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

CIVIL APPEAL NO.ABU0017 OF 1998S
(High Court Civil Action JR No.HBJ 33 of 1997S)

BETWEEN:

NIVIS MOTOR AND MACHINERY COMPANY LIMITED

Appellant

AND:

MINISTER FOR LANDS AND MINERAL RESOURCES

Respondent

Coram: **The Hon. Sir Ian Barker, Presiding Judge**
The Hon. Justice I.F. Sheppard, Justice of Appeal
The Hon. Justice D.L. Tompkins, Justice of Appeal

Hearing: **Friday, 6 November 1998, Suva**

Counsel: **Mr. H. Nagin for the Appellant**
Mr. S. Kumar for the Respondent

Date of Judgment: **Friday, 13 November 1998**

JUDGMENT OF THE COURT

In Fiji Airline Pilots' Association v. Permanent Secretary for Labour and Industrial Relations (Civil Appeal No. ABU0059U of 1997, judgment 27 February 1998), this Court made the following comment on the requirement of O. 53 r.3(1) of the High Court Rules that leave be obtained from the High Court before any application for judicial review be entertained by that Court. ".....the requirement for leave can lead to delay and uncertainty for which there is dubious justification in the assured need to filter out vexatious and hopeless claims. Other jurisdictions have no difficulty in allowing review applications to proceed without leave."

The present appeal illustrates the appropriateness of those remarks with which the members of this Court presently sitting in this appeal, fully concur. The respondent seeks to acquire compulsorily land leased by the appellant in purported exercise of statutory powers, claiming that the land is needed for road works in the public interest. The appellant does not want its land compulsorily acquired: it wishes to build extensions to its motor vehicle business on the land.

One should therefore have thought that the interests of both parties required a speedy resolution of the appellant's challenge to the purported exercise by the respondent Minister of his statutory powers. Instead, the application for leave to issue judicial review proceedings was the subject of full argument before Fatiaki J.in the High Court in November 1997, culminating in a reserved judgment on 4 February 1998 in which the Judge refused leave. There then followed a full argument on 10 March 1998 on whether the Judge would give leave to the appellant to appeal to this Court and would order a stay. In another reserved decision delivered on 25 March 1998, Fatiaki J. gave leave to appeal and granted a stay. This Court can only presently decide if the Judge was right to refuse leave. If it holds that he was not, then there will have to be a hearing on the merits in the High Court, with a possible appeal as of right to this Court by the unsuccessful party.

Had there been no requirement for leave, then a decision on the validity of the respondent's decision could have been reached after a full consideration of the evidence. But that decision would surely have been given well before now.

As the Court in the Fiji Airline Pilots' case (Casey, Kapi and Dillon JJA) pointed out, other jurisdictions cope adequately with judicial review applications without a leave requirement. Such is the experience in Australia and New Zealand of the members of the Court hearing this appeal. Allegedly frivolous applications are there met with strike-out applications which are promptly considered by the Court. It could be more appropriate that judicial review practice in the Fiji Islands be modelled on practice in other Pacific jurisdictions than on United Kingdom practice. Many members of Bench and bar in Fiji received their legal education in Australia or New Zealand. Several members of this Court and of the Supreme Court come from those jurisdictions: they are familiar with the practice there in administrative law matters. We suggest respectfully that consideration be given to abolishing this leave requirement which could be accomplished by a rule change.

However, for so long as Fiji continues to impose a leave requirement, we endorse the criteria for leave laid down by this Court in the Fiji Airline Pilots' case thus.

> *"The first ground of appeal, however, raised an important question on the Judicial Review procedure. It is clear that Fatiaki J. went into the merits of the Association's case in some depth. The Appellant submitted that this was inappropriate in what was merely an application under Order53 r.3(1) of the High Court Rules for leave to issue review proceedings. The basic principle is that the Judge is only required to be satisfied that the material available discloses what might, on further consideration, turn out to be an arguable case in favour of granting the relief. If it does, he or she should grant the application - per Lord Diplock in Inland Revenue Commissioners v. National Federation of Self Employed, [1982] AC617 at 644. This principle was applied by his Court in National Farmers'Union v. Sugar Industry Tribunal and Others (CA 8/1990; 7 June 1990). In R. v. Secretary of State for the Home Department ex p. Rukshanda Begum(1990) COD 107 (referred*

to in 1 Supreme Court Practice 1997 at pp.865 and 868) Lord Donaldson MR accepted that an intermediate category of cases existed where it was unclear on the papers whether or not leave should be granted, in which event a brief hearing might assist, but it should not become anything remotely like the hearing which would ensue if the parties were granted leave.

In the High Court the appellant, the respondent and Company were heard, although the latter did not appear in this Court. It is difficult to escape the conclusion that this was hardly a brief intermediate hearing of the kind envisaged by the Master of the Rolls, but we can appreciate the problem faced by the Judge in being presented with what on the record were extensive submissions by all 3 counsel. The area of dispute was adequately covered in the Association's affidavit, and the issues were reduced to the two main points discussed in this Judgment. They were quite straightforward. His Lordship was able to reach the firm conclusion that there was no arguable case warranting the grant of leave."

In the present case, the appellant filed an affidavit detailing its dealings with the respondent's Ministry. A notice was signed by the respondent on 28 August 1997 and gazetted on 5 September 1997 under the State Acquisition of Land Act (Cap.135) ("the Act"). The notice, which was also served on the appellant, gave the 30 days notice required by s.5(1) of the Act upon expiry of which the respondent intended compulsorily to acquire the land. Thus, what would be relevant to an application for judicial review of the Minister's decision to issue the notice was the Minister's state of mind as at 28 August 1997. Fatiaki J. discussed fully the matters raised in the affidavit filed on behalf of the appellant but, although the Minister was represented by counsel at the leave hearing, the Judge was not provided with any evidence from the Minister or his officials. On the basis of the appellant's affidavit alone, he was able to hold that an application for judicial review would have no prospect of success and thus refused to grant leave.

We consider that at least two matters raised in the appellant's affidavit called for some evidentiary response from the Minister or his officials before the Judge could

authoritatively have ruled as he did that the appellant should not be granted leave to instigate judicial review on the grounds that it had no prospect of success. Those matters are:

(a) A letter from the Ministry of Works dated 10 November 1995 to the appellant's architect advising that the Public Works Department had no objection to the appellant's proposed building extension involving a 2 metre setback from the boundary. This letter may or may not have been written in consultation with the respondent's ministry which had been dealing with planning objections.

(b) A discussion by Mr Singh, the managing director of the appellant on 30 July 1997 with a Mr Dennis Maxwell of the Public Works Department. Mr Singh took notes of this discussion. According to him, he told Mr Maxwell that the appellant had obtained alternative designs of the roundabout from some consultant traffic engineers in Auckland which he wished to discuss with Mr Maxwell. The latter is reported as saying "no doubt there are alternatives which will achieve the same results without involving [the appellant's] land "but it was "too late because tenders have been awarded." Questioned on how a tender could have been awarded when the PWD did not have possession of the land, Mr Maxwell is reported as saying that this section of the work had

> been "put on hold" but that the PWD was proceeding to acquire the land. Mr. Singh advised that his traffic engineers' proposals gave alternatives which did not require taking the appellant's land. Mr Maxwell repeated the PWD's intention to acquire it nonetheless. Support for Mr Singh's assertion came from a written report from his consultants provided after the decision to acquire had been made. This report articulated 3 alternatives, none of which involved acquisition of the land. Later, these consultants claimed that the Ministry's consultants had made an error in their application of certain widely-used industry standards and that rectification of the error would mean that the appellant's land was not required for the roadworks.

We do not say that these matters are determinative of the appellant's case for judicial review; but they do point to the appellant having an 'arguable case.' All the more so when there was no affidavit filed on behalf of the respondent which might well have been able to correct any impression that the Ministry was not interested in considering a proposal which would have achieved the desirable roadworks but without involving the acquisition of the appellant's land.

Fatiaki J. discussed at some length in his judgment the merits of the appellant's claim, but only on the basis of the appellant's evidence. The Judge rightly pointed out the diffuse nature of the grounds relied on for relief. However, in fairness to the appellant's counsel, it could not have been possible to be as precise as desirable in the absence of knowledge

of the Ministry file and in particular;

(a) why Mr Maxwell decided not to consider the alternatives and

(b) the circumstances surrounding the decision to let a tender before the land had been lawfully acquired.

We are aware that such information does not have to be provided on a leave application, but the respondent's failure to provide it does not make it easy for a Judge to hold that there is just no possibility of the appellant succeeding on judicial review. Nor can we see the full argument on the leave application which ensued as an example of the ***inter partes*** hearing encouraged by Lord Donaldson in the authority cited in the Airline Pilots' case.

A further consideration in deciding whether it was proper to refuse leave lies in the lack of any mechanism for a party, such as the appellant, to ascertain information in advance of issuing judicial review proceedings or indeed any other kind of proceedings.

Under the present rules of Court in this country, there is no provision for the ordering of pre-trial discovery as is found in Australia and New Zealand jurisdictions. As authorities in those jurisdictions show, pre-trial discovery with leave of the Court can be an effective tool in the administration of justice. It can be a helpful counter to the 'cards close to the chest' syndrome which is often encountered when large organisations are sued.

Moreover, Fiji, as yet, has no official information/freedom of information legislation. S.174 of the 1997 Constitution requires the Parliament to enact a law to give members of the public rights of access to official documents of the Government and its agencies, "as soon as practical after the commencement of the Constitution." Clearly, there has not been time for Parliament to consider such legislation since the 1997 Constitution came into force. We express the hope that the clear wish of the new Constitution be fulfilled in this regard at an early date.

Because of the lack of any evidence from the respondent to counter matters raised by the appellant and because the appellant had no way of ascertaining information from the respondent's files, we consider that the Judge should not have refused leave.

That conclusion however is not determinative because there is the possibility that an alternative remedy may be an adequate remedy for the appellant. Section 9(1) of the 1990 Constitution sets out the powers of the State compulsorily to acquire land from citizens. These rights are repeated in the Act in more detail. In summary, the Minister must give reasonable notice of intention to acquire land, on the expiry of which, the Minister must apply to the High Court for an order authorising the taking. Section 9(1) (c) of the 1990 Constitution and s.6(3) of the Act require the Court not to grant such an order unless it is satisfied that the .....acquisition is necessary or expedient, in the interests of defence, public safety, public order, public morality, public health, town and country planning or utilisation of any property in such a manner as to promote the public benefit."

Further provisions follow as to payment of compensation. Clearly, the onus is on the Minister to satisfy the Court on the matters described in s. 6(3).

Section 40 of the 1997 constituion is not so detailed. It provides that every person has the right not be deprived of property by the State otherwise than in accordance with a law (s.40(1)). Such acquisition is permissible for public purposes only (s.40(2) (a)) and is subject to payment of compensation on stipulated criteria (s.40(2) (b)). Thus, it would seem that the provisions of the 1990 Constitution, s.9(1)(c), are still applicable through the medium of s.6(3) of the Act which remains in force.

The mechanism described above is the way in which the legislators of Fiji have given the subject the right to test a minister's decision to acquire land compulsorily. Other jurisdictions have different procedures such as those detailed in Webb v. Minister of Housing and Local Government [1964] 3 All ER 473 and in the case cited by the Judge, i.e. Perpetual Trustees Co. Ltd. v. Dunedin City [1968] NZLR19. It should be noted that the New Zealand procedure discussed in that case has changed for the better. Objections to compulsory acquisition are now heard by a Court and not by the Minister or local authority being judge in its own cause.

The constitution under discussion in one of the cases referred to by counsel for the respondent i.e. Windward Properties Ltd. and Anor. v. Williams [1988] LRC (Const) 406 (i.e. the constitution of the Carribean state of St. Vincent), conferred a right of direct access to the Court for "determining whether that taking of possession or acquisition was duly carried out in accordance with a law authorising the taking of possession or acquisition."

We consider in the absence of anything like that St.Vincent provision in the Fiji Constitution that the High Court in the Fiji Islands can only consider an application under s.6(3) of the Act where there has been a validly made decision. The subsection cannot encompass a decision which could be open to challenge on the grounds of unreasonableness, bias etc. We are not of course saying that those considerations apply here. However, we consider that existence of the requirement for the Minister to apply to the Court under s.6(3) of the Act for an order to acquire the land can only apply to a decision of the Minister which is unflawed in administrative law terms.

Accordingly, we do not consider that an application under s.6(3) can be considered until the application for judicial review has been determined. An application under s.6(3) has apparently been filed. It can only be actioned should the judicial review application fail.

Accordingly, we do not consider that the procedure under s.6(3) of the Act operates as a barrier to the bringing of an application for judicial review. In some circumstances, which we do not endeavour to specify, that procedure could have some bearing when determining an adequate remedy.

The appeal must be allowed and the appellant is given leave to commence judicial review proceedings.

On hearing an appeal, this Court can exercise all the powers of the High Court (sec.13 Court of Appeal Act (Cap.12). Because there has been so much unnecessary delay

caused mainly by the cumbersome processes to which we have referred, we think it appropriate to make procedural orders consequentially. The High Court may vary these orders if proper grounds are made out.

(a) The respondent is to file a statement of defence and any affidavits within 28 days from the delivery of this judgment.

(b) Both parties are to give full discovery within a further 14 days.

(c) Both parties are at liberty to apply to the High Court for any further interlocutory orders within a further 7 days.

(d) The Appellant may file an amended statement of claim once it has considered the respondent's documents and affidavits. The appellant will have to be far more concise and precise than the present pleadings indicate.

(e) The application for judicial review is to be set down for hearing in the High Court on a date not earlier than 14 days after the completion of the above steps.

We were concerned at the hearing of the appeal that counsel for the respondent did not appear to contemplate what documents are required to be discovered by a respondent in

judicial review proceedings. He asserted that some documents on the Department's file were 'confidential.' Even without any official information legislation, there is a duty on a Minister in cases such as the present to disclose all documents which may be relevant no matter how embarrassing or helpful to the other party. The only documents which have to be discovered but which may not be inspected are those covered by legal professional privilege. Another possible exemption category, i.e. for documents involving security or defence of the State, cannot possibly apply to a highway construction project. This respondent like every other litigant must comply fully with the Rules of Court relating to discovery.

Fatiaki J. also ordered a stay pending the hearing of this present appeal. He was right to do so because he was aware of a facsimile from the Permanent Secretary for Communication, Works and Energy dated 6 February, 1998 which stated inter alia: "I have given instructions to our contractor Vuksich and Borich that they may proceed to taken (sic) possession of the area in question."

Even if there had been no application for judicial review, this communication coming from a senior official of a government department is disturbing. Unless and until the High Court authorises the compulsory acquisition under s.6(3) of the Act, what was being suggested by the permanent secretary was clearly illegal and in breach of the appellant's constitutional rights. Accordingly, we consider that the stay imposed by Fatiaki J. should

remain pending further order of the High Court in the expectation that the stay will enure until the judicial review proceedings have been determined.

When the matter returns to the High Court, we could understand how the learned Judge might feel some unease at hearing an application for judicial review on the merits since he had expressed a clear view that the appellant had no chance of success. Whilst we have no doubt that he would bring an open mind to bear, appearances would suggest that another Judge become involved for the substantive hearing.

The appellant is entitled to costs both in this Court and in the Court below which we fix in both Courts at $2,000 plus disbursements as fixed by the Registrar. These are to be costs in any event, even if the judicial review application ultimately fails.

The result therefore is

(a) Appeal allowed.

(b) Leave to commence proceedings for judicial review in the High Court granted.

(c) Case referred to High Court with procedural orders made as specified in judgment..

(d) Costs of $2,000 plus disbursements as fixed by Registrar to be paid by the respondent to the appellant in any event.

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Sir Ian Barker
Justice of Appeal

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Justice Sheppard
Justice of Appeal

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Justice Tompkins
Justice of Appeal

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