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 RESPONDENTS

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PART A: FACTS AND CIRCUMSTANCES

1. The Appellants ("the Plaintiffs") appeal from a final judgment of the Fiji Court of Appeal delivered on 18th February 1977. By that judgment, a majority of the Court (Sir Trevor Gould V.P. and O'Regan J.A.; Marsack J.A. dissenting) dismissed an appeal by the Plaintiffs from a judgment in favour of the Respondents ("the Council") delivered on 26th August 1975 by the Honourable Mr. Justice Stuart in the Supreme Courtof Fiji in an action commenced by writ of summons dated 4th October 1968. The gravamen of the Plaintiffs' claim was that they were entitled to possession as against the Council of certain land, situate at Kinoya, outside Suva, which the Council had purported to acquire by compulsory process in 1967. The trial judge, in dismissing the action, made no order for costs.

2. The central questions in the litigation are:

(a) The validity or otherwise of the procedures which the Council set in train as long ago as 1966 for the compulsory acquisition of the land under statutory powers, for the construction of a new power station for the supply of electricity to the city of Suva and its environs; and

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(b) If those procedures were in any respect defective so as to be ineffectual in law, whether the Plaintiffs were nevertheless precluded from relying upon any such defect.

3. As the trial judge found, the Council took possession of the subject land in September 1967; at that time none of the parties affected by the procedures adopted objected to the Council's entry into possession on the ground that it was lacking in statutory justification, or, for that matter, on any other ground. The Plaintiffs invoked their statutory right to lodge a claim for compensation for the loss of their interest in the land. This they did on 25th October 1967: see para. 25 below. It was not until 16th September 1968 that, having changed their solicitors, they also changed their tune, asserting in a letter of that date the invalidity of the Council's acquisition and their entitlement to possession of the land. In the meantime the Council had expended money (at least $31,000) in surveying and preparing the land for the construction of the buildings necessary for the establishment of the power station.

Record 318.3

Record p.320. 20
Record p.455 Ex. "F"

4. After the commencement of the action, the Plaintiffs not having claimed interlocutory relief, the construction work continued to completion. When the action came on for trial in September 1974, the power station was in operation; the total cost to the Council of buildings and equipment by then erected or installed was approximately F$2,700,000.

5. The subject land is situated at Kinoya, approximately 3½ miles beyond the City boundary. As surveyed in connection with the Council's acquisition, it consists of 20 acres and 2 perches, being the eastern end of the land comprised in Certificate of Title Vo. 8316. The eastern boundary of the land is high-water mark on the coast-line.

6. At all relevant times the Council was the Local Government Authority for the City of Suva constituted as a Town Council under the Towns Ordinance (Cap. 106) or under the statutory predecessor of that Ordinance, the Local Government Towns Ordinance (Cap. 78).

7. Pursuant to its statutory powers, the Council had for many years carried on an electricity undertaking at premises situated within the city boundaries. Increasing demand for electricity, coupled with the onset of environmental problems associated with the urban location of the then

existing power station, caused the Council in 1964 to turn its attention to the possibility of acquiring land outside the city for the construction of a new station with increased generating facilities.

8. Prior to the completion of the steps that led to the Council's entry into possession of the subject land, the Plaintiffs were not the registered proprietors of any estate or interest therein. On 22nd July 1964, they had, however, entered into a specifically enforceable contract in writing to buy about 88 acres, part of the land comprised in the Certificate of Title, from Sukhi Chand, the registered proprietor in fee simple. He conducted a dairy farm on the property. This 88 acres included the whole of the land subsequently taken by the Council under the processes of compulsory acquisition. It was common ground at the hearing of the action that at all relevant times the Plaintiffs, although never in possession of the land so acquired, were the equitable owners of the fee simple by virtue of the contract. But the only person in possession at all material times prior to September 1967, (as the trial judge found) when the Council took possession, was the registered proprietor, Sukhi Chand. As will later appear, he vacated the land in favour of the Council in response to a notice of acquisition and of intention to take possession that had been served upon him. Then he claimed and was paid compensation under the relevant statutory provisions for the loss of his interest. These facts have an important place in the development of one of the arguments tobe presented on behalf of the Council in this appeal: see paragraphs 35-37 (infra).

Record 299.10

9. The principal forms of relief claimed by the Plaintiffs in their writ and in their pleadings were as follows:

(a) A declaration that the compulsory acquisition of the land was beyond the powers of the Council and/or otherwise ineffectual in law;

(b) A declaration that the Council was a trespasser upon the plaintiffs' land;

(c) A perpetual injunction to restrain further trespass; and

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(d) Damages.

10. At the trial, leading counsel for the Plaintiffs expressly disavowed any suggestion that the Council had acted in bad faith. This
Record 320.36 concession is referred to in two of the judgments
348.40 in the Court of Appeal: see per Gould V.P. at
371.38 p.320.36 and p.348.40; and per O'Regan J.A. at
275.10 p. 371.38. The trial judge also referred to the Council's 'bona fide' acquisition of the land "for proper purposes". 10

PART B: OTHER EVENTS AND CIRCUMSTANCES GIVING RISE TO AND CONNECTED WITH THE LITIGATION:

11. On 14th October 1964, the Plaintiffs, having heard of the Council's desire to acquire land for the purpose of establishing a new power station, offered as a gift 5 acres of the land that they had agreed to purchase from Sukhi Chand (see para. 8 (supra)). The Council, however, considered that such an area was inadequate for its requirements; it so informed the Plaintiffs, who then indicated 20 their willingness to negotiate for the sale of about 50 acres of such land. But no negotiation ensued in relation to that proposal.

12. It appears that the Council investigated, and for various reasons rejected as unsuitable, a number of properties other than that comprised in the contract between the Plaintiffs and Sukhi Chand. Then, in April 1966, the question of acquiring some of that land was re-opened. The Plaintiffs offered to sell 50 acres, described as the 30 eastern portion of lot 2 (scil. in Certificate of Title 8316) at a price £200 ($400) per acre. This proposal came to nothing. The Council then became interested in purchasing an area towards the western end of the land in the Certificate of Title. On 13th May 1966, the Plaintiffs increased their asking price to £300 ($600) per acre. They made a further stipulation: the Council would have to provide without cost to the Plaintiff an access road to the western end of the balance of 40 the Plaintiff's land.

Record p.248.2313. To borrow the trial judge's words:

> "The Council could still not make up their minds, and it was not until 12th August 1966 that they replied to the Plaintiff's offer. By that time they had decided that they wanted to buy the western end of both the Plaintiffs' land comprised in C/T 8316 and the adjoining land comprised in CT 8315 owned by a man named Chanik Prasad, a total of about 80 acres, but they wanted to buy at 40

$200 an acre. So they made a counter offer, offering to buy 40 acres from the Plaintiffs at the western end of their property at £110 ($220) per acre, and stating that they would form a public road access to the western end of the Plaintiffs' land. It appears fairly clear that the Plaintiffs' solicitors had indicated that they considered £110 per acre too low, because the Council stated that if the price were not acceptable, they would proceed to acquire compulsorily. The Plaintiffs' solicitors replied speedily, stating that they considered the offer quite unrealistic, in view of the then use of the land and its potential, and ended up by assuming that compulsory acquisition would therefore be undertaken. That was on 17th August 1966."

14. The next step was that on 8th September 1966, the Council's solicitors wrote to the Acting Chief Secretary of Fiji, seeking the approval of the Governor under what became section 136(1) of the Towns Ordinance (Cap.106), to the compulsory acquisition of "approximately 40 acres" out of Certificate of Title 8316. The letter stated that the Plaintiffs' asking price was £300 ($600) per acre, which was considered "highly excessive". Record 250, 420

15. Section 136 of Cap.106 is in the following terms :-

"136(1) If a town council are unable to purchase by agreement and on reasonable terms suitable land for any purpose for which they are authorized to acquire land the council may represent the case to the Governor in Council and if the Governor in Council is satisfied, after such inquiry, if any, as he may deem expedient, that suitable land for the said purpose cannot be purchased on reasonable terms by agreement and that the circumstances are such as to justify the compulsory acquisition of the land for the said purpose and that the said purpose is a public purpose within the meaning of the Crown Acquisition of Lands Ordinance he may authorize the council to acquire the land compulsorily.

(2) The provisions of the Crown Acquisition of Lands Ordinance shall apply to the compulsory acquisition of

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land by a town council under the provisions of this section, and in the application of the provisions of that Ordinance to such acquisition reference to "the Crown", "the Governor" or "Government" shall be deemed to be reference to a town council authorised to acquire land under the provisions of this section and reference to "The Director of Lands" shall be deemed to be reference to the Town Clerk."

Record 423-424

16. There followed a letter dated 19th September 1966 from the Lands and Survey Department, to which the request for approval had been referred by the Chief Secretary's Department. The first point raised in this letter was a suggestion that the procedures prescribed by section 137 were inappropriate; and that the application fell to be considered under section 15 of the Suva Electricity Ordinance (Cap.76). In the event, this suggestion was ignored, and was not

Record 423

pursued by the Governor's advisers. The letter then requested detailed information about the Council's proposal, including a plan. A reply

Record 428

to this letter was made by the Council's solicitors on 26th October 1966. Because of the significance sought to be attached in the Plaintiffs' submissions to the trial judge and the Court of Appeal to the failure of the Council to provide an access road to serve the balance of land

Record 428

retained by the Plaintiffs after acquisition, it should be noticed that in this letter it was stated on behalf of the Council that "(I)t was

Record 386.24

agreed with the owner of C.T. 8316" that if the Council acquired the area out of the title ... a road would be provided to give access to the balance area." But as was rightly observed by O'Regan J.A. in the Court of Appeal, the evidence in the case "disclosed no such agreement. It disclosed no more than that such was a term of various offers none of which was accepted."

17. There followed further correspondence,

Record p.433 434

culminating in a letter dated 16th March 1967 addressed to the Town Clerk by the Department of Fijian Affairs and Local Government. This notified the approval of the Governor-in-Council, in terms of section 136, for the compulsory acquisition by the Council of "20 acres of land for a power station." This letter recorded the fact that 20 acres was substantially less than the area of land applied for but stated that the

Record 435

Governor-in-Council considered that 20 acres was sufficient. On 7th June 1967, through its solicitors, the Council notified the government authorities that "after further consideration ...

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it would prefer to acquire 20 acres at the eastern end i.e. adjacent to the sea out of C.T. 8316." This letter referred to an enclosed sketch showing "the proposed site hatched red, the suggested access road coloured brown and the recommended cable easement coloured blue". The trial judge inferred that the "locality plan produced in Court by Mr. Warren, the former solicitor for the Plaintiffs, was identical with the sketch referred to in the letter dated 7th June 1967.

Record 435-6

Record 268.16

44 Ex. "N"

18. Then, on 5th July 1967, the Governor-in-Council signified his approval of the compulsory acquitision of the 20 acres at the eastern end of C.T. 8316: see letter dated 18th July 1967 to the Town Clerk from the Department of Fijian Affairs and Local Government. This letter also notified approval "to the compulsory acquisition of such land as is necessary, following either of the two routes proposed, to give access to the new power station site from the King's Road; it observed that after discussion between government and council officials, a route through the Kinoya subdivision had been decided upon. The trial judge correctly inferred that this was the route ultimately shown upon a survey plan signed on behalf of the Plaintiffs on or about 26th October 1967. But it is clear that it was so signed before that route was marked on the plan. The route as marked did not provide access to the balance of the Plaintiffs' land.

Record 437

Record 268.24

19. On or about 27th July 1967, there was served personally on Sukhi Chand as the registered proprietor of the subject land, a notice of acquisition bearing that date and purporting to be given and, in the Council's submission, effectively given under section 6 of the Crown Acquisition of Lands Ordinance (Cap. 119), as adapted by section 136(2) of the Towns Ordinance to the case of compulsory acquisition of land by a Council. This notice, together with the sketch plan forming part of it, is set out at pages 444 and 445 of the Record. It stated the Council's intention of entering into possession of the subject land the expiration of 8 weeks from its date.

Record 251.5
52.30

Record 444-445
250.50 - 251.10
442-443

20. At or about the same time a similar notice was delivered to the then solicitors for the Plaintiffs. It was common ground at the trial

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that the provisions of section 7(4) of the Crown Acquisition of Lands Ordinance (Cap. 119) relating to advertisement of the notice of acquisition were not complied with.

255.27-34
295.1
296.34

21. As found by the trial judge, Sukhi Chand (who was accepted as a truthful witness), in September 1967, relinquished possession of the land specified in the notice of acquisition "with the knowledge and intention that the Council were taking over to the extent of excluding him from the land" ... "He ceased to occupy the land about a month or two after he received the notice of acquisition. His attitude was that he got the notice, he knew the Council were going to take the land, and when the Council surveyors came along, he found out what they wanted, put up his fence on the boundary, and kept his cattle on the rest of the land." It was in this fashion that His Lordship resolved favourably to the Council conflicting allegations as to the time at which possession of the land had been ceded to the Council conformably with the notice. This finding was not reversed in the Court of Appeal. Marsack J.A. expressly referred to it without dissenting from it; and it is implicit in the judgments of Gould V.P. and O'Regan J.A. in that Court that they accepted it.

Record 356.4

Record 446-7

22. Sukhi Chand submitted a claim for compensation dated 25th October 1967. It was formulated on the basis that, as against the Plaintiffs, he was entitled, at the date of the notice of acquisition (27th July 1967), to retain possession of the subject land until 31st December 1968, unless the Plaintiffs were to give him six months prior notice to vacate and were to pay to him the balance of the purchase price under their contract with him. As found - correctly, it is submitted - by the trial judge, the Plaintiffs after 27th July 1967 did not act "evidencing an intention of exercising dominion over the land until their solicitors wrote to the Council's solicitors on 16th September 1968 after the construction of the power house had apparently begun." But, in the meantime, the Plaintiffs, on 24th October 1967, themselves lodged a claim for compensation (£400 ($800) per acre) with respect to the Council's acquisition. As the trial judge found, they did not demur to the notice of acquisition after it was brought to their notice until their newly appointed solicitors wrote the letter dated 16th September 1968 (hereinafter referred to: see para. 30). O'Regan J.A. referred to the Plaintiffs' claim for compensation by setting out the relevant portion of their solicitors' letter dated 24th October 1967:

Record p.295. 25

Record p.295. 30

Record p.296.4

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"We claim compensation at the rate of £400 per acre, computed on the surveyed area for our estate in fee simple in the land affected by the Notice of Acquisition". Record p.392.3

(The underlining is that of His Lordship. The 'surveyed area' refers to the plan Ex.D1).

23. On 19th March 1968, Sukhi Chand's solicitors wrote on his behalf to the Council's solicitors saying that he had ceased, by the end of "September 1967, using the subject land, in accordance with the terms of the notice of acquisition." Record p.295.10

24. To return now to the actions of the Plaintiffs subsequent to the receipt by them of the notice of acquisition: first, their claim for compensation has been referred to. Second, their attorney under power (Jethalal Naranji) on or about 25th October 1967, signed a plan of subdivision (Ex.D1) which eventually became D.P. 3265. His signature was qualified by the expression of an understanding as to the provision of an access road to serve the balance of the Plaintiffs' land (see para. 26); but as Gould V.P. observed there was no qualification based on the alleged uncertainty of the description of the land which the Council had taken. Record p.324.24 317.30 440 324.37

25. Another relevant event occurred on 25th October 1967: the Plaintiffs' then solicitors confirmed to the Council's solicitors, by letter, advice previously given that "in order to simplify the claims" (scil. for compensation) they had registered a transfer of the land in C.T. 8316 from Sukhi Chand to the Plaintiffs and a "Mortgage back securing a balance of the purchase price". This letter also forwarded the Plaintiffs' claim for compensation, to which reference has already been made. Registration of the transfer and mortgage had been effected on 16th October 1967: see Exhibits C & K (not reproduced in Record).

26. On 26th October 1967, Mr. Warren, the Solicitor then acting for the Plaintiffs returned to the Council's solicitors, under cover of a letter of that date, a locality map, on which was marked a proposed road giving access to the power station site and to the balance of the plaintiffs' land. This map had been lent to Mr. Warren in connexion with a request made onbehalf of the Council that the Plaintiffs should sign the survey plan which is referred to in the judgments of Record p.440 Record 268.25 317.10-40

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Stuart J. at p.268.25, of Gould V.P. at 317.10-40 and of O'Regan J.A. at p.386.28. That survey plan, which became Deposited Plan 3265 (Exhibit D1), was signed by Jethalal Naranji on behalf of the Plaintiffs. The basis upon which he did so is set out in Mr. Warren's letter of 26th October 1967:

386.28-387.11

> "It has been signed by our clients without prejudice to their claim for compensation and on the understanding that it is the council's intention to establish access from King's 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."

386.41-387.1 440

27. The trial judge found as a fact that in May 1968, Jethalal Naranji received oral advice from the Council's surveyors that the road access to the power house "was no longer to be as originally anticipated". On 13th May 1968, Jethalal Naranji reported this information to Mr. Warren, who upon his instructions told the Council's solicitor that the Plaintiffs would increase their compensation claim from £400 ($800) to £600 ($1,200) per acre if a suitable road giving access to the balance of the Plaintiffs land were not constructed.

252.24

51-54 60.31 - 61.5 53.13-38 255 318.8

252.30

28. The important point that emerges is that until later in 1968 (see para. 30 below) the Plaintiffs treated the lack of road access as relevant only to compensation; until then they gave no hint that they regarded it as in any way relevant to the validity of the acquisition.

29. Prior to the withdrawal of his retainer, which occurred on 13th September 1968, Mr. Warren inspected the subject land. He gained access to the site of the new power house along the access road constructed by the Council. Excavation work preparatory to the construction of the power house building was in evidence.

54.35 55-56

30. On 16th September 1968, the Plaintiffs' newly retained solicitors, Messrs. Koya & Co., wrote to the Council's solicitors, advising that they were now acting in place of Mr. Warren's firm. This letter continued:

318.13-37

> "It appears that our clients were led to believe that the Council would establish, at its expense, an access from King's Road to the 20 acres in question by means of a Public Road. This road, we understand, has been

shown in red in the said Survey Plan. No satisfactory explanation has been given as to why the Council has not taken any action in this regard when it has already taken steps to construct the Power House and carried out other works on the land in question. In addition, the Council has not yet accepted our clients' claim for compensation. Our clients also wish to place on record that the claim for compensation was bsed on the express understanding that the Council would construct the said Public Road.

This matter has been dragged for too long and this in turn has caused considerable inconvenience and loss to our clients.

Our clients have re-appraised the whole matter and we are instructed to notify you and the Council that our clients now :-

(a) challenge the validity of the purported compulsory acquisition of their property

(b) claim damages for trespass and interference of their proprietory rights."

31. By letter dated 17th September 1968, the Council's solicitors replied to Koya & Co., asserting (inter alia) that Sukhi Chand had given up possession and had been paid compensation. In his evidence-in-cheif, Sukhi Chand said that after he "had received the compensation" he told Jethalal Naranji that he had built a fence and moved his cattle from the subject land. 318-320

32. The letter just referred to was the last in the chain of correspondence before action; and there was no further discussion between the parties before the issue of the Writ on 4th October 1968.

33. By letter dated 24th September 1968, (Exhibit Q) written to Koya & Co., Mr. Warren wrote to the Council's solicitors :-

"We have your letter of 24th September.

The writer does not recall anything that he said or did on behalf of Mukta

Ben and Shanta Ben which would have been construed as an arrangement for the Council's Electrical Engineer, or indeed anyone representing the Council, to take possession of the land.

It must however be remembered that the registered proprietors were not themselves immediately entitled to possession. Mr. Sukhichand was entitled to possessuion until 31.12.68, under the terms of the contract of sale and purchase made btween him as vendor and Mukta Ben and Shanta Ben as purchasers.

We understand that, when Mr. Sukhichand received notice of the acquisition of the 20 acres, he moved his stock and fences and gave up occupation of the area. We submitted his claim for compensation, which included loss of the free use of the land for 15 months, and his claim was paid by the Council.

The writer has no personal knowledge of what took place between Sukhichand and the Council's representatives regarding the surrender or handing over of possession. Whatever it was could have been misunderstood as being also the act of the registered proprietors."

C. THE LEGAL ISSUES

34. These were numerous, as is indicated by the length of the hearing at first instance - 20 days - and in the Court of Appeal - approximately 8 days. The pleadings were amended several times. Before the primary judge the validity of the Council's acquisition of the land was challenged on no less than 32 grounds.

35. The Plaintiffs did not assert in their pleadings that the notice of acquisition served upon Record p.3.23 Sukhi Chand was tainted by invalidty: they p.7.13 concentrated their attack on the notice served on them. This carries clear legal consequences, fatal, so it is submitted, to the Plaintiffs' case. Sukhi Chand was the only person entitled in terms of section 7(1) of the Crown Acquisition of Lands Ordinance to receive service of any notice under section 5 and 6 of the Act: for he was at the time of the issue of the notice the only registered proprietor of any estate or interest in the subject land; and there were no "mortgagees", "encumbrances" or "Lessees" thereof. The trial judge was not

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disposed to agree with these submissions, as appears from his reasons for judgment. Gould V.P., however, expressed the view that the term "registered proprietor" was not wide enough to include persons having unregistered proprietorial interests. O'Regan J.A. agreed in that view, stating (with respect, correctly) that there is no statutory requirement to give notice to equitable owners.

Record pp.285. 42 - 286.23
Record pp.328. 41 - 329.18 380.43 - 381.20

36. The legal consequences of those views were not perceived in the Court of Appeal. It was submitted both to that Court and to the trial judge that the Plaintiffs had omitted to challenge the validity of the only notice, namely, that served on Sukhi Chand, that could have given rise to any right in the Council to acquire and to demand possession of the subject land. It was of course perfectly understandable that the Plaintiffs did not undertake that burden. For Sukhi Chand had in the most unequivocal fashion accepted his notice as valid by vacating possession, and by thereafter claiming and accepting compensation from the Council. Had he sought to attack the validity of that notice, a good defence of estoppel by conduct would have been available against him. An estoppel is binding not only on the party whose conduct gives rise to it, but upon his privies in title. The Plaintiffs at all relevant times stood in that relationship to Sukhi Chand. They would therefore have been precluded from making any successful attack on the legality of the notice which had been served and acted upon by him. And it is submitted that unless, within the framework of their case as pleaded, they could bring down that notice, they were not entitled to succeed in the action, because they had no standing to challenge the notice <u>given to them by service upon their solicitors</u>. This lack of standing stemmed not so much from a legal disentitlement to challenge the acquisition if there was available to them a ground (which, it is submitted, there was not) for doing so; but rather from a disentitlement to call into question the only notice that they sought by their pleadings to impeach, that is, the notice which they actually received. Such disentitlement arose from the fact that their notice, because not required by the relevant Ordinance to be given to them, gave rise to no legal consequence with respect to the right to possession of the land. No such right was vested in them at any relevant time, either as against Sukhi Chand or as against the Council.

37. Any conclusion contrary to the foregoing submissions would produce an anomalous result: the acquisition would be valid as against the registered proprietor who vacated possession of the land conformably with the statutory notice and thereafter accepted his compensation; on the other hand, it would be invalid as against someone who, being a privy in title of the registered proprietor, received a notice to the receipt of which he had no statutory right, and who successfully challenged the effectiveness of that notice. It is submitted that the only notices in relation to the validity of which a justifiable issue may arise are those which the relevant statute requires to be given. In this case there is only one notice falling within that description, namely, that which was served on Sukhi Chand, whose conduct in accepting the notice, vacating possession, and claiming and receiving compensation precluded the Plaintiffs from challenging that notice.

38. An attempt will first be made to summarize, for the purpose of subjecting them to separate treatment by way of submissions in this Case, the principal points raised on behalf of the Plaintiffs in the courts below as grounds for invalidating the notice of acquisition. These points are summarized in the order in which they are set out hereunder because their statement in that fashion will serve to set out the grounds of attack in some sort of chronological sequence :-

(a) The Council had no power to acquire by compulsory process land situated outside the city boundaries.

(This amounted to an assertion that with respect to the subject land the Council could not validly invoke section 136(1) of the Towns Ordinance).

This point is dealt with in para. 39 (infra).

(b) A position was never reached in which it could be said that the Council was, within the meaning of section 136(1), "unable to purchase suitable land by agreement and on reasonable terms".

(This amounted to an assertion that a condition precedent to the valid invocation by the Council of section 136(1) had not been fulfilled). See para. 40 (infra).

(c) The acquisition of the subject land was invalid because the Council had, in putting

its case for the authorization of compulsory acquisition, misled the Governor-in-Council :-

(i) into believing that there had been negotiations with the Plaintiffs;

(ii) by not disclosing the prior offer for the land in Certificate of Title 8315;

(iii) in relation to the proposal for an access road;

(iv) by not disclosing the Plaintiffs' offer to give 5 acres to the Council.

(v) by not disclosing that the Council's Valuer (Tetzner) had valued the land on the basis of rural use.

(See para. 41 (infra)).

(d) The Council failed to comply with the principles of natural justice or to act fairly towards the Plaintiffs. (See para. 42 (infra)).

(e) The Notice of Acquisition was void for uncertainty. (See para. 43 (infra)).

(f) The Council's failure to comply with the provisions of section 7(4) of the Crown Acquisition of Lands Ordinance. (See para 44 (infra)).

(g) The Council should not be permitted to retain the benefit of the authorization by the Governor-in-Council by reason of its failure to carry out an undertaking to provide an access road to serve the balance of the Plaintiffs' land. (See para. 45 (infra)).

(h) By becoming (as they did on 16th October 1967) subsequent to the expiry of the Notice of Acquisition, registered proprietors in fee simple of the land covered by their contract with Sukhi Chand, the Plaintiffs acquired as against the Council an indefeasible title to the subject land, unaffected by the Notice of Acquisition. (See para. 46 (infra)).

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(i) The Council's omission to obtain the approval of the Subdivision of Lands Board to the subdivision said to be involved in the acquisition of the subject land. (See para. 47 (infra)).

(j) The compulsory acquisition was invalidated by reason of the fact that the Council subsequently used some of the land for the allegedly unauthorized purpose of providing residential accommodation for persons to be employed at the power station. (Para. 48).

(k) The fact that the Council utilized only a small part of the subject land for the erection of the power station demonstrated that there was no genuine requirement for 20 acres of land. (Para. 49).

(l) The acquisition was invalidated by the circumstance that the Council took more than 20 acres in purported reliance on the Governor's authorization. (See para. 50 (infra)).

39. No power to acquire land outside city boundaries by compulsory process. (See para. 38(a)).

Stuart J. pp.292.45-294.50
Gould V.P. 325.5-326.37
O'Regan J.A. 366.5-368.27

(a) This argument was expressly rejected by the primary judge and by two of the judges in the Court of Appeal. It is submitted that their Lordships were correct. Marsack J.A. impliedly rejected it, as appears from the structure of His Lordship's reasons.

(b) The Respondent's main submissions on his point are in summary form as follows :-

(i) Section 133(1) of the Towns Ordinance empowers a Town Council to acquire land by agreement for the purpose of any of its functions under that Ordinance or any other law. The sub-section expressly provides that such land may be within or without the boundaries of the town.

(ii) The Council at all relevant times conducted its electricity undertaking under the authority of the Suva Electricity Ordinance. As amended, this Ordinance empowered the Council to construct "works" (an expression so defined as to include a power station and ancillary buildings) within and for a distance of 4 miles beyond the boundaries of the City of Suva. The subject land was within that distance.

(iii) The Suva Electricity Ordinance qualifies as "any other law" within the meaning of section 133(1).

(iv) Section 136 of the Towns Ordinance is to be read as supplemental to section 133. That is to say, it prescribes a mode for the compulsory acquisition of any land that may be acquired under the latter section.

(v) Section 15 of the Suva Electricity Ordinance was an alternative foundation for the application of section 136(1) of the Towns Ordinance in this case. As amended, section 15 empowered the Council, subject to the approval of the Governor-in-Council, to set in motion the procedures provided by the conjoint operation of section 136(1) and the Crown Acquisition of Lands Ordinance.

(vi) Section 132 of the Towns Ordinance makes it clear that the activities (including the establishment of power generating facilities) of the Suva City Council were not intended to be confined within the city boundaries.

40. The Plaintiffs' submission that a position was never reached in which the Council was "unable to purchase suitable land by agreement and on reasonable terms" within the meaning of section 136(1). (Para. 38(b) (supra)).

(a) On behalf of the Plaintiffs, it was argued that the Council was never in the position of being "unable to purchase by agreement and on reasonable terms" suitable land for a power station. The next step in the argument was that the Council was therefore not entitled to represent to the Council a "case" for compulsory acquisition. Thus it was said that the invocation by the Council of the procedures specified in section 136(1) of the Towns Ordinance was legally ineffectual, so that the purported authorization of the acquisition by the Governor-in-Council was invalid.

(b) The first thing to be said about this argument is that there is inherent in it a proposition which, if correct, would so affect the operation of section 136(1) as to make it virtually a dead letter. The proposition is that the question whether the Council is "unable" within the meaning of the subsection falls to be determined according to an objective standard as to the reasonableness of the terms that are available for purchase of the subject land by agreement. This cannot be correct, because it would lead to the extraordinary consequence that if in any case the Council genuinely believed that the terms (including price) offered by a landowner were unreasonable and backed its judgment to the point of rejecting them and of proceeding to utilise the section, a subsequent assessment of compensation in an amount exceeding that which the Council had been prepared to pay would operate to render a compulsory acquisition invalid at the option of the dispossessed owner. Such a result would make the section quite unworkable; so one must look for another interpretation. One does not have to search far to find a viable alternative: the procedures prescribed by section 136(1) are available if the Council is bona fide of the opinion that the terms offered are unreasonable. This view of the section appealed to Gould V.P., and it is submitted that His Lordship was correct. The Council's bona fides was not impugned. As indicated above, it was expressly conceded and this concession was mentioned in two of the judgments in the Court of Appeal. A slightly different way of viewing the sub-section would be to regard it as meaning that the procedures therein specified may be used if the Council and a landowner fail to reach agreement as to what are reasonable terms for the purchase of land. That condition was satisfied in this case.

37.15 - 338.11

(c) The learned trial judge expressed the view that in the circumstances revealed by the evidence "the Council might fairly say that they were unable to purchase the land required on reasonable terms". If this is understood, as it should be, as meaning that the Council held the belief that it could not reach agreement with the Plaintiffs as to a reasonable price, it is a finding amply supported by the evidence. His Lordship made

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explicit and clearly correct findings of fact on this aspect of the case:

> "It is plain that the Council's solicitors enquired if the plaintiffs would sell and that the price could not be agreed upon. The plaintiffs say there was no negotiation. That, to my mind, is negotiation and I reject the plaintiffs' submission that negotiations did not take place. The position appears to me to be that both parties realised that between them was a great gulf fixed, and over that gulf neither was prepared to pass. I think that is the explanation of the last paragraph of Mr. Warren's letter to the Council's solicitors of 17th August 1966 when he says:
>
> 'As there seems to be no prospect of further negotiation on price, the Council will presumably now proceed with a compulsory acquisition.' "

Record 266.27-42

Gould V.P. expressly agreed with this finding.

Record 334.27-50

(d) The Plaintiffs' argument, propounding as it does a purely objective standard for assessing whether available terms of purchase are reasonable, is not in consonance with the rest of section 136(1). For the Governor-in-Council is empowered to make a subjective assessment of that question: his opinion ("satisfaction") about certain matters is the operative factor in any authorization. One asks, therefore, why the existence of the conditions precedent to an application to the Governor-in-Council should be ascertained by reference to a different criterion, based on objectivity?

(e) If the interpretation of section 136(1) as outlined above be correct, all the evidence adduced by the Plaintiffs as to the actual value of the subject landaat or about the time of the application for authorization of the Governor-in-Council, was irrelevant.

(f) On behalf of the Plaintiffs a submission was made to the effect that the procedures specified in section 136(1)

are not available to a Council unless it be the fact (and, in case of a challenge to the validity of a particular acquisition, established as a fact) that suitable land other than that sought to be compulsorily acquired was not available for purchase by
376.44 the Council on reasonable terms. This argument was rejected by O'Regan J.A. It is submitted that on the true interpretation of the sub-section the burden of proof so ought to be case upon the Council does not rest upon it.

41. The argument that the Council "misled" the Governor-in-Council in one or more material respects and that the acquisition was therefore invalid.

(a) This argument is based upon the assumption that if the Governor-in-Council was so misled, the authorization that he gave was on that account subject to challenge. The validity of that assumption is disputed.

(b) To take in the order set out in paragraph 38(c) the various points upon which it is alleged that the Council misled the Governor-in-Council, it is submitted that:

(i) There had in fact been a negotiation with the Plaintiffs. This negotiation led to no agreement. The trial judge's findings on this point should stand.

(ii) The disclosure of the prior offer for the land in Certificate of Title 8315 was unnecessary and would have been irrelevant to the issues which fell for decision by the Governor-in-Council.

(iii) If anyone was misled in relation to the proposal for an access road, that person was not the Governor-in-Council. In this connexion reference is made to the letter dated 18th July 1967: see paragraph 18 (supra).

(iv) The disclosure of the prior offer by the Plaintiffs of a gift of 5 acres was unnecessary and would have been irrelevant.

(v) The fact that the Council's Valuer (Tetzner) had valued the land on the basis of rural use was also irrelevant.

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42. The Plaintiffs' argument that the authorization of the Governor-in-Council was vitiated by non-compliance with one of the principles of natural justice ("audi alteram partem") or by unfairness towards the Plaintiffs.

(a) This point, it is submitted, was not open to the Plaintiffs having regard to the way in which the action was framed, because neither the Crown nor anyone representative of the Crown (e.g. the Attorney-General) was made a party to the proceedings: cf. De Verteuil v. Knaggs ((1918) A.C. 557). The trial judge accepted this submission. Record: 281.7-282.5

(b) In any event, as a matter of interpretation, the Governor-in-Council was not obliged to hold an inquiry, at which the Plaintiffs would be entitled to be heard, into the Council's application. His Excellency had a discretion whether or not to hold an inquiry. The Plaintiffs' argument that the Governor-in-Council was bound to give the Plaintiffs an opportunity to state a case in opposition to the application ignores the significance of those words in section 136(1) which empower him to authorize a particular acquisition if he "is satisfied, after such inquiry if any, as he may deem expedient" about certain relevant matters. O'Regan J.A. 377.10

(c) As was pointed out in several of the judgments below, the argument also overlooked the reality of the situation. The Plaintiffs never took issue with the Council as to its need for the subject land for purposes covered by section 136(1). The Plaintiffs never sought an inquiry. Their then solicitors accepted on their behalf that the only bone of contention was the question of price. In the circumstances, the argument that the executive decision of the Governor-in-Council was vitiated for alleged failure to adhere to a rule of natural justice was unsustainable. In the circumstances the rules of natural justice had no application. As Stuart J. observed, the Plaintiffs, "when the Council would not buy at their price, ... sat back and waited for the Council to

acquire compulsorily". In another passage, His Lordship remarked that they "had given the Council, as one might say, the green light to go ahead". Gould V.P. agreed with these findings.

341.10-18

(d) On the question whether it could be said that the Governor-in-Council had acted unfairly to the Plaintiffs in authorizing the acquisition of the subject land without seeking their views upon the proposal, three of the learned judges below expressly held that he had not acted unfairly: see per Stuart J. at 277.25-281.6; per Gould V.P. at 339.5-343.43; per O'Regan J.A. at 376.24-378.20. Marsack J.A. (see p.355) did not make any finding adverse to the Council on this issue; and the structure of his reasons indicates that he was not of the view that there had been any denial of natural justice or unfairness on the part of the Governor-in-Council. Thus there are concurrent findings of fact on this issue in each of the Courts below. It is therefore submitted that the Board consistently with well established principle will not disturb this or any other such findings in this case.

43. <u>The alleged deficiency of the Notice of Acquisition for want of certainty in the description of the land intended to be taken</u>:

(a) If the notice served on Sukhi Chand was, as submitted above, the only relevant notice from the view point of determining the validity (or otherwise) of the acquisition of the subject land, this question does not fall for consideration. Sukhi Chand accepted the notice and acted upon it. Therefore, for reasons already submitted, the Plaintiffs are precluded by his actions from asserting the invalidity of that notice.

(b) In any event, the Plaintiffs are precluded by their own conduct subsequent to the receipt by them of the notice served on their solicitors from maintaining any attack on that notice on the ground of uncertainty. For even if that notice failed to define the boundaries of the subject land with sufficient precision, the Plaintiffs concurred in the subsequent definition of the boundaries (Ex. D1) and thereafter acted, by claiming compensation, on the basis that the notice was valid. This point was felicitously expressed by Gould V.P.

342.40

when, in relation to the act of Jethalal Naranji in signing D.P. 3265 of 25th October 1967, His Lordship said:

> "I think that this action indicated that so far as metes and bounds are concerned the minds of the parties were at that stage ad unum and that the appellants should not be permitted later to rely on what is shown to be an artificial objection."

(c) O'Regan J.A. held a similar view. His Lordship said: 392.25

> ..."The Plaintiffs' set their hand to a plan defining the land and making possible the computation that might be assessed on an acreage basis."

(d) It is quite clear that the Plaintiffs acted on the assumption that the notice of acquisition, whether that which was received by them, or that which was served on Sukhi Chand, was valid: otherwise they would not have utilized it as a springboard for claiming compensation. This assumption gave rise to a reciprocal assumption by the Council, on the basis of which the Council proceeded before the action was commenced to incur expense in developing the subject land as a power station. The Plaintiffs should not be permitted to undermine that reciprocal assumption. By claiming compensation, the Plaintiffs accepted, in effect, that the notices of acquisition received by them and by Sukhi Chand were valid. They cannot now turn about and assert the contrary for the purpose of securing an advantage other than compensation. To do so would be a legally impermissible exercise in approbating and reprobating the same transaction: Verschures Creameries v. Hull and Netherlands Steamship Co. ((1921) 2 K.B. 608); Grundt v. Great Boulder Pty. Gold Mines Ltd. ((1937) 59 C.L.R. 641).

(e) Quite apart from the application of the principle of estoppel, or the principle against approbating and reprobating, none of the notices of acquisition lacked

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certainty in relation to the description of the subject land. Upon this aspect of the case, the Council relies upon the reasons given by the trial judge and by Gould V.P.

282.6-285.3
320.40-325.4

(f) O'Regan J.A. was wrong in attributing the defect of uncertainty to the notice of acquisition.

380.26

(g) Any uncertainty in the description of the land in the notice of acquisition was cured by the subsequent assent of the Plaintiffs to the definition of the boundaries; see Exhibit D1.

44. Non-compliance with section 7(4) of the Crown Acquisition of Lands Ordinance:

(a) This point is dealt with in the following passages in the judgments:

Record pp.286.35-289.22

(i) Stuart J.: at pp. 286.35-289.22:

His Lordship held, correctly it is submitted, that the requirement as to advertisement was directory only and not mandatory and that the acquisition should therefore not be held invalid on the ground that the sub-section had not as yet been complied with.

Record pp.330.13-334.15

(ii) Gould V.P.: at pp.330.13-334.15:

After a careful review of the authorities cited by the Appellant, His Lordship rightly held that compliance with subsection (4) is not a condition precedent to the legal validity of a notice of acquisition. His Lordship also accepted the argument, which will be put to the Board on behalf of the Council, that such compliance is by section 8 of the relevant Ordinance made a condition precedent only to the assessment of compensation by the Court in a case where no claim for compensation has been lodged.

Record pp.358.32-360.36

(iii) Marsack J.A.: at pp.358.32-360.36:

His Lordship held that the requirements of subsection 4 are mandatory, but that non-compliance with them "need not ... be necessarily fatal". He declined to hold that such non-compliance resulted in "the invalidation of the compulsory acquisition" in the circumstances of the present case.

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(iv) O'Regan J.A.: at pp.382.46-385.5 — Record pp.382.46-385.5

His Lordship held after considering relevant authorities, that because the Plaintiffs had suffered no substantial prejudice from non-compliance with subsection (4); and because there had been substantial compliance with the statutory prescriptins as to giving notice to parties affected, the particular non-compliance did not serve to invalidate the subsequent steps taken by the Council.

(b) It will be submitted on behalf of the Council:

(i) That the reasons given in the Supreme Court and in the Court of Appeal for rejecting this particular ground for alleged invalidity are correct.

(ii) Further, and in the alternative;

(aa) The accural of the Council's right to enter into possession of the subject land is not expressed to be dependent upon compliance with section 7(4): see section 6.

(bb) Section 7(4) omits to prescribe any time within which a notice of acquisition shall be advertised. On the other hand, the form of notice of acquisition set out in the schedule to the ordinance in effect requires the recipient to vacate at the expiration of a time which is expressed to run from the date of the notice. It follows that compliance with section 7(4) is not a condition of the validity of a compulsory acquisition.

(cc) The verbal structure of section 8 indicates that compliance with section 7(4) is a condition precedent only to the assessment of compensation, and that only

in a case where no claim for compensation has been lodged with the appropriate authority.

(dd) The learned trial judge was right in observing that "it may not yet be too late to advertise the notice of acquisition."

44. The Council's alleged disentitlement to retain the benefit of the authorization of the Governor-in-Council because of its failure to provide an access road serving the balance of the Plaintiffs' land (Para. 38(g) (supra)).

It is submitted that :

Record p.300-302 Record p.342 Record p.385-387

(a) This point was correctly dealt with in the judgments of Stuart J., of Gould V.P., and of O'Regan J.A.

(b) The granting of the authorization was not made conditionally upon the provision of such an access road. Nor could such authorization lawfully have been so limited; section 136 of the Towns Ordinance does not empower the Governor-in-Council to impose such a condition.

(c) The Plaintiffs' submission on this point appears to concede that but for the Council's failure, the acquisition - other arguments aside - would have been and would have remained valid. There is nothing in the relevant statutory provisions and there is no principle of law to sustain the proposition that an acquisition, if otherwise valid, is defeasible upon the Council's failure to perform a non-contractual understanding as to the provision of access.

46. The effect (if any) upon the acquisition of the Plaintiffs' registration as proprietors in fee simple of the subject land after the expiry of the time specified in the Notice of Acquisition for giving possession. (Para. 38(h) (supra)).

(a) It is submitted that the Plaintiffs cannot rely upon a registered title, acquired after the date upon which the Council obtained possession of the land pursuant to the Notice of Acquisition, to displace the Council's statutory right to possession.

Record p.298-299 Stuart J. so held.

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(b) Gould V.P. adopted another approach, which will be relied upon in the submissions to be made to the Board on behalf of the Council. His Lordship regarded the Plaintiffs' claim for compensation, together with the letter dated 25th October 1967 (q.v. para. 25(supra)) as giving rise to an estoppel against the Plaintiffs to preclude them from relying upon their registration as defeating the Council's statutory right to possession.

Record p.348.46 p.350.3
Record p.349.5
Record p.439

(c) Gould V.P. was right in his provisional view that had he thought "otherwise" he "would have been of opinion that the learned Judge ought to have acceded to the application, late though it was, to amend the pleadings to raise the issue of fraud". This was a reference to an application so made on behalf of the Council, after the point based on the supposed indefeasibility of the Plaintiffs' registered title had been raised in the final address of leading counsel for the Plaintiffs. (The re-amended statement of claim had not asserted the Plaintiffs' registration as invalidating any Notice of Acquisition). It would be dishonest and fraudulent for the Plaintiffs now to assert their registration, which they took at a time when they expressly recognized the Council's rights under the Notice of Acquisition, as a basis for the denial of those rights. This point is made stronger by the fact that the Plaintiffs acquiesced in the Council's possession of the land from the end of September 1967 until the issue of the Writ a year later.

Record p.349.47 p.350.3

(d) O'Regan J.A. rejected the Plaintiffs' submission as to the effect of registration for other reasons which will be relied upon as correct. His Lordship thought that the submission overlooked "the fact that the respondent has made no attack on the appellants' title".

Record p.388.20-389.27
Record p.389.14

(e) Alternatively, it is submitted that the provisions of the Crown Acquisition of Lands Ordinance (Cap.119) dealing with compulsory acquisition of land override the provisions of the Land Transfer legislation to the extent that a registered title in fee simple will not confer upon the proprietor a title to

possession which is good against a valid notice of acquisition:

South Eastern Drainage Board (S.A.) v. Savings Bank of South Australia ((1939) 62 C.L.R. 603) at pp.621-622, 627-628. Pratten v. Warringah Shire Council ((1969) 90 W.N. (N.S.W.) (Part 1) 134).

(f) The Plaintiffs' argument that upon their registration as proprietors in fee simple they became entitled to receive a fresh notice of acquisition cannot be well founded. The argument means in effect that because they chose to register a transfer to them from Sukhi Chand the Council had to start the acquisition procedures all over again. But section 5 of the Crown Acquisition of Lands Ordinance makes it clear that the entitlement of anyone to receive a Notice of Acquisition falls to be determined at, or within a reasonable time after, the Governor-in-Council has resolved that the land is required. The section does not contemplate that the need for a further notice will arise on the occurrence of dealings with the registered title.

47. The effect (if any) of the Council's omission to obtain the approval of the Subdivision of Lands Board to the subdivision said to have been involved in the compulsory acquisition of the subject land. (Para. 38(i) (supra)).

Record p.296. 35 - 298.31

(a) Stuart J. correctly rejected the Plaintiffs' submission that this omission operated to vitiate the Notice of Acquisition. His Lordship's reasoning on this point will be relied upon. The Plaintiffs fared no better in the Court of Appeal on this part of the case. Gould V.P. and O'Regan J.A. dealt with it in some detail. Their Lordships' reasoning is also relied upon by the Council.

Record p.350. 4 - 353.27

Record p.389. 28 - 391.4

(b) In summary form, the main points to be developed in this connexion are as follows :-

(i) The Subdivision of Lands Ordinance (Cap.118) has no application to a compulsory acquisition or, to put the point perhaps more precisely, to the giving of a Notice of Acquisition.

(ii) Even if it did so apply, it should not be construed so as to invalidate a

compulsory acquisition made in breach of its provisions, or to invalidate a Notice of Acquisition given before any requisite approval of the Subdivision of Lands Board has been obtained.

48. The use of part of the subject land for the allegedly unauthorized purpose of providing residential accommodation for persons to be employed at the power station. (Para. 39(i) (supra)).

(a) For the Plaintiffs it was argued that such use operated to invalidate the authorization. To this proposition there are two answers.

(b) First, the provision of on-site housing for employees is manifestly incidental to the use of the land for a power station and is thus within the purpose for which the Council sought and the Governor-in-Council granted the relevant authorization. Further, as observed by Stuart J., the Council in the course of the correspondence leading to that authorization notified the Director of Lands that the provision of "living quarters for breakdown and shift staff", was in contemplation. His Lordship correctly observed that the determination of what is incidental to the Council's business of supplying electricity is a question of fact and correctly found in the Council's favour on this issue. In the Court of Appeal, Gould V.P. expressly concurred in this finding of fact. So did Marsack and O'Regan J.A. These are concurrent, unanimous and plainly correct findings which, it is respectfully submitted, the Board would not overturn.

Record p.290.10

Record p.292.11

Record p.343.44-344.30
362.29-363.2
387.41-388.19

(c) Second, the subsequent use of the subject land for an authorized purpose could not as a matter of law operate retroactively to undo the compulsory acquisition.

49. The legal consequences (if any) flowing from the circumstances that the Council has utilized, in the sense of erecting buildings on, only a small part of the subject land. (See para. 38(k) (supra)).

(a) For the Plaintiffs it was contended that

this circumstance evidenced the lack of any genuine need on the part of the Council for the whole of the land the subject of the Governor's authorization. This contention is of course quite inconsistent with the concession, to which the Plaintiffs should be held, that the Council had not acted in bad faith: (see para. 10 (supra)).

Record p.348. 20 (b) As Gould V.P. pertinently observed, and as appears from reading the reasons for judgment of the learned trial judge, "this question of excess land" was not made a clear issue in the Supreme Court. It is submitted that if, which is not admitted, more land was acquired than was in fact required, the acquisition is not on that account invalidated, either wholly or in part. The subsequent use or non-use of the subject land cannot affect retroactively the validity of the Governor-in-Council's authorization or of the steps taken by the Council pursuant thereto.

50. The legal effect (if any) of the fact that according to the Survey Plan (Ex.D1) which became D.P. 3265 the area acquired by the Council was 2 perches in excess of 20 acres.

On behalf of the Council it will be submitted that if the Council took more land than it was authorized Record p.285. 4-41 to take, the acquisition is not invalidated in toto: it is good except as to the excess. This view found favour with Stuart J. who observed in effect that it would be a simple matter to redress any error. This approach was also adopted by Marsack J.A.

51. The judgment of Gould V.P.

On behalf of the Council it will be submitted that the judgment of Gould V.P. was correct as to all the points upon which His Lordship decided the appeal in the Council's favour. In truth, the only question upon which His Lordship rejected submissions for the Council in the Court of Appeal was that relating to the entitlement or otherwise of the Plaintiffs to challenge the validity of the Notice of Acquisition given to them. This aspect of the case has been covered in paragraphs 35-37 (supra).

52. The judgment of Marsack J.A.

Except as a matter of last resort the submissions for the Council before the Board will not endeavour to support the reasoning or the ultimate conclusion

RECORD

of Marsack J.A. In other words, if the Respondents' other arguments were to fail, it would be submitted that the acquisition would stand good as to 5 acres. Record p.364.16-30

53. The judgment of O'Regan J.A.

(a) It is submitted, first, that His Lordship was correct in deciding the issue of estoppel in the Council's favour and his reasoning on this point will be supported in argument.

(b) It will be submitted that His Lordship was wrong in his conclusion that a condition precedent to the validity of the Council's legal entitlement to "represent a case to the Governor-in-Council" pursuant to section 136(1) was not fulfilled. In essence, His Lordship's conclusion is based upon the supposition that the Council took no proper steps, prior to applying for authorization, to inform itself what was a reasonable price for the land. Even if this supposition were correct, the validity of the Governor-in-Council's authorization is not affected. In this connexion reliance is placed on the arguments summarized in paragraph 40. Record p.373.39-374.22

(c) His Lordship erred in holding that the Notice of Acquisition failed for uncertainty in the description or delineation of the land to be taken. These were sufficiently certain; and in any event it was open to the Governor-in-Council to leave it to the parties (i.e. the Council and Sukhi Chand) to work out for themselves the boundaries of the twenty acres to be taken. And this they had no trouble in doing.

54. It is therefore submitted that this appeal should be dismissed with costs for the following (amongst other)

R E A S O N S

(a) Stuart J. was right in dismissing the action.

(b) The majority of the Court of Appeal was right in dismissing the appeal.

(c) The Plaintiffs failed to challenge the only Notice of Acquisition which gave rise to the Council's entitlement to take the land. (See

(d) The Plaintiffs' were estopped by their conduct from maintaining their claim.

(e) It was not open to the Plaintiffs to approbate the acquisition by lodging a claim for compensation and yet to reprobate it by bringing their action.

(f) The reasons summarized in this case. 10

T.E.F. HUGHES

CATHARINE F. WEIGALL

No. 19 of 1977

IN THE PRIVY COUNCIL

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 RESPONDENTS

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