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

CIVIL APPEAL NO. ABU 002 of 2023
[In the High Court at Suva Case No. HBE 060 of 2021]

BETWEEN	**:**	**CREATIVE DISTRIBUTORS PTE LTD**
		Appellant
AND	**:**	**AUTOCARE (FIJI) PTE LIMITED**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Morgan, JA** **Andrews, JA**
Counsel	**:**	**Mr. R. S. Prakash for the Appellant** **Mr. S. Parshotam and Ms. N. Pratap for the Respondent**
Date of Hearing	**:**	**05 & 15 May 2025**
Date of Judgment	**:**	**29 May 2025**

JUDGMENT

Prematilaka, RJA

[1] This is appeal by the appellant Creative Distributors Pte. Ltd (‘***Creative Distributors’***) against the judgment of the High Court[1] on 05 September 2022. By Originating Summons on 25.11.2021, ***Creative Distributors*** sought to set aside a creditor’s statutory demand dated 16.11.2021 issued by the respondent, Autocare [Fiji] Pte. Limited (‘***Autocare***’). The demand stated that, the debtor, ***Creative Distributors*** owed the creditor, ***Autocare*** an

[1] **Creative Distributors Pte Ltd v Autocare (Fiji) Pte Ltd** [2022] FJHC 566; HBE60.2021 (5 September 2022)

amount of FJD$389, 300.72, being the sum due and owing in respect of fuel supplied by ***Autocare*** to ***Creative Distributors*** over the period of 18 February 2020 to 31 July 2021. By the impugned judgment, the application to set aside the Statutory Demand was refused by the High Court subject to costs of $1000.00.

[2] ***Creative Distributors*** had contended that there was a genuine dispute as to the amount of the debt for the purposes of section 517(1)(a) of the Companies Act 2015. The affidavit of Manish Sharma, a Director of ***Creative Distributors*** had set out the said dispute in the following paragraphs:

> *'8. The Respondent despite pleading the monies owed failed to file a Counter-Claim in Lautoka High Court Civil Action No. HBC 219 of 2021.*
>
> *15. The demand made by the Respondent under the Statutory Demand is disputed by the Applicant as follows: -*
>
> *(a) The Respondent was well aware that it has double charged for the supply of fuel to the Applicant. The Respondent's own employee has admitted through email dated 19 May 2020 that there were errors from the Respondent's side and advised an updated statement will be sent to the applicant. The Respondent till date has failed to provide the Applicant with an updated statement. Annexed hereto and marked with the letter "G" is copy of email dated 19 May 2020 sent at 3.06 pm from the Respondent's employee to the Applicant.*
>
> *(b) The Applicant on 1 June 2020 wrote to the Respondent's Director Mr. Kalpesh Patel and advised him that there is an error on the Respondent's side and further stated that the Respondent's Driver or another person who was looking after the Respondent's fuel supplies had created false invoices. Annexed hereto and marked with the letter "H" is a copy of letter dated 1 June 2020 from the Applicant to the Respondent.*
>
> *(c) The Respondent had delivered fuel on certain days at the Applicant's premises after 5pm knowing that all fuel delivered was to be done between 8 am and 5 pm. The Applicant's designated workers who were authorized to receive the fuel Supplied were not at work after 5 pm.*
>
> *(d) The Applicant also advised the Respondent that fuel was being supplied without Local Purchase Orders being issued by the Applicant. The Applicant further stated that it will not pay for fuel supplied without Local Purchase Orders been issued.*

(e) The Applicant in its letter dated 10 June 2020 wrote to Mr. Kalpesh Patel and advised him that the Respondent is not to deliver fuel after 5 pm and payments for fuel delivered without Local Purchase Orders will not be paid. Annexed hereto and marked with the letter "I" is copy of letter dated 10 June 2020 from the Applicant to the Respondent.

(f) On 12 June 2020, the Applicant wrote to Mr. Kalpesh Patel and advised him that the supply of fuel does not match the Applicant's general account and banking reconciliations. The amount of fuel supplied did not balance with the sales. Annexed hereto and marked with the letter "J" is a copy of letter dated 12 June 2020 from the Applicant to the Respondent.

(g) On 9 August 2021, the Applicant wrote to the Respondent requesting invoices, statements, payment details, remittance, delivery copies and Local Purchase Order copies for the supply of fuel, recharge cards and rent. Till date the Respondent has failed to provide the information requested by the Applicant. Annexed hereto and marked with the "K" is a copy of letter dated 5 August 2021 from the Applicant to the Respondent.

(h) On 19 August 2021, the Applicant once again wrote to Mr. Kalpesh Patel and advised him that the Applicant has placed a stop payment on the cheques it had issued in respect of the fuel supplied. The Applicant also gave reasons as to why a stop payment was enforced. Annexed hereto and marked with the letter "L" is a copy of letter dated 19 August 2021 from the Applicant to the Respondent.

16. I have been advised by the Applicant's Solicitors that the Respondent ought to have filed a counter-claim in Lautoka High Court Civil Action No HBC 219 of 2021 as it has pleaded in its Statement of Defence that the Applicant owes substantial monies to the Respondent and should not have issued a Statutory Demand.

17. I have been further advised by the Applicant's Solicitors that the Statutory Demand amounts to an abuse of process and that the Respondent ought not be allowed to proceed with a Winding Up Application based on the dispute in respect of the sum demanded by the Respondent and the abuse of process when the Respondent issued the Statutory Demand and failed to file a Counter-Claim.'

[3] ***Creative Distributors*** have raised 06 grounds of appeal:

'(1) The Learned Judge erred when he refused to accept the Appellant's Affidavit in Reply and/or allow the Appellant leave to file its application for an extension of time under Order 3 Rule 4 of the High Court Rules to file its Affidavit in Reply;

(2) The Learned Judge erred when he failed to take into consideration that the Appellant had shown issues of dispute which were clear and logical and amounted to a genuine dispute;

(3) The Learned Judge had erred when he held that there was no nexus between the issuance and service of the Statutory Demand and Lautoka High Court Civil Action No. 219 of 2021 despite the Respondent pleading monies owed for the supply of fuel in its Statement of Defence;

(4) The Learned Judge had erred when he failed to take into consideration email dated 19 May 2020;

(5) The Learned Judge had erred when he failed to take into consideration that the Appellant had requested for documents from the Respondent for reconciliation purposes after it was found that the supply of fuel by the Respondent did not match the sale of the fuel;

(6) The Learned Judge had erred when he accepted the Respondent's arguments that it did not receive letters written by the Appellant dated 1 June 2020, 10 June 2020, 12 June 2020, 5 August 2021, and 19 August 2021.'

01st ground of appeal

[4] I shall now proceed to consider the grounds of appeal. There was no affidavit in reply by ***Creative Distributors*** in response to the affidavit in opposition by the respondent's director Mr. Kalpesh Patel. The proceedings on 23 June 2022 into the hearing of the appellant's application to have the statutory demand set aside shows that Ms. Takali, the appellant's counsel had indicated to the High Court judge that she was ready to proceed with the hearing to have the statutory demand set aside. She had also brought to the attention of court that an affidavit in opposition had been filed but not issued and sought leave of court to have it issued. She had also added that if the court was not inclined to issue it, she could rely on the initial supporting affidavit because she had understood that the respondent's counsel was objecting to the issuance of the same at that stage. It transpired that the affidavit in reply had been filed on the day before or two days before the hearing with a delay of about 20 days. The respondent's counsel Mr. Parshotam as expected by Ms. Takali had not consented to the issuance of the affidavit in reply at that stage due to the long delay and the matter had accordingly proceeded to hearing without any application or protest by Ms. Takali.

[5] It is clear that the appellant had not only failed to file the affidavit in reply prior to the date fixed by court but also had failed to seek any extension of time *at all* in terms of Order 3 Rule 4 of the High Court Rules either before or after the expiry of that period. There was not even a 'tardy application'[2] by Ms. Takali for extension of time to file and serve an affidavit in reply even on the date of hearing. There was no affidavit explaining the delay either. Nor did Ms. Takali offer any explanation even orally why an application was not made for extension of time for 20 long days or thereafter or at least even as late as the time of filing an affidavit in reply without leave of court one or two days ago. Neither did she offer any reason for the omission to do so either. Further, Ms. Takali did not make any application even at the hearing but simply sought to have the affidavit in reply issued. As Pathik J said[3] referring to SUPREME COURT PRACTICE 1979 Vol. I under Order 3/5/1 (our order 3 Rule 4) that if substantial delay occurs without any explanation being offered, the court is entitled, in the exercise of its discretion, to refuse the extension of time. Unlike in the present case, in ***South Pacific Recordings Ltd*** (see footnote 2) there was a specific motion seeking leave to appeal out of time and there was also an affidavit explaining the delay.

[6] ***South Pacific Recordings Ltd*** is not an authority to say that the court should *ex mero motu* (on his own motion) grant an enlargement of time under Order 3 Rule 4 of the High Court Rules, although upon an application using its wide discretion it can grant extension of time to avoid injustice to the parties in an appropriate case. Order 3 Rule 4 of the High Court Rules has no provision for a court to act on its own to grant extension of time. Had the appellant thought that it was absolutely vital for his challenge to the statutory demand that the respondent's denial of receiving letters dated 01 June 2020, 10 June 2020, 12 June 2020, 05 August 2021 and 19 August 2021 should be countered by way an affidavit in reply, it should have either filed it within time or sought an extension of time to file the same and explained the delay satisfactorily. *Vigilantibus non dormientibus jura subveniunt*

[2] See **Extreme Business Solution Fiji Ltd v Formscaff Fiji Ltd** [2019] FJSC 9; CBV0009.2018 (26 April 2019)
[3] **South Pacific Recordings Ltd v Ismail** [1995] FJHC 71; Hbc0597d.93s (13 April 1995)

(the law aids the vigilant, not those who sleep over their rights). Therefore, the 01st ground of appeal is without any merit.

06th ground of appeal

[7] The appellant also complains of the judge's factual finding that he accepted the respondent's position that the latter had not received the letters dated 01.06.2020, 10.06.2020, 12.06.2020, 05.08.2021 and 19.08.2021. The appellant relies on these letters to substantiate that they raised a genuine dispute regarding the debt demanded by the respondent. The reason for the judge's decision is that the appellant had not challenged the said denial in an affidavit in reply thus failing to adduce contrary evidence.

[8] The appellant states that those letters had been 'sent'. When questioned by this court at the hearing, the counsel for the appellant was unable to confirm the mode of sending those letters and any proof thereof. The respondent denies having received the same. As stated by the respondent, there are no email confirmations of the dispatch of the letters or any other proof of the appellant having sent them to the respondent attached to Manish Sharma's supporting affidavit. Nor is there any email confirmation by the respondent of the receipt of them. The appellant's counsel has submitted that his client was unaware of any of those steps which to me is nothing but simple common sense. The appellant was running a distributorship and not just a layman. On the other hand, the appellant's email on 19 May 2020, the earliest of all communications to the respondent had been sent by email. It is incredible that the appellant now pleads ignorance of email communications. The respondent too on the same day had sent an email to the appellant. Therefore, email correspondence between the parties was a practice well-known to both parties and nothing new.

[9] When one party fails to deny the other party's allegation or position, a court may infer an admission or acceptance of that allegation, particularly if the denial was reasonably expected. The failure of one party to deny or respond to the other party's position can lead to the inference that the matter is not genuinely disputed or even implicitly admitted,

depending on the context. Courts across the Commonwealth have consistently drawn such inferences to uphold fair trial principles, prevent ambush litigation, and preserve procedural fairness. As a result, I see no merit in the challenge to the trial judge's position that the respondent had not received the letters dated 01.06.2020, 10.06.2020, 12.06.2020, 05.08.2021 and 19.08.2021. Thus, in my view the 06th ground of appeal cannot be sustained.

02nd, 04th and 05th grounds of appeal

[10] The appellant contends that there is a genuine dispute as to the debt between the parties and therefore there is no legal basis for the statutory demand to recover the debt. Under section 515(a) of the Companies Act 2015, a Statutory Demand is a formal demand served by a creditor owed more than $10,000.00 by a company (debtor) and if not satisfied within 21 days (3 weeks), it creates a rebuttable presumption of insolvency ('deemed to be unable to pay debt'[4]). If the presumption of insolvency arises under section 515 (e.g., failure to comply with statutory demand within 21 days), the burden shifts to the company to rebut that presumption on a balance of probability, a higher threshold to be met than in showing a genuine dispute. Partial payment *per se* is not proof of solvency and the court requires comprehensive financial evidence.

[11] However, it is trite law that a statutory demand is not a debt collection device but a mechanism to determine solvency. The court's discretion to set aside or vary the demand ensures that companies are not wound up unjustly for disputed or defective claims. A statutory demand is not for resolving complex disputes—only for clearly owed debts and the presumption of insolvency arises if the demand is not complied with, unless set aside[5]. Heath JA emphasized in **Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd** [2024] FJCA (26 July 2024) at [41]:

> *'...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*

[4] Section 515

[5] **David Grant & Co Pty Ltd v Westpac Banking Corporation** [1995] HCA 43; 184 CLR 265; 69 ALJR 778; 131 ALR 253; 13 ACLC 1572; 18 ACSR 225

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)[15] may be at risk of a substantial award of costs to mark the abuse of process.'

[12] A company is solvent if, and only if, it is able to pay all its debts, as and when they become due and payable[6]. A company is insolvent if it cannot pay its debts as and when they fall due in the ordinary course of business[7]. Thus, insolvency is defined in section 514(1) & (2) as the inability to pay debts as they become due and payable—a cash-flow test rather than a balance sheet test; focus is on liquidity, not asset value[8] which means that solvency refers to commercial solvency, not just asset-rich status — the focus is on liquidity. This is a widely adopted approach in common law jurisdictions. The court may consider contingent and prospective liabilities when assessing solvency[9].

[13] Under section 517(1)(a), a genuine dispute about the debt's existence or amount can justify setting aside a statutory demand. A genuine dispute must be real and not spurious, hypothetical, illusory or misconceived[10]. The company need not prove the dispute on the balance of probabilities but the dispute must be *bona fide* and based on real substance yet the court will not conduct a mini-trial at the statutory demand stage[11]. A dispute is genuine if there is a plausible contention requiring investigation—even if the creditor believes the claim is weak[12]. The dispute need not be likely to succeed—only that it is not plainly untenable[13].

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[6] Section 514(1)
[7] **Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation** [2001] NSWSC 621
[8] **The Bell Group Ltd (in liq) v Westpac Banking Corporation** [No 9] [2008] WASC 239; 39 WAR 1; 70 ACSR 1; 225 FLR 1 [2024] FCAFC35
[9] **Bank of Australasia v Hall** [1907] HCA 78; 4 CLR 1514; [1907] 14 ALR 51
[10] **Swire v Cox** (1884) 55 LT 846
[11] **Eyota Pty Ltd v Hanave Pty Ltd** (1994) 12 ACSR 785 (NSWCA)
[12] **Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd** (1997) 76 FCR 452; [2007] WASC 187; [1997] FCA 681
[13] **TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd** [2008] VSCA 70; 26 ACLC 342; 66 ACLR 67; 66 ACSR 67

[14] The question is whether the appellant has demonstrated a genuine dispute of the debt. **CGI Information Systems and Management Consultants Pty Ltd v APRA Consulting Pty Limited** [2003] NSWSC 728, states as follows in respect of a genuine dispute:

> *"..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 section 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 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."*

[15] In **Roadships Logistics Ltd -v- Tree** [2007] NSWSC 1084 (28 September 2007) Justice Barrett observed as follows in respect of a genuine dispute:

> *"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 or competing contentions. If it sees any factor or 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."*[14]

[16] The court does not determine the merits of any dispute that may be found to exist, but simply whether there is such a dispute and the threshold for that is not high[15]. This does not mean that the court must accept uncritically as giving rise to genuine dispute, every statement in an affidavit "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be not having "sufficient prima facie plausibility to merit further investigation as to its [truth]" (cf Eng Mee Yong v Letchumanan [1980] AC

[14] See also **Panel Tech Industries (Australia) Pty Ltd v Australian Skyreach Equipment Pty Ltd (N.2)** [2003] NSWSC 896 and **Fitness First Australia Pty Ltd v Dubow** [2011] NSWSC 531

[15] **Fitness First Australia Pty Ltd v Dubow** (supra)

331 at 341], or "a patently feeble legal argument or an assertion of fact unsupported by evidence": cf South Australia v Wall (1980) 24 SASR 189 at 194.)[16].

[17] I have already held that the trial judge was right in his view that the respondent had not received the letters dated 01.06.2020, 10.06.2020, 12.06.2020, 05.08.2021 and 19.08.2021 allegedly sent by the appellant. These were the letters that appellant relied on to show a genuine dispute. There is one other email sent by the appellant to the respondent on 19 May 2020 where the appellant has said that there was a discrepancy in the statement provided by the respondent and requested a correct statement which is the basis of the 04th ground of appeal. The email sets out some invoices amounting to 67,083.38 and claims that those invoices had been settled but still shown in the statement of account dated 30 April 2020 which was not before the High Court. Two more invoices to the value of 15,539.80 are also mentioned in the email where the appellant claims that it had not received deliveries on those two but shown on the statement.

[18] The respondent has submitted a statement of account as at 31 July 2021 to court showing the total debt of $389,300.72 demanded by the Statutory Demand dated 16 November 2021. The contentious invoices referred in the appellant's email are not reflected in this statement of account. It could reasonably be inferred that the issues, if any, pertaining to those invoices had been resolves by then. This type of situation is not uncommon in business dealings.

[19] On the other hand, the appellant had confirmed a debt of $385,123.33 as at 30 April 2020 on 01 July 2020 in response to the respondent's letter dated 22 May 2020. No dispute had been raised by the appellant at that time. The statement of account as at 31 July 2021 shows that after 30 April 2020 only three payments namely $27,937.79 (16/10/2020), $450.00 (29/01/2021) and $11,869.48 (15/07/2021) had been credited. Thus, the admitted debt of $385,123.33 obviously remained unpaid even as at 31 July 2021. There have been many deliveries of fuel since 30 April 2020 denoted by debit entries and considering that, the

[16] **Eyota Pty Ltd v Hanave Pty Ltd** (supra)

total debt of $389,300.72 by 31 July 2021 and till 16 November 2021 (the date of the Statutory Demand) is quite plausible.

[20] For the sake of argument, even if one turns to the appellant's other letters dated 01.06.2020, 10.06.2020, 12.06.2020, 05.08.2021 and 19.08.2021, the appellant in its letter dated 12 June 2020 had confirmed that the fuel supply records provided by the respondent *via* statements were 'almost correct'. This is after saying in its 01 June 2020 letter that there was definitely a huge error on the respondent's side and made some breaches of protocols for fuel delivery in the letter of 10 June 2020. After a long silence, the appellant had allegedly written to the respondent on 05 August 2021 requesting invoices, statements, and payment details/remittance's, delivery copies and LPO copies from day one of the operation to 31 July 2021 but still not disputed the statement of account as at 31 July 2021 showing a debt of $389,300.72. The letter dated 19 August 2021 was to inform the respondent of countermanding payment of some cheques already given to the respondent as part payments for fuel supplies. Taken at their best, these letters did not raise a genuine dispute of the debt but some of them amounted to near acknowledgement of it and some calling for information which should have been with the appellant in the first place as the distributor of fuel supplied by the respondent.

[21] Requesting more information can support a genuine dispute if it shows confusion or uncertainty about the basis or amount of the claim, not if it is just a delaying tactic and a mere failure to understand or a general assertion of wanting 'more details' is not sufficient to establish a genuine dispute. The appellant never asserted what the actual debt was according to its calculations. Merely asking for more information or clarification without identifying any specific basis for denying liability, does not establish a genuine dispute**.** The appellant has not produced credible and substantive evidence such as (i) Accounting Records - company ledger entries indicating non-acceptance or partial acceptance of liability and comparison with creditor's statement of account (ii) Correspondence between parties - emails and letters raising concerns or contesting the invoice or amount & requests for clarification before or soon after receiving the demand (iii) Invoices and Statements - disputed invoices with notations or cross-references to differing terms & reconciliations

showing discrepancies in pricing, quantity, or delivery (iv) Contract or Agreement - the underlying contract, purchase order, or service agreement to show that the debt claimed falls outside the contract, or is not yet due (v) Proof of Non-Delivery or Defect *via* delivery dockets, inspection reports, complaints, photos, or return receipts to show breach or partial performance by the creditor challenging the basis of the debt.

[22] Therefore, the appellant has failed to demonstrate that there is a 'plausible contention requiring investigation' — that is, the dispute is genuine, bona fide, and based on real issues of fact or law. In other words, the appellant has not simply reached the threshold required by law to demonstrate a genuine dispute.

[23] On the issue of solvency, the appellant has submitted that the part payments referred to earlier establish that it was not insolvent. Partial payments may rebut the presumption of insolvency, but only if it shows that the company can pay all debts as they become due. Insolvency is judged holistically on a cash-flow basis —not whether a company can pay part of one debt, but whether it can pay all of its debts when due. When a company pays part of the debt and promises the rest, it does not prove solvency—it only shows a temporary willingness to pay part of one debt. Partial payment made under protest is not enough to defeat a statutory demand but the company must show ability to pay all debts. However, where such part payment is combined with other indicators (e.g., healthy cash flow, access to credit), insolvency may be contested. Occasional or partial payments do not necessarily mean the company is solvent if the overall picture suggests it cannot pay debts generally. Where a company pays one creditor but fails to pay others, it cannot be held to be solvent.

[24] The appellant has failed to provide up-to-date audited or management-prepared financial statements showing working capital, assets, liabilities etc., balance sheet, recent bank records showing available funds, cash flow analysis, creditor lists, payment records, solvency certificates or other reliable evidence establishing that it was solvent. Partial payments and stop payment orders made by the appellant in this case may suggest cash flow problems**,** especially since the balance remained unpaid. Companies must provide

clear financial proof of solvency and specific reasons why a debt is disputed to succeed under sections 516–517.

[25] Uncontroversial as it is, the statutory demand process is not to be used as a debt collection tool where there is a genuine dispute, but equally cannot be set aside without credible evidence of a genuine dispute or solvency. Therefore, in my view the appellant has not satisfied the court on a balance of probability that it was solvent and also failed to rebut the statutory presumption of insolvency under section 514. According to the appellant's counsel, the appellant has not been in business of distribution of fuel since October 2021 and even vacated the land where it was carrying on the business.

[26] Thus, for the forgoing reasons, I am not inclined to uphold the 02nd, 04th and 05th grounds of appeal.

03rd ground of appeal

[27] The appellant's argument supporting this ground of appeal is based on the Lautoka High Court case No. 219 of 2021. The appellant challenges the trial judge's conclusion that there was no nexus between the issuance and service of the Statutory Demand and the Lautoka High Court Civil Action No. 219 of 2021. The respondent has understood the issue the appellant is raising as being that the issuance and service of the Statutory Demand is an abuse of process due to the pending litigation in the Lautoka High Court being Civil Action No. HBC 219 of 2021.

[28] The appellant relies on Order 15 Rule 2 (1) of the High Court Rules 1988 which states as follows:

> *"(1) Subject to Rule 5 (2), a defendant in any action who alleges that he or she has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he or she does so he or she must add the counterclaim to his or her defence."*

[29] It is also submitted by the appellant that in terms of the Supreme Court Practice 1997 at 15/2/2 the dispute over debt owed to the respondent by the appellant does not allow the respondent to issue a Statutory Demand and knowing that a dispute was at hand, the latter ought to have filed a counterclaim against the appellant which would have been rightly tried at the time of trial in Lautoka High Court action. The appellant's contention is that the defendant's counterclaim need not be 'an action of the same nature as the original action' (per Fry J, in **Beddall v. Maitland** (1881) 17 Ch.D 174, p. 181) or even analogous thereto.

[30] The respondent's position is that the relief that the appellant is seeking in the Lautoka High Court proceedings arises from breach of tenancy agreement and deals with a tenant - landlord dispute where the cause of action pleaded against the respondent is fraudulent misrepresentation and inducement. The appellant is the plaintiff as the tenant in that action and the respondent is the first defendant and Autocare Holdings Pte Ltd is the second defendant who according to the respondent was the real landlord. The respondent argues that there is no connection between the Lautoka High Court proceedings, and the Statutory Demand issued for debt payment for the fuel supplied where the appellant is in the business of selling fuel at retail and the respondent is in the business of supplying fuel in wholesale and the Statutory Demand was served on the appellant on its inability to pay its debt for the fuel supplied whereas the Lautoka High Court proceedings is a tenant - landlord issue.

[31] In my view, for Order 15 Rule 2 (1) of the High Court Rules 1988 to apply, a defendant should allege that he or she has any claim or is entitled to any relief or remedy against a plaintiff in the same action in respect of any matter. Then the defendant ***may*** either bring a separate action in respect of that claim or make a counterclaim in respect of that matter in the existing action. If the defendant adopts the second option, he or she ***must*** add the counterclaim to his or her defence. The appellant submits that the respondent pleaded monies owed for the supply of fuel in its statement of claim and therefore must have necessarily pleaded that claim as a counterclaim in its defense. Given the scheme of Order 15 Rule 2 (1) of the High Court Rules 1988, I cannot agree with this proposition. In my view, the respondent still had the discretion to counterclaim that amount in Lautoka High

Court proceedings or file a separate action. The respondent had decided to take the latter route. If the respondent believed the appellant to be insolvent, as it appears to be from the Statutory Demand, there was no purpose of making a counterclaim in Lautoka High Court Civil Action No. HBC 219 of 2021. Therefore, I do not see any merits in the 03rd ground of appeal too.

[32] Before parting with this judgment, I shall refer to a matter of general importance to practitioners before the Court of Appeal. This appeal was set down for hearing before the Court of Appeal on 05 May 2025 at the call over on 07 March 2025 and directives for written submissions were also given. However, lawyers for both parties had not filed written submissions till the date of hearing. On 02 May 2025, a notice of change of solicitors was signed and filed by Brown & Prakash Attorneys, newly retained lawyers for the appellant. The counsel for the appellant Mr. Richard S Prakash had addressed a letter dated 30 April 2025 to Mr. Subhas Parshotam of Parshotam Lawyers for the respondent (a copy of which had been copied to the Registry on 30 April in an email but the original received by the Registry on 02 May) informing Mr. Parshotam that Mr. Prakash would seek an adjournment of the hearing and 'hopefully' have the matter fixed for hearing in the next session in July. Mr. Parshotam had replied to Mr. Prakash on 02 May stating *inter alia* that no notice of change of solicitors had been received yet and that he would not oppose the application for adjournment but would seek costs reminding that the costs of $1000.00 ordered by the High Court had still remained unpaid. These costs had been paid on 02 May 2025.

[33] The judges of this court scheduled to hear the matter received the notice of change of solicitors on the date of hearing i.e. in the morning of 05 May 2025. Mr. Prakash moved for an adjournment of the hearing on the premise that he had been retained at the eleventh hour. The counsel for the respondent maintained their position already communicated to Mr. Prakash.

[34] The court advised Mr. Prakash that a practitioner should not undertake a professional assignment such as prosecuting an appeal before the Court of Appeal which sits only 04

times a year to hear appeals where judges from abroad also attend. Mr. Prakash was informed that in any event, if an application was made for an appeal set down for hearing well in advance to be adjourned, except for an exceptional and unavoidable reason, the court would not accommodate any such request as it would be a waste of precious time and resources of the court and it would have deprived another deserving appeal from being taken up and disposed of. However, considering Mr. Prakash's passionate plea even for a short adjournment, the court decided to postpone the hearing until 15 May only on the condition of payment of $5000.00 as wasted court costs on or before 14 May. Time was granted to both parties to file their respective written submission until 09 May 2025. Mr. Parshotam had filed respondent's submissions on time but Mr. Prakash had filed his submissions only on 13 May.

[35] When the matter was taken up for hearing, it was found that the appellant had not paid the costs ordered by court. Mr. Prakash submitted to court that he had informed his client by email, telephone calls and even personally meeting him of the requirement of paying cost to court. The court found that Mr. Prakash had taken an honest effort to get the appellant to comply with the order for costs.

[36] This court is of the view that in the future if a practitioner is to move for an adjournment of a hearing of an appeal or application even for a short date on the basis that he could not get ready for the arguments for the reason that he or she had been retained at the eleventh hour, he or she must not assume that this court would automatically grant an adjournment of the hearing whether the other party consents or otherwise. On the contrary, this court would not be inclined to grant such a request except on an exceptional and unavoidable reason beyond the control of the practitioner. Any such adjournment would significantly shorten the time for the judges to hear, deliberate and prepare the judgments to be delivered at the end of the session thus causing unwarranted inconvenience to them. Even if the court does grant an adjournment, it would ordinarily be, among other orders, subject to an order for costs to be personally paid by the practitioner making the application. He or she must take personal responsibility for the payment of wasted court costs.

Morgan, JA

[37] I concur with the reasoning, conclusions and orders of Prematilaka, RJA.

Andrews, JA

[38] I have read and agree with the judgment of Prematilaka, RJA.

Orders of the Court:

1. Appeal is dismissed.
2. Appellant must pay costs of $5000.00 of the appeal to the respondent within 21 days hereof.
3. Appellant must also pay the wasted court costs of $5000.00 to the Court of Appeal Registry (ordered by the court on 05 May 2025) within 21 days hereof.
4. If the appellant fails to comply with Order 3 above, the court costs of $5000.00 must be deposited in the Court of Appeal Registry upon the completion of recovery proceedings by the respondent in the High Court, if any.

The Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

The Hon. Mr. Justice Walton Morgan
JUSTICE OF APPEAL

The Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

Solicitors:

Brown & Prakash Attorneys for the Appellant
Parshotam Lawyers for the Respondent