

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION



CIVIL ACTION NO.: HBC 512 OF 2004

BETWEEN: THE ATTORNEY GENERAL OF FIJI

PLAINTIFF

A N D: NIVIS MOTORS & MACHINERY COMPANY LIMITED

DEFENDANT

Mr. K.T. Keteca with Mr. A. Pratap for Plaintiff

Mr. H. Nagin for Defendant

Date of Hearing: 11th and 12th May 2006

Date of Judgment: 4th July 2006

JUDGMENT

Nivis Motors operates a motor vehicle business since 1984 on land owned by it at the corner of Kings Road and Jerusalem Road. The plaintiff intends to acquire 455 square meters of the defendant's land to complete a two lane approach from Nausori to the Nabua Roundabout and to complete the roundabout. The plaintiff says the Nabua roundabout has remained incomplete since 1997 as the defendant has refused to give 455 square meters of the land. The result it says is a major traffic congestion. The plaintiff is seeking an order for compulsory acquisition under the provisions of State Acquisition of Lands Act Cap

135. Nivis Motors says there is no need to take its land as the objective can be attained by readjustment to the present roundabout.

The issue for resolution is whether the acquisition of the 455 square meters of land is necessary or expedient in the public interest. To consider this the court has to look at the provisions of Section 5(3) of the State Acquisition of Lands Act Cap 135. It provides :

"the court shall not make an order referred to either in subsections (1) or (2) unless it is satisfied that the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or utilization of any property in such a manner as to promote the public benefit."

Clearly the plaintiff has the onus to satisfy the court that the acquisition is necessary for any one or more of the purposes stated in the section. The section attempts to balance the right of an individual not to be deprived of his property or to his right to enjoyment of his property against the state's ability or desire to promote the public welfare. A State has vast resources of its disposal; simply because it is able and willing to pay compensation is no reason to deviate from the need to show necessity.

Public benefit entails that the court considers the interests of the defendant as well. In Stringer v. Minister of Housing & Local Government -1970 1 WLR 281; 1971 1 ALL ER 65 R.B. Cooke J stated that the public interest, may require the interests of individual occupiers should be considered. The protection of interests of individual occupiers is one aspect, and an important one, of the public interest as a whole. Although, Cooke J was speaking on a different issue, his comments are of general application and also apposite to the present case.

The defendant has submitted and attempted to show that there is no necessity to take its land in order to achieve the objective of providing two lanes for Suva bound traffic from Nausori to Suva. It says the existing Ratu Mara Road, if properly designed will meet the desired objective. In support of its contention it relied principally on the evidence of Mark Apeldourn, a traffic engineer from Tauranga, New Zealand. His conclusion is that traffic flow at the Nabua roundabout can be achieved by reducing the size of the roundabout and the size of splitter island at the Nausori end of the roundabout.

The plaintiff principally relies on the evidence of Peni Tuinona, principal engineer for roads. He stated that the current roundabout at Nabua has deficiencies to it in that there is a single lane at Suva approach which causes delays for traveling public. He said that the proper sight distances are not met so public safety is compromised. He stated that the Public Works Department had considered the three (3) proposals put forward by the defendant and rejected them on grounds of safety or costs.

Both engineers had relied on Austroads Guide to Traffic Engineering Practice in support of their assertions. Austroads is a guide only. It recommends that roundabout should be so designed that the speed of vehicles on the roundabout is restricted to 50 kmph or less. This it states is achieved by providing adequate deflection at entry points to the roundabout. Secondly it recommends certain sight distance criteria to enhance safety at the roundabouts. Criterion 1 of the sight distances deals with forward visible distance for a driver approaching a roundabout so he has good view of splitter island, the roundabout and vehicles on the roundabout carriageway. There is no controversy about this criterion. Criterion 2 deals with a driver who is stationary at the 'give way'. He should have a clear line of sight to his right for at least 70 meters which represents a distance a vehicle would take to travel if it was traveling at 5 kmph (representing 5 seconds traveling time). In higher circulating flows sight distance would be reduced to 4 seconds critical gap. Criterion 2 is an essential element. Criterion 3 represents what is desirable but not essential. It recommends that drivers who are

approaching a roundabout are able to see other entering vehicles well before they reach the "give way" line. It says *"It is desirable that this sight triangle be achieved, although in urban areas it may not always be possible"*.

The situation today at the roundabout is that there is a constriction at the Nausori end. The two lanes are constricted to a single lane so there is traffic congestion and sudden constriction causes accidents. The defendant's director agreed that if there are two lanes, then there would be no long traffic queues at that point.

The plaintiff's engineer stated that the present roundabout is not a perfect circle so the circulating width is not wide enough on one side of the roundabout resulting in tight manoeuvre. The plaintiff's engineer confirmed that side swipes were possible at that stretch on the roundabout. The State wants to acquire the land to ease traffic congestion, to prevent side swipes at one side of the roundabout, and to ensure proper sight distance for vehicle traveling along Jerusalem Road towards the roundabout. The State needs the land to make the roundabout a proper circle.

One cannot deny the large scale queuing of vehicles at the point in the mornings. It results in delays for people coming to work in Suva. Such delays can only be avoided if there is enough space to locate two lanes of roadway where there is only one. The present reduction of two lanes to one at the Nausori end has resulted in accidents with drivers trying to force their way into one lane. The defendant's director confirmed that almost every week he witnessed accidents at that point.

The plaintiff's engineer stated that safety of traveling public was paramount. He wanted vehicle traveling along Jerusalem Road to have a desirable distance of visibility in accordance with criterion 3 of Austroads. The plaintiff's engineer wanted a 70 meter visibility to the right. That he insisted could be achieved by acquiring the Nivis land. The defendant's engineer says that is not essential but only desirable and he is prepared to sacrifice this lateral visibility

to the right and at the same saying his plan increases visibility for traffic coming from the Mead Road. In urban areas criterion 3 need not be insisted upon. I find that State's position of providing lateral vision to the right along Jerusalem road would enhance safety for traveling public. There is no reason to confine public safety to the minimum standards recommended by Austroads and not the maximum which it says is desirable.

The defendant had engaged engineers and they had discussions over the years regarding the issues of the roundabout. The defendant's three alternative suggestions had been rejected by the Public Works Department. At the hearing a fourth alternative was proposed. The urgency of ameliorating the traffic congestion at this roundabout ~~cannot be over-emphasized~~ . It needs immediate and quick resolution and not proposal after proposal. The defendant cannot force the plaintiff to place traffic lights if the plaintiff does not consider it to be appropriate now, in the same way that it cannot force the State to provide an overhead bridge just to stop the State from acquiring its land. It is for the State to decide on the mode of solution to the problem.

Every acquisition causes some inconvenience, some hardship or some disruption to business of an occupant. It is the extent of disruption that is important. If an acquisition is likely to cause an economic ruin or affect the entire livelihood of a person, then the public interest element must be very strong and overwhelming. In the present case, the Crown Lease 9007 is 9368 square meters. The acquisition is approximately five percent of the total area. The business would not have to relocate. It could still continue operations from the existing premises.

The fact that the Nivis property was not originally included in the Nabua by-pass scheme is immaterial. Under this section, acquisition can be made when the need arises.

I am satisfied that the state needs to acquire the piece of land to promote the public benefit and I order that the state do acquire an area of 455 square meters of land in Crown Lease 9007.

[Jiten Singh]

JUDGE

At Suva

4th July 2006