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

CIVIL APPEAL NO. ABU 042 of 2024
[In the High Court Case No HBC 332 of 2019]

BETWEEN	**:**	**BIJU INVESTMENTS PTE LIMITED**
		Appellant ***(Original Plaintiff)***
AND	**:**	**TRANSFIELD BUILDING SOLUTIONS (FIJI) LIMITED**
		Respondent ***(Original Defendant)***
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. A. Pal for the Appellant** **Mr. A. K. Narayan (JNR) for the Respondent**
Date of Hearing	**:**	**13 March 2025**
Date of Ruling	**:**	**08 April 2025**

RULING

[1] The appellant on 14 April 2024 had by summons (and supporting affidavit) sought extension of time to appeal against the ruling by Seneviratne, J dated 20 April 2023[1] [where he struck

[1] **Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd** [2023] FJHC 306; HBC332.2019 (20 April 2023)

out the summons for stay of the decision of Nanayakkara, J made on 29 January 2021[2] subject to cost of $2000.00]. Nanayakkara, J by the said decision had declined the application by the appellant to set aside the respondent's statutory demand subject to cost of $2000.00. Apparently the appellant had earlier filed a timely appeal against the ruling of Seneviratne, J but due to not having filed summons for security for cost, it had got abandoned. Anyway, the extension of time application does not seem to have proceeded beyond filing to date. Apart from these proceedings, there were two separate appeals between the parties.

[2] In the meantime, the Full Court had delivered the judgment **Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd** [2024] FJCA 133; ABU014.2021 & ABU041.2021 (26 July 2024). ABU014.2021 is an appeal against High Court at Lautoka Case No. HBC 332 of 2019 (dated 29 January 2021 where the High Court dismissed ***Biju's*** application to set aside a statutory demand) and ABU041 of 2021 is an appeal against High Court at Lautoka Case No. HBE 07 of 2021 (dated 07 April 2021 where the High Court dismissed Biju's application for leave to oppose a winding up petition – a copy of which has not been seen by this court). ***Biju*** appealed against both the statutory demand and winding up judgments. Thus, the ruling by Seneviratne, J dated 20 April 2023 including the costs of $2000.00 was not before the Full Court for determination on 26 July 2024. Nor, was obviously Azhar, J's costs order (a copy of which I have not seen either) said to have been made on 28 August 2024, for it had been made after the Full Court judgment.

[3] The aforesaid judgment dated 26 July 2024 is on the said two other appeals between the appellant and respondent pending at that time in this court. As per Jitoko, P (as he then was) the judgment contains a detailed and comprehensive analysis, carefully crafted of statutory demands and winding up petitions, and insolvency proceedings, especially under the Companies Act 2015 in Fiji. The gist of the judgment as summarized by Morgan, J is that a statutory demand is not a debt collection process; its sole purpose is to create a rebuttal presumption of insolvency and if the creditor knows that the debtor company is not

[2] **Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd** [2021] FJHC 59; HBC332.2019 (29 January 2021)

insolvent, it is an abuse of the process to use a statutory demand to obtain payment and creditors who proceed in that way (and possibly, in a clear case its legal advisers) may be at risk of a substantial award of costs to mark the abuse of processes. Accordingly, the court unanimously, dismissed the statutory demand (as moot) and winding up appeal (for lack of jurisdiction - in that the Court did not grant leave to appeal out of time and therefore, dismissed the winding up appeal on that basis as the winding up judgment was interlocutory in nature and no leave had been earlier obtained) without cost.

[4] The appellant had thereafter filed summons (again supported by an affidavit) on 01 October 2024 seeking stay of execution of enforcement of costs orders of Nanayakkara, J on 29 January 2021, Seneviratne, J on 20 April 2023 and Azhar, J on 28 August 2024 and reversion of the said cost orders given the aforesaid Full Court decision. It does not appear from the Full Court judgment that the appellant had urged the Full Court to set aside the costs orders of Nanayakkara, J on 29 January 2021 in the same proceedings; the other two costs orders being challenged were not before the Full Court for deliberation anyway. The appellant had later filed fresh summons on 18 October 2024 seeking only the stay orders as prayed for in the earlier summons. On 09 December 2024, the appellant moved to withdraw the application for a stay of enforcement of cost orders made on 18 October 2024 which was allowed by this court leaving only the application for reversion of cost still pending before this court. The respondent did not seek cost in respect of the withdrawal of the stay application though it had already filed an affidavit-in-opposition followed by the appellant's affidavit-in-reply to the 18 October 2024 summons.

[5] The appellant argues that any costs order made by the High Court in conjunction with the decision to dismiss the appellant's application for setting aside the statutory demand ought to be reversed given the Full Court's decision. The appellant further contends that a single Judge of this court has the power to do so in terms of section 20(1)(j) read with 20(1) (k) of the Court of Appeal Act. Section 20(1)(j) vests a judge of this court with discretion to deal with costs and other matters incidental to matters in any of the earlier paragraphs in section 20(1). Section 20(1)(k) empowers a judge of this court generally to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal. The

appellant relies on the Supreme Court judgment in **Abbco Builders Ltd v Star Printery Ltd** [2019] FJSC 6; CBV0008.2018 (26 April 2019) in support of his contention.

[6] According to the SC judgment, the factual context of ***Abbco Builders Ltd***, was that before the appeal was heard in the Court of Appeal, the petitioner had successfully applied to strike out a notice of cross-appeal and then successfully opposed an application by the respondent for an extension of time in which to file an appeal. A single judge of the Court of Appeal had earlier directed that those the costs applications be considered by the Full Court when it would hear the petitioner's substantive appeal. However, the Court of Appeal failed to address those applications, so the petitioner issued a summons returnable before a single judge of the Court of Appeal by which the judge was asked to award the costs to the petitioner. The judge referred the summons to the Full Court which held that the single judge did not have jurisdiction to make the orders sought and dismissed the application but the Full Court did not itself assume jurisdiction. As a result the petitioner remained deprived of costs to which it was entitled and the filed a petition for leave to appeal the decision of the Court of Appeal to the Supreme Court.

[7] The SC judgment continued to describe that the Court of Appeal had taken the view that the single judge was bereft of jurisdiction to make the costs orders sought because the applications were made after determination of the substantive appeal and that therefore they could not logically be said to be applications or orders sought which were *"incidental to an appeal or intended appeal"* within section 20(1)(k) [it is not 20(1)(j) as referred to by the Supreme Court] of the Court of Appeal Act. Thus, the central question before the Supreme Court was whether the Court of Appeal erred; *i.e.* whether as a matter of law an application made under section 20(1) (k) may be entertained by a single judge notwithstanding the fact that the application is made after the substantive appeal has been determined. The Court of Appeal appears to have decided that after delivery of the judgment the Court which heard the substantive appeal is too *functus officio* in order to consider section 20(1)(k) application in relation to cost. This is the second question identified by the Supreme Court for determination.

[8] On the second issue, the Supreme Court determined unanimously that the Court which delivered judgment on the petitioner's appeal was not *functus* in relation to the two applications for costs of which it was seized but was only *functus* as regards a claim or application before it when it had finally discharged its duties – its function - in determining the claim or application and the Court had not completed the function entrusted to it to decide the two cost applications. The Supreme Court said that the remedy which was open to the petitioner was to draw to the Court's attention to the fact that there were before it two outstanding applications for costs which awaited the Court's decision and that could have been accomplished by the issue of a summons returnable before the Court, or (no less appropriately and less costly) by sending a letter to the Court, copied to those acting for the respondent, referring the Court to its oversight. The Supreme Court even said that there was no need in the circumstances to issue a section 20(1)(k) application.

[9] On the first and foremost question of jurisdiction of the single Judge of this Court under section 20(1)(k) of the Court of Appeal, the Supreme Court held in the affirmative as follows:

> *23. To answer the issue posed in the application of section 20(1)(j), the question which has to be asked is this: to what were the costs applications incidental ? That they were incidental to something goes without saying, for costs applications are never made in a vacuum. There can be no question in the present case but that when the two applications were first made they were incidental to the respondent's intended (cross) appeal, intended rather than commenced because its notice of cross-appeal was irregular and because it then sought an extension of time in which to appeal. The fact that thereafter that intended appeal did not materialise because of the order to strike out and of the refusal to extend time, is a fact which did not change the character of the process to which the costs applications were attached, the process to which, in other words, they were an incident. They were at all times incidental to something and that something was nothing other than the respondent's unsuccessful attempts to launch an appeal. In this case, it so happens that the costs applications were first made immediately after the order to strike out and the order refusing an extension of time, respectively. It would have been a bold argument which suggested that those timely applications were not incidental to the intended appeal on the basis that by reason of those orders there was no longer an intended appeal afoot. Such an argument could not withstand a rational and purposive construction of the statutory provision. And if that be correct, it cannot matter if the applications for costs be made, not immediately after the respective orders, but later. It follows that the costs applications in this case were incidental to an intended appeal when first they were made and remained so when the petitioner issued the summons in October 2017. (emphasis added)*

[10] In order to get a clear picture of what had transpired, I perused the Court of Appeal judgment in **Abbco Builders Ltd v Star Printery Ltd** [2018] FJCA 57; ABU0087.2015 (1 June 2018) which was the subject of review by the Supreme Court **Abbco Builders Ltd v Star Printery Ltd** [2019] FJSC 6; CBV0008.2018 (26 April 2019). The Court of Appeal judgment shows that pending appeal by the appellant, a single Judge of this Court considered (i) an application for enlargement of time to appeal against the judgment of the High Court by the respondent together with (ii) an application by the appellant to strike off a cross-appeal which had been filed by the respondent. The single Judge held against the respondent in regard to its application for enlargement of time to appeal and in favour of the appellant in its application to strike off the respondent's cross-appeal. Consequently, the single Judge made order that, *"Costs regarding the application for enlargement of time and the application for striking out the cross-appeal of the Respondent to be considered by the full Court when the substantive appeal is heard."* (Vide order (2) as per Justice Suresh Chandra, RJA's said order dated 07 December, 2016[3] who said '*since the substantive appeal on the grounds filed by the appellant is to be taken up at a future date it would be best to consider the costs the appellant is seeking now in respect of the two matters when its appeal is taken up for hearing'*). The most important aspect is that while determining the substantive appeal on 14 September 2017[4], the Full Court had not addressed its mind to the said order of the single Judge *although it had been urged in the appellant's written submission* thereof. Subsequently, the appellant had filed summons seeking costs in respect of those two applications which a single Judge had fixed for consideration by the Full Court which was eventually decided by the Full Court on 01 June 2018 where it dealt with the situation where the appellant was seeking orders for the determination of costs for interlocutory applications that were made by the parties *prior to the substantive appeal* being determined by the Full Court which a single Judge had left for the Full Court to decide on, but, which the Full Court had not dealt with.

[3] **Abbco Builders Ltd v Star Printery Ltd** [2016] FJCA 172; ABU87.2015 (7 December 2016)
[4] **Abbco Builders Ltd v Star Printery Ltd** [2017] FJCA 104; ABU0087.2015 (14 September 2017)

[11] Thus, the Supreme Court decision has to be understood in the above context. As far as the summons before me, the only costs order that could have been considered by the Full Court in its judgment on 26 July 2024 was the costs order of $2000.00 made by Nanayakkara, J on 29 January 2021. The ruling by Seneviratne, J dated 20 April 2023 including the costs of $2000.00 was not before the Full Court for determination on 26 July 2024 and obviously Azhar, J's costs order of $1500.00 on 28 August 2024 was anyway made after the Full Court judgment. However, the appellant had not urged the Full Court to consider the costs order of $2000.00 made by Nanayakkara, J, for there is no reason whatsoever for the court not to deal with it if the appellant had brought it to the notice of court as in ***Abbco Builders case.***

[12] Can this court of a single Judge now consider the appellant's summons to have costs order of $2000.00 made by Nanayakkara, J reversed because the substantive order of Nanayakkara, J on 29 January 2021 where he had declined the application by the appellant to set aside the respondent's statutory demand had been set aside by the Full Court by dismissing the statutory demand altogether.

[13] I remind myself that under section 20(1) a single Judge has a discretionary power as denoted by the word *'may'* to act under section 20(1)(j) and 20(1)(k) of the Court of Appeal Act (CA Act). However, section 20(1)(j) has no application here as the reversion of costs order of $2000.00 made by Nanayakkara, J sought by the appellant cannot be treated as incidental to matters under section 20(1) (a) to (h) of the Court of Appeal Act. Nevertheless, I believe that I would still be able to consider the appellant's application under section 20(1)(k) of the Court of Appeal Act on the basis that it is incidental to the appeal heard and determined by the Full Court on 26 July 2024 because the costs order being challenged had been made along with the impugned substantive order and the former was very much before the Full Court. Unfortunately, the appellant was oblivious to it and did not remind the Full Court of it at the hearing. I am fortified to take this view by the Supreme Court judgment in ***Abbco Builders case.*** The other question is if I do so, would I be seen to be usurping the powers of the Full Court? In my view, the Full Court judgment is not a bar for me to consider the reversion of cost application under section 20(1)(k) of the Court of Appeal Act simply because the Full Court had said that the statutory demand appeal had become moot because

the appellant had paid the debt in full between 07 April 2021 and 14 April 2021 but still exercised a residuary discretion, on limited public interest grounds, to hear the otherwise moot appeal and dismissed the statutory demand appeal as moot. The Full Court also said that although, an order setting aside the statutory demand ought to have been made, it did not consider that any order as to costs should be made because the appeal is moot. Here, the Court refers to cost of the appeal and not the costs of $2000.00 awarded by Nanayakkara, J in favour of the respondent.

[14] I feel confident in thinking that had the Full Court addressed its mind to the costs order of $2000.00 made by Nanayakkara, J, in all likelihood to a point of almost certainty, that it would have set aside the costs order as well, for the costs followed the event being the refusal of the setting aside of the statutory demand which refusal has now been effectively set aside by the Full Court by dismissing the statuary demand. Therefore, I am inclined to hold that in this instance the costs order of $2000.00 made by Nanayakkara, J cannot stand and therefore I should exercise my discretion under section 20(1)(k) to reverse it. I do not think that I am encroaching upon the authority of the Full Court in this instance either.

[15] However, there is one crucial matter that stands in the way of my making that order. The appellant had paid $5,500.00 as the total costs on or about 05 December 2024 to the respondent pursuant to consent orders made on 14 October 2024 between the parties as a precondition to allow the appellant to amend its statement of claim. The appellant had not disclosed this fact to this court but it was brought to my notice by the respondent and I have now perused the said consent orders sealed on 20 November 2024. $5500.00 is the totality of costs being challenged by the appellant in the current proceedings. It is clear that the appellant knew of this payment by 09 December 2024 when he chose to withdraw the stay of enforcement application but not the reversion of cost application. To me, this is a wilful suppression or at the least a chronically careless non-disclosure. In the circumstances, I see no reason why this court should reverse the costs order of $2000.00 made by Nanayakkara, J.

[16] What about the ruling of Seneviratne, J dated 20 April 2023 regarding costs of $2000.00. It was not a matter to be determined by the Full Court on 26 July 2024. Yet, as I have already said at the beginning, it arose from the said ruling which is the subject matter of the extension of time application already before this court though not yet pursued by the appellant beyond filing. Thus, technically, it is incidental to an application under section 20(1)(b) and could come under jurisdiction of a single Judge under section 20(1)(j) of the Court of Appeal Act. However, should I exercise my discretion to reverse it?

[17] It arose from the appellant's application to stay of the decision of Nanayakkara, J on 29 January 2021 pending the appeal which has now been determined. By the time the appellant made this application before Seneviratne, J on 25 February 2021, the appellant had not paid the debt on which the statutory demand was based. The full payment of $115, 073. 80 had happened between 07 April 2021 and 14 April 2021 because having dismissed ***Biju's*** applications on 07 April 2021, the High Court adjourned the winding up petition for seven days to allow time for ***Biju*** to pay the debt on which the statutory demand was based and prior to the winding up petition being re-listed on 14 April 2021, ***Biju*** paid the debt in full. On 14 April 2021, with leave, Transfield withdrew the winding up petition. On withdrawal of the petition, the winding up proceeding was at an end. The Judge made an order for costs against ***Biju***. Therefore, there was still a justiciable reason for the appellant to make the application on 25 February 2021 to stay the decision of Nanayakkara, J on 29 January 2021 pending the appeal. However, the appellant could and should have immediately filed a motion and informed the High Court that their application was no longer necessary and sought to withdraw it in view of the full payment made, before Seneviratne, J heard it on 28 March 2023 and delivered the ruling on 20 April 2023. The appellant had not acted with due diligence and as a result incurred costs of $2000 by Seneviratne, J who stuck out the summons for stay. Therefore, I am not inclined to exercise my discretion to reverse costs order of Seneviratne, J. dated 20 April 2023. In any event, as I have already alluded to this cost too had been paid by the appellant to the defendant on or about 05 December 2024.

[18] Finally, Azar, J had made the alleged order for costs of $1500.00 to be paid by the appellant to the respondent on 28 August 2024, two months after the Full Court judgment on 26 July

2024. That order is at the moment not subject to any appeal, application for leave to appeal or extension of time application. Therefore, it is not incidental to any of the matters set out from section 20(1)(a) to 20(1)g) of the Court of Appeal Act. Not is it incidental to any appeal or intended appeal. Therefore, I have no jurisdiction to deal with the application to reverse Azar, J's order for costs under section 20(1)(j) or 20(1)(k) of the Court of Appeal Act. In any event, as I have already alluded to this costs too had been paid by the appellant to the defendant on or about 05 December 2024.

[19] The respondent is asking for indemnity cost. This court considered the law in depth relating to indemnity costs in an earlier ruling[5] and said *inter alia* as follows:

> *'[28] However, the court will carefully assess whether the history of litigation justifies a departure from the usual standard of costs (standard basis) to the more punitive indemnity basis. The decision will depend on the specific facts and circumstances of the case, and the court will aim to balance the interests of justice with the need to discourage improper conduct. In summary, while the history of litigation can be a relevant factor, it is not determinative on its own. The court will consider the overall conduct of the parties and whether indemnity costs are appropriate in the circumstances.'*
>
> *[34] Costs are by statue and by rules of court in the discretion of court. The starting point is the general rule that costs follow the event and, therefore, the successful party ought to be paid its cost by the unsuccessful party. That general rule would apply unless there are cogent reasons to depart from it. The judge has a large discretion as to cost. However, that discretion must be exercised judicially i.e. in accordance with established principles and in relation to the facts of the case.'*

[20] Given the totality of circumstances discussed above and the applicable law on indemnity costs set out in ***Griffiths***, I do not think that this case approaches the threshold of awarding indemnity cost.

[5] **Griffiths v McGrath** [2025] FJCA 45; ABU0063.2024 (24 March 2025)

Orders of the Court:

(1) Appellant's summons seeking the reversal of costs of $2000.00 made by Nanayakkara. J. on 29 January 2021 is dismissed.

(2) Appellant's summons seeking the reversal of costs of $2000.00 ordered by Seneviratne, J. on 20 April 2023 is dismissed.

(3) Appellant's summons seeking the reversal of costs of $1500.00 ordered by Azar, J. on 28 August 2024 is dismissed.

(4) Appellant is directed to pay $3000.00 to the respondent as costs of the reversion of costs application in connection with impugned High Court costs orders referred to in order (1) to (3) above within 21 days hereof.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

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