

**IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION No. HBC 163/2019

BETWEEN **THE ATTORNEY GENERAL OF FIJI** for and on behalf of the
Director of Lands

PLAINTIFF

AND **SADIQ KHAN** f/n Mustafa Khan of Nasilivata Road, Namaka,
Businessman

DEFENDANT

APPEARANCES : Ms M Faktoufou for the Plaintiff
Mr Koya & Ms Chand for the Defendant

DATE OF HEARING : 7th August 2020

DATE OF JUDGMENT : 19th August 2020

DECISION

1. The defendant Mr Khan is, and has been since 2001, the owner of what was originally a 692m² rectangular property (Certificate of Title 31521, Lot 1 DP 8128) located between –now effectively surrounded by - Queens, Cawa and Nasilivata Roads, Namaka, Nadi.
2. In or before 2013 the Ministry of Lands & Mineral Resources decided that it needed to acquire part of Mr Khan’s land to enable it to carry out extensive upgrading to part of Queens Road from the Denerau Roundabout to Wailoaloa Road. Notice of its intention to acquire the land was given to Mr Khan in August 2013. The Notice referred to two parts of the land (shown in a diagram accompanying the notice):
 - 170m² at the Northwestern end of Mr Khan’s land (*Area 1*)
 - 125m² at the Southeastern end of the land (*Area 2*).
3. Mr Khan was, if not happy at least co-operative with regard to Area 2. Agreement was reached between the Director of Lands (on behalf of the Fiji Roads Authority (*FRA*)) and Mr Khan in 2015 for the acquisition of Area 2 and the compensation to be paid. This enabled the upgrading of the intersection between Queens Road and Nasilivata Road to proceed (it now appears to be completed), making it safer for the increased amount of road traffic in the area.
4. However, Mr Khan was less accommodating with regard to Area 1 at the other end of his property, which the FRA wished to acquire so that it could eliminate a blind bend where Cawa Road veers around Mr Khan’s property, which, in the words of the FRA (affidavit of Teke Kaa’ke dated 28 June 2019, para 12):

... prevents road users (motorists and pedestrians alike) from seeing obstacles, oncoming vehicles or other hazards present ahead, which in turn can cause major road accidents.

5. In November 2016 FRA wrote to Mr Khan offering to pay him \$65,000 for Area 1. Should he not accept this offer the FRA indicated that it would:

... explore its panoply of legal rights to compulsory (sic) acquire the land.

6. Apparently not as impressed with this as the FRA hoped, Mr Khan replied that he wished to obtain valuation advice, and to speak to the Prime Minister (with whom he said he had already discussed the matter). This correspondence led to a meeting between the parties in February 2017 when various options were tabled and discussed. These were outlined (along with the parties' initial reactions to the different solutions proposed) in a letter dated 16 February written by FRA to Mr Khan following the meeting. FRA invited Mr Khan to discuss the options with his family, and let it know his response by the following week. The four options referred to in this letter were:

- i. Instead of taking only the 170m² that it required FRA would purchase the whole property from Mr Khan at a valuation to be determined by an independent valuer agreed to by the parties, who would be bound by the valuer's opinion.
- ii. FRA would take only the 170m² but the purchase price would be determined by an agreed valuer, whose decision would be binding. FRA would create some additional parking spaces on the road for the benefit of Mr Khan's property.
- iii. In exchange for the 170m² FRA would close the section of Cawa Road that adjoined Mr Khan's property (an area substantially greater than 170m²), and would convey that closed section of the road to a transferee nominated by Mr Khan. There would be no monetary adjustment for the difference in the areas of land taken and conveyed by FRA.
- iv. FRA would proceed with the compulsory acquisition of Area 1.

The first, second and fourth options were acceptable to FRA, but it indicated that it would be unlikely to agree to the third option, which had been suggested by Mr Khan.

7. Although Mr Khan responded promptly as requested (copying his letter to the Prime Minister, the Attorney General and several others), the parties could not agree on a means of resolving the matter, and eventually (in 2019) the FRA has proceeded with the process of compulsorily acquiring Area 1 of Mr Khan's property. A notice in terms of sections 3 & 5 State Acquisition of Lands Act 1940 was issued in February 2019 and served on Mr Khan, and was published in the Government of Fiji Gazette on 22 February 2019.
8. On 1 July 2019 by Originating Summons the plaintiff on behalf of the Minister of Lands, filed the current proceedings in the High Court at Lautoka seeking orders:

- i. *Authorising the compulsory acquisition by the Plaintiff of an area of approximately 170m² from the Defendant's land contained in Lot 1 on Deposited Plan 8128 in Certificate of Title No. 31521:*
 - ii. *For compensation to the Defendant for the compulsory acquisition in accordance with the Plaintiff's valuation report in respect of valuation undertaken on 11 December 2018;*
 - iii. *That the costs of this application be paid by the Defendant or that such order as to costs be made as the Honourable Court may think fit.*
 - iv. *Such other or further orders as this Honourable Court may deem just in these circumstances.*
9. The originating summons was supported by an affidavit dated 20th June 2019 sworn by Teke Kaa'ke, the Acting Director of Lands at the Ministry of Lands and Mineral Resources setting out the history of the matter, and annexing copies of correspondence between the parties, the formal Notice to Acquire and a copy of the Gazette Notice. Also annexed to this affidavit was a copy of a report dated 27 December 2018 by Savenaca Ralagi, a registered valuer employed by the FRA, as to the amount of compensation payable to the owner for the land that the FRA wished to acquire. The report suggests that the *fair and reasonable sum of compensation* for the land is \$65,500 on the basis of the analysis set out in the report, which I will discuss in more detail later in this decision.
10. In response to this the defendant filed a summons on 24 July asking the Court to strike out the plaintiff's action on the grounds that it is:
- (a) *Scandalous, frivolous and vexatious*
 - (b) *May prejudice, embarrass or delay the fair trial of the action.*
 - (c) *Otherwise an abuse of the process of the Court.*

In support of this application, and in opposition to the orders sought by the plaintiff Mr Khan has sworn an affidavit dated 18 July 2019 which regrettably consists mainly of submissions, and his inadmissible (inexpert) opinion evidence on the need for and safety of the works proposed by FRA, and the valuation of his property. The affidavit also annexes copies of three valuations carried out for the defendant in July 2019 by Landprop Valuations & Consultancy Service (Mr Salacieli Lomaiviti being the registered valuer who prepared the reports) covering:

- i. the valuation of the 170m² proposed to be taken, which is assessed – along with compensation for disturbance and loss of business income - to be worth \$120,000.
 - ii. the value of the whole property (without the loss of either Areas 1 or 2) once a three level commercial building (of which plans are provided) has been built on it (\$4m).
 - iii. the level of rent that might be recoverable from the three level building referred to in (ii).
11. In the event the defendant has elected not to proceed with the striking out application, and instead the parties have invited me to decide the matter on the basis of the affidavits filed and submissions that have been made in writing. The

parties are in agreement that the issues raised by the plaintiff's originating summons should be dealt with in two stages. First I should decide whether the plaintiff has made out its case for compulsory acquisition of the land in question. If so, there will be a need for me to decide on the issue of compensation, but that will involve further evidence, possibly cross-examination of witnesses and submissions at a further hearing. I will make directions about this second stage of the proceedings depending on the decisions made at the first stage.

The Applicable Law

12. As the Court of Appeal noted in **Singh v Attorney General of Fiji** [2008] FJCA 33, the starting point for cases involving the compulsory acquisition of property by the State lies with the provisions of (now) section 27 of the Constitution of the Republic of Fiji, headed **Freedom from compulsory or arbitrary acquisition of property** which states:

- 27(1) *Every person has the right not to be deprived of property by the State other than in accordance with a written law referred to in subsection (2), and no law may permit arbitrary acquisition or expropriation of any interest in any property.*
- (2) *A written law may authorise compulsory acquisition of property –*
- (a) *Where necessary for a public purpose; and*
 - (b) *On the basis that the owner will be promptly paid the agreed compensation for the property, or failing agreement, just and equitable compensation as determined by a court or tribunal after considering all relevant factors including:*
 - (i) *the public purpose for which the property is being acquired;*
 - (ii) *the history of its acquisition by the owner;*
 - (iii) *the market value of the property;*
 - (iv) *the interests of any person affected by the acquisition; and*
 - (v) *any hardship to the owner.*

13. These principles are brought into effect via the State Acquisition of Lands Act 1940, the relevant sections of which provide:

- 2 **Interpretation**
acquiring authority means the Minister [of Lands], in relation to the Government ...
public purpose means-
- (a) *a purpose of defence, public safety, public health or town or country planning;*
 - (b) *a purpose of providing a public amenity or public facility;*
 - (c) *a purpose of preserving property of national, archaeological, palaeontological, historical, cultural, architectural or scenic value.*
- 3 **Power to acquire land**
- (1) *Subject to the other provisions of this Act, an acquiring authority may acquire any lands required for any public purpose, paying such consideration or compensation as may be agreed upon or determined under the provisions of this Act.*
 - (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.*
- 5 **Notice of intention to take lands**
- (1) *... whenever the acquiring authority determines that any lands are required for a public purpose, the acquiring authority shall give not less than 30 days written notice to every person having any interest in such lands which would be affected by the*

taking of possession or acquisition of the lands that, upon the expiry of such period of notice, the acquiring authority intends compulsorily to take possession of or acquire such lands (sic).

- (2) The notice referred to in subsection (1) shall specify clearly the land intended to be taken possession of or acquired and shall further be published in the Gazette.

6 Application to court

- (1) The acquiring authority shall not compulsorily acquire any land unless he or she has applied to the court and has obtained therefrom an order authorising such acquisition.

- (2) In the event of an acquiring authority's compulsorily taking possession of any land he shall within 30 days of so entering into possession apply to the court for an order authorising such taking of possession.

- (3) The court shall not grant an order referred to in either of subsections (1) or (2) unless it is satisfied that the taking of possession or acquisition is necessary or expedient for a public purpose.

- (4) If the taking of possession or the acquisition is for a purpose referred to in paragraph (c) of the definition of 'public purpose' in section 2, the court must also take into account whether the need to ensure the preservation of heritage of the State at a cost that is justifiable outweighs any hardship to a person having an interest in the land.

7 Damages and compensation

- (1) An acquiring authority shall pay damages to all persons owning the property or having any other interest or right therein that would be affected by the taking of possession or acquisition thereof in respect of the taking of possession prior to the application to the court under the provisions of section 6(2) in a case where the court does not grant the order sought for which application has been made.

- (2) Adequate compensation for the taking of possession or the acquisition of property where an order has been granted by the court under the provisions of section 6 shall be paid to the persons entitled thereto within 30 days of such order being granted.

- (3) If no agreement has been concluded with any person claiming to be entitled as to the amount or manner of payment of compensation referred to in this section within 30 days of the grant of the order of the court, the acquiring authority shall, immediately upon the expiry of such period of 30 days, apply to the court for the determination of those matters in relation to such claimant including where necessary any question as to the entitlement of such a claimant to compensation.

- (4) The acquiring authority shall pay all costs reasonably incurred by any other person in connection with the proceedings before the court under the provisions of this and section 6 and including any appeal not made unreasonably or frivolously from any decision of the court of the Court of Appeal given for these purposes.

11. Report of Government officers as to value to be evidence

The written report of any officer of the Public Works, Lands or Agricultural Departments as to the value of the lands or of any buildings or trees or crops thereon shall be evidence thereof. Such officer may, on giving 3 days notice in writing to the occupier, enter upon any such lands or into any buildings thereon for the purpose of ascertaining the value of such land and the buildings, trees and crops thereon. Any person having an interest in such lands may call such officer as a witness and may also adduce any other evidence as to value. The report of such officer may be proved by a copy thereof under his hand. Proof of the signature of such copy shall not be required unless the Court sees reason to doubt the genuineness thereof. If any party so desires the officer shall be called as a witness for cross-examination

12 Matters to be considered in determining compensation

- (1) *In determining the amount of compensation to be awarded for land acquired under this Act –*
- (a) *the court shall take into consideration-*
- (i) *the market value of the land at the date of the notice of intention to take such land;*
 - (ii) *the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of taking possession thereof;*
 - (iii) *the damage, if any, sustained by the person interested, at the time of taking possession of the land, by reason of severing such land from his or her other land;*
 - (iv) *the damage, if any sustained by the person interested, at the time of taking possession of the land, by reason of the acquisition injuriously affecting his or her other property, real or personal, in any other manner, or his or her earnings;*
 - (v) *if in consequence of the acquisition of the land, the person interested is compelled to change his or her residence or place of business, the reasonable expenses, if any, incidental to such change.*
- (b) *but the court shall not take into consideration –*
- (i) *the degree of urgency which has led to the acquisition;*
 - (ii) *any disinclination of the person interested to part with the land acquired;*
 - (iii) *any damage sustained by him or her which, if caused by a private person, would not render such person liable to a suit;*
 - (iv) *any increase to the value of land acquired likely to accrue from the use to which it will be put when acquired;*
 - (v) *any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put;*
 - (vi) *any outlay or improvements on or disposal of the land acquired, commenced, made or effected after the date of the notice of the intention to take such land.*

13 Compensation for loss of rents and profits

When the acquiring authority has in pursuance of a notice under section 5 entered into possession of any lands, the court may award compensation to the owner of such lands and to all parties entitled to any estate or interest therein for loss of rents and mesne profits for the period between the time the acquiring authority so entered into possession , and the time when the consideration due under an agreement has been paid to the persons entitled thereto or compensation has been paid into court under the provisions of this Act.

14. In his decision in **Attorney General v Nivis Motors & Machinery Company Limited** [2006] FJHC 147 Jiten Singh J made the following comments on the onus that the acquiring authority has to show that the requirements of (now) section 6(3) of the Act are met:

Clearly the plaintiff has the onus to satisfy the court that the acquisition is necessary for 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 and desire to promote the public welfare. A State has vast resources at 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 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.

- 15 Most definitions of 'market value' involve variations on the following formula endorsed by the US Supreme Court in **United States v Cartwright** (1973) 411 US 546:

The fair market value is the price at which the property would change hands between a willing seller and a willing buyer, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

In Fiji the Court of Appeal in **Singh** (above) accepted the following formulation adopted in the court below:

... the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in arm's height and length transaction after proper marketing wherein the parties each acted knowledgeably, prudently and without compulsion.

Reasons for acquiring the land

- 16 The affidavit of Teke Kaa'ke filed in support of the plaintiffs application refers in paragraphs 8-12 to the FRA's explanation for wanting to acquire the land in question. He says:

8 *The Defendant's land is situated at the corner of Queens Road between Nasilivata Road and the old Cawa Road which is now closed to traffic.*

9 *Traffic on the existing Cawa Road currently flows through the Nasilivata Bypass Road, onto Nasilivata Road and then onto Queens Road which is a very busy highway with heavy traffic flow, as it intersects at the Wailoaloa Junction with Denerau Bypass Road and Northern Press Road.*

A satellite image is annexed at this point (a copy of which is attached to this judgment) which shows how the Nasilivata Bypass Road diverts to skirt Mr Khan's property before joining the main part of Nasilivata Road at a T intersection. In so far as the affidavit refers in paragraph 8 above to Cawa Road, it would be more accurate to say that part of the old Cawa Road is now closed to 'through traffic' to Queens Road (which it apparently once joined). Except that it no longer intersects with Queens Road, Cawa Road is still open to traffic. The satellite image shows that Mr Khan's property is now effectively an island, surrounded on four sides by Queens Road, Nasilivata Road, Nasilivata Bypass Road and Cawa Road. Mr Kaa'ke's affidavit continues:

10. *The Nasilivata Bypass Road is a road with a sharp curve and has a blind bend at its approach towards Nasilivata Road. ...*

11. *The remedial works involves straightening the Nasilivata Bypass Road to remove the blind bend and reduce the hazard caused to motorists and pedestrians. The only option for straightening Nasilivata Bypass Road is to acquire Area 1 so that the portion of Cawa Road open to motorists can:*

- i. extend through the portion of land to be acquired from the Defendant's land; and*
- ii. exit directly onto Nasilivata Road.*

12. *This action is necessary as having a blind bend in the road reduces visibility for road users. This prevents road users (motorists and pedestrians alike) from seeing obstacle, oncoming vehicles or other hazards present ahead, which in turn can cause major road accidents.*

17 Mr Khan's response to these parts of the FRA evidence is set out in paragraphs 24 – 26 of his affidavit. He says:

- 24 *I verily believe that linking Nasilivata Road and Cawa Road, would be a road hazard for motorists and pedestrians as well. Cawa Road is mostly residential and having motorist travelling through an area which is vastly residential is dangerous.*
- 25 *The road at present linking Cawa Road and Nasilivata Road is open to the motorist. Therefore paragraph 8 of the [plaintiff's] Affidavit is misleading.*
- 26 *I verily believe that the planning of the road was not done in a proper manner by the Fiji Roads Authority and now seeing that the current construction of the road linking Cawa Road to Nasilivata Road is posing a danger to pedestrians and motorists, are trying to take a further 170m² of land in Certificate of Title No 31521.*

Preliminary objections

18 In written and oral submissions filed and made on behalf of Mr Khan his counsel Mr Koya raised a number of preliminary issues which I will deal with before going on to consider the substantive application.

- i. Objection was taken to production by Mr Ka'ake in his affidavit of 28 June 2019 (annexure TK6) of a letter dated 23 November 2015 from the FRA to Mr Khan's solicitor. The objection is on the basis that the letter is marked 'Without Prejudice'. Counsel in his submissions has not identified what from this letter is or might be prejudicial to the defendant. The letter appears to have been produced as part of the chronological narrative setting out previous dealings between the plaintiff and the defendant regarding the proposed acquisition of part of the Mr Khan's property. It appears to record the terms of an agreement (the letter is signed by the defendant, as well as by an officer of the FRA) between the parties whereby the FRA is to pay Mr Khan \$20,000 in compensation for:

- The proposed warehouse development [apparently referring to the property at CT 31521]
- Town Planning Approval from Nadi Town Council
- The costs for engaging with surveyors
- The costs for engaging with an architect or engineer

The meaning and purpose of the letter is rather obscure, but what is clear is:

- (a) that given the letter records an agreement between the parties it is evidence of that agreement and so – to that extent at least - is not privileged
- (b) although the letter records that

Therefore in full and final payment [of the \$20,000] Mr Khan is prohibited from seeking further monetary entitlements as the matter shall be understood as complete at the conclusion of the transaction

(whatever that is supposed to mean), the plaintiff has not sought to argue that the agreement recorded in the letter entitles it either to acquire part of the defendant's property, or to deny the defendant compensation for any such part acquired

I readily accept the importance of preserving privilege for 'without prejudice' communications, and that – given the public interest that lies behind the principle - that protection should be applied generously rather than restrictively. These issues were discussed in some detail in the decision of the United Kingdom Supreme Court in **Oceanbulk Shipping & Trading SA v TMT Asia Limited** [2010] UKSC 44. In the present case it is far from clear what material contained in the letter of 23 November 2015 is of concern to the defendants (noting that the letter is written by the plaintiff, and would normally – although not inevitably - contain material which it, rather than the defendant, wished to protect). In the absence of any identification of material of concern, and since the plaintiff has not argued that the letter has any significance, other than as part of the history of dealings between the parties, I will not be taking into account as adverse to the defendant either the fact that the agreement was entered into, or the terms of that agreement.

- ii. That the originating summons filed by the plaintiff does not comply with Order 7, rule 3(1) High Court Rules and should therefore be struck out with indemnity costs. This rule states:

Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

Time and time again in numerous decisions of the courts at every level, the point has been made that the purpose of the High Court Rules is to provide an orderly framework for the identification of and proper resolution of disputes. Compliance with the rules is important, not because it is an end in itself, but because doing so is seen as the best way of achieving that objective. Except in the case of deliberate disregard of the rules, or genuine and irremediable prejudice to a party arising from non-compliance, a court is unlikely to strike out proceedings for non-compliance. Instead it will give the party in default – often accompanied by an order for costs against it - the opportunity to correct the non-compliance so that the essence of the parties' dispute can be identified and decided. This is particularly the case where striking out the proceeding will still leave an issue to be resolved, and will therefore simply obstruct and delay the final resolution of that dispute. The present case falls into this category. Even if there is a serious defect in the plaintiff's originating summons such that the defendant is genuinely confused

about what is being sought, striking out the summons will not resolve the issue of whether the FRA should be entitled to acquire part of the defendant's land to enable work to be carried out to enhance public safety. I am far more concerned about resolving that issue than pandering to nit-picking concerns about whether O.7., r 3(1) is perfectly and completely complied with. In any case it is apparent that the defendant is in no way confused about exactly what is being sought in these proceedings, and if there is any minute failure on the part of the plaintiff to comply with the letter of the rule (a failure that the defendant's counsel has not explained in the submissions, and that I cannot for myself discern) it has certainly not resulted in any prejudice to the defendant in the conduct of his defence. I do not accept that there is any non-compliance with the rule referred to, or that, even if there was, there is any need now to do anything about it.

- iii. That the plaintiff has not specified the exact location on CT 31521 from which the 170m² is to be taken. Again the defendant is clearly under no misapprehension whatever about what land the plaintiff seeks to acquire, and where that land is located, and he has not identified any way by which he has been disadvantaged in the conduct of his opposition to the application by any lack of precision in the wording of the originating summons. I am satisfied that the summons, read together with the affidavit of Mr Ka'ake, provides sufficient particulars to identify – as O.7.,r 3 requires – *the cause or causes of action in respect of which the plaintiff claims that relief or remedy*. In coming to this finding I am mindful of the rejection by the Privy Council of a similar argument in **Ben v Suva City Council** [1979] UKPC 46. In that case it was suggested by the appellant land owner (in relation to the then different wording of Crown Acquisition of Lands Ordinance – which prescribed a form of notice to be given to the owner of the land) that the notice did not sufficiently define the subject land. In response to this submission Lord Russell, giving the opinion of the Privy Council said:

... their Lordships do not consider that the words in parentheses in the Schedule to the Crown Acquisition of Lands Ordinance forbid in the case of an area such as this a notice of acquisition based on a sketch plan. The notice made it clear that the subject land was to be 20 acres of CT8316 inward of the High Water Mark, and that was capable of ascertainment. ... Nor are they persuaded that exactitude is required by the fact that a penalty may be incurred if there be resistance to or hindrance of the taking of possession of land of which notice ... has been given:

In light of the broader wording of section 5(2) of the present Act (which requires that the notice *shall specify clearly the land intended to be taken possession of or acquired*) and the incontestable fact that Mr Khan fully understands what part of his land the FRA wishes to take, I am not persuaded by this argument.

- iv. That the plaintiff is not entitled to rely on the valuation of Mr Ralagi because:

- It is not the plaintiff's own valuation

- it is not an independent valuation report, since Mr Ralagi is an employee of the FRA
- the valuation does not explain the method used to calculate the value of the 170m².

As I have mentioned above, the parties are agreed that this decision will deal only with the issue of whether the land specified by the plaintiff should be acquired by the State, with the issue of compensation being decided at a subsequent stage. I will leave to the next stage any discussion about the conclusions reached by the respective valuers, but the first two objections can be dealt with here. I understand that the first of these makes a distinction between the plaintiff (the Attorney General on behalf of the Director of Lands) and the FRA. Mr Ralagi is – apparently – an employee of the FRA, and there is no evidence that he is *an officer of the Public Works, Land or Agricultural Departments*, as section 11 of the Act quoted above in paragraph 13 above, requires. In paragraph 14 of his affidavit of 28 June 2019 Mr Ka’ake explains that the FRA is a ‘statutory body responsible for all matters pertaining to construction, maintenance and development of roads in Fiji’. It is not clear from the evidence what the relationship is between the FRA and the Ministry of Lands and Mineral Resources, and it may be that Mr Ralagi is not someone who is covered by section 11 of the Act. But even if that is true, it seems that Mr Ralagi is a registered valuer, and so whether or not he is an officer under section 11, his expert opinion evidence is admissible in terms of section 15 Civil Evidence Act 2002. His independence or otherwise is a matter of weight. Given that the evidence of both valuers who have provided reports relating to this property is contested, and that neither has sworn an affidavit, any finding as to compensation will require a further hearing and (I would have thought) cross examination of the valuers, together with a far more thorough analysis of the compensation issues than has occurred to date.

- v. That the plaintiff has not properly complied with section 5 of the Act because the notices published by the plaintiff in the Gazette do not clearly specify the land to be taken and/or wrongly describe the land or the project for which the acquisition is said to be necessary. This again, as with the concerns expressed in item (iii) above, is a complaint about the adequacy of the description of the land to be taken. In **Ben v Suva City Council** (supra) the Council had failed to publish any notice in the Gazette. Nevertheless the Privy Council agreed with the Court of Appeal that this failure was not fatal to the acquisition. Lord Russell agreed with the views expressed by O’Regan J in the Court of Appeal, (**Ben v Suva City Council** [1977] FJLawRp 2) who in turn referred to the following passage from de Smith’s **Judicial Review of Administrative Action** (3rd Edition 1973 @ p123):

... much may depend on the particular circumstances of the case in hand, although ‘nullification is the natural and usual consequence of disobedience’ breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial

prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory ...

Just as in the present case, the Courts in **Ben** were satisfied that the owner (i.e. the person for whose benefit the notice requirements are made in the Act) well knew and understood what land the Council wanted to acquire, and there was no-one else with an interest in the land who could possibly have been prejudiced by the failure to publish a notice in the Gazette. In those circumstances the courts were not prepared to entertain the suggestion that the acquisition was null and void, even though there had clearly been a breach by the Council of the procedural pre-requisites for acquisition as set out in the Act. In the present case, given the defendant's clear understanding of what the FRA was seeking, and the fact that no-one else has an interest in the land, no-one was prejudiced by any deficiency, if indeed there was any, in the notice that was published.

- vi. That the plaintiff has failed to provide evidence that it has met the requirements of section 5 of the State Acquisition of Lands Act (set out in paragraph 13 of this decision) in that there is no evidence that notice of the proposed was given to the mortgagee of the defendant (i.e. *a person having an interest in such land which would be affected by the ... acquisition*), the Home Finance Company Ltd. It is true that there is no evidence of the mortgagee being served with a copy of the initial Notice of Intention to acquire land (which was issued in August 2013), nor with a copy of the present application. On the other hand:
- A gazette notice of the intention was published in February 2019, the purpose of which must be taken as being to give the opportunity to persons having an interest in the property to come forward with their concerns.
 - the consent of the mortgagee to the sale of the land in Area 2 (see paragraph 2 above) is annexed to the sale and purchase agreement of that part of the defendant's property (Annexure TK5 to Mr Ka'ake's affidavit),
 - there is no suggestion by the defendant in his evidence that the mortgagee's interest in the property is likely to be adversely affected by the acquisition, or that any matter relating to the mortgagee arising from the acquisition will impose hardship on him.

While it would unquestionably have been preferable if the plaintiff had been more thorough in giving the notices required by section 5(1) of the Act to those having a clear interest in the land (the mortgage is clearly registered on the title), the belated reliance on this matter by the defendant (it is not referred to in his evidence, or in written submissions made by the defendant's counsel, but was raised only in oral submissions at the hearing), and the fact that – unlike **Ben** – a Gazette notice was published, and consent of the same mortgagee was obtained as part of the sale of Area 2, suggest

that this issue should be treated as an irregularity of the sort mentioned by the Court of Appeal in **Ben** above, and not as a factor that invalidates the whole process. Rather than requiring the plaintiff to start this process again I will delay making any orders under the Act until the mortgagee either consents to the acquisition, or makes an appearance to be heard as to the orders sought.

- vii. The plaintiff has not complied with section 161(1) Land Transfer Act 1971, which requires the plaintiff to lodge a notice of intention to acquire land with the Registrar of Titles, and for the Registrar to enter a memorial thereof on the title of the land being acquired, within 14 days after publication in the Gazette of the notice of intention required under section 5 of the State Acquisition of Lands Act 1940. I did not understand the basis of this submission, and Mr Koya for the defendant was not able to alleviate that incomprehension. It seems to be suggested that the failure of the plaintiff to have the acquisition of Area 2 (acquired by agreement in 2015) registered against the title, in some way prevents it from now acquiring Area 1. If this is what is suggested, I reject the submission. Section 161 seems to me to deal with the process requirements for entering a memorial on the title of land that is the subject of acquisition under the Act warning anyone dealing with the land of the proposal to acquire it. While a delay in entering the requisite memorial may result in someone acquiring an interest in the land without notice of the acquisition, which might in turn lead to further claims for compensation against the State, I do not see that the delay or failure has any effect on the operation of the acquisition mechanism under the State Acquisition of Lands Act.

Analysis

19. The starting point for deciding the substantive application for compulsory acquisition is to acknowledge the emphatic assertion in section 3(2) of the Act that:

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.

The section requires the State's need for the land in question to be weighed against the 'resultant hardship' to the owner whose land is taken. I accept that, as Singh J observed in the passage quoted from **Nivis** in paragraph 14 above, this is not simply a matter of proper compensation. The State is always likely to be able to afford to pay compensation for what it seeks. The fact that it can does not mean it should be allowed to acquire the property. The court must conclude that the benefits from the public purpose that is asserted as the reason for the acquisition are such as to justify the acquisition. I suggest that this justification must occur both at the level of principle (i.e. is the necessity for the acquisition important enough to justify the taking of private property?), and in the particular circumstances of the case (what are the actual hardships caused to Mr Khan by the loss of the land, and are these

outweighed by the benefits of the public purpose?). In reality of course these two issues are not independent of one another.

20. Given the requirement in section 3(2) of the Act for '*reasonable justification*' I accept that there is some – albeit limited - scope for a landowner opposing acquisition to argue that the history of the case, and how the asserted necessity arose, is relevant to the decision of the court. It is conceivable, for example, that the proposed acquisition is necessary only because of earlier questionable decisions of the authority or the State, without which the taking in question would not now have been required. But it would, I think, take a truly extraordinary set of facts for a court to refuse for historical reasons an acquisition that is shown, as the plaintiff argues is the case here, to be necessary for public safety.
21. This case, on the material made available to the Court, certainly does not warrant that approach. The defendant submits that the acquisition of the additional 170m² of his property is necessary only because of mistakes made by the FRA in planning and carrying out the upgrading works to the intersection of Queens and Nasilivata Roads. If there was any sound basis for the criticism of the FRA's planning made by Mr Khan in paragraph 26 of his affidavit (paragraph 17 above) and submissions I would have expected this to be covered more thoroughly, and by someone qualified to provide that opinion. In the absence of such evidence, what Mr Khan thinks is beside the point. Otherwise than in the extreme hypothetical situation canvassed above the Court's role on an application under the State Acquisition of Lands Act is not to explore how or why the present point has been reached, but to decide whether the acquisition of the land sought by the acquiring authority is *necessary or expedient for a public purpose* (see section 6(3) of the Act). As to the public purpose for which the land in this case is required, FRA relies in its submissions on the issue of public safety, and argues that the acquisition of Area 1 is:

... necessary as the remedial works on Nasilivata Bypass Road is essential in order to provide a safe entry and exit from Cawa Road by linking it to Nasilivata Road.

22. Accepting that the onus of establishing this lies with the plaintiff, any response by the defendant to this argument should be directed at showing:
- i. there is no issue of public safety involved, or - if there is –
 - ii. that the issue can be resolved in some other way than that proposed by FRA, or
 - iii. that the hardship created for him by the acquisition is such as to outweigh the improved safety achieved by the works proposed.

As the decision of the High Court of Fiji in **Nivis** (see above) demonstrates, a contest on the first two of these issues is likely in most cases to require expert evidence of an alternative approach to that proposed by the acquiring authority. Mr Khan has provided no evidence of an alternative approach, instead he appears to accept in paragraph 26 of his affidavit that there is now an issue of safety, albeit that he says that it is the fault of the FRA. In the absence of alternative expert evidence the Court is not equipped to say whether this acknowledged safety issue can be resolved in a different way from what is proposed by the FRA, for which it requires part of Mr

Khan's land. There is in the defendant's counsel's submissions a suggestion – made for the first time, and unsupported by any evidence - that the FRA should, instead of taking part of his land, use part of the carpark on the other side of Cawa Road opposite the defendant's property, but the plaintiff has had no opportunity to comment on this proposal, and the court is not in a position, without evidence, to weigh this idea against what is proposed by the plaintiff as a solution to the safety issue.

- 23 Nor has Mr Khan provided any information contemplated by section 27(2)(b) of the Constitution about the history of his acquisition of the property, or of any hardship that he says will be caused by the acquisition, to enable the court to weigh these factors against what the plaintiff has said about the public safety issues in deciding whether to make an order for the compulsory acquisition. Reviewing the correspondence between the parties as disclosed in the affidavits, it seems clear that the real issue here is not whether the acquisition is justified, but what compensation is appropriate.
- 24 I am accordingly satisfied on the basis of the evidence and arguments of the parties, that it is necessary or expedient for the public purpose relied on by the plaintiff for the plaintiff to acquire the 170m² area shown as Area 1 of the defendant's land (Lot 1 DP 8128 CT 31521) identified by the plaintiff in its Notice of Acquisition dated 7 February 2019, and I therefore make an order under section 6(1) State Acquisition of Lands Act 1940 authorising that acquisition.

Compensation

- 25 The defendant is entitled to compensation for the loss of part of his land in terms of the Act. The case is adjourned for mention to 31 August 2020 to discuss how the compensation issue needs to be dealt with. Costs are reserved to be dealt with as part of any compensation orders.



A.G. Stuart
Judge

At Lautoka this 19th August, 2020

SOLICITORS:

Office of the Attorney General, Lautoka – Plaintiff
Siddiq Koya Lawyers, Nadi - Defendant