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

CIVIL APPEAL NO. ABU0070 OF 2006S
(High Court Civil Action No. HBC 512 of 2004S)

BETWEEN: NIVIS MOTORS AND MACHINERY COMPANY LIMITED

Appellants

AND: THE ATTORNEY GENERAL OF FIJI

Respondent

Coram: Scott, JA
Wood, JA
McPherson, JA

Hearing: Monday, 13th November 2006, Suva

Counsel:
B C Patel] for the Appellants
H Nagin]
L Draunivalu] for the Respondent

Date of Judgment: Friday, 24th November 2006, Suva

JUDGMENT OF MCPHERSON, JA

---

[1] When travelling by road from Nausori to Suva along Ratu Mara Road, you come to a place where the road meets Jerusalem Road, formerly Golf Links Road, coming in from the left. There, in order to ease traffic dangers and congestion, the Public Works department some time ago installed a traffic roundabout (the Nabua Roundabout) in the centre of the meeting point of the roads, where it occupies a circular space with a radius of 22.645 metres. Approached from Ratu Mara Road in

the direction of Suva, the land abutting the left hand verge before or opposite the roundabout is occupied by the premises of Nivis Motor and Machinery Company Limited, which is the appellant before the court. It is a company that conducts the business of selling or disposing of motor vehicles at those premises and uses the land fronting the road as a display yard for vehicles it has for sale or lease.

[2] The Nabua Roundabout is notorious for traffic congestion. Especially at peak traffic times in the morning and evening, there is a delay that lasts at times for up to an hour or more. Impatient drivers who are unwilling to wait force their way into the traffic lane with the consequence that collisions with other vehicles or "sideswipes" are not uncommon. Mr Nirmal Singh, who is the managing director of the appellant, estimates that there is an average of a traffic accident almost every week. The reason is that at the point of which I speak, the road narrows from two lanes, so that oncoming vehicles are funnelled into a single lane. The explanation is that the original plans for the roundabout have never been carried through to completion. The plans envisaged a road-widening at that point involving the incorporation in the roundabout of a sliver of land of 455 sq m in area forming part of the site of the appellant's car display yard.

[3] Mr Nirmal Singh and his company the appellant are adamantly opposed to giving up that portion of the appellant's land, which is held under a 99 year lease No.9007 commencing on 1 June 1982, granted by the State. He claims that the retention of that area is essential to his business and is worth (he estimates) some $100,000 or more in annual income to the appellant. Without it, the company's business would be detrimentally, perhaps fatally, affected. While this may be no more than the assessment of a committed owner, it nevertheless represents some evidence which, in the absence of contradiction, is not capable of being completely ignored.

[4] Attempts to persuade the appellant to change its corporate mind having proved unsuccessful, the Minister for Lands issued under the Acquisition of Lands Act a notice dated 28 August 1997, published in the Gazette of 5 September 1997,

compulsorily acquiring the area of 455 sq m for the Nabua By-Pass Road. In various proceedings, some of which have travelled to the Court of Appeal, the appellant has challenged the acquisition in every way that the law allows. Despite at times having some interlocutory victories, the appellant has so far been uniformerly unsuccessful in resisting the Minister's efforts to acquire its land.

[5] In this state of things, the contest came before the High Court on an originating summons issued by the Attorney-General for an order:

(a) that the compulsory acquisition proceed; and

(b) that compensation for the land acquisition be determined.

The amount of compensation is yet to be fixed; but, after receiving written and oral evidence, Mr Justice Jiten Singh on 4 July 2006 made an order that the State acquire the subject 455 sq m area of the appellant's land. It is against this order that the present appeal is brought.

[6] Much of the evidence at the hearing was directed to the design concept underlying the Nabua Roundabout and its dimensions. The initial planning was carried out or supervised by Kingston Morrison, a firm of consultants advising the Minister of Works and the Director of Roads. The appellant in turn was advised by a Mr Mark Appeldoorn, who is director and manager of the Tauranga office of Traffic Design Group Ltd., a New Zealand company specialising in road design and safety. It is fair to remark to say that, from the beginning, his efforts have been directed to persuading the Departmental engineers that there were other ways in which the traffic bottleneck at the roundabout can be avoided without acquiring the 455 sq m area of the appellant's land. A further such proposal was presented by Mr Appeldoorn in a report tendered in affidavits on this appeal. For the present it is enough to say that the tender of this further evidence has been rejected by the Court on the ground that it failed to satisfy the requirements for admission of fresh

evidence on appeal, as laid down in ***Ladd v Marshall*** [1954] 1 WLR 1451, 1491 and other decisions in that tradition. In particular, it was not shown that the evidence in question could with diligence not have been obtained for use at the trial or hearing itself. It involved another further attempt by the appellant to devise and present a safe solution to the roundabout problem without taking or using any of the appellant's land.

[7] In his judgment at first instance, his Lordship considered the various criteria recommended in the Austroads Guide to Traffic Engineering Practice on which the engineers on both sides claimed to rely. There are, it seems three criteria. The first is concerned with forward visibility meaning the vision of the driver of a vehicle approaching the roundabout from the Jerusalem Road, as to which the learned judge said there was "no controversy about this criterion." Criterion 3, described "as desirable but not essential" (Austroads Guide, sec.4.2.7) is that drivers approaching a roundabout should be able to see other vehicles entering it well before they reach the "sight triangle" that is graphically displayed on some of the design plans produced before this Court.

[8] Criterion 2 concerns the speeds of vehicles approaching or entering a roundabout. It is necessary, and it is also common ground, that the design ought to be such as to induce a reduction in those speeds. It is not entirely clear to us precisely what his Lordship's finding on this point was. But he appears to have accepted the evidence of the departmental engineer that the provision of lateral vision along Jerusalem Road would enhance safety for the travelling public (which I think is part of criterion 3 not 2) and that there was no reason to confine it to the minimum standard recommended in the Austroads Guide. Mr Appeldoorn's proposal would involve a reduction in the size of the splitter island and also in the diameter of the inner circle of the roundabout from 45.3 m to 39.2 m, without any reduction (as he claims) in any safety element for the travelling public. A diameter of 39.2 m is much more than the 24 m required at a minimum in the Austroads Guide. Mr Peni Tuinona, who gave evidence for the respondent, testified at the hearing that he was

seeing this most recent proposal for the first time at the hearing and that it was different from the ones previously advanced. He nevertheless felt able to reject this proposal as "deficient" in design.

[9] The Judge's notes of Mr Tuinona's evidence record that in cross-examination he said that "before the roundabout was built, there may perhaps have been other options besides taking [the appellant's] land." He said that he could not see how the desired level of safety could be achieved by making the roundabout smaller. He also agreed that sight distance was not "an important thing in a roundabout" and that "deflection" was used to reduce traffic speeds.

[10] In the end his Lordship appears to have regarded the enhancement to safety by improving the sight line "triangle" of vehicles entering from Jerusalem Road as the decisive factor because it provided the *maximum* safeguard for the public using the roundabout. To the contrary, the appellant's expert claimed that his proposal could be adopted without compromising the safety of the public. In these circumstances, the respondent submits that it was a matter for the Department to decide, as it did, to pursue its original proposal based on the Kingston Morrison design. It was submitted by the respondent on appeal that the learned Judge had a discretion to exercise in deciding the application and that, having exercised that discretion, it was not open to the court to interfere with his decision on appeal unless it was shown to be "unreasonable or plainly unjust" in terms of the well-known decision in ***House v. The King*** (1936) 55 CLR 499, at 505. However, this is not an appeal against the exercise of a discretion but against a straightforward decision on a matter of fact and law. There is nothing in the Act or the High Court Rules to place the ambit of the appeal in this case outside the ordinary limits specified in ***Benmax v. Austin Motor Co. Ltd.*** [1955] AC 370 and ***Warren v Combes*** (1979) 142 CLR 531. In that respect, it is subject to the rules applicable to the general run of appeals.

[11] The respondent nevertheless submits that, once the court is satisfied that the purpose of the acquisition is within the limits of the Act, there is nothing for the

court to do but to make the order that is sought here. This raises for consideration the effect of the law bearing upon a compulsory acquisition in this or other cases. The Constitution of 1998 provides in s.40(1) that a person is not to be deprived of property by the State except in accordance with a law; and, in s.40(2), that the acquisition of property under a law referred to in s.40(1) is permissible for public purposes only, and is subject to the payment of compensation. The relevant law here is the State Acquisition of Lands Act. Section 3(1) provides that subject to the Constitution and the Act, an acquiring authority may acquire any lands required for any public purpose. The expression "public purpose" is defined in s.2 of the Act to mean, among other matters, "town or country planning." There is no dispute that the acquisition of the appellant's land for the purpose of the roundabout or the roads leading into or forming part of it satisfies that description.

[12] Section 6(1) of the Act then provides that the acquiring authority shall not acquire any land unless it (the Act says "he") has applied to the Court and has obtained an order authorizing such acquisition. Subsection (3) of s.6 provides.:

> ***"(3) The Court shall not grant an order referred to in [subsection (1)] unless it is satisfied that the ..... acquisition is necessary or expedient for public purposes."***

[13] The word "expedient", which is wide, means "fit, proper, suitable to the circumstances of the case" (Shorter OED). Even, however, if s.6(3) had referred only to the Court's being satisfied that the acquisition was "necessary", that requirement would have been fulfilled here. In conjunction with "expedient" (and even without it) "necessary" does not in this context mean an absolute necessity but, as Pollock CB said in ***Attorney-General v. Walker*** (1849) 3 Ex 242, 255-256, "reasonably necessary in the circumstances of the case." It does not mean indispensable or "essential" but is "subjected to the touchstone of reasonableness": see ***Pelechowski v Registrar*** (1999) 198 CLR 435, 452. American authorities are to similar effect. See ***Kay County Excise Board v Atchison*** (1939) 91 P.2d 1087, at 1088 and ***State v Whitcomb*** (1933) 22 P. 2d 823. In the latter case, the Supreme

Court of Montana considered a compulsory acquisition statute permitting the acquisition of an easement of way where "necessary" for highway purposes. The defendant owner wished the easement to be located elsewhere than along the route chosen by the plaintiff highway authority; but the Court said that the word "necessary" did not mean "an absolute necessity of the particular location, but means reasonably requisite and proper for the accomplishment of the end in view, under the peculiar circumstances of the case." This was said to be a question of fact and, when the plaintiff authority selected the route of the right of way, "it did not lie in the mouth of the defendant to say that another possible route could have been selected."

[14] This sounds very much like the submission being advanced by the acquiring authority in the present case, and, if matters stood there, dismissal of the appeal right follow. Section 3(1) and s.6 are not, however, the only relevant provisions of the Act. In the wake of alterations to the Fiji Constitution in 1998, s.3 was amended by the addition of a new s.3(2) in the following terms:

> ***"(2) An acquisition under this section must not proceed unless the necessity for the acquisition is such as to provide reasonable justification for the causing of any resultant hardship to a person having an interest in the lands."***

[15] The effect of this amending addition plainly was to alter the law as it would presumably have been under an acquisition statute like that considered in the Montana case. It incorporates a further requirement that falls to be fulfilled before the acquisition under the section can "proceed" under s.3(2), and it appears to place on the acquiring authority the onus of proving fulfilment of that requirement. That additional obstacle or restriction was applicable at the date of the hearing before his Lordship in this matter. It was then that leave to proceed with the acquisition was being sought, and that is so irrespective of the fact that the acquisition itself had taken effect in law on 5 September 1997, which was before the amendment was

passed and assented to on 20 April 1988. In that way, s.3(8) is ambulatory to the time when the order to proceed is sought and made.

[16] It is unfortunate that this alteration was not noticed in the proceedings before his Lordship. Indeed, it seems clear that the 1988 amendment to the Acquisition of Lands Act was not adverted to by either counsel at the hearing or by the Judge, who quotes from and evidently used the earlier (and unamended) version of the Act. The first reference to the provision in s.3(2) is in the appellant's amended notice of appeal dated 24 October 2006. Consequently, his Lordship's reasons do not reflect s.3(2) or consider whether its terms were satisfied in ordering that the acquisition before him should proceed. Plainly, what s.3(2) requires, stated shortly, is a comparison of, on one hand, the "resultant hardship" that will be caused by the acquisition to the person (in this case the appellant) having an interest in the lands; and, on the other, the "reasonable justification" that exists for causing the hardship by means of the acquisition that is proposed. This made it relevant to consider the evidence, arguments and submissions about the plausibility of Mr Appeldoorn's most recent opinion that an alteration even now of the constructed roundabout and its approaches can, consistently with the requirements of public safety, be achieved by altering its dimensions without having to acquire the subject area of the appellant's land. The learned Judge was correct in remarking that the problem required quick resolution, rather than "proposal after proposal"; but s.3(2) requires further proposals to be considered up to the time at which an order is made allowing the acquisition to proceed.

[17] I am far from suggesting that those arguments would or will succeed; but they must be considered in the light of s.3(2) of the Act before the order to proceed is made. Through oversight, this did not happen before His Lordship at the hearing or in the judgment that followed it. A relevant and material requirement of the Act was therefore disregarded. Because of this the appeal must be allowed. I may add that the appellant undertook itself to bear the cost of altering the roundabout as presently constructed if the respondent abstains from taking its land. The success

on this view of the appellant on this appeal would not earn the admiration of the long-suffering public who use the Nabua Roundabout; but the law must be applied.

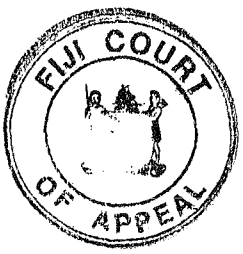
[18] I would therefore make the following orders:

(1) allow the appeal;

(2) set aside the order made in the High Court on 4 July 2006;

(3) direct that the summons to proceed with the acquisition of the subject land be reheard before another Judge of the Court.

[19] In view of the joint contribution of both parties to the critical oversight, there should be no order with respect to the costs of this appeal.



McPherson, JA

Solicitors:

Sherani and Company, Suva for the Appellants
Office of the Attorney General Chambers, Suva for the Respondent

D:WD\WIN\USHAABU0070U.06S