

IN THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT OF FIJI]

CIVIL APPEAL NO. ABU 0087 of 2015
(HIGH COURT CIVIL ACTION No. HBC 153 of 2012)

BETWEEN : **ABBCO BUILDERS LIMITED**

Appellant

AND : **STAR PRINTERY LIMITED**

Respondent

Coram : **Basnayake JA**
Prematilaka JA
Jameel JA

Counsel : **Mr.B.C. Patel for the Appellant**
Mr. R.A. Singh for the Respondent

Date of Hearing : **17 August 2017**

Date of Judgment : **14 September 2017**

JUDGMENT

Basnayake JA

[1] I agree with the findings and the proposed orders of Jameel JA.

Prematilaka JA

[2] I have read in draft the judgment of Jameel JA and agree with Her Ladyship's reasons, conclusions and proposed orders.

Jameel JA

Introduction

- [3] This is an appeal from the judgment of the High Court dated 05 November 2015 awarding the Plaintiff- Appellant ('**Appellant**'), damages in a sum of \$1,555,882.71. The Appellant's claim for indemnity costs was not allowed. However, the court awarded costs summarily assessed at \$8000.00.
- [4] The first ground of appeal is that the learned High Court Judge erred in overlooking to exercise the discretion contained in section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935 (Volume 2, p.710,021), ("**the Act**"). For the reasons that will be set out below, this court holds that the failure of the High Court to indicate in the judgement why pre-judgment interest was not considered, amounts to a failure on the part of the High Court to exercise its discretion, and is an error of law.
- [5] The second ground of appeal is that despite the evidence before it, the failure of the High Court to award indemnity costs was an error of law. For the reasons that will be set out below, this court holds that the High Court did not err in refusing to award indemnity costs.

The Appellant's Statement of Claim

- [6] By Writ of Summons dated 4 June 2012, and Statement of Claim dated 31 May 2012, the Appellant stated that by its Architect's letter dated 8 October 2009, the Respondent accepted the Appellant's tender and awarded the building contract to the Appellant. The contract was to construct an extension to an existing building belonging to the Respondent for a contract price of \$2,080,000.00. The Appellant entered the property on or around 12 October 2009, and commenced work. The agreement was that all extras and additions to the works would be paid at a price to be fixed and certified by the Architect, who was appointed by the Respondent. The date for completion was extended from time to time due to additional work, variations and bad weather. On 21 August 2010, the

Respondent paid the Appellant a sum of \$ 400,000.00 leaving a balance of \$155,882.71. In or about September 2010, the Respondent took possession of the completed works, although the alucobond panelling was completed on or about January 2011. Despite demand by the Appellant, the Respondent failed to pay the balance due for the work completed.

[7] In paragraphs 19 and 20 of its statement of claim, the Appellant stated as follows: -

"19. The Defendant knew or should have known that the Plaintiff would utilize the monies payable by them in the furtherance of the Plaintiff's business"

20. Due to the Defendant's failure to pay the monies when due, the Plaintiff has lost use of the same." (Emphasis added).

[8] The prayer in the statement of claim was as follows:-

"(1) judgment in a sum of \$155, 882.71 or for such other sum as may be found owing by the Defendant to the Plaintiff.

(2) Compound interest on the judgment at such commercial rates as may be determined by this Honourable Court pursuant to Law Reform (Miscellaneous Provisions) (Death and Interest) Act;

(3) Indemnity costs of this proceeding.

(4) Such further or other Order as may seem just to this Honourable Court. "

The Respondent's Statement of Defence and Counter-Claim

[9] The Respondent filed a Statement of Defence and a Counter Claim dated 29 June 2012, and denied the claim of the Appellant. It counter-claimed *inter -alia* liquidated damages of \$344,000.00, an order of repayment of \$266,693.07 (which it claimed it had paid under mistake), and special damages of \$ 31,726.54.

[10] In paragraph (g) of its prayer, the Respondent claimed as follows: -

“An order that the Plaintiff pay interest on judgment at such rate and on such amount as may be determined by this Honourable Court pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.

[11] In paragraph 24 (b) of its Defence and Counter-Claim, under the general heading of “Particulars of damage”, the Respondent claimed as follows:-

“Interest charges on borrowed funds employed in and about the construction of the building at the rate of 6.3 per annum between approximately 02 April 2010 and 10 February 2011 totalling \$165,493.13”

[12] The Appellant filed a Reply dated 23 July 2012 in response to Respondent’s Statement of Defence and Counter Claim, and in paragraph 19 denied the claim of the Respondent for interest, and pleaded that the Respondent was not entitled to any special damages, as they were too remote.

Minutes of the Pre-Trial Conference

[13] Issues Nos 13 and 14 of the Agreed Issues recorded, stated as follows: -

“(13) Should the Plaintiff or the Defendant pay interest on any sum the Court awards to the other?

“(14) Should the successful party be awarded indemnity costs of this action?” (Emphasis added).

The Judgment of the High Court

[14] The trial in the High Court lasted eight days, of which one day was for submissions of counsel. Several witnesses testified on behalf of both parties. The learned trial Judge has set out in much detail the chronological sequence of facts, and only those relevant to the issues before this court need to be referred to here.

[15] Having carefully considered the evidence, the learned trial judge set out his findings of fact. The construction contract began with the issue of the Respondent's Architect's letter dated 8 October 2009, awarding the contract to the Appellant. Numerous additions and variations to the original contract led to the delay in completion. The evidence was that in or about August or September 2010, the Respondent took possession of the completed building and the keys to building as well. By letter dated 8 October 2010, the Appellant requested payment for work done, but the Respondent failed to pay the money due. In regard to the delay in completion, the Respondent claimed that the Appellant failed to request in writing, an extension of time. The Respondent's Architect testified on its behalf, and admitted that certain instructions that he had given involved additional work, but he was unable to state with certainty which instructions involved additional work, and which did not. The High Court found that it was the issuing of numerous and continuous instructions for additions and variations to the original contract, that caused the delay in completion, and that the Appellant had been treated unfairly because the Architect unreasonably failed and neglected to issue a Certificate of Completion, despite practical completion having been achieved, thus denying the Appellant of its right to payment.

[16] On 5 November 2015, the High Court allowed the claim of the Appellant, dismissed the Respondent's Counter Claim and made the following orders: -

1. *The defendant shall pay the plaintiff \$ 155,882 with interest in terms of section 4 of the Law Reforms (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) as amended by Decree No.46 of 2011, from the date of the judgment until the entire judgment is paid in full.*
2. *The defendant shall pay the plaintiff \$8000 as costs (summarily assessed) of this action.*
3. *The counter claim of the defendant is dismissed.*

The Grounds of Appeal

[17] The Appellant pleaded the following grounds of appeal: -

1. *The learned trial judge overlooked to consider the Plaintiff's claim for pre-judgment interest and thereby erred in law and in fact.*

2. *The learned trial Judge omitted to take into consideration relevant matters in exercising his discretion to award \$8000 costs and as a result the award is grossly inadequate and plainly wrong. The relevant matters omitted included:*
- (i). Each party was represented by two Counsel;*
 - (ii) There were seven full days of hearing and one full day of submissions;*
 - (iii) At least seven days of preparation was required for the hearing of the action;*
 - (iv) Substantial work was done between the issue of the Writ and the preparation for the hearing of the action;*
 - (v) Disbursements totalling \$2177.50 were paid. Court fees for filing documents (\$402.50); hearing fees for days (\$ 690.00) and agency to Suva Agent for attendees on interlocutory matters (\$1085.00);*
 - (vi) Counsel had to travel to Suva for the hearing and for the submissions; and*
 - (vii) Plaintiff's Managing Director and Counsel incurred hotel expenses in Suva for 8 days.*

The law relating to Interest - The Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935

Section 3 - Pre-judgment interest

- [18] The power of the court to award interest is contained in section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935, (Volume 2, p.710,021). Section 3 of the Act is similar to the corresponding provision in the Law Reform (Miscellaneous Provisions) Act 1934 of England, and provides as follows: -

"3. In any proceedings tried in the Supreme Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section-

- (a) shall authorise the giving of interest upon interest; or*
- (b) shall apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; or*

- (c) *shall affect the damages recoverable for the dishonour of a bill of exchange.*

Section 4- post-judgment interest

[19] The Act was amended by the Law Reform (Miscellaneous Provisions) (Death and Interest (Amendment) Decree 2011 (Decree No. 46 of 2011) by the introduction of section 4 and it states as follows: -

2. *The Law Reform (Miscellaneous Provisions) (Death and Interest) Act [Cap.27] is amended by inserting the following new section after section 3*

"Judgment debts to carry interest

4. (1) *Every Judgment Debt shall carry interest at the rate of four cents per centum per annum from time of entering up the Judgment until the same shall be satisfied, and such interest may be levied under a Writ of Execution on such Judgment.*
- (2) *Rules of court may provide for the court to disallow all or part of any interest otherwise payable under subsection (1)*
- (3) *Notwithstanding anything contained in this section, the State Proceedings Act or any other written law, no interest shall be payable on any Judgment Debt entered in any proceedings against the State, or the Attorney-General."*

[20] Section 4 makes it mandatory for court to award post-judgment interest on every judgment debt and imposes a ceiling on the rate of interest, from the time of entering up the Judgment until the judgement is satisfied. Thus, a claimant does not have to plead post-judgment interest, and the court is statute-bound to award interest in respect of a judgment debt. In this case, the High Court awarded post-judgment interest and this is not in issue in this appeal.

[21] Section 3 empowers the High Court Judge to award pre-judgment interest at a rate it considers appropriate. This discretion is to be exercised rationally taking into

consideration all relevant matters in order to ensure that justice is done to the successful party. Section 3 (a) however prohibits the awarding of pre-judgment compound interest.

The Failure to exercise discretion

- [22] The first ground of appeal is whether the failure of the Learned Judge of the High Court to exercise the discretion given in Section 3 of the Act, was an error of law.
- [23] The Appellant submitted that the silence on the part of the learned trial Judge, cannot lead to the presumption that he had dealt with the claim for pre-judgment interest.
- [24] The Respondent relied on the dicta of Rowlatt J in **Becker Shillan & Co. v Barry Brothers** [1921]1 K.B. 391. This case concerned the omission on the part of an Arbitrator to make a general award in regard to the general costs of reference to arbitration. The passage relied on states as follows:-

“One of the terms incorporated was that “the costs of the reference and award shall be in the discretion of the arbitrators or umpire” Now, that does not mean that it is in his discretion whether he will deal with them or not, but that he must deal with them by exercising his discretion upon them. If he chooses he can say that he leaves them to be borne by the parties that incur them and make no order that either party pay the costs of the other. [Emphasis added].

His Lordship continued at p.398.

It is clear that prima facie the successful respondents were entitled to get their costs; they had incurred great expense and defeated a claim for 8000/- Can it be supposed that the umpire is entitled to deprive them of costs by mere silence as to costs? I cannot think so. “In my view, it would be most unsatisfactory to infer from his silence that he had dealt with them.”[Emphasis added].

- [25] In regard to the failure to exercise discretion, the Appellant also relied on the judgement in **Williams v Wilson** (1853) 9 Ex.90 (cited in **Becker, Shillan & Co. v Barry Brothers** (supra) which was a case in which costs were submitted to the discretion of the arbitrator and, the issue for consideration by the court was whether the award was final when the

arbitrator had not dealt with the question of costs. Parke B., at p. 99, described this as follows: -

"We do not think the award can be made good on the ground that this matter is left to the discretion of the arbitrator, in the sense that he may award upon this question or not as he thinks fit. We think it clear that it was intended that he should exercise his discretion on the question of the costs, not whether he would award upon that question or not at his option or discretion."

[26] The statutory discretion contained in section 3 of the Act empowers the judge to determine whether the evidence reveals that the successful party had been kept out of his money, and whether fairness and justice requires him to be compensated for the deprivation suffered. The trial judge, will be best placed to make such a determination. Thus, the intention of the legislature is that the judge must bring his mind to bear upon the evidence before him, and make a conscious decision as to whether or not going to grant pre-judgment interest.

[27] The complaint of the Appellant is that in this case, the learned Judge overlooked considering the award of pre-judgment interest although it was a live-issue between the parties in court. This is correct because the statement of claim, and the Pre-Trial issues recorded, and the closing written submissions of the Appellant contain sufficient reference to the claim for interest. In these circumstances, it was incumbent upon the court to have dealt with the claim. It remained open to the court to refuse it, but nevertheless it had to consider it. Thus, in the absence of any reference whatsoever to pre-judgment interest in the judgment, I am compelled to hold that the High Court has failed to exercise its discretion, and that this amounts to an error of law.

Failure to Comply with the High Court Rules, 1998

[28] Order 18, r.7 of the High Court Rules, 1998 specifies as follows; -

"7(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any statute of limitation, fraud or any fact showing illegality-

- (a) *which he alleges makes any claim or defence of the opposite party not maintainable; or*
 - (b) *which, if not pleaded, might take the opposite party by surprise; or*
 - (c) *which raises issues of fact not arising out of the preceding pleading*
- (2) *Without prejudice to paragraph (1), a defendant in an action for the recovery of land must plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant is not sufficient.*
- (3) *A claim for exemplary damages must be specifically pleaded together with the facts on which the party pleading relies”*

[29] Rule 7(1) refers to “any pleadings subsequent to a statement of claim”. There is no reference in this rule to a claim for interest to be set out in the statement of claim. What must be noted at the outset is that Order 18, r.7 of the High Court Rules, 1998 of Fiji contains only three sub-paragraphs. There is no equivalent of sub-paragraph (4) of r.7 which is contained in the English High Court Rules. However the Respondent relied on the authorities that had followed authorities decided with reference to the said English High Court Rule.

[30] Rule 7, sub-paragraph (4) of the (‘White Book’) in England states as follows:

- (4) *A party must plead specifically any claim for interest under section 35A of the Act or otherwise.*

[31] However, as will be set out below, the Courts in Fiji had chosen to follow the English authorities, although there is no equivalent in the High Court Rules, 1998 of Fiji. This appears to have first been followed in **Usha Kiran v The Attorney General of Fiji** Civil Appeal No. ABU 0025.1989 [FJCA 1990] (23 March 1990), which was a case of damages for personal injury. The claim for interest on damages was refused on the following basis: -

“In England under Order 18 Rule 8 it is mandatory to plead specifically any claim for interest under the English Act. While we have no comparable rule in Fiji the reasons given in the 1985 ‘White

Book' at note 18/8/10 commends itself to us. The passage is as follows: -

"The claim for interest must be pleaded in the body of the pleading and not only in the prayer though it should also be repeated in the prayer, (see O.18, r.5 (1). It must identify precisely the ground or basis on which it is claimed, and whenever possible, the date from which and the rate at which the interest is being claimed, assuming, that is, that the date to which it is claimed is the date of the judgment". (Emphasis added)

- [32] This passage in **Usha Kiran** (supra) was subsequently cited by the court in refusing the application for interest in **Vatukoula Joint Venture & Emperor Gold Mining Co. Ltd v Muni Deo** ABU 0054.2006 [2008] FJCA 121 (12 March 2008), which was also a case of damages for personal injury. At paragraph 38 of its judgment the court stated as follows: -

"It has been the law for many years that where interest is to be awarded it must be specifically claimed in the Writ."

- [33] Although the court in **Vatukoula** (supra) proceeded on the basis, that it was 'the law' (in Fiji) for a claim for interest to be set out in the statement of claim, it is significant that in **Usha Kiran** (supra), the Court did recognise that there was no provision equivalent to Order 18, r.7 in England, and then stated as follows: -

"In England under Order 18 Rule 8 it is mandatory to plead specifically any claim for interest under the English Act. While we have no comparable rule in Fiji the reasons given in the 1985 'White Book' at note 18/8/10 commends itself to us" (Emphasis added).

- [34] In this context, I note that in the written submissions of the Respondent, a relevant portion from paragraph 38 of the judgment, in **Vatukoula** (supra), has been omitted and the omitted portion states as follows: -

"In this case it was not, nor was any reference to interest made in the submissions of Counsel for the Respondent".

- [35] Thus, it is seen that the court in Vatukoula (supra) recognised that had the claim for interest been made at least in the submissions of counsel, it could have been considered. This court will, however not venture to reflect on that statement in Vatukoula (supra) as it is unnecessary because, in this case, the court finds that the claim for interest has been specified in the statement of claim by the Appellant.
- [36] The court in Usha Kiran (supra) was cognisant of the fact that Order 1, r.7 of the High Court Rules of Fiji do not have the English equivalent, and its exclusion in the High Court Rules, 1998 of Fiji, could be regarded as an intentional omission. Thus the restrictive approach taken by the courts in Usha Kiran (supra) and Vatukoula (supra) was not necessary.
- [37] In this context, it is appropriate to be guided by the judgement of Lord Greene, M.R. in Riches v Westminster Bank Ltd. [1943] 2 All ER 725 which states as follows: -

“I think that the Plaintiff on the course of action pleaded was not entitled to interest as of right and, therefore, that the Judge was at liberty in the exercise of his discretion, to avoid interest under the Law Reform (Miscellaneous Provisions) Act, 1934, s.3. The discretion which the Judge has under that section seems to me to be as unfettered as any discretion can be, and I think it would be a misfortune if we were to seek to import into this section the result of decisions on other sections of other acts of Parliament, or, indeed, the words of other acts of Parliament which the Legislature has not thought fit to reproduce. There is nothing here about notice; there is nothing, as My Lord has said, to indicate that it is necessary – I say “to state in the pleadings that it is intended to ask for interest. If one looks at R.S.C., Ord. 20, r.6, it is quite clear, as it seems to me, that such relief as this may always been given by the Court, although it is not asked for in the pleadings. That rule says – “that relief may always be given as the court or the Judge may think just to the same extent as if it had been asked for. At the same time, I think it may be well to say that there is never any objection to state in the Statement of Claim that it is intended to ask for interest. I have seen that the latest addition of BULLEN AND LEAKE suggests that that should be done. I do not agree that it is necessary that it should be done. There can, as I say, be no objection to it and it may sometimes be convenient, where that is a payment into court, that the party paying should know that a claim for interest, not a claim as of right but still a claim for interest, is to be made against him. I say nothing about the

effect of such a claim on payment in or on the question of costs, but it seems to me that it may be advantageous that the point should be raised in the statement of claim. But that it is necessary to plead it I am by no means convinced; in fact, I feel clear that it is not”.[Emphasis added]

- [38] At this moment, it is useful to pause and closely consider the basis of the judgment in **Riches v Westminster Bank Ltd** (supra). It was a case in which the award of interest to the judicial trustees of the testator was challenged on the basis that it was not pleaded in the statement of claim, and that therefore the exercise of discretion given in section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, could not have been exercised. Lord Greene M.R. rejected this argument on the basis that there was no statutory requirement for the claim for interest to be contained in the statement of claim, in order for the judge to exercise his discretion. In other words, it was not a condition precedent to the exercise of the statutory discretion of the judge. It appears that the actual import of this judgment was not fully appreciated in **Usha Kiran** (supra), which created a ‘practice’.
- [39] The ‘requirement’ has arisen, it appears, based on the dicta in **Usha Kiran v Attorney General of Fiji** (supra) in which the court whilst admitting that Fiji did not have the equivalent of the English High Court Rules, (that is r.7 (sub paragraph (4) of Order 18) nevertheless, chose to adopt it due to the reason that “it commended itself” to the court. Thus, was born the ‘practice’, and it continued to be called a ‘practice’ and nothing more, despite the dicta in **Vatukoula** (supra).
- [40] The extract cited by the court in **Kiran** (supra) is from the ‘examples’ relating to paragraph (4) of r.7 of Order 18, which specifically relates to interest. There is no similar provision in the High Court Rules, 1998, of Fiji.
- [41] Accordingly, this practice that arose in respect of a rule that was, and is not part of the Fiji High Court Rules, 1998 ought not to be equated to, and treated as a requirement, particularly if it results in injustice to a successful claimant; and there is nothing in the

judgment that indicates that the learned trial judge did not intend to deny the successful claimant to enjoy the true benefit of his success.

[42] It is useful to consider the English Law on the subject.

The Law relating to interest in England

[43] Under the Common Law, the power to award interest could be first traced to the judgment in **Page v Newman** (1829) 9 B&C 378 by Lord Tenterden MR in the Court of Kings Bench as follows: -

“the long-established rule, was that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments.”

[44] Subsequently, section 17 of the Judgments Act 1838 provided for post-judgment interest and stated as follows: -

‘Every judgment debt shall carry interest at the rate of Four pounds per centum per annum from the Time of entering up Judgment, or from the Time of the Commencement of this Act in Cases of Judgments then entered up and not carrying interest, until the same shall be satisfied. And such interest may be levied under a Writ of Execution on such Judgment’.

[45] In **London, Chatham and Dover Railway Company v South Eastern Railway Company** [1893] AC 429, it was held by the House of Lords that at Common Law, in the absence of any agreement (express or implied) or statutory provision for payment of interest, a court had no power to award interest by way of general damages for late payment of a debt. This appears to have been because of the decision in **Page v Newman** (supra).

The Law Reform (Miscellaneous) Provisions Act 1934 (England)

- [46] The Law Reform (Miscellaneous) Provisions Act 1934 was passed on 25 July 1934. Section 3(1) empowered the court to award pre-judgment interest on debts and damages. Section 3 of this Act provided as follows:

“3. In any proceedings tried in the Supreme Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section

(a) shall authorise the giving of interest upon interest; or

(b) shall apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

- [47] Section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934, empowered the court trying any claim for “the recovery of any debt or damages” to order that there be included in the judgment debt, interest from the date that the cause of action arose, to the date of judgment. “Any debt” covered liquidated or unliquidated sums recoverable in contract (express or implied) or under statute. Thus, arose the statutory basis for the award of pre-judgment interest in England.

The Amendment of 1970

- [48] In England, section 22 of the Administration of Justice Act 1969 amended the Law Reform (Miscellaneous Provisions) Act 1934 Act, with effect from 1 January 1970. The amendment added a new sub section, with effect from 1 January 1970, which made it compulsory to award damages in cases of personal injury, when the sum awarded

exceeded 200 pounds. However, that amendment has no direct bearing on the issue for determination for this court.

The Amendment of 1983

[49] On 1 April 1983, section 3 of the Law Reform (Miscellaneous) Provisions Act 1934 ceased to have effect, and section 35A of the Supreme Court Act 1981, and the consequential amendments to R/S.C. Ord 13. R1 (2) **Order** 18, r. 8 and Ord.22 r. 1 (8) came into operation. **(Practice Note) (Claims for Interest) (No. 2)**, 1983 (1) W.L.R. 377.

[50] The significance of the duty of court to exercise its discretion under section 3 of the Act can be appreciated by considering the purpose of awarding interest. The recognised purpose of an award of interest is to ensure a plaintiff is properly compensated for the practical loss he has suffered, by not having the use of its money at the time it was due. The Appellant relies on the following authorities in this regard.

[51] In Jefford v Gee, [1970] 1 All ER 1202 at 1206, Lord Denning MR, as he then was, tracing the history of granting of interest cited London, Chatham and Dover Railway Company v South Eastern Railway Company (supra) in which Lord Hershell described the principle as follows: -

“ ... I think that when money is owing from one party to another and the other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events”. (Emphasis added)

- [52] In Harbutt's Plasticine Ltd v Wayne Tank and Pump Co. Ltd [1970] 2 WLR 198 at p.212, the court described interest as follows: -

... the basis of an award of interest is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself. So, he ought to compensate the plaintiff accordingly.

- [53] In Christopher Bernard Thompson v Karan Faraonio [1979] UKPC 12 at p.5, the Privy Council (on appeal from the Full Court of the Supreme Court of South Australia) held that:-

"The reason for awarding interest is to compensate the plaintiff for having been kept out of money which theoretically was due to him at the date of his accident"

- [54] In BP Exploration Co (Libya) Ltd v Hunt (No 2) [1979] 1 WLR 783 Rober Goff J (as he then was) quoting Lord Salmon in General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd [1975] 1 WLR 819 at 836 stated as follows, at p. 846:

"It is for this reason that interest will generally run from the date of accrual of the cause of action in respect of money then due or loss which then accrues; and in respect of loss which accrues at a date between accrual of the cause of action and judgment, from that date. For convenience I shall refer to these dates compendiously as the "date of loss" ..."

His Lordship continued at p.847:

"The basic principle, is, however, that interest will be awarded from the date of loss. Furthermore, the mere fact that it is impossible for the defendant to quantify the sum due until judgment has been given will not generally preclude such an award. Thus, in Admiralty, in collision cases where the ship is totally lost, interest has been held to run from the date of the loss (see eg. The Berwickshire [1950] p.204 and Owners of Leisbosch Dredger v Owners of SS Edison [1933] AC 449, 468) and in the case of a salvage award, from the date of the rendering of the salvage services: see The Aldora [1975] Q.B.748. There must have been many cases in the commercial court in which. Although the quantum of damages was in doubt until the date of the judgment, interest was awarded from the date of loss. Similarly, the mere fact that it is doubtful whether the plaintiff's claim will succeed,

and it is reasonable to contest his claim, will not generally require any departure from the general principle; nor generally will any doubt, however justified, as to the principles of law which will be applied.” (Emphasis added).

[55] In **Day v Mead** [1987] 2 NZLR 443 (CA) Somers J held at p.463 line 30:-

“Upon these considerations, I would conclude that generally justice may require interest to run from the date the cause arose down to judgment, for it is from that date that the plaintiff’s entitlement to the debt or damages arises.”

[56] In **Grincelis v House** [2000] 201 CLR 321 at p.328, the High Court of Australia quoting from the judgment in **MBP (SA) Pty Ltd v Gogic** (1991) 171 CLR 657) held as follows: -

“There is no doubt that this is a very important purpose of statutory provisions providing for the award of interest on the amount of a debt or damages in respect of the period between the cause of action accruing (or, in some statutory provisions, the commencement of the proceedings(41))and the date of judgment. It may be, however that statutory provisions for interest serve not only that purpose, but also a purpose of encouraging early resolution of litigation. (42)”

[57] In **Attorney General of Fiji v Cama** ABU 0021.2004S [2004] FJCA 31 (26 November 2004) at paragraphs 23 – 24, the Court held as follows:-

*“[23] The nature of an award of interest was considered by Bingham J in the **Swiss Bank Corporation v Brink’s-Mat Ltd and others** [1986] All ER 188 at 189:*

"Approaching an application for interest in circumstances such as this, I, like any English judge, start off with an inclination to award interest. That is, after all, the order that ordinarily follows where a plaintiff succeeds in establishing a breach of contract, in the absence of fairly compelling reasons why interest should not be awarded. The award of interest is not, of course, made as part of the damages but as interest on damages, and is paid not by way of any penalty against the defendant but as compensation to the plaintiff for having been kept out of his money for whatever period is deemed to be appropriate. The award of interest is, furthermore, seen as having a public policy purpose in that it tends to deprive a recalcitrant defendant of any advantage

which he might otherwise have from protracting the proceedings." (Emphasis added)

[24] Although Bingham J refers to breach of contract, his comments are equally applicable to the award of damages on other causes of action". (Emphasis added).

[58] In this case, when practical completion was achieved by 2 September 2010 by possession of the building being taken by the Respondent and, the 6 months Defects Liability Period thus commenced on this date. This period expired on 2 March 2011. Thus, the date from which the balance of the contract sum of \$155,882.71 became due and owing, and the cause of action arose, was 3 March 2011. On the principles set out above, it is evident that the Respondent had the use of the Appellant's money (\$155,882.71) from 3 March 2011, and unlawfully continued to benefit by it, to the detriment of the Appellant. Therefore, considering the facts of this case it is appropriate to award pre-judgment interest from 3 March 2011, up to the date of judgment that is, 5 November 2015, at the rate of 3% per annum on the principal sum due.

[59] The nature and characteristic of interest and its purpose was compared to unjust enrichment in considering an award for interest in **Heydon v NRMA Ltd (No 2)** [2001] 53 NSWLR 600, in which Mason P. having considered several authorities on unjust enrichment and stated as follows p.605;-

"Passing London, Chatham like ships in the night, these cases proceeded upon the obvious principle that, when A retains money owned by or owing to B over a period of time, A derives a benefit (at B's expense) usually measurable by what A would have to pay in the market to borrow that sum for that period. Since this benefit is derived without justification and at the expense of the person to whom the principal sum was due, we should now recognise it as an unjust enrichment. It stands independently of, but appurtenant upon the obligation to pay, the 'principal' sum". (Emphasis added).

Was the claim for interest pleaded in the statement of claim?

[60] Paragraph 19 of the Statement of Claim specifically states that *"due to the defendant's failure to pay the monies when due, the Plaintiff has lost the use of same."* This, taken in

conjunction with the fact that, the question of an award for interest was recorded by the parties in the Pre-Trial Conference Minutes, places this matter beyond any doubt. This court takes the view that the claim for interest has been sufficiently pleaded.

- [61] Further, as it was admitted that no portion of the balance sum of \$ 155,882.00 had been paid on the date the statement of claim was filed, the Appellant was a person, who, in the words of Lord Herschell LC, in **London, Chatham and Dover Ry Co v South Eastern Ry Co** (supra) at p.429: -

“is driven to have recourse to legal proceedings in order to recover the amount due to him.”

- [62] The rationale behind the requirement to plead certain specific matters is to prevent the element of surprise and unfair prejudice being visited upon the opponent. In the circumstances of this case, there was no such surprise. As set out above, the subject of interest was foremost in the minds of the parties, and it was the Respondent that led evidence of the rates at which it borrowed money to finance the project. Thus, both parties were well aware that pre-judgment interest was an imminent possibility. It must necessarily be so, because post-judgment interest is a statutory right and there would have been no need for it to have been recorded as an issue.

Rate of interest

- [63] The Appellant admits that it did not lead any evidence at the trial in respect of Pre-Judgment Interest and relies on the Respondent's evidence that the latter borrowed at the rate of 6.35% for the purpose of the project. The Appellant thus submitted that it was open to this court to award interest of 6.35% on the judgment sum of \$155,882.71.

- [64] However, this court is unable to agree with this proposition. Instead the court is inclined to rely instead on the passage relied on by the Appellant in a passage in the judgement of Davis LJ, in **F&C Alternative Investments v Barthelemy** [2012] 4 All ER 1096 at p.1121 paragraph [98]f. Although that was a case in respect of

costs, the passage relied upon refers to interest on judgments and is an useful guide in this case states as follows: -

“(4) in the context of awards of interest on judgment sums, the court ordinarily does not have regard to, or at least is not bound by, the rate at which a particular recipient in his particular circumstances might have borrowed funds: rather the court ordinarily focuses on the relevant class of person (if I can put it that way)..see, even so, the approach underscores the need for a general appraisal, having regard to what is fair, reasonable and proportionate as between both paying party and receiving party. (Emphasis added).

- [65] In regard to the question of whether pre-judgment interest must be awarded, this Court observes that the learned trial Judge did not find a valid or compelling reason to refuse awarding pre-judgment interest. On the contrary, after a detailed consideration of the evidence, the learned trial judge found that the Appellant had been unfairly treated by the Respondent, and had been deprived of its money for work completed. The learned trial Judge found in paragraph (64) of his judgment that the refusal of the Architect to issue a certificate of completion rendered the Appellant ‘helpless’, and having taken possession of the completed building, the letter of demand dated 31 January 2011 calling for the balance due on the work done, was met with the Respondent’s list of defects dated 4 February 2011. Thus, the Respondent continued to deprive the Appellant of the money that was lawfully due to it on the work completed. Accordingly, the Respondent is ordered to pay a sum of \$11,433.00 being interest at the rate of 3% on the sum of \$155,882.71 from 3 March 2011 to 5 November 2015, the date of judgment.
- [66] The principle that interest is awarded to compensate the successful party and also act as a deterrent would be rendered nugatory, if a court in circumstances such as this, fails to exercise its discretion given to it in section 3 of the Act. Accordingly, in all the circumstances of this case, the Appellant is entitled to, and this court awards a sum of \$17,149.00 as interest on the sum of \$155,882.00 at the rate of 3% per annum, payable from 3 March 2011 up to the date of judgment (5 November 2015).

Costs

[67] The second ground of appeal was as follows:-

"The Learned Trial Judge omitted to take into consideration relevant matters in exercising his discretion to award \$8,000.00 costs and as a result the award is grossly inadequate and plainly wrong. The relevant matters omitted included the following:

- (i) Each party was represented by two counsel;*
- (ii) There was seven full days of hearing and one full day of submissions;*
- (iii) At least seven days of preparation was required for the hearing and one day of preparation for the submissions;*
- (iv) Substantial work was done between the issue of the Writ and the preparation for hearing of the action;*
- (v) Disbursements totalling \$2,177.50 were paid. Court fees for filing documents \$402.50; hearing fees for 8 days (\$690) and agency to Suva Agent for attendances on interlocutory matters (\$1,085.00);*
- (vi) Counsel had to travel to Suva for the hearing and for the submissions; and*
- (vii) Plaintiff's managing director and counsel incurred hotel expenses in Suva for 8 days."*

[68] In **South Pacific Recording Ltd v Yates** Civil Appeal ABU 0039 u.96S [1997] FJCA 43 (14 November 1997) the Court held:-

"The general rule is that the costs are in the discretion of the trial Judge. An appellate Court is unwilling to interfere unless the discretion has been exercised on a wrong principle. The scale under Appendix 4 of the High Court Rules, normally the basis for an award, is exceptionally modest; it cannot be taken as allowing more than a token contribution to a successful party's reasonably incurred expenses. O.1 r 9 (3) (a) allows a Judge to make a special order in any proceedings, but the discretion is restricted by O.1 r. 9 (3) (b) and the detailed considerations set out in that sub-rule. However, O.62 r. 9 (4) (b) entitles a Judge to award a gross sum in lieu of taxed costs". [Emphasis added].

The Court stated further that: -

"Matters to be taken into account include the length of the trial, the amount of preparation, and the amount of solicitor-and client costs actually incurred. A Court is not obliged to make the unsuccessful party pay for the opponent's desire for Rolls Royce" representation".

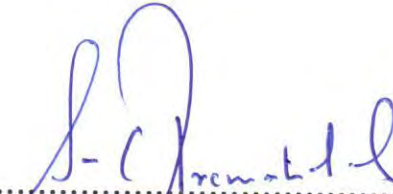
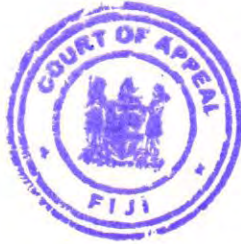
- [69] The Respondent submitted that grounds (i) to (vii) of ground 2 of the Appeal are matters that any litigant must expect as part of the normal course of a High Court trial. This is not entirely incorrect. I have also given anxious consideration to the numerous authorities in respect of the award of indemnity costs, relied upon by the learned Counsel for the Appellant, and do not find any reason or circumstances peculiar to the appeal which warrants a departure from the order made by the learned trial judge, and the principles contained in South Pacific Recording Ltd v Yates (supra). Therefore, the appeal of the Appellant on the second ground of appeal is dismissed.
- [70] The judgment of the High Court ordering the Respondent to pay the Appellant the sum of \$155,882.00 together with interest in terms of the Law Reforms (Miscellaneous Provisions) (Death and Interest) Act 1935 (Volume 2, p 710,021) is affirmed.
- [71] Accordingly the Respondent is ordered to pay a sum of \$17,149.38 as pre-judgment interest at the rate of 3% on the principal sum, from 3 March 2011 to 5 November 2015.

The Orders of the Court are:

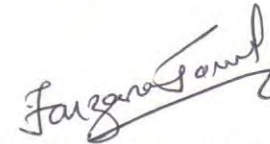
1. *The appeal of the Appellant is partly allowed.*
2. *The appeal of the Appellant in respect of pre-judgment interest is allowed. The Respondent is ordered to pay the Appellant a sum of \$17,149.38 as pre-judgment interest.*
3. *The Appeal in respect of indemnity costs is dismissed.*
4. *Subject to the above, the judgment of the High Court dated 5 November 2015 is affirmed.*
5. *In view of the orders made above the Respondent is ordered to pay the Appellant a sum of \$ 3000.00 as costs in this Court.*



.....
Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL



.....
Hon. Madam Justice F. Jameel
JUSTICE OF APPEAL