46/79

IN THE PRIVY COUNCIL No. 19 of 1977

ON APPEAL

FROM THE COURT OF APPEAL OF FIJI

BETWEEN:

MUKTA BEN (d/o Bhovan)
and SHANTA BEN (d/o Bhimji)

Appellants

- and -

SUVA CITY COUNCIL

Respondents

CASE FOR THE APPELLANT

RECORD

THE CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES

THE NATURE OF THE APPEAL

1. This appeal is brought by leave granted by the Court of Appeal of Fiji. It is an appeal from the judgment of the Court of Appeal of Fiji (Gould V.P., Marsack J.A. and O'Regan J.) given on 18th February 1977 whereby the Court of Appeal dismissed an appeal by the appellant from the judgment of Stuart J. in the Supreme Court of Fiji dismissing the appellants' action for (inter alia) declarations that a purported acquisition by the respondent of part of the appellants' land was unlawful and ultra vires. 395 394 247

THE BACKGROUND FACTS

2. The respondent ("the Council") decided to seek land for a new power station and began enquiries in about 1963. Under the Towns Ordinance Cap. 106-1967 the Council was entitled to compulsorily acquire land only if it was unable to purchase it by agreement and on reasonable terms 305

3. In 1964 appellants offered the Council a 304,305

gift of 5 acres out of 90-acre lot they had recently bought for residential and industrial development. They also offered
304,413 to negotiate with the Council for the sale of some 50 acres being part of the same lot. Neither offer was accepted.

4. In 1966 the appellants made a further offer of "some 40 to 50 acres" at a price
421 of £300 per acres. The Council rejected the offer and made a counter-offer of £110 per acre. That counter-offer was
418 based on rural value. The Council stated that if that were not accepted, the required land
418 would be compulsorily acquired.

5. On 8th September 1966 the Council
420-422 sought the authorisation of the Governor in Council to the acquisition of 40 acres of the appellants' land under s.136 of the Towns Ordinance.

367 6. The whole of the land was situate outside the boundaries of the City of Suva.

7. On 18th July 1967 the Governor in Council purported to authorise acquisition of
433-434 20 acres at the eastern end of the appellants' land.

8. (a) On 27th July 1967 the Council gave notice to the appellants that it proposed to acquire "all that piece of land containing 20 acres situated at the Eastern end of Certificate of
442-443 Title 8310 being part of the land known as 'Naivoce' (part of) and being part of the land contained in Certificate of Title No. 8316 in the district of Suva on the island of Vitilevu as delineated on the sketch plan hereinafter appearing."

(b) The notice declared that the Council intended to enter into possession of the 20 acres at the expiration of eight weeks from the date of the notice and that
442 any person who wilfully hindered or obstructed the Council from taking possession was liable to imprisonment for three months or to a fine of £25 or both.

(c) The eastern boundary on the sketch

showed the high water mark of the sea - not as it was at the date of the notice but as it was depicted on the plan of the land drawn on Certificate of Title 8316 and thus as it was when the survey plan (from which the plan on the title was taken) was made. 378-379 443

(d) The nornern and southern sides of the sketch plan were part of the northern and southern boundaries on the plan on the title. The western side of the sketch the purported boundary between the land to be acquired and that to be retained was shown as at right angles to both the northern and southern bounds of the land to be taken but those boundaries were not in fact parallel. 379 443

(e) The dimensions of none of the boundaries were shown and the sketch plan bore no bearings in respect of any boundary. Within the purported bounds were printed the words "20 acres to be acquired". Although it would be possible to survey off 20 acres at the eastern end of the land, that would involve a definition of both the eastern and the western boundaries, this including a defining of the actual high water mark on the eastern boundary (which had varied from time to time by reason of accretion) so as to enclose 20 acres. That could however be done in many different ways. Accordingly neither the notice of acquisition nor the plan accompanying it defined the metes and bounds of the land which the Council purported to take. 379 443

9. Section 7(4) of the Crown Acquisition of Lands Ordinance (Cap. 119-1940,) which governs events following the authorisation referred to in s. 136(1) of the Towns Ordinance, requires notice of acquisition to be inserted in the Government Gazette and in a newspaper circulating in Fiji. No notice was inserted in the Gazette or in a newspaper. 328 330

10. (a) When the Council's application for the authorization of the Governor in Council to the acquisition of part of the appellants' land was being considered by the Director of Lands for submission to the Governor in Council he requested the

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Council to provide a plan "showing clearly ... details of access to the 40 acres and the access which would be available to the balance of the 88 acres."

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(b) The Council by its solicitors lodged a plan showing access to that part of the appellants' land intended to remain with the appellants after the proposed compulsory acquisition and informed the Director of Lands that it had been agreed with the appellants that if the Council acquired the area out of the title that a road would be provided to give access to the balance area."

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(c) Four months after the Governor in Council purported to authorize compulsory acquisition the Council by its solicitors sought the signing by the appellants' attorney under power of a survey plan.

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(d) The appellants' attorney refused to sign the survey plan until a plan previously shown to him by the Council and shown an access road to the balance area was again produced to him.

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(e) That plan was then delivered to the appellants' solicitors by the Council's solicitors and the appellants' attorney then signed the survey plan.

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(f) The signed survey plan was returned to the Council's Solicitors with a covering letter stating that the survey plan was signed "on the understanding that it is the Council's intention to establish access from Kings Road to the 20 acres by means of a public road as shown red on the map returned herewith, portion of which will run along and touch the northern boundary of our clients' land for a distance of about 18 chains."

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(g) The Council subsequently altered the survey plan as so signed by the appellants' attorney to show the access road in a different position and not giving access to the appellants' balance area.

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(h) The Council made that alteration without reference to the appellants. 318 387

(i) The Council lodged the survey plan as so altered for registration.

(j) The Council did not inform the appellants that the survey plan had been altered and did not inform them that it had decided not to provide access to their balance area. 387

(h) On 7th September 1968 the appellants' attorney attended upon their solicitor, informed him of the actual position of the road as then constructed and complained that it did not give access to the appellants' balance area. 51

11. The Council carried out some preparatory work for the building of a power house on the land before the writ was issued. After the issue of the writ it proceeded with the building of the power house and also erected four blocks of flats for the accommodation of the power house staff. 320 344

12. The total power house area enclosed by fencing was 6.1 acres, the greater part of which is land which has not been used for the power house. The total area actually occupied by buildings, including the flats (together with their gardens), is only 1.6 acres. 344

ERRORS OF LAW

13. The Court of Appeal was wrong in holding that the Notice of Acquisition was not void for uncertainty. 321 - 324

(a) The land to be acquired was insufficiently defined.

(b) The want of definition rendered the Notice invalid:

Vitosh v. Brisbane City Council (1955) 93 C.L.R. 622

Corless v. City of Richmond (1924) V.L.R. 408

Stewart v. City of Essendon (1924) V.L.R. 219

Ingwersen v. Borough of Ringwood (1926) V.L.R. 551

Ashcroft v. Walker (1902) 2 S.R. (N.S.W.) Eq 131.

325-326
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14. The Court of Appeal was wrong in holding that the Council had power under the Towns Ordinance to acquire compulsorily land beyond the boundaries of the city of Suva.

The Council had no power under the Ordinance to cpmpulsorily acquire land beyond the city boundaries:

Towns Ordinance, ss.133, 136.

Horners Co. v. Barlow (1688) 3 Mod. Rep. 158; 87 E.R. 103

Taylor v. Harris (1953) V.L.R. 105

Whiteman v. Saddler (1910) A.C. 514, at p.527

McCurrie v. Nazia (1900) 2 W.A.L.R. 15.

330-334
358-360
383-385

15. The Court of Appeal was wrong in holding that the Council's failure to comply with the requirements of s.7(4) of the Crown Acquisition of Lands Ordinance did not render invalid the purported acquision.

(a) The requirements of s. 7(4) are mandatory: Auckland Harbour Bridge v. Haihe (1962) N.Z.L.R. 68, at p. 83

Jolly v. District Council of Yorketown (1969) 119 C.L.R. 347, at p. 350

Ayres v. Chacos (1972) 19 F.L.R. 468, at p. 477.

(b) Failure to comply with the requirements invalidated the steps taken thereafter: Corporation of Parkdale v. West (1887) 12 App. Cas. 602

Northshore Railway Company v. Pion (1889) 14 App. Cas. 612

Saunby v. Water Commissioners of the City of London (Ontario) (1906) A.C. 110

Cullimore v. Lyme Regis Corporation (1962) 1 Q.B. 718, at p. 728;

S.S. Constructions Pty. Ltd. v. Ventura Motors Pty. Ltd. (1964) V.R. 229, at p. 245

Attorney-General v. Melbourne & Metropolitan Board of Works (1965) V.R. 143, at p. 151

Scurr v. Brisbane City Council (1973) 133 C.L.R. 242.

16. The Court of Appeal was wrong to the extent that it held that the Council was unable to purchase the appellants' land by agreement and on reasonable terms — 334-339

(a) The Council did not negotiate with the appellants over the price of the land. — 413-420, 38

(b) The appellants were prepared to sell the land to the Council at a reasonable price. — 357

(c) The Council took no proper steps to inform itself as to what was a reasonable price to pay for the land. — 374, 372

(d) The value of the appellants' land was substantially above the figure offered by the Council as the only amount it was prepared to pay. — 356-357

(e) Accordingly the condition precedent to the Council representing the case to the Governor in Council had not been satisfied. — 357, 374

17. The Court of Appeal was wrong in holding that the Governor in Council was not required to comply with the requirements of natural justice: — 339-343, 377-378

(a) The rules of natural justice required that the appellants be afforded a hearing De Vertueil v Knaggs (1918) A.C. 557 Banks v. Transport Regulation Board (Victoria) (1968) 119 C.L.R. 223 Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S. 180, at p. 194 Delta Properties Pty. Ltd. v. Brisbane City Council (1955) 95 C.L.R. 11. Hoggard v. Worsborough Urban District Council (1962) 2 Q.B. 93 Gaiman v. National Association for Mental Health (1971) Ch. 317, at p. 333

Treasury Gate Pty. Ltd. v. Rice (1972) V.R. 148.

(b) The appellants were not afforded a hearing. Had they been, they could have put to the Governor in Council material to show that -

356, 374, 413-420 (i) there had been no genuine negotiation between them and the Council;

38, 413-420, 356 (ii) the council had adopted the attitude thet either its price had to be accepted or there was to be compulsory acquisition;

420-422, 428-430 (iii) the council had not disclosed to the Governor in Council that three and a half years before the date of the notice to treat it had offered $278 an acre for the land to the south of the appellants' land - $58 an acre more than it offered for the appellants' land;

356-357 (iv) the value of the appellants' land was greatly in excess of the sum being offered by the council;

420-422, 428-430 (v) the council had not disclosed to the Governor in Council that the appellants had offered the council 5 acres free of charge;

420-422, 428-430 (vi) the council had not disclosed to the Governor in Council that the appellants had offered to sell 50 acres to the Council;

344 (vii) the 5 acres offered to the Council free of charge by the appellants would have been more than sufficient for the powerhouse.

Bass Charrington (North) Ltd. v. Minister of Housing and Local Government (1970) 22 P. & C.R. 31, at p. 36.

(c) The rules of natural justice required that the appellants be shown the Tetzner valuation relied on by the Council. Had they been they would have been able to point out to the Governor in Council that it was based on rural use and ignored both the zoning and the potential of the land.

335, 356, 372, 220-231

RECORD

18. The Court of Appeal was wrong to the extent that it held that the acquisition was not for purposes beyond those specified by the Governor in Council. 343-348 387-388

(a) The Council applied to the Governor in Council for authorization of compulsory acquisition of 40 acres of the appellants' land "exclusively for erection of buildings in connection with the power house and all purposes incidental thereto." 321-322

(b) When the Council's application was being considered by the Director of Lands for submission to the Governor in Council he requested the Council to supply 424

(i) "full details of the reasons why City Council consider it necessary to acquire as much as 40 acres for a Power Station"; and

(ii) "if the 40 acres will not be wholly utilized to accommodate a new Power Station what other uses the Council propose to put the land".

(c) The Council by its solicitors replied defining the power house use and adding: "It is possible that some living quarters may be provided on the perimeter of the area for the housing of breakdown and shift staff." 327

(d) The purpose of acquisition had to be specified by the Governor in Council: Tinker Tailor Pty Ltd. v. The Commissioner for Main Roads (1960) 105 C.L.R. 344 and could not validly be left to be inferred:

Jones v. Commonwealth of Australia (1963) 109 C.L.R. 475;

State Planning Authority of New South Wales v. Shaw (1970) 21 L.G.R.A. 892 (affirmed, (1972) 27 L.G.R.A. 94);

Cromer Golf Club Ltd. v. Downs (1973) A.L.J.R. 219.

(e) The Governor in Council authorized the compulsory acquisition of 20 acres "for a power station" without any reference to housing. 434

(f) The areas of the land actually in use more than 7 years after the date of the notices to treat were:

363 (i) power station, cooling tower, oil tank with attendant installation, feeder tank and structure: 27,500 square feet

(ii) (A) flats 7,700 square feet

(B) garden area

around the flats 38,000 square feet

45,700 square feet

The acquisition is accordingly invalid Attorney-General v. Pontypridd Urban District Council (1906) 2 Ch. 257.

348 19. The Court of Appeal was wrong to the extent that it held that the acquisition was not invalid as relating to land other than that required by the Council for the erection of the power house.

(a) The Council required only about 0.63 acres for the purpose represented to the
344 Governor in Council namely a power house.

344 (b) Even including the flats and their gardens the Council required only about 1.6 acres.

(c) The greater part of the land purportedly compulsorily acquired (namely 19.37) acres)
344 - or, including the flats and their gardens, 18.4 acres) was not required by the Council for the erection of the power house and the Council misled the Governor in Council by stating that it required 40 acres and by accepting an authorization in respect of 20 acres.

20. The Court of Appeal was wrong to the extent that it held that, on the assumptions that (i) the Council had failed sufficiently to define the land to be acquired; and (ii) the conditions precedent contained in s.136 of the Towns Ordinance had not been
391-393 satisfied, the appellants were estopped from challenging the validity of the purported compulsory acqusition.

(a) The lodging of a compensation claim does not preclude a landowner from challenging

AMENDMENT TO APPEALLANTS CASE AT PAGE 10.

20.A. The Court of Appeal was wrong to the extent that it held that The Council's failure to obtain Sub-Division of Land Board Approval did not invalidate the purported acquisition.

(a) The sub-division of Land Ordinance applies to compulsory acquisitions.

Sub-Division of Land Ordinance (Cap.118) S5.

(b) The Council did not apply for approval of the sub-division of the Appellants land until 2nd April, 1968, seven months after the date of the Notice to treat (27th July, 1967).

(c) The Board's approval of the sub-division (15th August, 1968) was subject, inter alia, to a condition that the Council construct a road to the satisfaction of the Board within 2 years of the approval.

(d) The Council did not construct the road within the said period or at all, and the approval was thereby rendered ineffective.

Garbin v. Wild (1965) W.A.R. 73 at p.76

Garland v. Minister of Housing & Local Government (1968) 20 P and CR.93.

(e) The sub-division of Land Ordinance applies to the sub-divisior of the land which would otherwise result from the Notice for Possession and the taking of possession.

Patel v. Premabhai (1954) A.C. 35

the validity of a compulsory acquisition:

Auckland Meat Company Ltd. v. Minister of Works (1963) N.Z.L.R. 120

Hawtin v. Doncaster & Templestowe Shire (1958) V.R. 494, at p. 514

Lynch v. Commissioners of Sewers of the City of London (1886) 32 Ch.D. 72.

(b) A party is not estopped from asserting an illegality or an ultra vires act:

Commonweatlth of Australia v. Burns (1971) V.R. 825;

Walsh v. Commercial Travellers Association of Victoria (1940) V.L.R. 259; Cross on Evidence 2nd Aust. ed. 1979, pp. 337-338 and cases cited;

Spencer Bower on Estoppel by Representation (2nd ed. 1966), p. 131, and cases cited.

(c) The appellants engaged in no conduct that was intended to induce the Council to engage in a course of conduct. The appellants were acting on the mistaken belief that the Council had lawfully acquired the land from them and on the mistaken belief induced by the Council that it was providing the access road serving their land on the basis of which it had induced the Governor in Council to authorize compulsory acquisition and had induced the appellants' attorney to sign the survey plan.

Greenwood v. Martin's Bank Ltd. (1933) A.C. 15, at p. 57;

Spencer Bower, op. cit., pp. 4-5;

Hopgood v. Brown (1955) 1 All E.R. 550 at p. 559.

21. The appellants humbly submit that this appeal should be allowed and the purported acquisition declared invalid for the following reasons:

(1) that the Notice of Acquisition lacked the fundamental requisite of certainty;

(2) that the Council had no power under the Towns Ordinance compulsorily to acquire land beyond the boundaries of the city of Suva;

(3) that the Council did not comply with the requirements of s.7(4) of the Crown Acquisition of Lands Ordinance;

(4) that the Council was not "unable to purchase by agreement and on reasonable terms" the relevant part of the appellants' land within s.136(1) of the Towns Ordinance;

(5) that the Governor in Council did not comply with the rules of natural justice in determining the reference under s.136 (1) of the Town Ordinance; and

(6) that the Council represented to the Governor in Council that it required 40 acres of land for the erection of a power station whereas in fact it only required 0.6 acres.

KENNETH H. GIFFORD

ROSS A. SUNDBERG

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- and -

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WRAY SMITH & CO.,
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