IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 1658 OF 2006

IN THE MATTER of a dispute between Yvette Reid and Mavis Henry and the City of Kingston Co-operative Credit Union Limited

AND

IN THE MATTER of the Co-operative Societies Act.

BETWEEN	**CITY OF KINGSTON CO-OPERATIVE CREDIT UNION LIMITED**	**APPLICANT**
AND	**REGISTRAR OF CO-OPERATIVES AND FRIENDLY SOCIETIES**	**1st RESPONDENT**
AND	**YVETTE REID**	**2nd RESPONDENT**

Heard 19th October, 2006 and February 16, 2007

Mr. Jermaine Spence and Mr. Laurence Jones instructed by Dunn Cox for the Applicant;

Mrs. Marvalyn Taylor-Wright instructed by Taylor-Wright & Co for the 2nd Respondent.

Ms. Annaleisa Lindsay instructed by the Director of State Proceedings, for the 1st Respondent.

CORAM: ANDERSON, J.

In this application for judicial review, the Claimant/Applicant, City of Kingston Co-Op Credit Union Limited, ("COK") seeks the following reliefs:

1. A Writ of Certiorari to quash the decision of the Registrar of Cooperatives and Friendly Societies,
2. An Order that the matter for be remitted to the First Respondent for re-hearing and a proper determination.

The ground on which the order of Certiorari is sought is that there was an error of law on the face of the 1st Respondent's Award dated March 31, 2006. The "award" in question was that made initially by an Arbitrator appointed under the Registrar of Cooperatives and Friendly Societies Act ("the Act") in favour of the 2nd Respondent, and later upheld by the 1st Respondent pursuant to a reference to him under section 50 (3) of the Act.

It was the burden of the Applicant's submissions that the Arbitrator in these proceedings had made a finding, unsupportable in law, that COK's failure to deliver a registered title which was in its possession or control to the 2nd Respondent, was the cause of the loss of the 2nd Respondent's supply of goods contract with the Ministry of Education, Youth and Culture and a consequent loss of profit arising therefrom. The Applicant is of the view that the 1st Respondent fell into the same error as the Arbitrator when he upheld the award and as such his decision ought to be quashed. The Arbitrator had fallen into error, and the first Respondent, in upholding the Arbitrator's Award, compounded that error of law. It was counsel's submission that there was no evidence of a causal connection between the two things and that, accordingly, any award which was premised on such a cause was bad in law as there was no fulfillment of the *legal requirement* for there to be causation between the conduct or behaviour complained of, and purported consequential loss.

In order to have a proper understanding of this matter, it is necessary to have regard to the history as gleaned from the various affidavits which have been filed herein, and in particular, that of Indera Persaud, COK's legal officer, sworn on May 4, 2006. I should note that while counsel for the 2nd Respondent later took issue with Mrs. Persaud's affidavit on the basis of what she called "non-disclosure", there was no averment as to inaccuracy.

1. In or about 1991, Ms. Yvette Reid obtained a loan from the Applicant and delivered a certificate of title in the names of Matthew Henry and Mavis Henry. That loan was subsequently repaid.
2. In or about 1993 Ms. Yvette Reid obtained another loan from the Applicant which was secured by the same title and shares in COK. Ms. Reid was unable to service the loan which was liquidated by shares held in COK. The title remained with the Applicant until March 17, 2004 when it was delivered to Mrs. Mavis Henry pursuant to her instructions to COK.
3. By a contract dated October 23, 2003, between the Ministry of Education, on the one hand and Education Matters (a business apparently owned by Mrs. Mavis Henry, the mother of the 2nd Respondent) on the other, Education Matters agreed to supply goods to the Ministry of Education and the Ministry would pay the contracted price. The contract period was ninety (90) days thus the putative date for ending the contract was January 21, 2004. Mrs. Henry was unable to obtain a loan to purchase the goods needed under the contract and, on or around the 16th March, 2004, the Ministry of Education cancelled the contract. (The Ministry's termination letter is set out below in this judgment)
4. By a letter dated December 15, 2003 Mavis Henry advised COK that she wished "*to use the title now in the possession of the Credit Union as collateral*

for a loan at the Self Start Fund", which would facilitate the purchase of the goods that would form part of the contract with the Ministry of Education.

5. A letter dated December 31, 2003 was sent from COK to the Self Start Fund in which the Applicant said it would "forward the title to them as instructed ... as soon as we have been able to track down and receive same".
6. On the 16th March 2004, the Ministry of Education cancelled the contract between itself and Education Matters.
7. On March 17, 2004 the aforesaid title was delivered to Mrs. Henry's attorneys-at-law.

Mrs. Yvette Reid, the 2nd Respondent, was at all material times a member of C.O.K. Some time ago, Mrs. Reid raised a "dispute" with C.O.K. with respect to Certificate of Title in the name of her mother, Mrs. Mavis Henry, which title, it was alleged was being wrongly kept by C.O.K. It was the fulcrum of the allegation that as a result of the wrongful retention of the title by the Applicant, certain supply contracts which the 2nd Respondent had with the Ministry of Education, were lost and damages were occasioned thereby. It perhaps needs to be pointed out that the contract, the benefit of which is being claimed by the 2nd Respondent, was the same contract with "Education Matters Limited". Pursuant to an application for Settlement of Dispute under the Act, the "dispute" was referred to the Registrar of Co-operatives and Friendly Societies, who then referred the matter to an Arbitrator, under Section 50 (2), of the Act. The dispute was heard by the assigned Arbitrator, a Mr. Roy Stewart and, on 9th September, 2005, he gave a written award. He made the following findings of fact.

a) Wood Parchment and Company (a law firm) applied on behalf of COK to note the death of the deceased joint owner (Mrs. Henry);
b) The Applicant knew where the title was; had knowledge that Yvette Reid and Mavis Henry wanted the use of the title for business purposes; and had no lawful justification for withholding the title from Mesdames Reid and Henry;
c) The Applicant's letter of 31st December 2003 was a mere promise and not an undertaking to deliver the title to the Start Fund; and
d) Mrs. Henry is entitled to an award for loss of profits on the contract with the Ministry of Education. That it is immaterial that the loan from the Self Start Fund did not materialize or that the Applicant gave a letter of Undertaking to the Self Start Fund. Mesdames Reid and Henry were entitled as of right to have

the title returned to them and the Applicant's failure to deliver the title prevented them from obtaining the loan.

C.O.K. appealed the award of the Arbitrator to the Registrar as it was entitled to do, by serving on him a Notice of Intention to Appeal under Section 50 (3) of the Act. The ground of appeal before the Registrar was that the Arbitrator was in violation of basic principles of contract law, namely that the Arbitrator erred in law and in fact, in his findings that:

(a) "that Wood, Parchment & Company applied on behalf of City of Kingston Co-Op Credit Union Limited to note the death of the deceased joint owner" (page 9 of the award);

(b) "that a connection had been established by Ms. Yvette Reid between her not receiving her Certificate of Title from the Credit Union in a timely manner and her losing the contract she had with the Ministry of Education;

(c) "that the Claimant Mrs. Mavis Henry is entitled to an award for loss of profits on her contract with the Ministry of Education (page 11 of the Award);

It was the contention of C.O.K. that Reid and Henry (now deceased) did not present evidence to substantiate or prove that C.O.K. was the cause of alleged losses, Nor had it been shown that these losses were incurred as a result of the failure of C.O.K. to provide the registered title in question, so as to allow Mrs. Reid and Mrs. Henry to obtain a loan from Self Start Fund.

On his review of this matter pursuant to the Notice of Intention to Appeal, the Registrar found that:

(a) a nexus was established by Yvette Reid and Mavis Henry between the failure of C.O.K. to return Mrs. Henry's Certificate of Title in a timely manner and the loss of the contract with the Ministry of Education, Youth and Culture; and

(b) C.O.K. was liable to compensate Mrs. Henry for the loss incurred.

Submissions for the Applicant

Mr. Spence referred to the affidavit evidence of Ms. Persaud. It was his submission that it was the unchallenged evidence of C.O.K. that the only transaction that was brought to C.O.K's attention was an application "to use the title now in the possession of the Credit Union as collateral for a loan at the Self Start Fund." According to the Persaud affidavit, this would facilitate the purchase of the goods that would form part of the contract with the

Ministry of Education. He suggested that, contrary to the finding of the Arbitrator, the letter from COK to the self Start Fund was an undertaking to provide the title in exchange for the loan, as soon as the title was found.

It was submitted further by Mr. Spence that the conclusion reached by the Arbitrator and upheld by the Registrar, that the failure of C.O.K. to deliver the title to the 2nd Respondent was the cause for the loss of the contract with the Ministry by the 2nd Respondent as well as the subsequent damages had no evidential basis. Additionally, notwithstanding that speculative conclusion, nowhere in the findings of the Arbitrator is there any recognition or understanding of the test to be applied in order to ground liability for damages. Thus, there appears to have been a failure of any appreciation of the concepts of remoteness of damage, or the issue of causation, especially in light of the fact that the only loss was economic loss, loss of profits. He posited that, as a matter of law, for the 2nd Respondent to have succeeded it must have been shown that there was a causal connection between the failure to deliver the title, the failure to obtain the loan and the loss of the contract. To the extent the Arbitrator found in her favour without that evidence, he fell into error, further exceeded his jurisdiction by an award of damages, and this was compounded by the finding of the Registrar.

Counsel was of the view and so submitted to the court that, based upon the available evidence, the lack of the title was *not the cause* of the Claimant's loss of the contract with the Ministry. If it were not the cause of the loss of the contract, the Applicant could not be liable for any damages which arose. In support of this proposition he referred to several bits of correspondence contained in the agreed bundle.

In this regard, Counsel pointed to the evidence as contained in the agreed bundle of documents. At page 210 of the bundle was letter of December 15, 2003 from Mrs. Henry to C.O.K. This made it plain that the contract with the Ministry commenced on October 24, 2003. The relevant part of the letter is in the following terms.

> "I wish to use the Title now in the possession of the Credit Union as collateral for a loan at the Self-Start Fund. To allow for this I will clear all indebtedness for which it is being used, so that the process of replacement and submission to them car be effected.
> I hereby ask that you submit the title to the Self-Start Fund as soon as the replacement is in place.

Counsel stressed that this letter was being written some *two (2) months after* the contract *was said to have commenced*. Reference was also made to a letter from the Ministry of Education dated December 18, 2003 to Mrs. Henry in which the Ministry agreed "to pay over the sum of One Million and Fifty Thousand Dollars to the Self-Start Fund as at the date of completion of the contract." It was suggested that it was implicit in the terms of that letter that the Ministry was treating the contract as subsisting some three days after the date of Mrs. Henry's letter. Moreover, Counsel referred to a letter from the National Export-Import Bank of Jamaica Ltd. ("Exim Bank") of February 1, 2004. That letter, over the signature of Mr. Charles Lewis, Chief Credit Officer, advised that the Exim Bank had now "given your application favourable consideration". This was in response to Mrs. Reid's application for a loan of Fifty Two Thousand United States Dollars (US $52,000.00). The letter also indicated that "as a pre-condition to the establishment of the credit, the following is requested:

(1) Payment of an up-front amount of J$16,500.00 representing interest of one percent of the foreign currency applied for, for a period of 180 days, converted at Exim Bank's prevailing rate of exchange.

(2) A letter of undertaking from the Ministry of Finance and Planning covering the principal amount of the application plus all interest and charges, for the Jamaican dollars equivalent of US$ 27,200.00."

The letter went on to say that it was enclosing the requisite promissory note and indemnity which were to be completed and returned to the Exim Bank.

Mr. Spence also cited yet another letter (at page 218 of the bundle), from Certweld Engineers Ltd. addressed to Mrs. Mavis Henry and dated February 8, 2004 which was another purported offer of financing for the contract, over the signature of its managing director, Lance Gunning. That letter was in the following terms:

"I have instructed my secretary to prepare the cheque for 2.5 Million Dollars for the purchase of school equipment for Basic School on contract with the Ministry of Education, Youth and Culture and based upon the following agreed

A loan of 2.5 Million Dollars has been agreed upon by both parties at an interest rate of 14% for 60 months.

Collateral in the form of a Title registered at Volume 1931 Folio 572 shall secure the loan and shall be submitted upon the receipt of the cheque.

All attendant cost and charges associated with registration of the mortgage will be bourne by you.

I am mindful of the time frame set out on the contract and will comply accordingly.

Counsel said that it should be noted that this letter from Cartweld was the *only one* which had seemed to require presentation of the title as a condition of financing. Looking at the terms of the letter, it is not at all clear to me that the presentation of the title was a *condition precedent* to the receipt of financing from Certweld for the letter states that:

> "Collateral in the form of a Title registered at Volume 1931 Folio 572 shall secure the loan and ***shall be submitted upon the receipt of the cheque***. (My emphasis)

This seems to suggest that the title would be needed when the cheque was presented and not as a condition of the presentation. In any event, however, counsel submitted that there had been no evidence led before any of the tribunals before whom this matter had come, that C.O.K. was ever made aware of this request. I would also add that this was weeks after the original contract should have expired.

Counsel said that there was another letter in the bundle of documents which reinforced the submission that it was not the failure to return the title to Mrs. Reid that caused the loss of the contract. The letter referred to was one from a company, Capital Solutions. This letter, another purported offer of financing, was dated March 26, 2004, and was not only some ten (10) days after the Ministry had purported to cancel the contract, but was fourteen (14) days after the date to which the Ministry had previously extended the contract, (March 12, 2004), by its letter dated February 5, 2004. It was in the following terms:

> **Re: Approved Financing to Education Matters to Procure Early Childhood Equipment**
>
> This document confirms that Capital Solutions Ltd. has approved funding to Education Matters to acquire the educational supplies which are included in the contract dated October 24, 2003.
>
> In order to facilitate and expedite the process, please provide the following as soon as possible:
>
> 1. Written confirmation of the extension of the contract, which has expired.
> 2. Written confirmation that the funds have already been set aside for this transaction, since the MOEY & C has stated that funding is not from IADB as indicated in the contract.
> 3. An irrevocable commitment from the MOEY&C to pay Capital Solutions Ltd., per instructions from Education Matters.

Please contact me at 978-9941 if there are any questions

He pointed out that the letter from the Ministry cancelling the contract, found at page 222 of the bundle was dated March 16, 2004. In relevant part, that letter stated:

> The Ministry of Education, Youth and Culture and Education Matters entered into an agreement on the 24th October 2003 whereby Education Matters agreed to supply equipment for Early Childhood institutions as per schedule provided by the Ministry.
>
> The original contract period of ninety (90) days expired on January 21, 2004. However, upon several requests from you for additional time to complete the contract, the Ministry by letter dated February 5, 2004, granted an extension to March 12, 2004. Despite this your company has failed to deliver any of the items in the schedule within the extended contract period.
>
> ***The Ministry hereby advises that the contract has been terminated as of today's date, March 16, 2004, and the contract is deemed to be in default as set out in Clause 11, Cancellation of the Contract, of the Conditions of Contract and Schedule of Goods.***
>
> You are further advised that the Ministry reserves the right to seek redress for any additional expenditure that may be incurred as a result of your failure to provide the goods under the terms of the contract.

In effect, Mr. Spence submitted, of the offers of financing which the 2nd Respondent received, only the one from Certweld Ltd. referred to the need for a title, and there is no evidence that that particular offer letter was ever brought to the attention of the Applicant. The Credit Union was never told that the title was needed to effect financing. He referred to the findings of the Registrar at page 373 of the Judge's Bundle.

> A nexus was established by the Claimants between the failure of the Appellants to return the Claimants' Certificate of Title in a timely manner and the loss of the contract with the Ministry of Education, Youth and Culture. Adequate evidence was produced to validate Claimants' repeated requests for the return of the Certificate of Title and the Appellant's tardiness in honouring its obligations, in ensuring the safe return of the Certificate of Title that was not held by the COK Credit Union as collateral at that time. I concur with the Arbitrator's finding that the Appellant's failure to return the Certificate of Title to the Claimants in a timely manner denied the Claimants full use and benefits of the Title for Claimants' own benefits inclusive of the business venture in question.

In referring to the above finding of the Registrar, he was of the view that these were unsupportable as there was no evidentiary basis for the conclusions reached by him. In summary, counsel for the Applicant submitted that financing was available and an offer had

been obtained from Capital Solutions. In that offer, nothing turned on the availability of a title. That there had also been an offer of financing from the Exim Bank before the cancellation of the contract; and that from the Self-Start Fund had not said anything about the need for a title. It was submitted that what remained was the offer from Certweld which did mention the provision of the title on the handing over of the cheque but nothing of this requirement had been brought to the Applicant's attention. Further, nothing had been placed before the Arbitrator or the Registrar as to how the lack of the title had affected the Certweld offer.

In those circumstances he submitted, that there was no way that any court, having properly directed itself on the issue of causation as well as that of consequential economic loss, could have come to the conclusions arrived at by the Arbitrator and upheld by the Registrar. In consequence of the foregoing, he submitted that this Court was entitled to find that the Registrar had erred in law and had accordingly not advised himself properly because the lack of the title was not the cause of the loss of the title. In support of his submissions, he cited **Wade's Administrative Law, 7th Edition** page 312.

> Findings of fact are traditionally the domain where a deciding authority or tribunal is master in its own house. Provided only that it stays within its jurisdiction, its findings are in general, exempt from review by the courts, which will in any case respect the decision of the body that saw and heard the witnesses or took evidence directly. Just as the courts look jealously on decisions by other bodies on matters of law, so they look indulgently on their decisions on matters of fact.
>
> But the limit of their indulgence is reached where findings are based upon satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene.
>
> 'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on that evidence. This 'no evidence' principle, clearly has something in common with the principle that perverse or unreasonable action is unauthorized and ultra vires.

In **Allinson v General Medical Council [1894] 1 QB 750**, referred to in the passage from Wade cited above, the Court of Appeal was asked to overturn a decision of the first instance

judge who had refused to grant an injunction to the appellant to restrain the defendant council from allowing the appellant's name to remain struck from the medical register. One of the arguments before the Court of Appeal was that there had been no evidence before the council which had made the initial determination upon which that body could have reasonably concluded that the plaintiff/appellant had been guilty of professional misconduct. Lord Esher, M.R. stated: "....It is admitted that if there was no evidence upon which the council might fairly and reasonably say that the plaintiff had been guilty of "infamous conduct in a professional respect", they went beyond the jurisdiction given them by the Act in entertaining the case and proceeding to adjudicate upon it. If there was no such evidence, they ought to have declined to interfere".

In **Rex v Roberts, [1908] 1 KB 407**, another of the judgments referred to in Wade, the head note reads:

> On an application for certiorari under section 247(8) of the Public Health Act 1875, to remove and quash disallowances and surcharges made by an auditor acting in pursuance of that section, the jurisdiction of the Court is not confined to error in point of law but extends to error in point of fact.

At page 423 of the report, Fletcher Moulton L.J. had this to say.

> It was urged on behalf of the auditor that "erroneous" meant erroneous in point of law, and that the section gave no remedial jurisdiction when the auditor had come to an erroneous conclusion in fact. No reasons were given for this limitation of the meaning of the word "erroneous", which is directly contrary to the decision of the Court of Queen's Bench in **Regina v Haslehurst 51 J.P. 645.** I fully agree with that decision, although I am not satisfied that it is necessary for the purpose of the present case. It is admitted by the Appellant that if there was no evidence on which any tribunal could reasonably come to the conclusion to which the auditor has come the superior Courts have a jurisdiction to quash the surcharge, and in my opinion this is the case here.

Submissions for the 2nd Respondent

Counsel for the Respondent, Mrs. Taylor-Wright, urged the Court to deny the application for Certiorari and to allow the decision of the Registrar to stand. She used as her point of departure the trite proposition that Certiorari will lie on an application to bring proceedings of an inferior tribunal for quashing by a superior Court where the decision of the inferior tribunal shows either a lack, or an excess, of jurisdiction on the face of the decision. On the

other hand, she submitted, where the inferior tribunal has properly assumed jurisdiction and adjudicated upon evidence presented to it, from which evidence it arrives at a decision, it is not open to review by a superior Court. Put another way, it was necessary, if Certiorari was to be granted, for there to be demonstrated, what she described as a "clear excess of jurisdiction". In the absence of the inferior tribunal exceeding its jurisdiction, there could be no certiorari.

Mrs. Taylor-Wright submitted that the issues to be decided were:

(a) "What represents an error of law on the face of the award?" and

(b) "Has it been shown that there has been an excess of jurisdiction by the inferior tribunal?"

After citing some examples which would amount to the inferior tribunal exceeding its jurisdiction, Mrs. Taylor-Wright submitted that the Court had been provided with the totality of the evidence which had been placed before the tribunal, and no allegation had been made in that forum of excess of jurisdiction on the part of the tribunal below. Further, she submitted, as long as there was jurisdiction, it was open to the Registrar to arrive at a decision unfavourable to the Applicant *even where that decision was wrong*. It is not immediately apparent what principle it is being urged is to be drawn from this proposition. Is it that what is being suggested is that as long as the inferior tribunal had jurisdiction, it could come down on either side of an application such as this, and its decision would not be subject to any review on any basis?

It was further submitted that, in any event, the Act precluded a court from enquiring into a finding of the Registrar, which was not reviewable by it. In this regard, counsel referred to section 50(4) of the Act which states as follows:

> A decision of the Registrar in an appeal under subsection (3) shall be final and shall not be called into question in any civil court.

It seems clear that, notwithstanding the purported "ouster of the court's jurisdiction" pursuant to a privative or "finality" clause such as this, the court retains its review jurisdiction where either:

(a) the decision of the tribunal is a nullity; or

(b) the tribunal had *made an error of law which affected its jurisdiction*.

It was submitted by Mrs. Taylor-Wright that the meaning of the such a clause was considered in **Anisminic Ltd. v Foreign Compensation Commission and Anor[1969] 2 AC 147**, by the House of Lords when it reviewed the a similar clause in section 4(4) of the Foreign Compensation Act, 1950. That sub-section provided as follows:

> The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.

By article 4(1) in Part 111 of the Foreign Compensation (Egypt)(Determination and Registration of Claims) Order 1962, the Commission was obliged to "treat a claim under this Part of the Order as established if the applicant satisfies them" of certain matters as set out in that part of the Order. The plaintiffs brought an action against the commission for declarations to the effect that a provisional determination was a nullity and that they were entitled to participate in the compensation fund. The Commission contended that, under the section 4(4) of the Foreign Compensation Act, the Court had no jurisdiction to entertain the proceedings. Their Lordships held that the word "determination" in sub-section (4) *should not be construed as including everything which purported to be a determination* (My Emphasis) but was not in fact a determination, because the commission had misconstrued the provision of the Order defining their jurisdiction. Accordingly, the court was not precluded from inquiring whether or not the order of the commission was a nullity. Mrs. Taylor-Wright submits based on her reading of **Anisminic** that: "An ouster clause *only prevents the jurisdiction* of this court where the decision of the inferior tribunal is a nullity". (It may be that the word "prevents" in the Respondent's written submissions, should have read, "permits"). With respect, it seems to me that it is precisely where the decision of the inferior tribunal is *a "nullity"* that the court *must have a power to review it*. (All emphases mine)

It was further submitted for the Respondents that as long as the tribunal "acts within its jurisdiction", then even if an error of law is made, this will not affect the tribunal's decision. In the case of **South East Asia Fire Bricks SDN, BHD v Non-Metallic Mineral Products Manufacturing Employees Union and Others [1981] AC 363**, the Judicial Committee of the Privy Council was asked to consider whether a provision in the Malaysian Industrial Relations Act of 1967 precluded the court considering an application for Certiorari. The head note reads:

> Section 29 (3) (a) of the Industrial Relations Act 1967 provides:

Subject to this Act, an award of the (Industrial) Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called into question in any court of law.

A dispute arose between the appellant company and the respondents, a trade union, and certain of its members employed by the company. The dispute was referred under the Industrial Relations Act, 1967 to the Industrial Court, which made an award in favour of the respondents. The company applied to the High Court for an order of certiorari to quash the award on the ground that it contained errors of law on its face. The High Court granted the order. On appeal by the respondents, the Federal Court of Malaysia held that there was no error of law and restored the Industrial Court's award. The company appealed to the Judicial Committee.

On the question whether the jurisdiction of the High Court to quash an award of the Industrial Court was excluded by section 29 (3) (a) of the Industrial Relations Act of 1967:-

Held, dismissing the appeal that the words of section 29 (3) (a) providing that an Industrial Court award should not be "quashed" or "called into question in any court of law" were wide enough to oust the jurisdiction of the High Court to review the decision by certiorari although paragraph (a) would not exclude the jurisdiction of the High Court if the Industrial Court had exceeded its jurisdiction; that accordingly, there was no power to grant certiorari for an error of law which did not affect the jurisdiction of the Industrial Court and therefore since the only allegation was that there were errors of law on the face of the award, the High Court had had no jurisdiction to grant an order of certiorari.

In that case, Lord Fraser of Tulleybelton said at page 370:

The second question then arises. The decision of the House of Lords in **Anisminic Ltd. v Foreign Compensation Commission and Anor[1969] 2 AC 147**, shows that, when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by certiorari, *they must be construed strictly, and they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if "it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity" (Per Lord Reid at page 171)*. But if the inferior tribunal has merely made an error which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective. In **Pearlman v Keepers and Governors of Harrow School [1979] Q.B. 56, 70,** Lord Denning had suggested that the distinction between an error of law which affected jurisdiction and one which did not should be "discarded". Their Lordships do not accept that suggestion. They consider that the law was correctly applied to the circumstances of that case in the dissenting opinion of Geoffrey Lane L.J. when he said:

> ".....the only circumstances in which this court can correct what is to my mind an error of the (county court) judge is if he was acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of 'structural alteration.....or addition'"

Mrs. Taylor-Wright was at pains to emphasize the ostensible limitation placed upon the power of the court to grant relief by way of certiorari to those cases where the alleged error of law on the face of the record affected jurisdiction. It was her submission that in the instant case, even if the Registrar had been wrong in law as to what constituted causation as submitted by the Applicant, that decision was not subject to review. His Lordship, Lord Fraser in the **South East Asia** case, also referred to another case from the Malaysian jurisdiction, **Lian Yit Engineering Works Sdn. Bhd. V Loh Ah Fon [1974] 2 M.L.J 41**, and in particular the judgment of Abdul Hamid J. where he said at page 43, which may be instructive:

> It is, I think, well established law that this court has power to issue an order of certiorari to quash an Industrial Court's decision which, on the face of it, is wrong in law.

With respect to this formulation by the learned judge, Lord Fraser said: "In the opinion of their lordships the statement quoted is erroneous". The learned law lord went on to consider another Malaysian case, **Mak Sik Kwong v Minister of Home Affairs , Malaysia [1975] 2 M.L.J. 168**, where the judge had held that certiorari was available to quash an order by the Minister of Home Affairs depriving an applicant of citizenship of Malaysia, notwithstanding an ouster clause . There the judge had said:

> And, as I had occasion recently to observe in **Sungei Wangi Estate v Uni s/o Narayan Nambiar [1975] 1 M.L.J. 136**, that it is now settled law that this court has power to issue an order of certiorari to quash a decision of the Industrial Court which, on the face of it, discloses an error of law notwithstanding the much wider and far-reaching provisions of the privative clause enacted in section 29 (3) (a) of the Industrial Relations Act. I do not think that there can be any doubt that it is now settled law that a finality or privative clause does not restrict in any way whatsoever the power of the courts to issue certiorari to quash for jurisdictional defect, *error of law on the face of the record* or manifest fraud. (Emphasis supplied).

In commenting upon the passage cited, his Lordship, Lord Fraser observed: "The decision itself is not directly in point, but the passage cited is in their lordships' opinion erroneous". As, however, also observed by the learned law lord, there is a distinction "between those errors of law that give rise to an excess of jurisdiction and those that do not".

In further support of the proposition that it is only where the error of law on the face of the record leads to an excess of jurisdiction, counsel also cited what she called the "highly persuasive authority" of the New Zealand Court of Appeal in **Attorney General v Car Haulaways N.Z. Ltd. and Another [1974] 2 NZLR 331**.

However, even in that case, the New Zealand Court of Appeal accepted the dicta of Cooke J. (as he then was), at first instance, that if a tribunal fails to exercise its true jurisdiction or exceeds its jurisdiction, then in either case there would be a lack of jurisdiction which would be reviewable by the courts. This does not support the submission of a limited and restricted review power of the Court argued for by the Respondent.

I make one further observation in relation to the submission by Mrs. Taylor Wright that the Appellant herein had failed to make full and candid disclosure of the facts through the affidavit of Mrs. Indera Persuad. In particular, she refers to the implication which she says is to be drawn from Mrs. Persuad's affidavit that the only available source of financing was the Self Start Fund. She said that this omitted to point out that Certweld Engineering had indicated a willingness to fund the contract in exchange for the title. She states that this is a further attempt by the Applicant to ask "this court to sit as an appellate court and make a re-determination of facts which were already adjudicated on while distorting the members' position". She concludes: "As long as there is *any evidence available to the Registrar upon which he could base his conclusion,* (My emphasis) this court will not review his decision". She also adverted to the courts' "long-standing aversion towards investigating questions of fact in Judicial Review proceedings, citing inter alia, **R vs. Fullam Hammersmith and Kensington Rent Tribunal, Ex Parte Zerek reported 1932 2 KB p 1**. This aspect was later taken up by Ms. Lindsay, counsel for the Registrar of Cooperatives.

Submissions for the 1st Respondent

Ms. Lindsay adopted the submissions of Mrs. Taylor-Wright in opposition to the application. She also submitted that the Applicant had fallen into error in that the Applicant's counsel had sought to advert to the evidence as gleaned from the letters in the bundle and which evidence had been led before the Arbitrator and the Registrar. It was submitted that the Applicant was essentially inviting the Court to form a factual conclusion different to that arrived at by the Registrar, on the basis of a different view of that evidence. She submitted that if the Court were to do so in these proceedings, that would be, in effect, asking the court to overturn "findings of fact" which had been made by the Arbitrator and confirmed by the Registrar, and such was not the purview of the Court in judicial review proceedings.

She relied upon the authority **R vs. Fullam Hammersmith et al Ex Parte Zerek** cited above. In particular, she cited the judgment of ***Devlin J*** (as he then was) on page 11 of the report:

> "Orders of certiorari wand prohibition are concerned principally with public order, it being part of the duty of the High Court to see that inferior courts confine themselves to their own limited sphere. They also afford speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by the an inferior tribunal. But they are not designed to raise issues of fact for the High Court to determine de novo. Accordingly, it has never been the practice to put the party who asserts that the inferior court has jurisdiction to proof of the facts upon which he relies. It is recognized that the inferior court will have made a preliminary inquiry itself and the superior court is generally content to act upon the materials disclosed at that inquiry and to review in the light of them the decision to assume jurisdiction. This is possible only because the court is not, as I conceive it, finally determining the validity of the tribunal's order as between the parties themselves (except, perhaps, in a case such as ***Symons v. Rees (23),*** where the court investigated for itself the facts and pronounced upon them), but is merely deciding whether there has been a plain excess of jurisdiction or not. Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it then and there. But where the dispute turns on a question of facts, about which there is a conflict of evidence, the court will generally decline to interfere.

She submitted that the Applicant had suggested that since there was evidence of other avenues of financing without need for the title, the absence of the title was not the "cause" of failure to secure financing. In other words, the Second Respondent had not satisfied the "but-

for" test for establishing causation. It was her submission, however, that it was not the role of the court to review the factual evidence. She also joined with Mrs. Taylor Wright in the submission that Section 50(4) of the Act precluded the court's intervention in this matter. Without seeking in any way to enhance the jurisdiction of the judicial review court, it does not seem to me to be outside of the court's function to form a view that based upon the totality of the evidence, no reasonable tribunal properly instructed could have come to a certain factual position; with certain legal consequences. In other words, it seems to me that if there were a finding of perversity in the factual conclusions, and I do not say that this is the case here, it would render the decisions of the Arbitrator and Registrar wrong and in excess of its proper jurisdiction in **Anisminic** terms.

Ms. Lindsay also pointed to the findings of the Registrar at page 373 of the bundle. It was his finding of fact that, but for the tardiness of the Applicant, the loss of the contract would not have occurred. Contrary to the position advanced by Mr. Spence, that on any objective view of the evidence it was not possible to arrive at the decision arrived at by the Arbitrator and confirmed by the Registrar, she submitted that that was the end of that matter. She therefore submitted that it was not open to the court to "second guess" the finding of the Arbitrator as confirmed by the Registrar. Certiorari should be denied.

Applicant's response submissions

Mr. Spence in response submissions said he placed complete reliance on **ANISMINIC** which had considerably broadened the scope of the court's review powers as it had previously be exercised. This was not, he submitted, a case where the Appellant was asking the court to find the different facts. Rather, the Appellant was saying that on the very facts on which reliance had been placed in the hearings before the Arbitrator and the Registrar, it was not open to the tribunal to come to a conclusion that there had been a causative relationship between the delay in the producing the title and the loss of the contract by the Respondent. Indeed, the Ministry's letter, he submitted, seemed to confirm that this was not so.

Discussion of Issues

For the purposes of determining whether the this application should succeed, I propose to consider what is the modern approach adopted by some courts, particularly in New Zealand

where the courts have paid particular attention to the relationship between judicial review, constitutional protection and the Rule of Law. In that regard, I shall consider what the cases say about errors of fact and errors of law as they may affect the issue of jurisdiction which is central to the Respondent's resistance of the application, and I will also explore the approach which the courts have adopted to ouster clauses in legislation.

Error of Fact and Judicial Review

In so far as the issue of the court's ability to look again at the facts found by an inferior tribunal, it is now settled that the **ANISMINIC** case widens the court's capabilities. In that regard, I refer to an article by Charles Chauvel, "**Historical Trends and Key Principles in Judicial Review**" by Charles Chauvel, a New Zealand Attorney at Law in 2002 and adopt the analysis and reasoning wherein the author sets out the following, as the present approach to error of fact.

> The courts have traditionally claimed no jurisdiction to review for error of fact. It has always been thought that the decision-maker must exercise judgment itself as to the existence or non-existence of facts. The availability of review was summarised by Cooke J (as he then was) in **Car Haulaways Ltd v Attorney General**. (cite given elsewhere)
>
> > "Unless the errors of law . . . go to jurisdiction, they are not redressable ... A fortiori, findings of fact on the very question which the tribunal is set up to decide, and conclusions based on an evaluation of the evidence bearing on such questions, would be immune to review".
>
> However, just as the decision in Anisminic has expanded review for error of law substantially to include errors made in the course of the proceedings (as opposed to errors going to jurisdiction), so too has review of error of fact expanded. In **Secretary of State for Education and Science v Tameside Metropolitan Borough Council, [1977] A.C. 1014** Lord Wilberforce (at page 1047) said that the decision-maker could not act "upon an incorrect basis of fact". Similarly, Lord Diplock held that not only must the decision-maker ask the right question, he must be adequately informed so as to answer that question correctly.[1]

Chauvel continues:

> In New Zealand the expansion began with the dicta of Cooke J in **Daganayasi**:[2]
>
> > "The Minister has implied authority to delegate the function of making inquiries, but if as a result the Minister is lead into a mistake and a failure to take into account the true facts, it is not right that the appellant should suffer. On this view the

[1] Ibid at page 1065

[2] Daganayasi v Minister of Immigration 1980 2 NZLR 130

decision is invalid on the ground of mistake as well as on the ground of procedural unfairness

Richmond P and Richardson J were not prepared to go so far and instead observed merely that the law on this matter was "far from settled".[3] Cooke J further reaffirmed his view that mistake of fact was a separate ground of review in **Bulk Gas Users Group Ltd**. Likewise, in **Fowler & Roderique Ltd**.[4] Casey J accepted factual error as a ground for review. **In NZ Fishing Industry Association Inc v Minister of Agriculture and Fisheries**[5] the Court of Appeal was evenly split on the existence of review for error of fact. Cooke P, with whom Casey J concurred, referred to the judgment of Casey J in **Fowler & Roderique** and reaffirmed factual error as a ground of review.

> "[T]o jeopardise validity on the ground of mistake of fact the fact must be an established one or an established and recognised opinion: *and that it cannot be said to be a mistake to adopt one of two differing points of view of the facts, each of which may reasonably be held.* (My emphasis)

Richardson J, however, reaffirmed his position in Daganayasi and declined to express any view as to mistake of fact as a ground for granting relief in judicial review.proceedings.

Recently, in **Lewis v Wilson & Horton Ltd**,[6] the Court of Appeal held unanimously that *the High Court is not permitted to reopen any determination of fact on an application for judicial review*. (My emphasis) The Court stated that the High Court could only intervene where the factual matter was a condition precedent to the exercise of power. *In other words, an error as to "jurisdictional fact", or an error of fact resulting in a decision that is unreasonable, is required.*[7] Elias CJ, delivering the judgment of the Court held.

> "Whatever the scope of mistake of fact as a ground of judicial review (as to which see **Daganayasi v Minister of Immigration [1980] 2 NZLR 130**; **New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544**), the additional facts put forward in the High Court do not establish reviewable error. The approach adopted in the High Court would have the effect of permitting any conclusion of fact to be reopened on application for judicial review. *The supervisory jurisdiction does not go so far, except where the decision of fact is a condition precedent to the exercise of power or where the error of fact results in a decision which is unreasonable. In such cases, the decision-making process will have miscarried.* .....

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[3] Daganayasi at page 132
[4] [1987] 2 NZLR 56 at 74
[5] [1988] 1 NZLR 544 per Cooke P., at page 552
[6] [2000] 3 NZLR 546
[7] Ibid at page 568

> While the Court of Appeal in Lewis may now have drawn the parameters of review for error of fact more narrowly than did Cooke J in **New Zealand Fishing Industry** or Casey J in **Fowler & Roderique**, the decision in Lewis demonstrates that mistake of fact can still provide a basis for judicial review in appropriate circumstances.

I accept, in particular, the following section of the article as being a proper statement of the modern law relating to Judicial Review.

> *The circumstances now available for judicial review of error of fact include, at a minimum, those where the decision-maker has acted in the absence of evidence or material of probative value. Similarly, if the mistake of fact is fundamental it will vitiate the basis upon which the decision has been made. The more orthodox approach to matters of fact is one of relevancy of considerations.*

The judicial review court's limited role in relation to the facts of the case is of course well established. Indeed, the following proposition from the judgment of the New Zealand Court of Appeal[8] is undoubtedly apt.

> Proceedings by way of judicial review are markedly different in character from an appeal. They are concerned with whether a person entitled to act pursuant to a statutory power does act within the terms of the power, in a rational way, applying the law correctly and acting fairly. The reviewing Court's concern is therefore with the validity of legal processes and the Court is not entitled to substitute its own findings of fact as if it were rehearing the evidence

Nevertheless, in light of the foregoing analysis by Chauvel, which I believe is correct, I am prepared to hold that whereas the role of the Court is not to "find different facts" than those found by the tribunal whose decision is being called into question, there are cases where it is open to the Court to question as to whether "the mistake of fact is (so) fundamental", that it could "vitiate the basis upon which the decision has been made" as suggested by the cases cited in the article. I would agree with the author's proposition that:

> Therefore, at the very least, a mistake of fact is likely to add great weight to a contention that the decision-maker has failed to take all relevant factors into account.

Was there a Reviewable Error of Law

It is to be recalled that the Applicant's main ground in his application for Certiorari was that the Registrar had erred *in law* in finding a causative relationship between the failure to

[8] Peters v Davison [1999] 2 NZLR 164

deliver the certificate of title and the loss of the contract with the Ministry of Education, Youth and Culture and the consequential damages. Applicant's counsel had based this submission on the proposition that the Registrar had not understood and applied the legal concept of "causation". That as a result of that error of law, the Registrar had exceeded his jurisdiction and the award ought to be set aside.

In "**Judicial Review of Administrative Action" (1995) 5th Ed** by de Smith, Woolf and Jowell, it is started at p. 286:

> 'The concept of error of law includes the giving of reasons that are bad in law or (where there is a duty to give reasons) inconsistent, unintelligible or substantially inadequate. *It includes also the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, exercising a discretion on the basis of any other incorrect legal principles, misdirection as to the burden of proof, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence.* Error of law also includes decisions which are unreasonably burdensome or oppressive. Thus whether or not the drawing of an inference from the primary facts, or the application of a statutory term to the facts and inferences drawn therefrom, is held or assumed to be a matter of fact (or fact and degree) or a matter of law, the Court may still hold the decision erroneous in point of law if any of the above defects is present". (The emphasis is mine)

I would hold that, (given the alternatives bases upon which the learned authors suggest it would be possible to find that there had been a reviewable error of law,) in the instant case, there has been an application, or perhaps more correctly a mis-application, of the legal test. In the same text, the learned authors state in at p. 448:

> 'If the tribunal is obliged to observe the rules of evidence, in the past the rejection of relevant and admissible evidence was considered a mere 'error of law,' but nowadays it may constitute denial of a fair hearing according to the requirements of procedural fairness.'

What is the effect of a "Finality" or "Privative"Clause?

It is clear that whatever view that one takes of the question of excess of jurisdiction for error of fact or law, if the effect of the ouster clause is as argued for by the Respondents, that would be the end of the matter. It is therefore necessary to consider what is the real effect of the section 50(4) in the Act to which the Respondents appeal.

In this regard, I have found a recent case from New Zealand, **Zaoui Attorney General [2004] 2 NZLR 339**, which is very helpful and in which the court clarified some of the dicta of **Car Haulaways** referred to above. There, the threshold issue which the judge had to decide, was whether Section 19(9) of the Inspector General's Act, which concerned decisions by that officer in relation to an application for refugee status by a prospective immigrant, precluded an application for judicial review of an "interlocutory decision" by the officer. The terms of section 19(9) are as follows:

> Except on the ground of lack of jurisdiction, no proceeding, report, or finding of the Inspector-General shall be challenged, reviewed, quashed, or called in question in any Court.

The judge at first instance wondered whether the so-called "interlocutory decision" was subject to judicial review. He concluded that it was. The Crown took the view the Court had no jurisdiction to deal with the proceedings because of the privative provisions of s19 (9) of the Inspector-General's Act. The Crown asserted that s19 (9) of the Inspector-General's Act deprived the Court of jurisdiction to hear this case. The learned judge at first instance decided that if that submission were correct, it would, of course, bring the proceeding to an end and that it was accordingly necessary to treat with it as a threshold question first.

In his decision, His Lordship Williams J said, in a passage not doubted by the judges in the subsequent appeal in that case to the New Zealand Court of Appeal:

> It is generally accepted in New Zealand that an Act may empower an authority to decide a question of law conclusively and that a privative clause of this kind will then protect the authority's decision even though an error of law (in the opinion of the Court) may be apparent on the record: **Attorney-General v Car Haulaways (NZ) Ltd [1974] 2 NZLR 331.**
>
> But it is clear that such a clause does not apply if the decision results from an error on a question of law which the authority is not empowered to decide conclusively, even though in carrying out its functions it will have to form a working opinion on the question. **Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147** is the leading modern case and more recently the judgment of the Privy Council in **South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union [1981] AC 363** is to the same effect.

> It is further clear that courts of general jurisdiction will be slow to conclude that power to decide a question of law conclusively has been conferred on a statutory authority or tribunal.

The decision and reasoning of the learned judge were upheld when the matter went on appeal to the New Zealand Court of Appeal. William Young J. said:

> Interestingly, s 19(9) is in terms which are essentially the same as the privative clause considered in **Bulk Gas Users Group v Attorney-General [1983] NZLR 129**. Parliament must therefore have intended that the words "except on the ground of lack of jurisdiction" would be construed in light of the approach taken by this Court in the Bulk Gas Users case and, earlier, by the House of Lords in **Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147**. This particular form of privative clause is therefore a legislative indication that judicial review on grounds of lack of jurisdiction (in the Anisminic sense) is available.

I agree with the views expressed by the learned judges and adopt them and say that this proposition is good law for Jamaica. I believe, therefore, that the critical determination to be made here is whether there is an error of law on the face of the record which vitiates the finality of the Registrar's ruling and will allow for review in the face of a privative or finality clause. In that regard, it is instructive to consider the views as to what was really decided by **Anisminic**. According to Chauvel, the scope for judicial review was expanded in relation to privative clauses by **Anisminic**, the case universally regarded as the seminal authority for the more assertive approach to the construction of privative or finality clauses. In that case, the headnote for which was cited above, the finality clause in question was in the following terms:

> The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.

This was a privative clause. It will be recalled that here the Courts had to consider whether that provision could effectively bar an action which sought a declaration that the determination of the Foreign Compensation Commission was a nullity on the ground that it was made without jurisdiction. The House of Lords in reversing the Court of Appeal held that section 4(4) of the Foreign Compensation Act 1950 did not oust the Courts jurisdiction to issue a declaration where a statutory tribunal has acted without or in excess of its jurisdiction.

In his article above-mentioned, Chauvel states, and I again adopt the argument as correct for the purposes of this decision:

> Traditionally a decision-maker would only be reviewable for error of law if he or she incorrectly interpreted the source of his or her jurisdictional power, or ignored it completely. The decision in **Anisminic v Foreign Compensation Commission** rendered obsolete this restrictive approach towards jurisdictional error. The Court extended the scope of "jurisdictional error" to include *any material error made in the course of applying a statutory power*. (My emphasis)
>
> ***Anisminic*** held that privative clauses (clauses that seek to oust the jurisdiction of the court to review) must be strictly construed and "if such a provision is reasonably capable of having two meanings, that meaning should be taken which preserves the ordinary jurisdiction of the Court"[9]. Lord Wilberforce stated further[10]:
>
> > The question, what is the [decision-maker's] proper area, is one which it has always been permissible to ask and to answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality, or unquestionability upon its decisions.

In **Judicial Review** by **G.D.S Taylor (1991)** the author, dealing with finality clauses of this type states at p.68

> The characteristic of these clauses is that they state decisions are 'final and without appeal' or 'final and conclusive,' or similar expressions. It has long been held that such clauses *do not prevent review for error of law*, within or without jurisdiction. That position remains unaffected by **Bulk Gas Users Group v Attorney-General [1983] NZLR 129 (CA)**."

I have also come across a useful succinct summary of the effect of **Anisminic** in a decision from the Supreme Court of Samoa, **Keil v Land Board [2000] WSSC 41 (21 December 2000)**, judgment by Sapolu, C.J. The learned Chief Justice had the following to say, in a ruling which is clearly not binding upon me but which I find instructive and which I adopt it as a correct exposition of the present state of the law. Accordingly, I hope that my extensive quotation from his Lordship's judgment may be excused.

> Prior to **Anisminic's** case, one of the distinctions the Courts were often required to make for the purpose of judicial review was between jurisdictional errors and non-jurisdictional errors, that is, between errors that go to jurisdiction and errors within jurisdiction. Jurisdictional errors or errors that

[9] Lord Reid in Anisminic at 2 A.C. page 170 letter C
[10] Lord Wilberforce in Anisminic at 2 A.C. page 207 letter G

go to jurisdiction, would occur where a statutory body never had jurisdiction to act. Such errors were amenable to judicial review. Non-jurisdictional errors or errors within jurisdiction occur where a statutory body had jurisdiction to act but in the course of the exercise of its jurisdiction it commits an error. Such an error was treated as not amenable to judicial review unless apparent on the face of the record. The major breakthrough in administrative law which was achieved in **Anisminic's** case was the expansion of the scope of the notion of jurisdictional error so that nearly all the errors committed during the exercise of jurisdiction became errors that go to jurisdiction or jurisdictional errors and therefore subject to judicial review. In this way, *Anisminic* broadened the scope of judicial review in a major and significant way. Many Judges as well as academic and practising lawyers, consider that this was achieved principally in the judgment of Lord Reid where His Lordship said at pp. 213-214 of **Anisminic's** case:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend the list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

Sapolu C.J continued:

> In the more recent decision of the House of Lords in ***O'Reilly v Mackman [1983] 2 AC 237***, Lord Diplock at p. 278 said:
>
> > "Fortunately for the development of public law in England, s 14(3) contained express provision that the section should not apply to any order or determination of the Foreign Compensation Commission, a statutory body established under the Foreign Compensation Act 1950, which contained s 14(4) an express provision:

> The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.
>
> It was this provision that provided the occasion for the landmark decision of this House in **Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147,** and particularly the leading speech of Lord Reid, which has liberated English public law from the fetters that the Courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that the **Anisminic** case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination' not being a 'determination' within the meaning of the empowering legislation was accordingly a nullity."

Sapolu C.J. then concluded:

> In this passage Lord Diplock has actually reaffirmed the virtual elimination of the distinction between jurisdictional and non-jurisdictional errors that was achieved in **Anisminic**. The above passage was also cited with approval by Cooke J (as he then was) (*later Cooke P., later Lord Cooke of Thorndon*) in the New Zealand case of **Bulk Gas Users Group v Attorney-General [1983] NZLR 129 at p. 134**. In that case the appellants sought a declaration in the High Court that the Secretary of Energy had under the Commerce Act 1975, denied them the opportunity to be heard on a matter in which they had a direct interest. Section 96 of the Commerce Act 1975 which contains a privative clause provides:
>
> "Except on the ground of lack of jurisdiction, no order, approval, proceeding or decision of the Secretary under this Part of this Act shall be liable to be challenged, reviewed, quashed, or called in question in any Court...."
>
> On appeal to the Court of Appeal, Cooke J, in a judgment with which the other members of the Court concurred, said at p. 135:
>
> > "[If] as a matter of interpreting the Act the Court can see that a definite test is laid down by Parliament, a decision by the Secretary will be invalid if he has not applied that test but some other. It would then be a simple case of an authority, which happens to be bound to act judicially but is nevertheless basically an administrative authority or tribunal, applying a wrong and inadmissible test and so not exercising his or its

> true powers – just as in the Privy Council cases of **Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust [1937] AC 898, 917** and **Marada Mosque Trustees v Mahmud [1967] 1 AC 13, 25**. The privative clause would not apply, because there would be a lack of jurisdiction in the sense recognized in *Anisminic*."

In light of the foregoing analysis, I am of the view that section 50(4) of the Act does not give the blanket exclusion argued for by the Respondents, and I so hold.

There is one other observation which I wish to make in relation to this application. This concerns the letter sent from the Applicant to the Self Start Fund: "What was the true nature of the letter of December 31, 2003, from the Applicant to the Self Start Fund when the Fund had offered financing for the contract?" Was that letter in the nature of an undertaking by the financial institution to send the title to the lenders, so that the lender could use that title to secure the loan? The letter from the self Start to the Applicant dated August 15, 2005 certainly seems to suggest that they were prepared to treat it as an undertaking. However, Mrs. Taylor-Wright pointed out that the Arbitrator had found that the letter did not amount to an undertaking while counsel for the Applicant seemed to suggest that it did. It is not clear to me that this matter was fully ventilated before the Arbitrator.

While I do not presume to make any finding on this issue, nor do I claim to be entitled so to do, it does seem to me that a fulsome and explicit consideration of the import and consequence of the letters exchanged between Mrs. Henry and the Applicant, (December 15, 2003), between the Ministry and Mrs. Henry, (December 18, 2003) and the letter from the Applicant to the Self Start Fund December 31, 2003), ought to have featured in the decision as to whether the failure to deliver the title was the cause of the 2nd Respondent's loss of the contract. It does not appear that such was the case.

CONCLUSION

In considering whether the Applicant should succeed, I have been impressed by the influence the reasoning of Lord Cooke, (who seems to have been a part of all important judicial review cases in New Zealand from the 1980's in a line of authorities from **Bulk Gas Users Group Ltd**.,) had on subsequent cases including Zaoui in 2005 and cases in the Samoan jurisdiction. This is evident in the following cite from the Samoan decision of **Lokeni-Lepa v Public Services Commission WSSC 14 March 30, 2006,** another decision of Sapolu C.J.

In **Constitutional and Administrative Law in New Zealand (2001) 2nd ed by P.A. Joseph**, the learned author states in para 2.4.1 at pp 815-816:

> 'In **Peters v Davison [1999] 2 NZLR 164**, the Court of Appeal confirmed what Cooke J had suggested 16 years earlier in **Bulk Gas Users Group Ltd v Attorney General [1983] NZLR 129** that error of law by a public authority was a ground of review 'in and of itself.'
> The expression 'error of law' encapsulates illegality as a ground of review. It is no longer legally relevant (as it once was) to ask whether the error caused the decision-maker to exceed its jurisdiction. All a plaintiff need show is that the decision-maker erred and that error was material (the error must influence the 'outcome of the decision). 'The error has to be one which affected the actual making of the decision and affected the decision itself': **Peters v Davison per Thomas J at p.183.**'

Further in para 21.4.2 at pp. 816-817 the learned author states:

> 'An administrative authority commits a reviewable error of law if it: (a) acts in bad faith; (b) makes a decision which it has no power to make; (c) breaches the rules of natural justice; (d) mis-construes its statute and 'asks the wrong question'; (c) relies upon irrelevant considerations; or (f) disregards mandatory relevant considerations. An unreasonable finding of fact may also support a finding of error of law, as may inadequacy of reasons or a failure to make a finding of fact on a key issue for decision.'

In **Judicial Review (1991) by G.D.S Taylor**, the learned author states in para 14.09 at p.319:

> 'All grounds, other than fraud and bad faith, are referable to error of law in one or other of the **Edwards v Bairstow [1956] AC 14** manifestations. Thus, decisions beyond power as to extent have been described as in error of law. The same is true of failure to consider a material fact, giving wrong weight to a relevant factor, breach of jurisdiction, and breach of natural justice. The modern ground of unreasonableness is a direct application of the second **Edwards v Bairstow** manifestation.'
>
> To assert that a body has committed an error of law requires explanation not only as to how the error of law was committed but also why the alleged error is an error of law. This will facilitate understanding of what an applicant for review really has in mind.

I respectfully adopt the reasoning of the learned Chief Justice and say that in this case, the application should succeed. I have formed the view that in the instant case, there is reviewable error of law in the sense suggested by the visionary Cooke J (as he then was) in **Bulk Gas Users Group**, and accepted by de Smith and Joseph in their writings. As invited by the learned author Joseph, I state that a failure to understand and apply the legal principle

of causation to the stated facts led the Tribunal into error. I have been led to this view by a profound conviction that this Court must not, even at the risk of engendering some uncertainty in this important area of law, resile from its seminal role as the arbiter of the rights of the citizens of any society, and the protector of the Rule of Law.

Having stated this conclusion, I need only add here what will have been apparent from my analysis of the proper treatment to be accorded to finality or privative clauses in legislation. These clauses must be strictly interpreted in the context of the legislation of which it is a part and ought not to be given any wider application than is necessary to protect the purpose of the legislation. I do not believe that this restrictive interpretation of section 50(4) of the Act in any way diminishes its value in the context of the legislation.

I accordingly make the following orders as asked for by the Applicant. IT IS HEREBY ORDERED that:

1. A Writ of Certiorari to issue to quash the decision of the Registrar of Cooperatives and Friendly Societies,
2. The matter is to be remitted to the First Respondent for re-hearing and a proper determination.
3. Costs of this application to be the Applicant's, to be taxed if not agreed.