IN THE COURT OF APPEAL FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0063 of 2013
(High Court Case No. HBC 202 of 2011)

BETWEEN : **VIJAY RAGHWAN and DR. RONALD NEO**

Appellants

AND : **FIJI NATIONAL PROVIDENT FUND**

1st Respondent

AND : **JON ORTON**

2nd Respondent

Counsel : Mr. N. Barnes for the Appellant
: Mr. G. J. Christy with Ms M. Muir for the 1st Respondent

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Appellant

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2nd Respondent

Coram : Calanchini, P
Almeida Guneratne, JA
Lyone Seneviratne, JA

Counsel : Mr. G. J. Christy with Ms. Muir for the Appellant
Mr. N. Barnes for the 1st Respondent

Dates of Hearing : 6 and 13 May 2016

Date of Judgment : 27 May 2016

JUDGMENT

Calanchini, P

[1] I have read in draft the judgment of Guneratne JA and agree with his reasoning and conclusions.

Almeida Guneratne, JA

[2] Two appeals arise for determination in this matter viz: ABU 0063/12 and ABU 0066/12 respectively. The Appellant in ABU 0063/12 will hereinafter be referred to as RNJV and the Appellant in ABU 066/12 will be described as FNPF. The 2nd Respondent in both appeals shall be alluded to as the Arbitrator

Background Facts

[3] The matter involved a construction contract (vide: Articles of Agreement -00069-00071 of Vol.1 of the Record of the High Court (RHC) between RNJV and FNPF for the construction of what is now known as the FRCA building at Queen Elizabeth Drive, Nasese. Under the terms of the contract RNJV were to be paid $26,400,760.54. The building was completed only 443 days after the agreed date. This was an undisputed fact. However, a dispute arose as to who was responsible for the said delay. RNJV claimed from FNPF for "loss and expense" on account of the said delay on the basis that, it was attributable to the sub contractor, Kooline Refrigeration Limited originally appointed, on the contention that, it was FNPF's delay in appointing another nominated sub-contractor that was the cause of the delay. FNPF disagreed. Consequently, the parties referred the matter for arbitration in pursuance of the "Memorandum of Agreement" (MOA) (Vide: pages 00217 – 00219, Vol.1, Record of the High Court (RHC) .

The Arbitrator's Award Vide : - pp 597 – 622A of Volume 2 of RHC

[4] The Arbitrator allowed the claim of RNJV for "loss and expense" together with interest thereon imputing the said delay to FNPF.

The High Court Judgment – Vide: pp 0009 – 00032 – Vol. 1 RHC

[5] By his Judgment, the learned High Court Judge did not disturb the Arbitral award for "loss and expense" claimed by RNJV but set aside the award for interest claimed thereon on the ground that, the said interest was in the nature of "interest on interest on a debt and not in the nature of interest on a loss and expense claim and that therefore the Arbitrator had gone beyond the scope of his powers conferred on him by the MOA.

RNJV's Appeal in ABU 0063/12

[6] It is against that, that RNJV has preferred its appeal.

FNPF's Appeal in ABU 0066/12

[7] FNPF's said appeal transcends the limited basis on which RNJV based its appeal. FNPF has, in its appeal moved that, the whole award by the Arbitrator be set aside on the basis of breach of natural justice while contending that, should it not be found with favour by this court, it was entitled to support the learned High court Judge's order in striking off the interest awarded by the Arbitrator as being "interest on a claim for loss and expense" (as a question of law) It took issue with the High Court Judgment in regard to the finding on delay.

How the Proceedings before this Court Commenced

[8] Mr. Christy, who appeared for FNPF with Ms Muir moved that he be heard first in the context of the two appeals involved. Mr Barnes who was representing RNJV had no objection to that application.

[9] Adverting to his reply submissions dated 9th May, 2015 tendered on behalf of the Appellant in Appeal No. ABU 0066 of 2013 and his written submissions dated 8th May, 2015 filed on behalf of the 1st Respondent in ABU 0063 of 2013 (FNPF) Mr. Christ, commenced his submissions. Thereafter, Mr. Barnes made his submissions on behalf of the 1st Respondent in ABU 0066 and the Appellant in 0063 of 2013 (RNJV) followed by submissions by both counsel in response to each other.

The Approach adapted by me in the determination of both appeals

[10] Given the voluminous material and the elaborate submissions made by Counsel, in order to avoid repetition, I felt that the best approach to adapt is to first identify the core issues and then proceed to make my assessment in the light of the said material and the submissions.

The Issues that arose for determination

[11]

(i) Did the learned Arbitrator misdirect and/or err in fact when he imputed the delay in completing the construction (building) contract in question on the employer (FNPF) and not on the contractor RNJV having regard to the Memorandum of Agreement (MOA) and the stipulated conditions which the said MOA adapted?

(ii) Did the learned High Court Judge fall into the same error in affirming that part of the award of the Arbitrator?

(iii) Having regard to the provisions of the Arbitration Act of 1996 (of Fiji) particularly Section 12(2) thereof, did that error or misdirection constitute only a misdirection involving a question of fact and/or misdirection involving a mixed question of fact and law at the highest? If so, was the Arbitrator's award for the said "loss and expense" liable to be set aside by the High Court?

(iv) If not, does the Court of Appeal have jurisdiction to disturb those findings by the Arbitrator in the first instance and subsequently affirmed by the High Court, apart from the fact that, parties themselves had submitted to the Arbitrator's Jurisdiction?

(v) Was the Arbitrator wrong in law when he awarded 'interest' on the said claim for "loss and expense"? Was it interest on a constituent part of the claim for "loss and expense?" Consequently, was the learned High Court Judge correct then in setting the said interest aside in his Judgment? Was that a pure

question of law envisaged in the provisions of the Arbitration Act of Fiji? If not, was he in error?

(vi) What impact did the New Zealand Arbitration Act have on the aforesaid issues which the parties had by mutual agreement brought into the Arbitration proceedings?

(vii) Was the Arbitrator in breach of the principles of natural justice as going against the Concept of "a fair hearing" when he is alleged to have taken into consideration "an opinion" (as claimed on behalf of the Appellant in ABU 0066/13) as opposed to the 1st Respondent's contention that "it was a mere commentary with reference to authorities" , which 'opinion or commentary' the Arbitrator is alleged to have considered as having had an impact on his formal award for "loss and expense", affirmed by the High Court as well in its Judgment?

(viii) Did the said allegation of a breach of natural justice amount to a question of law that was so fundamental as to overturn the Arbitrator's award for "loss and expense" and to set aside that part of the High Court Judgment in consequence as well?

(ix) Finally, in any event, was the award which included compound interest wrong in law?

[12] Before dealing with those issues, in the light of the submissions made by both Counsel, I shall reproduce the material parts of the instruments relevant to the two appeals.

The Memorandum of Agreement (vide: at pp 0217 – 0219 of the RHC Vol.1),the Conditions that were absorbed into the same (vide: at pp 0090 = 00115 of the RHC,Vol.1 and the relevant provisions of the Arbitration Act of Fiji (Cap.38) and the New Zealand Arbitration Act of 1996

[13] These are the fundamental factors that formed the edifice on which the two appeals are founded.

(A) **The Memorandum of Agreement (MOA)**

Clause 1:

"The Arbitration Act of Fiji (Cap 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."

Clause 4:

"The matters in dispute are:

4.1 Determination for loss and expenses.

4.2 Determination of Liquidated damages

4.3 Liability for the cost of rectifying construction defects."

Clause 5:

"The Arbitrator's decision regarding the matters above and the quantum of cost attributed to each shall be final and binding on both parties save as allowed for under the Arbitration Act."

(B) **The Relevant Conditions that were absorbed into the MOA**

[14] **"Extension of Time" (Condition 23)**

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 of Completion stated in the Appendix to these Conditions or beyond any extended time previously fixed under this clause:

(g) by delay on the part of nominated sub contractors…which the Contractor has taken all practicable steps to avoid or reduce…

: 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 a fair 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.

(Condition 24)

(1) If upon written application 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 expense 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 from the Architect/Supervising Officer for which he specifically applied in writing on a date which having regard to the Date of Completion stated in the Appendix to these Conditions or to any extension of time then fixed under clause 23 of these Conditions or to any extension of time then fixed 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...

(e) Architect/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 of any part 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 is without prejudice to any other rights and remedies which the Contractor or 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 .... and nominated sub-contractors work.] (vide: 71 of Vol.1 RHC).

[15] **Nominated Sub Contractors (Condition 27)**

This is another condition that spells out the tripartite relationship between the Contractor – subcontractor and the Employer and have a bearing, direct and/or indirect on Conditions 23 and 24 referred to above.

[16] (c) **The Relevant Provisions of the Arbitration Act of Fiji (Cap.38)**

(a) Section 12(2) of the Arbitration Act decrees that "where an arbitrator has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside.

(b) Section 23 provides that,

> "Whenever in any Contract it is directed or agreed that any arbitration under or in pursuance of such contract shall be under the provisions of the Arbitration Act, 1950 of the United Kingdom, or any Act repealed or replaced by the Act, such contracts shall be read as if this Act were submitted for such Act."

(c) The first schedule (to Section 4) states in paragraph 8 that,

> "The award to be made by the arbitrator or umpire shall be final and binding on the parties.."

(d) Paragraph 9 of the first schedule decrees that;

> "The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to and by whom, and in what manner, those costs or any part thereof shall be paid and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between Solicitor and client."

[17] I shall refer to the provisions of the New Zealand Arbitration Act, 1996 later at an appropriate point.

[18] I shall now deal with the core issues taken cumulatively in the light of the submissions made by Counsel.

<u>Re: The Impact of the New Zealand Arbitration Act (1996) and the Alleged Breach of Natural Justice</u>

[19] Mr Christy's submissions on that issue had a direct bearing on the issue relating to the breach of natural justice, on the part of the Arbitrator he raised, that the Arbitrator had taken into consideration an expert opinion without notice to FNPF when making the award.

He was apparently relying on Section 31 of the said Act.

<u>Does a breach of natural justice go to substantive jurisdiction?</u>

[20] It is established law that it does. It has long been settled law that a decision which offends against the principles of natural justice is outside the jurisdiction of the decision – making authority (see: **<u>A-G v Ryan</u>** [1980] AC 718.

But did FNPF come within Section 31(4)? True, FNPF could not have raised the issue in the course of the proceedings. Only the award remained to be made. However, there was nothing to prevent FNPF from taking the objection bringing the matter within Section 31(4) before the award was made. This is clear from the Arbitrator's affidavit dated 28th September, 2011 and from the very response on behalf of FNPF reflected in Annexure 'C' attached to the said Affidavit. I saw no reason to reject the Arbitrator's

said affidavit. Having perused the Affidavits filed on behalf of FNPF, I saw nothing in them that take away from what the Arbitrator has deposed to in his said affidavit. Apart from all that, I am inclined to agree with Mr Barnes' contention that;

(a) the impugned opinion was not an opinion but a commentary on cases (in which connection he referred to tab 3 attached to his written submissions)

(b) if, parties did not ask for any opinion, that was 'waiver' on the part of both parties for they were in effect saying" here are our submissions and authorities; now you decide the matter".

(c) there were no complaints until after the award. It was when it was unfavourable to them that, the matter was agitated in the High Court by FNPF.

(d) and consequently, therefore, at the highest it was a complaint in the nature of a limited breach of natural justice linked to Section 12(2) of the Arbitration Act of Fiji.

The Impact of Section 12(2) of the Arbitration Act (Cap.38) of Fiji

[21] "12(2): Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award side."

[22] 'Misconduct' is "unacceptable or improper behaviour or mismanagement" (vide: Concise Oxford Dictionary, Tenth ed. P. 910.)

What would Constitute Misconduct on the part of an Arbitrator that could render an award made by him liable to be set aside?

[23] Decided cases reveal the following viz:

(i) Rejection of evidence by an arbitrator (vide: **Williams v Wallace and Cox** (1914) 2KB 478)

(ii) Introduction of evidence not adduced by the parties (**Owens v Nicholl** [1948] 1ALLER p.707)

(iii) Failure to take into account that a contract was illegal (see: **David Taylor & Sons v Barnett Trading Co**. [1953]1WLR 5 62].

(iv) Making a mistake of law or fact or because there is a simple inconsistency between two or more parts of an award he makes (vide: **Moran v Lloyds** [1983] QB 542.

[24] I have no hesitation in advancing the view, that, seeking "a commentary on cases" (as Mr Barnes submitted) or even seeking an "expert opinion" (as Mr Christy complained) could by any stretch of imagination be regarded as 'misconduct' on the part of the Arbitrator. He, not being a lawyer and parties opting not to seek the assistance of lawyers, the Arbitrator was only trying to do a good and honest job, to put the matter mildly.

Was the said 'expert opinion" "or the commentary on cases" (as the case may be) improperly procured?

[25] As would be seen from what I have articulated earlier in regard to what constitutes 'misconduct', 'improper' is a word that is associated with it.

[26] Nevertheless, was the said "expert opinion" or the commentary on cases" improperly procured?"

[27] To begin with, the same was not 'procured" by the Arbitrator at the instigation or through RNJV. It was on his own initiative. Thus, the said act of 'procuring' the said "opinion" or "commentary on cases" had to be given the ordinary meaning of "getting possession of something from another person". (Vide: **R v Mills** [1963] 2 WLR 137.

[28] Thus, the instant case falls nowhere near "improper procurement" as the phrase has come to be interpreted in a myriad of cases such as Re: Royal Victoria Pavilion, Ramsgate [1961] Ch. 581 in general, and specific contexts as seen on cases such as **Britt v Robinson** [LR[5C.P. 503.

Conclusion Re: the Allegation based on Natural Justice in the light of Section 12(2) of the Arbitration Act of Fiji.

[29] For the aforesaid reasons I conclude that the Arbitrator's award was not liable to be set aside on the ground of any breach of natural justice linked as it were to the terms of Section 12(2) of the Arbitration Act.

[30] Section 12(2) being a statutory provision, the legislature has shown as to what extent the principles of natural justice may be transplanted from its native judicial soil into the territory of arbitral proceedings.

[31] Accordingly, I affirm the Judgment of the High Court on that aspect and agree with the learned Judge's reasons and the conclusion he reached at paragraph [47] of his Judgment. [At page 23, Vol.1, RHC].

Re: The Award for "Loss and Expense"

The Memorandum of Agreement (MOA)

Matters in Dispute

[32] The terms of the MOA were referred to by me earlier. Clause 4 thereof expressly provided for the determination of 'loss and expense' as being a matter in dispute that parties submitted to arbitration.

Finality Attached to the Arbitral Decision

[33] Clause 5 of the MOA specifically stated "The Arbitrator's decision regarding the matters above (i.e. the matters in dispute) and the quantum of costs shall be final and binding on both parties save as allowed for under the "The Arbitration Act". There is no provision in the MOA that qualifies or takes away from the finality attaching to the Arbitrator's decision. The reference "to mutually agreed clauses contained in this memorandum" in Clause 1 re-enforces it.

How then could the Arbitrator's decision have been attacked?

[34] Mr Christy submitted that, "the Arbitrator jumped Clause 23 (of the conditions that were made part and parcel of the MOA) and went to Clause 24 thereof. Clause 23 being "a standalone provision", by jumping it and going to clause 24 the Arbitrator made a critical error of law.

Clause 23 was confined to the situations contemplated therein and in view of 23(g) the contractor (RNJV) was not entitled to get money for the sub-contractor's delay.

Consequently, clause 24 had no application".

[35] Learned Counsel submitted further that, in regard to the delay in completing the contract what was the effect it had on the aspect of extension of time envisaged in clause 23?'

[36] Did not, he asked, the issue boil down to one of concurrent delay? Whose delay trumped whom? The employer could not have directed and terminated the sub-contractor for the delay, because the employer would have then stood exposed to a direct action by the sub-contractor quite apart from the fact that it would have amounted to an interference with the Employer-Contractor relationship.

[37] Mr Barnes on the other hand argued that, as soon as the sub-contractor had delayed, RNJV had informed FNPF that it had terminated the services of the subcontractor. Thereafter, it was FNPF that procrastinated in regard to the appointment of a nominated sub contractor. There was an initial completion time. The Arbitrator made reference to the employer "holding off" the sub contractor. This was a finding of fact and the High Court Judge also referred to it. So, there was no jump from Clause 23 to clause 24 of the applicable conditions.

[38] Mr Barnes then proceeded to point out that RNJV had sought permission to terminate the sub-contractor's contract but the response had been negative. Further RNJV had asked for the retention money which had been released to the sub-contractor. The Agreement the parties entered into was in 2005. In 2007 the intention to terminate the sub-contractor on the part of RNJV as the head contractor stood as an established fact. FNPF then had an obligation to make a fresh nomination which it did. The Architect was the employer's (FNPF) representative who had taken up the position that he was not going to comply with the time factor. These were all matters of fact. Mr Barnes drew the Court's attention to Section 12(2) of the Fiji Arbitration Act and the New Zealand Arbitration Act of 1996 which the parties had incorporated into the MOA (viz: Clause 1 thereof) and submitted that, the High Court as well as this Court had limited jurisdiction to set aside an Arbitrator's award as envisaged in those provisions and the complaint regarding as to who was to be imputed with blame for the delay in completing the contract fell outside the jurisdictional purview of both in as much as the said issue was a question of fact and did not affect the jurisdiction of the Arbitrator.

[39] I shall now proceed to reflect and make my deductions on those submissions while recalling also two other points which Mr. Christy made in his submissions.

Reflections and Deductions

Re: the provisions of the Arbitration Act and the clauses in the MOA

[40] I have earlier referred to the relevant provisions of the Arbitration Act. The first schedule (to Section 4) read with Clause 5 of the MOA invest the Arbitrator's award with 'Finality'.

[41] That 'finality' however does not affect the powers of a High Court to set it aside and hold that it was not binding on a party on the ground that it was made without jurisdiction, under and in terms of Order 73 Rule 1 of the High Court Act (Cap 13A) which is the basis on which FNPF went to the High Court.

Was the Arbitrator's award, liable to be set aside on the basis that it went to his jurisdiction?

[42] The learned High Court Judge relied on the English decision in **Re: King Duveem** [1913] 2KB 32 which had held 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" (Vide: paragraph [57] of the High Court Judgment).

[43] Even if one were to go so far as accepting that, the alleged misconstruction of clauses 23 and 24 of the conditions that were absorbed into the MOA as being part and parcel thereof was a question of law that it was intrinsically connected with the factual content of the dispute, rendering it a mixed question of fact and law, which becomes apparent when the judge is seen qualifying the reliance he placed on the said decision at paragraph [58] of his Judgment wherein he concluded thus:

"On (a) perusal of the Arbitration award it is clear that the learned Arbitrator has dealt with the delays and whether the 1st Respondent (RNJV) took all reasonable steps to avoid or reduce the delays of (the) sub-contractor. IN my view, such a finding amounts

to a finding of fact and not reviewable in this application and furthermore grant of relief pursuant to Clause 24 is not unreasonable as the Arbitrator has concluded that (the) delay was attributable to the sub-contractor('s) delay."

Drawing on the Analogy of Established Judicial initiatives taken in the context of the approach adapted in regard to finality clauses' in Judicial review applications

[44] For my part, I prefer to draw on the analogy of established Judicial initiatives taken in the context of the approach adapted in regard to finality clauses in judicial review applications, for certiorari, save as to say that, the power conferred on the High Court being to set aside under Order 73 Rule 1 of the High Court Act, it is a power hardly different to a power exercised by way of hearing and appeal. But, a difference lies, which must be appreciated and that is that, while in an appellate power, both issues of fact and law are amenable to scrutiny, where no specific appeal is provided by Statute, as in the case of an Arbitral award, (like in the instant case) in conferring power on the High Court to 'set aside' an Arbitral award, that, could be done only if the award could be shown to be not final on the law, affecting an Arbitrator's jurisdiction upon showing an error of law on the face of the award and/or an excess or abuse of jurisdiction. Otherwise, such an award would be final on the facts.

Re: Provisions of the New Zealand Arbitration Act, 1996 (vide: pp 221 – 262 of Vol.1, RHC)

[45] The parties in the MOA adopted the said New Zealand Act (vide: Clause 1 of the MOA) Section 34(2) (a) (iii) thereof refers to the "only grounds an award of an Arbitrator could be set aside."

[46] I could see nothing in that section that takes away from what is decreed in Section 12(2) of the Fiji Act (Cap.38). I agree with Mr Barnes' contention that, section 5(1) of the New Zealand Act was not applicable to the instant case, and Section 5(10) thereof was not relevant to the present case either.

[47] Before parting with my judgment on the specific aspect in the Arbitral award and the High Court Judgment in question, I feel obliged to comment on two adjunct points Mr Christy made in the course of his submissions viz:

(i) That, when it was said by the Learned High Court Judge that, 'the whole contract was put at large" as a consequence of providing for an extension of time which was covered under clause 23, that it was another fundamental error in as much as, it at all, it was the date of completion of the contract that was placed at large and not the whole contract;

(ii) That, 'all procedural flaws were waived' as the learned High Court Judge held was another error. Mr Christy sought to derive support for that contention from paragraph (25) of the said Judgment, particularly form paragraph 25(b) 2nd sentence thereof.

[48] With all due respect to the learned Counsel and the valiant effort made by him to do his best for his client, I take the view that while nothing turns on and flows from (i) above, the same goes for (ii) above as well.

Conclusion

[49] For the aforesaid reasons I affirm the judgment of the High Court on the said aspect of "loss and expense".

Re: the interest awarded by the Arbitrator on the said claim for "loss and expense" and struck off by the High Court,

[50] This was the appeal by RNJV in Appeal No. AAU 063/2013.

[51] While it was Mr Barnes' contention that it was interest awarded as being a constituent part of RNJV's claim for 'loss and expense', Mr. Christy's counter to that was that it was not recoverable, in as much as, it was in the nature of interest on a debt upon a debt.

[52] Although much hair was split on that matter with counsel referring to a plethora of authorities, with all due respect, I did not find them to be useful.

[53] It is true that, the Arbitration Act of Fiji (Cap.38) makes no reference to such an interest component.

The Impact of Clause 1 of the MOA and Section 12 of the New Zealand Act of 1996

[54] But, what about Clause 1 of the MOA where the parties adapted the New Zealand Act?

[55] Section 12 of the said New Zealand Act begins by making reference to the Powers of an Arbitral Tribunal in deciding disputes.

[56] It states thus:

"12 (i) An arbitration agreement unless otherwise agreed by the parties is deemed to provide that an arbitral tribunal.

(a) May award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in Court"

[57] If I were to pause there for a moment, and reflect, 'interest' on a decretal amount awarded by the High Court in a civil proceeding would have been consequential.

[58] Then comes Section 12(b) which states that, the arbitral tribunal "may award interest on the whole or any part thereof up to the date of the award."

[59] In setting aside the 'interest' awarded by the Arbitrator for "loss and expense" the learned Judge reasoned as follows:

"It is abundantly clear that Raghwan Neo Joint Venture has not included the interest on the award in its reference to arbitration for determination (paragraph 65 of the Judgment)

[60] Apparently, the learned Judge looked at only Clause 4 of the MOA whereas Clause 7 acknowledged that;

"Both parties have submitted their points of claims and each party has a copy of the following:

1. *FNPF statement of Position dated 9 April 2010.*
2. *Submissions by Raghwan NJV dated 3 April 2010.*
3. *RNJV statement of Position dated 30 April 2010"*

The annexure to RNJV's said letter dated 30 April, 2010 (vide: at p.727 – Vol.2 (RHC) under the heading Prolongation Cost Claim and Others

Claim for interest recurs like a decimal (itemised as 1(a) (b) (c) (d) (e (f) (h) (i) (j) and (k) (vide: pages 729 – 730, Vol.2, RHC).

[61] Apart from that, as observed earlier by me, Section 12, of the New Zealand Arbitration Act provides the power to award interest. That Act was specifically incorporated into the MOA.

[62] RNJV's submissions referred to in Clause 7.2 of the MOA which are found at pages 163 to 188 of Vol.1 RHC, specifically refer to 'interest' at paragraph 1.3 thereof (page 164).

[63] Consequently, at the point of the parties signing the MOA the 'interest' in question was very much a part of RNJV's final claim.

[64] The authorities the learned Judge referred to such as **Ports Authority of Fiji v C&T Marketing Ltd (No.2)** [2001] FJCA 41 and **Cargill & Bower** [1878] 10 Ch.D.502,

508 and **Dillion v Macdonald** [1902] NZLR 357, 378 have no application to the instant case in as much as the interest so awarded, in my view, was not interest on a debt but a constituent part of a "loss and expense" claim. The Arbitrator was on the correct path when he relied on (vide: page 619A of Vol.2, RHC) the case of **FG Minter Ltd v Welsh Health and Technical Services Organisation** (vide: tab (1) of RNJV (appellant's) written submissions dated 2nd April 2015 in Appeal No. 0063/2013).

[65] More-over, as the proceedings before the Arbitrator reveal, parties had expressly given the power to make a determination on interest. (vide: pages 479 bottom to 480 of volume 2, RHC) The proceedings at page 480 appear to have been on the quantum which RNJV was sanguine of receiving and FNPF was resisting rather than contesting the principle whether interest was payable for "loss and expense".

[66] Consequently, I am unable to agree with Mr Christy's submission that, if interest was available it was contained in the $10,000.00 provided for in the subsequently inserted clause as Clause 24(3) of the conditions attached to the MOA. (vide: Page 71 of Vol, .1 RHC).

[67] In the face of the above I find it difficult to comprehend as to how the learned High Court Judge concluded as he did in striking off the said interest component in the Arbitrator's award.

[68] For the aforesaid reasons, without having to say more, I hold that Appeal ABU 63/2013 RJNV is entitled to succeed.

Re: the Appellant's contention in ABU 066/2013 – who was the 1st Respondent in ABU 63/2013 on the aspect of Comound Interest

[69] On that matter, Mr Christy submitted that, 'the interest issue', must be put into perspective. He was heard to say that what the Arbitrator awarded was at 12%

compounded (rather than simple) for four (4) years. Referring to the Arbitrator's discussion on the basis for payment of interest and interest rates. (at pages 619A to 620A of the RHC, Vol.2) learned Counsel submitted that the conclusion the Arbitrator drew at <u>paragraph 7.1.8</u> was a misdirection and must be set aside.

[70] At paragraph 7.1.8 of his award the Arbitrator decided thus:

> "An investigation of the interest rates for secured loans presently offered by two of the major commercial banks leads the Arbitrator to deem it fair to apply an annual interest rate of 12% , compounded monthly, on the outstanding amounts owed to RNJV and their subcontractors calculated from the dates of when those respective claims fell due."

[71] In his <u>Ruling Summary</u> the Arbitrator ruled that, "RNJV's claim for loss and expenses , non payment of retention, short payment of interim certificate advice (ICA) # 42 and other nominated sub-contractor's claim will attract interest at the rate of 12% per annum, compounded monthly, calculated from the dates when respective claims fell due."(at p.622A, RHC, Vol.2 – paragraph 9.8

<u>Application of Legal Principles</u>

[72] There can be doubt that what the Arbitrator ordered was in the nature of compound interest – ie. "Interest on interest."

<u>Common Law Position on Payment of Compound Interest</u>

[73] Compound interest will not be allowed except, interalia, where there is an agreement, express or implied, to pay it. (vide: Halsbury's Law of England, 4th ed, vol.32 , p78). This has been the Common Law position where the English decisions could be traced back to the 18th century **<u>Morgan v. Mather</u>** [1792] 2 Ves 15 may serve as an example. For a more recent case see **<u>National Bank of Greece SA v Pinios Shipping Co</u>**. [1990] 1 AC 637.

[74] Mr Barnes relied on the decision in **F. G. Minter v Welsh Health etal** (supra) and a passage from **Hudson on Building and Engineering Contracts** (11th Ed, 1995 p.1020) in defending the Arbitrator's decision to award compound interest.

[75] I had earlier approved of the decision in **Minter's** case but that was in regard to the aspect of awarding interest for loss and expense where I concluded that it was available to RNJV for the reasons stated in my judgment. By conduct of parties the payment of interest on a claim for loss and expense was recoverable provided that the delay in completing the contract was imputable to FNPF, and I add, as a direct consequence of that delay. That is what I held earlier in my judgment.

[76] But, awarding 'compound interest' is another matter. Of-course, under the Law Reform (Miscellaneous Provisions) Act 1934 in the UK, the preclusion of interest upon interest applied to interest bearing debts and not to damages for breach of contract. (see: **Bushwall Properties v Vortex Properties** [1975]1 WLR 1649.

[77] Perhaps and presumably, this is what must have inspired Mr Barnes to rely on **Hudson's Authority** referred to by me earlier given the basis on which I affirmed the award of the Arbitrator on the principal interest. Unlike in the case of payment of principal interest which I was able to hold as having been established by agreement (express or implied) between the parties by reference to 'the instruments' in question I took into consideration , I could not find any basis to infer that there was any agreement (express or implied) in the said "instruments" in regard to the payment of 'compound interest'.

Re: The Law Reform (Miscellaneous Provisions (Death and Interest) Legislation (Cap.27)

[78] This Ordinance has been in operation since 1935 (with some recent amendments).

[79] The Proviso to Section 3 of the nascent legislation precludes: "the giving of interest upon interest".

[80] True, the said section refers to proceedings filed in the Supreme Court (presently to be read as the High Court).

Would the said provisions apply to Arbitral Proceedings?

[81] Perhaps that may have warned Counsel not to refer to the said provision lest having to get involved in an argument as to whether parties even in arbitral proceedings could contract and/or agree to act contrary to a statute.

[82] I do not think it is necessary for me to go into that aspect for I choose to go on the basis that, in the absence of an agreement between the parties express or implied, 'compound interest' cannot be awarded even in arbitral proceedings.

[83] And I hold that, the arbitral proceedings in the instant case do not reveal any such agreement.

Conclusion

[84] Accordingly, I conclude that, that part of the Arbitrator's award in regard to 'compound interest' is liable to be set aside.

Some concluding Remarks on the issue Re: 'Compound Interest'

[85] I have refrained from expressing a view in regard to the 'compound interest' provisions enshrined in aforementioned legislation as to whether it should be held as being applicable to arbitral proceedings.

[86] However, I cannot resist in making some remarks in that regard.

[87] John Locke (of Civil Government, Certainity in the Law in general, 1924 ed. P.184) and Shael Herman's remark on Montesquieu's teaching that; "certainty can positively affect the citizenry (Legal studies 165, p.180) where Herman was inspired to say that "if private actors can adjust their activities to account for them, they could thereby avoid the effect of sporadic legal catastrophes", strike me as being significant.

[88] Then, there is Lord Denning who quoted the attack by Junius on Lord Mansfield's introduction into the 18th Century, common law of equitable principles, which though opposed at the time, eventually had come to be entrenched in English Judicial Jurisprudence by the 20th century; (Denning, **What Next in the Law** (1982), Butterworths, citing Letters of Junius of 14 November, 1770)

Specific Need for Legal Certainty in Arbitration Proceedings

[89] Finally, I reflect on Lord Diplock who illustrated the practical aspects of the need for legal certainty as regards the position of traders in arbitration disputes (see: **Pioneer Shipping Ltd v BTP Toxide Ltd**. **The Nema** [1981] 3 WLR 292 at p.305)

[90] The conflict between 'certainty' and 'flexibility' on the law is also seen in regard to the enforcement of arbitration awards in the context of the Limitation Act of 1980 in the UK which the English courts are seen to have grappled with in **Agromet Motoinport Ltd v Maulden Engineering Co.(Beds) Ltd** [1985] 1WLR 762.

A Matter for the Legislature

[91] Given the fact that this Court like any other court in the Judicial Structure in Fiji derives judicial power under the Constitution and statute law, needless to say, the provisions of the Law Reform legislation (Cap.27, supra) cannot be extended to Arbitral proceedings through Judicial decree. Policy in pursuance of achieving legal certainty is left to the

Supreme legislature of this country as much as I would have liked to take a cue from those greats referred to in the preceding paragraphs.

[92] Thus, leaving that matter for the legislature, within the limits of my constitutional jurisdiction, I take refuge – an indeed – I do so on the English Common Law principle that, unless it could be shown that there was agreement between the parties in arbitral proceedings as regards "compounding interest" - the same could not have been allowed.

My Final conclusions on both Appeals viz: ABU 0066/13 and 0063/13

[93] On the basis of the foregoing reasons and conclusions I have drawn, I finally conclude that:-

(a) the Appeal by FNPF (appellant) in ABU 0066/13 on the three grounds it agitated viz:-

(i) on the ground of breach of alleged breach of natural justice.

(ii) on the ground of delay related to the aspect of extension of time as to who was to be imputed in completing the contract in question in time, and

(iii) interest awarded by the Arbitrator and affirmed by the High Court on the aspect of loss and expense as to who was to be blamed shall stand dismissed.

(b) The appeal by RNJV (Appellant in ABU 0063/13 against the High Court Judgment) disallowing 'interest' on 'loss and expense' to stand allowed and;

(c) FNPF's Appeal against the Arbitrator's award allowing compound interest to stand allowed.

[94] Before parting with this judgment I wish to place on record the Court's appreciation of the assistance given by both Mr Barnes and Mr Christy for Court to make a determination in the two appeals in question which involved a number of intricate issues.

Seneviratne, JA

[95] I agree with the reasoning and conclusions of Guneratne JA.

Orders of the Court :

1. *The Appeal in ABU 0066/13 is dismissed on the aspects of alleged breach of natural justice, delay and 'interest' for "loss and expense".*

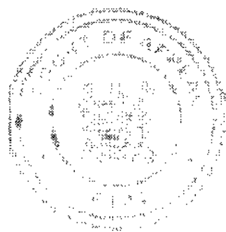
2. *The appeal in ABU 0063/13 which was on the aspect of 'interest' for "loss and expense" is allowed.*

3. *The Appeal in ABU 0066/13 on the award of compound interest is allowed.*

4. *Accordingly the award made by the Arbitrator shall stand restored subject to Order 3 above.*

5. *On a balance of the aforesaid orders, the appellant in ABU 0066/13 and the 1st Respondent in ABU 0063/13 (FNPF) is ordered to pay as costs to the Appellant in ABU 0063/13 a sum of $10,000.00 within 21 days of this Judgment.*

....
Hon. Mr. Justice W.D.Calanchini
President, Court of Appeal Fiji



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Hon. Mr. Justice Almeida Guneratne
Justice of Appeal

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Hon. Mr. Justice Lyone Seneviratne
Justice of Appeal