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

Civil Appeal No. ABU 0087 of 2004
(High Court Judicial Review No. HBJ 33/97S)

BETWEEN:

NIVIS MOTOR AND MACHINERY COMPANY LIMITED

Appellant

AND

THE MINISTER OF LAND AND MINERAL RESOURCES

Respondent

Coram: **Barker, JA**
Henry, JA
Scott, JA

Date of Hearing: **11 July 2006**

Counsel: **H. Nagin for the Appellant**
K. Keteca for the Respondent

Date of Judgment: **14 July 2006**

JUDGMENT OF THE COURT

---

[1] The Appellant (Nivis) has at all material times been the registered proprietor of Crown Lease 9007 which is situated at the corner of Jerusalem Road (previously known as Golf Links Road) and Ratu Mara Road. Ratu Mara Road is a very important

thoroughfare: it is one of the three main entries into Suva from the Suva/Nausori corridor.

[2] In October 1990 the Cabinet approved a project known as Fiji Road Upgrading Project – Stage 2. One component of the scheme was the construction of a by-pass at Nabua.

[3] In July 1992 the Minister of Housing and Urban Development published a Notice of Suspension of Part of City of Suva Town Planning Scheme in the Fiji Government Gazette. Gazette Notice 1794 advised that:

> "the Suva City Council proposes to substitute a new scheme for part of the City of Suva Town Planning Scheme at Nabua to provide for more commercial lots and car parking spaces, a mini market site and a new by-pass road ..."

In an accompanying gazette Notice 1796 the Suva City Council offered the scheme for inspection and objection.

[4] According to an affidavit sworn on 13 May 1999 by the then Minister of Land and Mineral Resources, a public hearing was held in August 1993 to consider the scheme. In January 1995 the Director of Town and Country Planning gave approval for the survey of all properties to be affected by the new by-pass.

[5] On 14 July 1995 Adrian Sofield, & Associates, Architects, submitted an application for development permission in respect

of part of Nivis' land to the Suva City Council. Nivis wished to extend its existing building westwards in the direction of the junction between Ratu Mara road and Golf Links road. A copy of the application is Exhibit C to an affidavit filed on 3 October 1997 by Mr. Nirmal Singh, a director of Nivis.

[6] On the reverse of Exhibit C there is a plan of the affected area. The plan shows Nivis' existing building and the proposed extension. Superimposed upon the plan of the existing junction at the corner of Ratu Mara road and Golf Links road is what is described in the plan as "proposed new road by PWD". The plan itself is entitled :

> "project : Nivis Motors new offices, showroom spare parts"
> "site plan of PWD new road layout".

As will be seen from the plan, under the proposal, Ratu Mara Road was to become a dual carriageway. A large roundabout was to be constructed at the junction of the two roads. The Ratu Mara Road boundary with Nivis' land was to be moved back towards Golf Links Road. The plan clearly marks "*existing boundary*" and "*new boundary line proposal by PWD Roads Department*" (emphasis added).

[7] In October 1995, Adrian Sofield Architects, wrote to the Permanent Secretary, Ministry of Infrastructure, Public Works and Transport. The letter (Exhibit D to Mr. Singh's affidavit) was headed "Proposed New Showroom for Nivis Motors and Machinery Company Limited Nabua, Nabua Roundabout". The final paragraph reads as follows:

> "the city council approved our proposal in principle. Now we have completed documentation and called tenders we have been referred to your office for approval. *The proposed roundabout encroaches on to our clients property*. As the final decision on the roundabout appears delayed we request an urgent meeting with you after 24 October 1995 to clarify this situation." (emphasis added)

[8] On 30 October 1995, Adrian Sofield, Architects, again wrote to the Ministry of Infrastructure Public Works and Transport. The second paragraph of the letter reads:

> "as per our discussion we request on behalf of our client that an approval be granted for the proposed building as it is set back two meters from the *proposed boundary*" (emphasis added).

[9] On 10 November 1995 the Ministry of Works advised Adrian Sofield, Architects that:

> "the PWD does not have any objection to the proposed building extension at a two meter sat back from the boundary line (coloured green) *defined by our Department*" (emphasis added).

[10] In June 1996 all objections to the planning application resulting from the public hearing held in 1993 were dismissed by the Director of Town and Country Planning.

[11] In October 1996 the Department of Lands and Survey advised Nivis that they would require an area of 455 square meters of their land to enable the by-pass to proceed. Compensation amounting to $28,000 was offered.

[12] In March 1997 solicitors for Nivis wrote to the Ministry of Land as follows:

> "Our client has advised us that you have intention of acquiring a portion of our clients land CL9007 for the proposed by-pass road.
>
> Our client has instructed us that it has no intention of selling any part of its land, as to do so, would affect its existing and future expansion of its existing business.
>
> *Our client has already made its objections known to you.....* We trust that the matter is now closed." (emphasis added)

[13] In fact, the matter was far from closed and the position taken by Nivis was far from final. In May 1997 Nivis offered the Ministry of Lands a choice of three options:

(i) the sale of approximately 400 sq meters of its land for $2,000,000 (two million Fiji dollars); or

(ii) exchange of the 400 sq meters for two acres of vacant state land at Golf Links Road; or

(iii) redesign of the proposed roundabout to make it smaller, or to shift it westwards towards Mead Road or to shift it towards Nabua, and in both cases away from Nivis' property.

[14] In June 1997 the Department of Lands and Survey rejected the three options. It increased its offer of compensation to $60,000 and explained that exchanging the two acres was "impossible". In view of the fact that the road designs had already been finalized it would not be possible to move the roundabout, or reduce its size.

[15] Further correspondence was exchanged during June, July and August 1997. The Ministry of Works offered to reduce the area of land that it required by 115 sq meters. Nivis refused to accept that offer and instead submitted a number of detailed counter proposals which had been prepared for it by a New Zealand company called Traffic Design Group Limited. These proposals were advanced as alternatives to the PWD plan which itself had apparently been prepared by another New Zealand company of engineers, Kingston Morrison.

[16] In June 1997 Kingston Morrison rejected the alternatives which had been put forward by Nivis. Kingston Morrison took the view that the first proposal, to reduce the size of the roundabout,

would result in the safety of the users of the roundabout being compromised. The proposals to move the roundabout itself either towards Nabua or towards the west were also rejected. They would involve extensive realignment of the road, the acquisition for substantial amounts of residential and recreational land and the need for the Golf Links creek to be realigned. Kingston Morrison also expressed the view that Nivis' claim for $2,000,000 was "unrealistic". In fact, it suggested that the upgrading of the Kings road as proposed by the PWD would probably result in *increased* beneficial exposure for Nivis' premises.

[17] According to Mr. Singh, he had a conversation with Mr. Dennis Maxwell of the Public Works Department in July 1997 and discussed the Nivis alternatives with him. Maxwell conceded that there might well be theoretical alternatives to the scheme proposed by PWD but that it was now too late to consider these alternatives since tenders for the by-pass had already been awarded.

[18] On 24 September 1997 the Ministry of Works, for detailed reasons given, formally advised Nivis that it was unable to accept its alternative proposals. Nivis, however, already knew that this was the case since on 29 August 1997 the Minister had advised it that he had decided compulsory to acquire 455 sq meters of its land for the Nabua by-pass road. A Notice to this effect (1656) was published in the Gazette dated 5 September 1997.

[19] On 6 October 1997 Nivis filed and application for leave to move for Judicial Review of the Minister's decision. It claimed that the Minister should have accepted the counter proposals put forward by Nivis and decided either to relocate or reduce the size of the roundabout. This would have been a less expensive option and would have avoided the need to acquire any of Nivis' land. By contrast, the PWD proposal was more expensive, offered no public benefit and required the compulsory purchase of land without which Nivis' business "would collapse".

[20] On 4 February 1998 the High Court refused Nivis' application for leave to move for Judicial Review. Although the matter was fully argued, the Minister did not file any evidence in answer to that filed by Nivis. On 13 November 1998 this Court allowed Nivis' appeal and granted leave. The Court noted that there had been much unnecessary delay and gave directions for the filing of further evidence and discovery. It also gave leave to the Appellant to file an amended statement of claim following receipt of the Respondent's documents and indicated that: "the Appellant will have to be far more concise and precise than the present pleadings indicate". The application for judicial review was to be set down for hearing on a date not earlier than 14 days after the completion of the interlocutory steps.

[21] The Court explained that its decision to allow the appeal was based on the Respondent's failure to counter Nivis' complaints, in particular (i) that the PWD had decided not to consider Nivis' alternatives and (ii) the award of tenders before Nivis' land had been lawfully acquired. Furthermore, Nivis had no means of

ascertaining certain information that it required from the Respondent's files. In these circumstances the High Court should not have refused leave and therefore the application was remitted to the High Court for hearing of the motion.

[22] It is not necessary to set out the reasons why the hearing of the remitted motion for judicial review did not "take place not earlier than 14 days after the completion of the [interlocutory] steps" but instead not until 18 September 2003, that is just under four years after the appeal was allowed. We think it appropriate, however, to observe that such delay, particularly in the field of public law, does not reflect at all well on the administration of justice in Fiji. In his judgment delivered on 3 November 2004 Jitoko J refused to order judicial review. This is an appeal by Nivis against that refusal.

[23] Despite the Court's suggestion that Nivis refine the terms of its application, the grounds upon which judicial review was sought in 2004 were precisely the same as this presented in 1997. The first ground was that:

> "The Minister for Lands and Mineral Resources has acted unfairly in making the decision to acquire the Applicant's land without giving the Applicant an opportunity to be heard."

[24] In support of this ground Mr. Nagin suggested that the Minister had not personally become involved in the matter at all until the compulsory purchase notice was published in the Gazette.

Relying on Jabbar Mohammed v. Director of Lands and Surveyor General (ABU 0008/2001) it was submitted that the Minister should have given Nivis a further opportunity to make representations to him personally before he reached his final decision.

[25] The High Court rejected that submission. In the first place, it took the view that the duty imposed on the Minister to act fairly (in the absence of anything to suggest that he ignored the advice of his department) was not separate from the duty imposed on the Ministry. The Court held, relying on Bushell v. Environment Secretary [1981] AC 75 that:

> "To treat the Minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to parliament is to ignore not only practical realities but also parliament's intention."

[26] Mr. Nagin did not suggest to us that the High Court's approach to the personal involvement of the Minister was wrong but he again referred to Jabbar. In our view, the circumstances of that case are quite different from those of the present. In Jabbar earlier negotiations on a different question were followed three years later by a peremptory decision to terminate the appellant's tenancy without any thought being given to further consultations before the tenancy was terminated on grounds upon which the appellant had been given no opportunity to make

representations. The Court of Appeal found that the appellant had been unfairly treated. In the present case, the High Court, after examining the evidence came to the conclusion that:

> "there had been many meetings between the applicant and/or its agents and the officials of the ministry involved .... Negotiations through meetings and correspondence from 1996 to 1997 are well documented in all the affidavits filed."

The judge concluded that Nivis had been given every reasonable opportunity to be heard and that there was nothing unfair in the procedures adopted by the ministry.

[27] Nivis first three grounds of appeal were to the effect that the High Court had erred in reaching this conclusion. In support of these grounds, however, Mr. Nagin only relied on one mistaken finding of fact which he suggested the judge had made.

[28] On the fifth page of his judgment, the judge found as a fact that the Minister had complied fully with the procedural legal requirements necessary for the implementation of the Suva Town Planning Scheme at Nabua. Mr. Nagin pointed out to us that the Nivis property CL 9007 is not mentioned in the list of properties included in the relevant gazette notice. Mr. Keteca accepted that this was the case and that the Minister had therefore been wrong to state otherwise.

[29] In our view, the fact that the Nivis property was not included in the Town Planning Act proposals does not lead to any conclusion that the decision to seek compulsory acquisition under the quite separate State Acquisition of Lands Act was flawed. The question before the court was not whether the decision to suspend part of the Suva Town Planning Scheme was fairly reached but whether proper and adequate consultation took place with Nivis before a decision was taken to apply to the High Court for the compulsory acquisition of part of its property. In view of the protracted and detailed negotiations which clearly took place between the parties there were overwhelming reasons for leading the judge to the conclusion that this was in fact the case. We do not read the judgment to suggest any confusion between the town planning and compulsory purchase procedures and we find no fault affecting the correctness of the overall conclusion reached. The first three grounds of appeal fail.

[30] The second ground for seeking judicial review was that the Minister had not taken into account a number of relevant matters; as a consequence it was said that he had acted arbitrarily and/or unreasonably, had exceeded his jurisdiction and had acted contrary to Nivis' legitimate expectations. Though argued together, the consequences were listed separately as the third, fourth and fifth grounds for seeking judicial review.

[31] As will be seen from Mr. Nagin's written submissions filed in the High Court and the virtually identical submissions placed before us, the main thrust of Nivis' argument was that it had made alternative and superior proposals of its own for the

reconstruction of the traffic junction. These, it was said, would be cheaper than the ministry's proposals and would avoid the need to acquire any of Nivis' land. The alternative proposals should, it was suggested, had been adopted. The ministry's decision to reject them and instead to proceed with its own plans which were clearly inferior and even contained plain errors of fact was so unreasonable that the decision should be quashed.

[32] The High Court rejected these submissions which we are moved to observe in passing are hardly consistent with the first ground upon which judicial review was sought. The judge reminded himself that the purpose of judicial review is not to review the merits of the decision reached but the manner in which it was arrived at. After carefully examining each of the arguments advanced he reached the conclusion that there was nothing to suggest that some procedural or substantive error had been committed by the Minister.

[33] The fourth, fifth and eleventh grounds of appeal were to the effect that the High Court had erred in not setting aside the Minister's decision for the reasons already placed before the High Court. Beyond, however, suggesting once again that Nivis' plans were superior and that the Minister's plans contained a number of mistakes (an apparent confusion between radius and diameter in one document was highlighted) Mr. Nagin did not place anything before us to suggest that the Minister's decision to accept the advice of his own experts was perverse or irrational or that the judge had erred in his approach. In our view the

High Court applied the correct principles and reached the correct conclusion. These grounds fail.

[34] The remaining grounds of appeal were not addressed at all. Some, such as the seventh, tenth and fourteenth are so imprecisely framed as to be incapable of consideration in the absence of detailed submissions. The remaining grounds are repetitive of those already considered. We were not assisted by Mr. Keteca's failure to file any written submissions at all.

[35] As already seen, this litigation has been dragging on since 1997. We have already referred to this court's directions designed to achieve a speedy resolution of the matters at issue. The directions were not followed and neither was any or any sufficient attention paid to this court's observations on page 10 of the judgment delivered on 13 November 1998:

> "... we do not consider that an application under section 6 (3) [of the State Acquisition of Lands Act – Cap. 135] can be considered until the application for judicial review has been determined. An application under section 6 (3) has apparently been filed. It can only be actioned should the judicial review application fail."

[36] Notwithstanding that observation, in 2004 an action was commenced in the High Court under the provisions of section 6 (3) of the Act. On 19 October 2005 a single judge of this court to whom application had been made to stay those proceedings

pending disposal of this appeal concluded that he had no jurisdiction to stay proceedings in the High Court which were not yet subject to appeal. It was observed however that the High Court might think it prudent and sensible to stay proceedings before it, pending the outcome of this appeal.

[37] We were advised from the bar that no application to stay the proceedings was made to the High Court and that neither the observations of this court made in November 1998 nor those made in October 2005 were brought to the High Court's attention. We were then handed up a copy of the High Court's judgment delivered on 4 July 2006. It makes no mention of the present appeal. This sequence of events is most unsatisfactory.

[38] In R v. Monopolies Commission ex parte Argyll Plc [1986] 1 WLR 763 the English Court of Appeal set out a number of principles which we think are particularly relevant to the way in which this dispute has been handled:

(i) good public administration is concerned with substance rather than form;

(ii) good public administration is concerned with speed of decision;

(iii) good public administration requires proper consideration of the public interest;

(iv) good public administration requires a proper consideration of the legitimate interests of individual citizens, however rich and powerful they may be and whether they are natural or judicial persons. But in judging the relevance of an interest, however legitimate, regard has to be had to the purpose of the administrative process concerned;

(v) lastly, good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary.

[39] It is important to bear in mind that the present proceedings are only concerned with and are restricted to the process by which the Minister, in 1997, decided to apply to the High Court for authority compulsorily to purchase part of Nivis' land. They are not concerned with whether the "taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or utilization of any property in such a manner as to promote the public benefit". All those questions are matters for the High Court alone to consider when determining a compulsory purchase application placed before it under the provisions of section 6 of the State Acquisition of Lands Act.

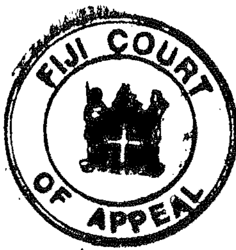
[40] In the absence of any reasons being given at all in 1997 by the Minister for his decision, this Court was not satisfied in 1998 that

the decision had been shown to have been fairly reached. Having now had the benefit of the High Court's very careful and considered judgment on all the facts, matters and arguments placed before it in the judicial review hearing we are satisfied that the Minister has not been shown to have erred in any significant way at all. The appeal must be dismissed.

RESULT

1. Appeal dismissed.

2. Respondent's costs assessed at $1,500.



Barker J.A.

Henry J.A.

Scott J.A.

Solicitors:

Messrs Sherani for the Appellant

Solicitor General for the Respondent