17-B (referred to in the affidavit in opposition of Mr Narendra Singh, sworn on 16-06-2020), the email requests for payments were evident at least by 04-09-2019 and the viber messages for payments were evident by 28-01-2020. **The applicant's schedule of defects dated 12-12-2019** (Annexure **I** to Mr Praveen Permal's affidavit in support sworn on 11-05-2020) which sets out what are purported to be nine defects had been brought to the attention of the respondent by way of an email on 19-02-2020.

(32) The delay in notification of report dated 12-12-2019 and the absence of notification of report dated 12-12-2019 **prior** to the email and viber requests for payments is some evidence of a lack of bona fides in the alleged off-setting claim for defects for $64,866.23.

(33) As I understand the off-setting claim, the applicant's calm for defect for $64,866.23 is based on the applicant's schedule of defects dated 12-12-2019. (Annexure **I** to Mr Praveen Permal's affidavit in support sworn on 11-05-2020). On 17th December, 2019, Irwin Alsop Pacific Ltd, the Engineering Consultant, has carried out an inspection of the project and had submitted a **"Pre-handover Inspection Report"** (Annexure marked M referred to in the affidavit of Mr Praveen Permal, sworn on 11-05-2020). The only items applicable to the respondent was at pages (6) to (8) under the heading "Mechanical Services". The rest were to do with other subcontractors. The respondent says the reason why the items at pages (6) to (8) were outstanding was because the respondent had to link up with the other subcontractors providing fire services. **This report dated 17-12-2019 makes no mention of any of the purported nine outstanding defects in the applicant's report dated 12-12-2019.**

(34) The "Pre-handover Inspection Report" of the Irwin Alsop Pacific Ltd (annexure M) will weaken the applicant's off-setting claim for defects for $64,866.23 and undermine the applicant's off-setting claim as to make it implausible or justify a conclusion that the claim is frivolous and vexatious.

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[10] **(1995) 60 FCR 136 at 143**

The applicant's report dated 12-12-2019 (Annexure I) is inconsistent with the undisputed contemporary report of Irwin Alsop Pacific Ltd (Annexure M). The applicant's report dated 12-12-2019 is inherently improbable in itself and it lacks sufficient prima facie plausibility to merit further investigation as to its truth, see; **Eng Mee Young v Letchumanan**[11].

(35) As regards to the off-setting claim for defects for $64,866.23, the measure of damages for defective work should be, at least ordinarily, the cost of remediation of that work. The applicant's evidence (i.e; Annexure "J" referred to in the affidavit of Mr Praveen Permal sworn on 11-05-2020) does not enable that to be ascertained, even on the preliminary and approximate level required on an application of this kind. The Country Cool Refrigeration & Electrical Services quotation at annexure "J" does not address the cost of rectification of purported nine outstanding defects (of course the respondent denies liability outright for all) in the applicant's annexure "I" (i.e. applicant's inspection report dated 12-12-2019). The annexure "J" is structured quite differently and it is not possible even to compare the items on each and deduce a cost of rectification of annexure "I". The annexure "J" does not establish what it would cost to rectify the defective work in annexure "I". Thus, the applicant's propounded off-setting claim for defects for $64,866.23 is a mere assertion without evidence that supports them.

The second claim for liquidated damages of $47,500.00

(36) Mr Praveen Permal in his affidavit in support sworn on 11-05-2020 deposed at paragraph (20);

> *(20) That the project which the Applicant was supposed to deliver on 13th September, 2019 remains incomplete to date and the Applicant's reputation and standing amongst its peers and clientele has consequently suffered. As a result of the said breaches, the Applicant has also suffered liquidated damages in the sum of* ***$47,500.00.*** *A true copy of the payment certificate from Fiji National University outlining deductions from payment for liquidated damages is annexed hereto and marked as* ***"K".***

(37) The respondent opposes the off-setting claim for liquidated damages and deposed; (Reference is made to paragraphs 25, 26, 26.1, 27 and 28 of the affidavit in opposition)

> *(25) The Respondent denies that it is liable for any delay and further says it was not responsible for any delay and if there was any delay then it was the Applicant itself as main contractor and/or other subcontractors that caused the delay resulting in the claim by Fiji National University, if there was such a claim.*
>
> *(26) By letter dated 4th October, 2019 written by Fiji National University to the Applicant the completion date was extended from 13th September, 2019 to*

[11] **(1980) A.C 331 at 341.**

11th October, 2019. So, it is misleading of the Applicant to assert that the completion date of the project was 13th September, 2019. This letter was emailed to all the subcontractors by the Applicant on 5th November, 2019.

(26.1) At all material times the Respondent was not aware of the original completion date of the project but only came to know about the "extended" completion date of 11th October, 2019 when it received the email of 5th November, 2019. Annexed hereto and marked with the letter ***"NS-13"*** *is a copy of email dated 5th November, 2019 and Fiji National University letter dated 4th October, 2019.*

(27) In response to paragraph 24 of Permal's Affidavit (annexure 'L' referring to email dated 20th December, 2019, refer Defects Inspection Report with annexure 'M' being Irwin Alsop Pacific Ltd Inspection Report dated 17th December, 2019 the only items applicable to the Respondent was at pages 6 to 8 under the heading "Mechanical Services". The rest were to do with other subcontractors. The reason why the items at pages 6 to 8 was outstanding was because the Respondent had to link up with the other subcontractor providing fire services. The fire services were supposed to run a cable from the fire panel to the air conditioning controller which the fire services had not done up to that day of the inspection report.

(28) There was an email report circulated to the other subcontractors which was also copies to me by Ravinesh by email dated 25th February, 2020. This email provides a report done by Gerard young of IAP Consultants dated 21st February, 2020 and it had no works to be rectified or completed that was attributed to the Respondent. The report of Gerard young referred to electrical, telecommunications, drawings, security with outstanding matters described as "Still pending for review are the Hydraulics and Lift Services" but none that could be attributed to the Respondent. Annexed hereto and marked with the letter ***'NS-14"*** *is a copy of the email dated 25th February, 2020.*

(38) The applicant's reply is at paragraph (19) of its affidavit in reply. Mr Praveen Permal deposed;

(19) *That in reply to paragraphs 25 - 26 of the Affidavit, I reiterate paragraphs 13 – 15 of my affidavit in support and further say that the completion date of the project was extended as the respondent had failed to complete the project on time.*

(39) The respondent's contention is that the respondent was not aware of the original completion date of the project but only came to know about the "extended" completion date of 11-10-2019 when it received the email dated 05-11-2019 (annexure NS-13).

(40) Mr Praveen Permal deposed at paragraph (11) of the affidavit in support that;

(11) That the project was supposed to be completed by 18th July, 2019 and at all material times, **it was an implied term** of the contractual arrangement that your client would carry out the required tasks diligently and as per standards and that the project would be delivered on time.

[Emphasis added]

(41) As I said earlier,

The relevant terms of the respondent's tender offer document are as follows;

(i) The equipment that was to be provided was to be a Toshiba VRF system.

(ii) Under the heading price summary the price quoted as $423, 792 VIP.

(iii) Under the heading "Payment and Indent" it is stated:

*"We need initial 30% deposit with order on acceptance of our offer. **Balance payments to be claimed on site progress basis.**"*

(iv) Under the heading "Exclusions" it is stated;

"Our price excludes the following costs:

(a) Builder's works, penetrations to wall, roof, making good to penetrations, water proofing and plinth for outdoor units.

(b) Electrical power supply to mechanical switchboard

(c) Digging and preparing of trench works if required

(d) Site storage, security, access, site services such as water, toilets, electricity by others."

(v) Under the heading "programme", it is stated;

"We shall follow builders programme on site to meet all critical deadlines & date".

The tender price in the tender offer document was reduced from $423, 792.00 to $393,792.00 (VIP).

Upon the respondent's tender offer document being accepted, the applicant issued a Purchase Order no: - 15855 on 10. 12. 2018. The purchase order stated;

"Mechanical services works for above mention project for the sum of $393, 000 VIP as per tender document".

I am surprised that there is no contract document executed between the applicant and the respondent defining the; (A) scope of work (B) working procedure of the contract (C) specifications of materials (D) payment basis (E) contract laws (G) time frame for the completion of the work.

(42) The contract can be taken to be constituted by acceptance of the respondent's tender offer document and the subsequent issuance of the purchase order no. 15855 on 10-12-2018, which stated;

"Mechanical services works for above mention project for the sum of $393,000.00 VIP as per tender document".

(43) As I said earlier, there is no contract document at all. The uncertainty extends to the extremes of what one might call the key terms of the contract. Without a written contract document, there is a difficulty in establishing after the event, exactly, what the parties did agree, memories can fade and have a nasty habit of changing to suit what might best help a party's case when a dispute arises.

Time frame for the completion of the project – should this be implied?

(44) A contract can include terms of two types – express terms (i.e. those which the parties spell out for themselves), and implied terms. Implied terms are the terms which the law will imply into a contract even though the parties may not have expressly stated them.

Terms may be implied into a contract from one of three **sources:**

Customs: a contract may be deemed to incorporate a term which can be shown to be the "certain and general" custom of a particular industry.

Statute: e.g.: Sale of Goods Act, 1979:

Section 14 – implied undertaking as to title.
Section 15 – conditions implied by description.
Section 16 – implied undertaking as to quality or fitness.

The Courts: The starting points seem to be that parties to a contract should (in general) be free to deal on the terms they themselves fix (and therefore, by implication, not on terms they omit – parties to a contract are generally presumed to know what they are doing!); and that where practicable, the law should help the parties to make the contract actually 'work'.

So in general, where parties to a contract have got contract sufficiently clear for a contract to 'work' (whether by express agreement – or, for that matter, omission), the courts will not interfere.

But where on the other hand it is necessary to imply a particular term into a contract in order to give it 'business efficacy' (or in other words, *the contract won't work without it),* or where the court is satisfied that the implied term would satisfy the 'officious bystander' test, then the Courts will imply such a term. In ***Silverman v Imperial Hotels Ltd*** **[1972]** a term was implied under this principle into a contract for the use of Turkish bath, to the effect that the couches used for reclining would be free from vermin! And in another case, a term was implied into a contract for driving lessons to the effect that the vehicle would be insured.

And in other cases, where the courts perceive a particular type of a relationship between the parties, and the Court is persuaded that the contract would be incomplete without a particular term which the court feels would be reasonable within the context of that relationship, the Courts may imply that term. Within the context of the employer/ employee relationship, for example, the Courts have used this principle to imply terms that the employee will carry out his work with reasonable skill and care, and will indemnify the employer against any loss caused by his negligence. In a Landlord/Tenant relationship, the Courts have used this principle to imply term requiring a landlord to maintain the common parts of a block of flats.

And this is where we hit the grey area: **what the Courts *won't* do is to imply a term *simply* because the term to be implied seems reasonable – the Courts must also be satisfied that the term to be implied is *necessary*.** No term was implied, for example, into an employment contract to the effect that the employer would take reasonable care to ensure the employee's property was not stolen.

(45) For obvious reasons, the courts are slow to imply a term.

In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree, each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And there is the difficulty of identifying with any degree of certainty the terms which the parties would have settled upon had they considered the question.

Accordingly, the courts have been at pains to emphasize that it is not enough that is reasonable to imply a term; it must be necessary to do so to give business efficacy to the contract. So in ***Heimann v Commonwealth of Australia*** [12], Jordan C.J (at P. 695), citing ***Bell v Lever Brothers Ltd*** [13], stressed that in order to justify the importation of an implied term it is "not sufficient that it would be reasonable to imply the term..... It must be clearly necessary". To the same effect are the comments of **Bowen L.J. in *The Moorcock*** [14]; Lord Esther M.R. in ***Hamlyn & Co v Wood & Co***[15]; Lord Wilberforce in

[12] **(1938) 38 S.R. (N.S.W.) 691**
[13] **(1932) A.C. 161, at P.226**
[14] **(1889) 14 P.D. 64, at P.68**
[15] **(1891) 2Q.B. 488, at pp.491 – 492**

Irwin (at p.256); Scrutton L.J in ***Reigate v Union Manufacturing Co. (Ramsbottom)***[16].

The basis on which the Courts act in implying a term was expressed by MacKinnon L.J. in ***Shirlaw v Southern Foundries***[17] in terms that have been universally accepted:

> *"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying..."*

The conditions necessary to ground the implication of a term were summarized by the majority in ***B.P Refinery Pty Ltd. v. Hastings Shire Council***[18]:

(1) it must be reasonable and equitable;
(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it:
(3) it must be so obvious that 'it goes without saying';
(4) it must be capable of clear expression;
(5) it must not contradict any express term of the contract.

(46) Returning to the case before me, it is not enough to assert that "*the project was supposed to be completed by 18-07-2019*" was an implied term, without any factual or evidential foundation as to four grounds for implication of a term mentioned in **B.P. Refinery Pty Ltd v Hastings Shire Council** (*supra*).

(47) The applicant's email dated 05-11-2019 (annexure NS-13) states;

> *To all sub-contractors,*
>
> *Please be mindful that the completion date of the project was dated 13th September, 2019 and the date for the liquidated damages began from the 14th as per the attached. We currently faced a total of 17 working days of delay till date with a total of $500 fine per day. Having that mentioned, there has been no testing and commissioning from any of the subcontractors. PCL will not be liable for any of the delays caused by your team. The management team for this project made sure that all alternatives were approved within the time frame which benefited respective companies such as 4 way cassette approval for tradeair, approval of glitz lighting instead of Philips brand for Powerkam, approval of Commscope for Shazcom and approval of selective fire hydrants and alarms for pioneer supplies. There had been ample amount of time given till commissioning and testing finishes including the defects as well. Also at the end project, whatever the LD charges given will be distributed among all the contractors.*
>
> *Hope we get to see all works finishing by this week.*

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[16] **(1918) 1 K.B 592 (at pp. 605 – 606).**
[17] **(1939) 2 K.B 206, at p.227**
[18] **(1977) 52 A. L. J. R. 20, at p.26**

Regards.
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(Emphasis added)

(48) However, it is common ground that, by letter dated 04-10-2019 written by Fiji National University to the applicant, the completion date was extended from 13-09-2019 to 11-10-2019. This letter was emailed to all the subcontractors by the applicant on 05-11-2019.

(49) The applicant did not seek to explain the accuracy of its email dated 05-11-2019. The absence of explanation is some evidence of lack of bona fides of the claim for liquidated damages for delay in completion of the project.

(50) There is no evidence upon which the applicant could rely upon to say that the respondent agreed to a "term" at the time of the constitution of the agreement that if the practical completion is delayed, the resulting liquidated damages are payable by the respondent to the applicant.

There was no evidence that the respondent knew and did agree to any "term" that if the practical completion is delayed, the resulting liquidated damages are payable by the respondent to the plaintiff.

(51) In these circumstances, the applicant has not set up a plausible contention requiring further investigation, or a triable issue, that it is entitled to liquidated damages. The claim is vexatious or frivolous.

The applicant presently has not – will have – offsetting claim against the respondent for liquidated damages

(52) Mr Praveen Kumar deposed in paragraph 23 of his affidavit in support that;

> *(23) That the applicant's losses and counter claims are of a recurring nature and which will be more fully computed and quantified and made available to the respondent prior to hearing of this application.*

(53) I note that the payment certificate issued by the Fiji National University (Annexure K referred to in the affidavit in support of Mr Praveen Permal sworn on 11/05/2020) is an **interim certificate**.

The applicant's cause of action for liquidated damages, is most likelihood, only accrue ***upon a future occurrence***, namely, ***upon the issuance of***: (1) the letter demand, and (2)

the final payment certificate, by the Fiji National University. The court is entitled to take into account the lack of demands from the Fiji National University for liquidated damages. A demand for payment for liquidated damages had never been raised by the Fiji National University. The respondent has a right to traverse, (1) the demand made by the Fiji National University (if any) for liquidated damages, (2) the final payment certificate issued by the Fiji National University (if any).

(54) The off-setting claim for liquidated damages must be one which the applicant presently has. The mere fact that the applicant has filed an interim payment certificate does not mean that the applicant has a claim in that amount. The definition of an off-setting claim requires not only that the claim be a genuine claim, but that it be in respect of a cause of action which has already accrued and that it cannot relate to a cause of action which is not presently in existence.

(55) The claim of the applicant for liquidated damages appears to be that the applicant will be entitled to liquidated damages arising from an event in future, namely, upon the issuance of Demand Notice and Final Payment Certificate by the Fiji National University, then I do not regard the claim for liquidated damages as being one which falls within the definition of a genuine claim that the applicant has against the respondent. The claim for liquidated damages is not in respect of a presently accrued cause of action.

(56) The term "cause of action" is of ancient origin. In **Cooke v Gill**[19], Brett J states at 116;

> *"Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse."*

(57) In **"Do Carmo v Ford Excavations Pty Ltd"**[20], Wilson J states at 245;

> *"The concept of a cause of action would seem to be clear. It is simply the fact or combination of facts which give rise to a right to sue. In an action for negligence, it consists of the wrongful act or omission and the consequent damage."*

Thus, an off-setting claim refers to that combination of facts which entitles an action to be brought.

(58) The contention of the applicant cannot succeed as regards the claim for $47,500.00. The claim is merely a ***"possible future claim"*** and thus does not qualify as an off-setting claim. At this point in time, the cause of action with respect to the claim for liquidated damages is likely to accrue in the future, but it has not as yet presently accrued. The applicant has yet to suffer the claim foreshadowed by Fiji National University.

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[19] **(1973) 8 LR CP 107**
[20] **(1984) 154 CLR 234**

[D] ORDERS

(1) The application for setting aside the statutory demand is dismissed.

(2) The respondent is entitled to costs on this application which I summarily assessed at $1,500.00 which is to be paid within seven days from the date of the decision.

02/09/2020.

.....

Jude Nanayakkara
[Judge]

HIGH COURT OF FIJI
LAUTOKA

At Lautoka
Wednesday, 02nd September, 2020.