**IN THE HIGH COURT OF FIJI**
**AT SUVA**
**CIVIL JURISDICTION**

**CIVIL NO. HBC 202 of 2011**

**BETWEEN** : Fiji National Provident Fund

**APPLICANT**

**AND** : Vijay Raghwan and Dr. Ronald Neo trading as Raghwan Neo Joint Venture

**1st RESPONDENT**

**AND** : John Orton

**2nd RESPONDENT**

**COUNSEL** : Ms. M Mouir with N Brendi N for the Applicant
Mr. Nicholes Bernes for the 1st Respondent
Mr. Peter Knight for the 2nd Respondent

**Date of Judgment** : 8 October 2013

# JUDGMENT

1. The Applicant (Fiji National Provident Fund) by its Notice of Originating Motion dated 11 July 2011 seeks to set aside an arbitration award made on 22 June 2011 by the Second Respondent (Arbitrator) in relation to a construction contract dispute between the Applicant and the First Respondent (Raghwan Neo Joint Venture).

2. Applicant subsequently filed its amended Notice of Originating Motion on 26 August 2011, supported by supplementary affidavit by Mosese Waqanibete sworn on 24 August 2011.

3. Mr John Orton, the learned Arbitrator filed an answering affidavit on 28 September 2011, sworn on the same day.

4. Mr. Vijay Raghwan, filed an affidavit in response on 29 September 2011 sworn on 28 September 2011 to the supplementary affidavit of the Mosese Waqanibete sworn on 26 August 2011.

5. Mr. Mosese Waqanibete filed two affidavits in reply on 28 September 2011 sworn on 28 September 2011 to the answering affidavit of the Second Respondent and to the affidavit in response of First Respondent.

6. The Applicant and the Respondent both filed its Written Submission on 13 December 2011 and 14 March 2012 respectively. The Applicant filed its Reply Submissions on 13 April 2012.

**Brief Back Ground**

7. The Applicant (Fiji National Provident Fund) and the First Respondent (Raghwan Neo Joint Venture) entered into a construction contract for the construction of Office Complex for Fiji Island Revenue and Customs Authority, located on the corner of the Ratu Sukuna Road and the Queen Elizabeth Drive.

8. Raghwan Neo Joint Venture was the contractor responsible to build the building and when the building was completed by the Raghwan Neo Joint Venture, the actual completion date was 443 days after the agreed completion date that was specified in the construction contract between the parties, that was based on Fiji Standard Construction form contract.

9. The dispute between Fiji National Provident Fund and Raghwan Neo Joint Venture primarily revolved around Raghwan Neo Joint Venture's claim for loss and expenses due to delay in contract completion allegedly caused by Fiji National Provident Fund's delay in nominating a new subcontractor to replace the existing nominated subcontractor, Kooline Refrigeration Ltd, for dilatory performance.

**Summary of the Arbitration Award**

10. Disputes that arose during the course of the contract for the construction of a New Office Complex for Fiji Inland Revenue and Customs Authority at Nasese.

> *"Now I, the said Jon Orton, having duly considered the matters submitted to me, do hereby make an award as follows:*
>
> > *That, in respect of Raghwan Neo Joint Venture's claim for $3,296,761.18 VAT excl for Loss & Expense, Retentions and ICA # 42, plus interest at 15% pa, plus $94,722.95 VAT incl costs, Fiji National Provident Fund pays to Raghwan Neo Joint Venture the following:*
> >
> > *$ 2,269,190.00 VAT excl being RNJV's award for Loss & Expenses, Retentions and ICA #42.*
> >
> > *$ 1,011,773.80 VAT excl being RNJV's interest on the above*
> >
> > *$ 75,785.45 VAT excl being RNJV's award for costs*
> >
> > *$ 3,356,749.30 VAT exclusive Total*
> >
> > *That, in respect of Fiji National Provident Fund's claim for $886,000 VAT excl for liquidated damages as a result of delay in completing of the contract, RNJV pays to FNPF.*
> >
> > *$ 0.00 VAT exclusive Total*
> >
> > *That, in respect of Fiji National Provident Fund's claim of $571,197.12 VAT excl for the cost of rectifying construction defects RNJV owes to FNPF.*
> >
> > *$ 195,019.13 VAT excl being FNPF's award for rectifying the cost of construction defects.*
> >
> > *$ 195,019.13 VAT exclusive Total.*

*Payment of the FNPF's claim for defects has been made by a reduction in the retention amount from 1 September 2009 as reflected in Appendix 1 and therefore no interest charge is applicable. Payment of the $585,456.18 VAT excl retention amount owed at Practical Completion is to be made immediately and $2,771,293.13 being the balance of the award is to be paid on or before 7 July 2011."*

11. Grounds to set aside the award pursuant to notice of amended notice of originating summons:

a. *Followed an improper process that breached principles of natural justice.*
b. *Erred in law*
c. *Is based on legal misconduct by the Arbitrator by reason of the serious irregularities of process and errors of law set out in this Motion that has prejudiced the Applicant and has put substantial public funds at risk.*
d. *Has been improperly procured.*
e. *Was excessively delayed.*
f. *Awarded excessive interest – no jurisdiction and/or exacerbated by Arbitral delay.*
g. *Is not in the public interest.*
h. *Was based on apparent bias by the Arbitrator.*

12. Governing law of the Arbitrator pursuant to Memorandum of Agreement:

*"The Arbitration Act of Fiji chapter 38 shall apply to the arbitration process. If the Fiji Act should be silent on any matters the New Zealand Arbitration Act 1996 shall be used, except where its clauses are in contradiction to mutually agreed clauses contained in this Memorandum."*

13. It is noted that the grounds of challenge of the award have been narrowed down to three heads of challenge in the submissions of the Applicant which are as follows:

a. Breaches of natural justice and due process, based on the agreed arbitral process contained in the Arbitration Agreement, Fiji Act and NZ Act.

b. Acting outside the Second Respondent's powers by making an excessive interest award that the Second Respondent exacerbated by his delay, and failing to provide the Award within the statutory time limit contained in the Fiji Act.

c. Error of law, those are apparent on the face on the Award. [the interpretation of clauses 23(g), clause 24(3) in the Contract and the Arbitrator's failure to properly consider applicable and legal principles relating to concurrent delay].

**The Alleged Breaches of Natural Justice Serious Irregularities in the Process that Led to the Award**

14. (i) Failure to deliver the award in accordance with timelines in the Arbitration Act of Fiji and the Memorandum of Agreement, which resulted the payment of higher interest by the Applicant.

(ii) Failure to properly notify the parties regarding when the award would be made and failure to abide by the Section 10 and Schedule 1 to the Arbitration Act of Fiji.

(iii) The learned Arbitrator misled the parties in relation to when the award would be prepared which has caused prejudice to the parties in the Arbitration.

(iv) The acceptance of the evidentiary documents from Raghwan Neo Joint Venture in relation to interest and costs after the hearing was closed which caused prejudice to Fiji National Provident Fund because it was denied an opportunity to challenge the evidence and to

appraise the tribunal that interest was not specific claim in the memorandum of the Arbitration Agreement.

(v) The acceptance of the legal opinion, provided by Munro Ley Law firm to Raghwan Neo Joint Venture, two months after hearing was concluded, caused prejudice to Fiji National Provident Fund because it was denied any opportunity to provide comment on this legal opinion.

(vi) The learned Arbitrator's decision to engage an independent expert (Cromptons Law Firm) without providing an opportunity to both parties to question the expert on its findings.

15. It is noted that Arbitrator sent an e-mail to both parties about his decision to seek a legal opinion. It was submitted by the Applicant that the process of notification was deficient because the mere act of informing Fiji National Provident Fund's non legal representative that a legal opinion would be sought does not meet the Arbitrator's requirement to provide proper opportunity to both parties in this Arbitration process.

16. In relation to the delay in delivering the award, it is important to ascertain the law relating to the time limits set out in the Arbitration Act of Fiji paragraph 3 of the First schedule of the Arbitration Act. It provides:

> *"3. The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators,. By any writing signed by them, may, from time to time, extend the time for making the award."*

Paragraph 15 of the Memorandum of Agreement provides:

*"The award will state the date upon which it is made and every effort will be made to ensure that this is within two weeks of the arbitration hearing."*

17. It is evidently clear that the learned Arbitrator has taken approximately 12 months to write and deliver the award which is a substantial delay specially in consideration with the time limits provided in the Memorandum of Agreement and the Arbitration Act of Fiji.

18. The Applicants submits that the delay in delivering the award is a serious procedural irregularity which amounts to misconduct.

19. In support of the above assertion the Applicant relies on **Ports Authority of Fiji v C&T Marketing Ltd [2000]** FJCA 18; ABU0010E.20S (5 May 2000) and it was determined in chambers by the Hon. Justice Ian Thompson, Justice of Appeal. In the Court of Appeal's judgment, the following relevant points to the instant case were noted:

*"The application before me is to strike out the appeal, which is against the judgment delivered in the High Court by Byrne J. on 28 October 1999. In the High Court the appellant had applied by originating motion, pursuant to section 12(2) of the Arbitration Act (Cap 38), to set aside an award made in the arbitration of a dispute between the parties. The High Court has power to set aside such an award if the arbitrator has misconduct himself. On 20 May 1998 the learned judge had delivered an interlocutory judgment in which he had found that the arbitrator had not misconducted himself in any of the ways alleged by the appellant....."*

20. On perusal of the Memorandum of Agreement and the other relevant documents pertaining to the Arbitration, it is abundantly clear that the parties are bound by the Arbitration Award and intended the award to be a final award.

If any party aggrieved in this arbitration, must necessarily prove that there was an irregularity or misconduct is of a such serious nature that amount a serious miscarriage of justice. In my view, although there is a delay in making the award, the court is unable to conclude that such delay has caused a serious prejudice to Applicant which warrants setting aside the Arbitration Award.

21. In the case of **William v Walters and Cox [1914] 2KB**, Atkin J states at p.485.

> *"The term ['misconduct'] does not really amount to much more that such mishandling of the arbitration as is likely to among to some substantial miscarriage of justice."*

22. Issue of payment of excess interest due to the delay would be dealt with separately in this judgment when dealing with the scope and mandate of the arbitrator in awarding interest in favour of the Raghwan Neo Joint Venture.

23. The Applicant also alleges that certain Statements made by the learned Arbitrator in relation to progress of his award was misleading and prevented them from exercising its rights. If the delay is causing substantial prejudice to the Fiji National Provident Fund, in my view there is a procedure set out to expedite the process which the Applicant has failed to do so. Further it is noted that the alleged misleading statements have not caused prejudice only to one party but applies to both parties equally and as they were in the same position.

24. The Applicant asserts that the Arbitrator's decision to accept evidentiary documents submitted by Raghwan Neo Joint Venture on interest and costs of Raghwan Neo Joint Venture after the hearing without providing any opportunity to Fiji National Provident Fund to test or challenge that evidence, has caused serious prejudice to them. Applicant further asserts the learned Arbitrator considered the documents provided by Raghwan Neo Joint Venture in making its finding in relation to the interest and costs awarded to Raghwan Neo Joint Venture.

25. Applicant in support of its assertion submitted that the conduct of the Arbitrator amounts to breach of rules found in Chapter 5 of schedule1 to the New Zealand Arbitration Act; which provides:

a. *The parties shall be treated equally and each party shall be given a full opportunity of presenting that party's case. (Paragraph 18).*

*b. All statements, documents, or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may relay in making its decision shall be communicated to the parties. (Paragraph 18).*

*c. Unless otherwise agreed by the parties the arbitral tribunal may appoint one or more experts to report to it on specific issues. (Paragraph 26(1)).*

26. The Applicant further submitted that the breach of above rules amounted to a breach of natural justice and entitled to have the award set aside in pursuance of 34 (2) of the New Zealand Act.

27. It is noted that acceptance of the aforementioned documents was notified to the Applicant by the learned Arbitrator, well in advance, before the awards was made. There is no evidence whatsoever in the affidavit of Mosese Waqanibete, that the Applicant has objected to the acceptance of the evidentiary documents from the Raghwan Neo Joint Venture.

28. Russel on Arbitration page (225-226) deals with the powers and functions of the Arbitrator as follows:

*"The arbitrator is not functus officio until he has made an award. Until then either party can make any application to him he pleases, and the arbitrator, still having jurisdiction, must deal with such application."*

29. Russel on Arbitration page 388 also deals with the acceptance of evidentiary documents by the Arbitrator as follows:

> *"Improper rejection, reception or misconception of evidence:*
>
> > *If the parties wish to object to the reception of evidence, as the matter is a question of law, they should apply to the arbitrator to state a case for the court under section 21, and, if he refuses, should ask him to adjourn the proceedings so as to allow of an application to the court for an order directing him to do so.*
> >
> > *If they do not take this course, they cannot afterwards, object to the award on the ground that the evidence was not admissible."*

30. Memorandum of Agreement signed between the parties, expressly incorporated the provision of the New Zealand Arbitration Act and Chapter 1 General Provisions Section 4 states:

> *"Waiver of Right to Object*
>
> *A party who knows that any provision of this schedule from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating that party's objection to such non-compliance without undue delay or, if a time limit is provided therefore, within such period of time, shall be deemed to have waived the right to object."*

31. In my view, in consideration of the paragraphs from the leading text on Arbitration and the provisions of the New Zealand Act, which has a contractual force by incorporation, the Applicant has lost the right to object if the objection to the acceptance of evidentiary documents has not been raised with the

arbitrator without undue delay. In the instant case, the Applicant has not made any objection whatsoever after the notification of the Arbitrator was received.

32. Applicant also asserts that the decision by the learned Arbitrator to accept a legal opinion from the Law Firm Munro Leys written to Raghwan Neo Joint Venture two months after the close of hearing without any notice has caused prejudice to Fiji National Provident Fund because it was denied any opportunity to provide comment on the legal opinion.

33. The 2nd Respondent, the learned Arbitrator, in his answering affidavit deposed in relation to the acceptance of the legal opinion, as follows:

> *"With regard to paragraphs 42 and 44 of the Applicant's Affidavit I say that a copy of the Munro Leys opinion dated 15th October 2010 was provided to the Applicant on or about that date. Attached hereto and marked "JO1" and "JO2" respectively are copies of an e-mail from me to Mr Hallacy of the Applicant and Mr. Raghwan of the First Respondent dated 7 October 2010 and a copy of a letter from Mr Raghwan to me of 15 October 2010 attaching a copy of Munro Leys opinion which shows that it was copied to Mr Hallacy."*

34. The 1st Respondent in his affidavit deposed the circumstances under which he tendered the legal opinion received by him from Munro Leys Law Firm to the learned Arbitrator. He states that he protested to the Arbitrator about the Applicant's submission which is an entirely a legal opinion when both parties at the outset agreed not to have legal representatives in the arbitration.

35. As the Arbitrator failed to respond to the 1st Respondent's objection, 1st Respondent decided to obtain legal opinion in rebuttal and submit to learned Arbitrator.

36. "JO 1" of the affidavit of learned Arbitrator clearly shows that the 1st Respondent's legal opinion was forwarded Mr. Steve Hallacy, the Applicant's legal representative.

Explanation of the Fiji National Provident Fund in this regard as follows:

> *"Fiji National Provident Fund notes that the Arbitrator sent an email to Steve Hallacy of Fiji National Provident Fund (who is no longer employed by Fiji National Provident Fund) saying that he would be seeking such a legal opinion. However, it is submitted that this process of "notification" was deficient because the mere act of informing Fiji National Provident Fund's non-legal representative that a legal opinion would be sought does not meet the Arbitrator's requirement to provide a proper opportunity to both parties to participate in this significant and important process.*

37. Even in this instance, in my view, there is proper notification to the applicant about the acceptance of the legal opinion in an acceptable form of communication, which the applicant has not responded or raised any objection to acceptance of the same which amounts to waiver of right to object as provided in the Chapter 1 General provision, section 4 of New Zealand Act.

38. This applicant alleges that the engagement of an independent expert (Cromptons Law Firm) without providing an opportunity to Fiji National Provident Fund or Raghwan Neo Joint Venture to raise the questions to the expert or to questions the expert's findings caused to Fiji National Provident Fund prejudice because it was denied an opportunity to assist in the proper framing of question of law that would had the potential of influencing the non legal expertise of the Arbitrator.

39. The learned Arbitrator in his affidavit deposed as follows with regard to the notification of his decision to seek expert opinion as follows:

*"With regard to paragraphs 43 and 44 of the Applicant's Affidavit I say that I did advise both the Applicant and the First Respondent that I was seeking an expert opinion on a matter of law. Attached hereto and marked "JO3" is a copy of an e-mail dated 23 September, 2010 from me to both Mr. Hallacy and Mr. Raghwan."*

40. Even in this regard Fiji National Provident Fund takes up the position that the process of notification was deficient and does not meet the Arbitrator's requirement to provide a proper opportunity to both parties to participate in this process.

41. The procedure in relation to the appointment of an expert is set out in Section 26 of the New Zealand Arbitration Act Section 26 provides:

*"Expert appointed by arbitral tribunal:*

*[1] Unless otherwise agreed by the parties, the arbitral tribunal:*

*a. may appoint 1 or more experts to report to it on specific issues to be determinate by the arbitral tribunal;*

*b. may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for the expert's inspection.*

*[2] Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of a written or oral report, participate in a hearing where the parties have the opportunity to put questions and to present expert witnesses in order to testify on the points at issue.*

42. On careful examination of the Section 26, it is clear that the above provision does not automatically require the expert to participate in the hearing unless if the parties or a party requests or Arbitrator considers it necessary. In this case, it is observed that no such application was made to the learned Arbitrator by either party.

43. It is to be noted that the applicant after the receipt of the notification from the learned Arbitrator about his decision, has not taken any steps as provided in law, which once again amounts to waiver of right to object as stated Chapter 1 General provisions Section 4 of the New Zealand Arbitration Act.

44. The Applicant, Fiji National Provident Fund, cited following authorities in its submissions to establish that the manner in which the acceptance of evidentiary documents, legal opinion of Munro Ley Law Firm and expert opinion has caused a serious prejudice which amounts to a breach of natural justice.

In the case of **R v Deputy Industrial Injuries Commissioner Ex parte Moore,** [1965] 1 All E.R.81 CA, in which Wilmer, LJ, said as follows of natural justice at p.87.

> *"It is also involves that the Commissioner must be prepared to hear both sides, assuming that he has been requested to grant a hearing, and on such hearing must allow both sides to comment on a or contradict any information that he has obtained. This would doubtless apply equally in the case where a hearing had been requested, but refused, for in such a case it would not be in accordance with natural justice to act on information obtained behind the backs of the parties without affording them an opportunity of commenting on it."*

45. In the same judgment, Diplock, LJ discussed the requirements of natural justice in detail at p. 95 of the Court's judgment:

"*Where, however, there is a hearing, whether requested or not, the second rule requires the deputy commissioner (a) to consider such "evidence" relevant to the question to be decided as any person entitled to be represented wishes to put before him; (b) to inform every person represented of any" which the deputy commissioner proposes to take into consideration, whether such "evidence" be proffered by another person represented at the hearing, or is discovered by the deputy commissioner as a result of his own investigations; (c) to allow each person represented to comment on any such "evidence" and, where the "evidence" is given orally by witnesses, to put questions to those witnesses; and (d) to allow each person represented to address argument to him on the whole of the case."*

46. In the case of **Chee v Stareast Investment Limited HC Auckland Air 2009 – 4004-5255NZHC 1011** (1 April 2010), court held:

*"Again, this process was unsatisfactory and in breach of the principles of natural justice.* ***Without the express agreement of the parties****, the Tribunal should not have accepted further evidence after the hearing had been concluded. If it required further evidence, it should have reconvened the hearing, sworn the witnesses, asked them to confirm their additional material, and given the parties the opportunity to test it and respond to it…."*

47. Having considered the underlying principles in the above judgments, I am of the view that the instant case before the court could be distinguished from the above cases as there was an express agreement between parties in the Memorandum of Agreement to incorporate Section 4 of New Zealand Act which deals with the Waiver of right to object, if is the objection has not been raised

without undue delay. The objection of the Applicant has been raised after the award was made in the application for setting aside the Arbitration award.

**Errors of laws, that are apparent on the face on the Award [Clause 23(g) Clause 24(3) and concurrent delay].**

48. The Applicant states that the learned Arbitrator erred in law by misconstruing and/or misinterpreting and/or his applying clause 23 of the contract between parties in relation to the responsibility of the parties with regard to the delay by a subcontractor.

49. The 1st Respondent, Raghwan Neo Joint Venture, made its claim on delay pursuant to clause 23 (g) to seek relief in the Arbitration.

Clause 23 of the Contract provides:

> *"Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect/Supervising Officer, and if in the opinion of the Architect/Supervising Officer the completion of the Works is likely to be or has been delayed beyond the Date for Completion stated in the Appendix to these Conditions or beyond any extended time previously fixed under this clause:*
>
> *a. by force majeure, or*
>
> *b. by reason of exceptionally inclement weather, or …*
>
> *g. by delay on the part of nominated sub-contractors or nominated suppliers which the Contractors has taken all practicable steps to avoid or reduce, or …*
>
> *Then the Architect/Supervising Officer shall so soon as he is able to estimate the length of the delay beyond the date or time aforesaid make in writing affair and reasonable extension of time for completion of the*

*Works. Provided always that the Contractor shall use constantly his best endeavours to prevent delay and shall do all that may reasonably be required to the satisfaction of the Architect/Supervising Officer to proceed with the Works."*

50. The Applicant submits that the only remedy provided in clause 23 is only to grant fair and reasonable extension of time for completion of work and learned Arbitrator incorrectly applied the remedy provided in Clause 24 (3) and granted relief to Raghwan Neo Joint Venture which amounts to the learned Arbitrator acting outside the contract.

Clause 24 of the Contract provides:

*"(1) If upon written application being made to him by the Contractor the Architect/Supervising Officer is of the opinion that the Contractor has been involved in direct loss and/or expenses for which he would not be reimbursed by a payment made under any other provision in this Contract by reason of the regular progress of the Works or of any part thereof having been materially affected by:*

*(a) The Contractor not having received in due time necessary instructions, drawings, details or levels, form the Architect/Supervising Officer for which he specifically applied in writing on a date which having regard to the Date for Completion stated in the Appendix to these Conditions or to any extension of time then fixed under clause 23 of these Conditions was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same; or*

*(b) The opening up for inspection of any work covered up or the testing of any of the work materials or goods in accordance with*

*cause 6(3) of these Conditions (including making good in consequence of such opening up or testing), unless the inspection or test showed that the work, materials or goods where not in accordance with this Contract; or*

*(c) Any discrepancy in or divergence between the Contract Drawing and/or the Contract Bills; or*

*(d) Delay on the part of artists tradesmen or others engaged by the Employer in executing work not forming pat of this Contract; or*

*(e) Architect's/Supervising Officer's instructions issued in regard to the postponement of any work to be executed under the provisions of this Contract;*

*and if the written application is made within a reasonable time of it becoming apparent that the progress of the Works or of any pat thereof has been affected as aforesaid, then the Architect/Supervising Officer shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss and/or expense. Any amount from time to time so ascertained shall be added to the Contract Sum, and if an Interim Certificate is issued after the date of ascertainment any such amount shall be added to the amount which would otherwise be stated as due in such Certificate.*

*(2) The provisions of this Condition are without prejudice to any other rights or remedies which the Contractor may possess.*

*(3) Loss and expense due to causes described in clause 24(1) shall be adjusted at a weekly rate to be calculated exclusive of scaffolding, craneage, Dayworks charges, loss of efficiency/production*

*(disruption) of on-site labour and Nominated Sub-contractors work, each of which shall be treated as a separate entity. All provisionally for two such weeks delay at the rate of $10,000.00 per week exclusive of VAT.*

51. The main contention of the Applicant in this regard was that, Raghwan Neo Joint Venture has never adduced any evidence or prove any of the grounds to seek relief pursuant to Clause 24(3) of the Agreement.

52. Applicant further submitted that even if the Clause 24 is taken into consideration for the purpose of relief the only remedy stipulated there under is only to allow two weeks delay at the rate of $10.000.00 per week exclusive of VAT.

53. At the outset, it is necessary to consider what constitute an error of law which necessitate and justify the setting a side of an award. In the case of:

*"**F R Absalom Ltd v Great Western (London) Garden Village Society [1933]** AC 592, page 607:*

*[It] is, I thing, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the Court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one."*

54. In the case of **Samoa National Provident Fund v Apia Construction and Engineering Ltd [2008]** WSSC 1 (30 January 2008) commented as follows:

> "More recently in New Zealand in **Smale and Brookbanks v Illingwort and Randerson** (1994) judgment of the Court of Appeal delivered on 12 May 1994), Richardson J said:
>
> *i. If the parties have asked the arbitrators to decide a specific question of law then, save for matters of illegality not in point here, the proper inference is that the parties put the question of law to the arbitrators on the following that their own decision would be binding on the parties. Further, if the parties have asked a series of questions one of which is a specific question of law, the exception from curial review of answers to questions of law will apply to the answer to that question.*
>
> *ii. A matter referred to the arbitrator for decision which involves mixed questions of disputed fact and law would not be a reference of a specific question of law. But where the matter referred to the arbitrator for decision involves the application of the law or the interpretation of a contract on the basis of undisputed facts, then that would be a reference of a specific question of law: F R Absalom Ltd v Great Western (London) Garden Village society Ltd [1933] AC ; **Smale and Brookblands v Illingworth and Renderson** (Supra)."*

55. The 1st Respondents contends that the question is not reviewable and if reviewable, it is a decision that a reasonable Arbitrator could make and so it not erroneous.

56. The Memorandum of Agreement between the parties encompasses the Fiji Arbitrator Act and the New Zealand Arbitration Act. In both statutes clearly

provide that a party to the Arbitrator could request the Arbitrator to refer any question of law to the court. The learned Arbitrator before the award was made, made it clear to all parties that he is seeking a legal opinion on matters of law involved in this Arbitration from an expert. It is noted that neither party sought any clarification from the Arbitrator on the issue of matters of law involved in this Arbitration. In my view, that both parties are bound by the finding in the award on questions of law even if such findings appear to be erroneous.

57. In the case of the Re King Duveem [1913] 2 KB 32:

> *"It is equally clear that if a specific question of law is submitted to an arbitrator and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit it being set aside."*

58. On perusal of the Arbitration award it is clear that the learned Arbitrator has dealt with the delays and whether the 1st Respondent took all reasonable steps to avoid or reduce the delays of subcontractor. In my view, such a finding amounts to a finding of fact and not reviewable in this application and further more the grant of relief pursuant to clause 24 is not unreasonable as the learned Arbitrator has concluded that delay was attributable to subcontractors delay.

**Acting Outside the Powers of the Arbitrator in Making an Interest Award**

59. The Applicant submits that the Arbitration Agreement did not include the granting of interest as an issue to be specifically determined in the Arbitration between the parties. The Applicant further submits that the ruling of interest of 12 percent per annum compounded monthly awarded by the learned Arbitrator and the extreme delay in delivering the award has further penalized the Applicant.

60. In this regard the court needs to ascertain the disputes referred to the learned Arbitrator by the parties to the Agreement for Determination.

61. Dispute referred to, in the Memorandum of Agreement are as follows:

> *"i. Determination of loss and expenses.*
>
> *iii. Determination of liquidated damages.*
>
> *iv. Liability for the cost of rectifying construction defects.*

62. It is abundantly clear that Raghwan Neo Joint Venture has not included the interest on the award in its reference to arbitration for determination.

63. The First Respondent submits that the Fiji National Provident Fund was well aware of the intention of Raghwan Neo Joint Venture to claim interest on the final award because it was pleaded in the initial claim. It further submits that the representative of the Fiji National Provident Fund had not made any observation on interest when requested by the Arbitrator and thereby Fiji National Provident Fund is estopped in denying the interest awarded.

64. It further argued that Section 12 of the New Zealand Arbitration Act specifically provides the power to award interest and the interest is not on the debt but a constituent part of the loss or expenses which Raghwan Neo Joint Venture has pleaded in its pleadings.

65. For the purpose of determination of this issue, I rely on the principles laid down **in the case of Ports Authority of Fiji v C&T Marketing Ltd (No. 2) [2001] FJCA 41; [2001] 1 FLR 340 (18 October 2001].**

> "A prayer for general relief is always limited by two things, the facts which are alleged, and the relief which is expressly asked: **Cargrill v Bower (1878) 10 ChD 502, 508**. Notwithstanding the general prayer the Plaintiff must be limited to relief of the kind the statement of claim notifies will or may be asked for: **Dillion v Macdonald (1902)** NZLR 357, 378. For the reasons already stated, the two additional items were outside the scope of the relief of which the body of the Statement of Claim gave notice."

66. In any event, even if the additional items could be regarded as within the scope of the prayer for general relief, this could not, without the other party's agreement, have the effect of enlarging the scope of the arbitration agreement."

One separate matter the subject of discussion before us was the appropriate approach to interest accruing after the date of the award. However, the proceedings before us do not involve that issue, and we are not seized of it, we decline to give a ruling on it."

67. The fact that the interest is a relief prayed in the Statement of Claims of the Raghwan Neo Joint Venture has no material bearing in this arbitration if the interest claim is not a dispute referred to the Arbitration for determination in the Memorandum of Agreement.

68. Although the New Zealand Act provides for the learned Arbitrator to grant interest on the award, in my view, interest could only be granted if the determination of interest component is incorporated in the Memorandum of the Arbitration Agreement.

69. It is further noted that the inaction or silence on the part of legal representative of Fiji National Provident Fund do not give rise for the learned Arbitrator to award interest as the interest is a specific claim that should be incorporated into the Memorandum of Agreement drawn by the parties.

70. Considering the above reasons, I conclude that the award made on interest should be set aside as it was clearly outside the scope of Arbitration and the mandate of the Arbitrator.

**Conclusion**

Having considered all the circumstances, I am of the view that learned Arbitrator has erred by awarding the interest in his award in favour of the Raghwan Neo Joint Venture. By so doing, the learned Arbitrator has gone beyond the scope of the Arbitration as stated in the Memorandum of Agreement. I therefore set aside the award to the extent the interest awarded on the Applicant is deleted. Save as just indicated the award is confirmed. The parties are directed to give effect to the Arbitration award as varied, within 28 days from this judgment. I also order that the First Respondent pay the Applicants costs of this proceeding which are fixed summarily in the sum of $2,000.00.

Susantha N. Balapatabendi

**JUDGE**