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

CIVIL APPEAL NO. ABU0070 OF 2006S  
(High Court Civil Action No. HBC 512 of 2004S)

BETWEEN:

NIVIS MOTORS AND MACHINERY  
COMPANY LIMITED

Appellants

AND:

THE ATTORNEY GENERAL OF FIJI

Respondent

Coram:

Scott, JA  
Wood, JA  
McPherson, JA

Hearing:

Monday, 13<sup>th</sup> November 2006, Suva

Counsel:

B C Patel	]	
H Nagin	]	for the Appellants
	]	
L Draunivalu	]	for the Respondent

Date of Judgment: Friday, 24<sup>th</sup> November 2006, Suva

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JUDGMENT OF SCOTT AND WOOD, JJA

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[1] We have read in draft the judgment of Justice McPherson, and are indebted for his analysis of the facts in the case, and of the law relating to the compulsory acquisition of land under the State Acquisition of Lands Act Cap.135 as amended by the State Acquisition of Lands Act (Amendment) Act 1/1998.

- [2] We agree in every respect with that analysis, including the fact that, by reason of section 3(2) of the Act, the Court is not free to make an order for acquisition of land under s.6(1) unless, in addition to being satisfied under S6(3) that the proposed acquisition is necessary or expedient for a public purpose, it is also satisfied that the necessity for the acquisition is such as to provide reasonable justification for the causing of any resultant hardship to a person having an interest in the lands to be acquired.
- [3] The decision of his Lordship that there was error in the High Court turns upon the fact that Justice Jiten Singh did not make reference to the provisions of s.3(2), and, by implication, did not direct his attention to the need to be satisfied of its requirements before making the acquisition order.
- [4] It is in respect of this conclusion that we differ, since it seems to us that the matters which were considered, and found upon the evidence, would have been conclusive in relation to the subsection being satisfied. If that is so then a reference back to the High Court would lack utility, and, in the exercise of the Court's discretion should not be made.
- [5] In this respect we consider it important to give attention to the fact that s.3(2) does not look to a simple balance of competing interests. Rather it focuses upon whether the necessity for the acquisition provides "reasonable justification" for the causing of the "resultant hardship" to the land owner.
- [6] In assessing the degree of that hardship and whether there is reasonable justification for causing it, we consider that it is permissible to look beyond competing traffic engineering arguments, or to whether a design can be produced that acquires as little as possible of the land of an owner that abuts a roadway.

- [7] Certainly it is necessary to take into account any harm occasioned to the landowner in so far as that might make the residue of the land less valuable, or interfere with whatever activities are undertaken on it. However the necessity and justification issues do not stop there. We consider it proper for the Court to have regard, additionally to considerations of public safety, in this case the construction of a roundabout and of a second lane that will permit a safe use of a busy roadway, to questions of the cost and difficulty in the construction of the required road works, any consequent delays in the carrying out or completion of those works, and their impact on road users and nearby land holders, as at the time that the matter comes before the Court.
- [8] In the present case, it is the fact that the roundabout had been constructed in 1997, that is well before the application came to be considered by the High Court. Its existence, and the inability of the highway authority to construct a second lane until these proceedings were finally resolved, has been an occasion of very great delay and annoyance to too many motorists for far too long, and it has been the occasion of very many accidents. The costs of acquisition and construction can only have been escalating. These matters, together with the consequences of further delays to the works, seem to us to have been properly available for any consideration of the question whether the necessity of the acquisition of the relevant parcel of the respondent's land, at the time of the proceedings, that is in the light of the then prevailing traffic conditions and economic considerations, provided reasonable justification for the resultant hardship to that party. Particularly is that so when account is taken of its entitlement to compensation, not only for the value of the land acquired but also for injurious affection.
- [9] An examination of the matters which Justice Singh took into account, as disclosed by his reasons for judgment, leaves us satisfied that, had he given express attention to s.3(2) in the light of the evidence before him, the result in the proceedings would have been no different.

- [10] In this regard, we note that his Lordship did accept that the interests of the respondent, as an individual occupier, had to be considered as part of the “public interest;” and that “the situation today at the roundabout is that there is a constriction at the Nausori end. The two lanes are constricted to a single lane so there is traffic congestion and sudden constriction causes accidents.”
- [11] His Lordship noted the existence of large scale queuing of vehicles in the mornings that result in delays for people coming to work in Suva, and observed that those delays could only be avoided if there was enough space to provide two lanes of roadway where there is currently only one.
- [12] These are all important and relevant considerations, that emphasise the fact that, whatever may have been the case in the past, and whatever possible traffic engineering plans could have been put up, with their individual advantages and disadvantages, the application had to be considered, as the location existed at the time of trial, and on the basis of the evidence before the court, including those matters of which judicial notice can be taken. So far as we are aware nothing has changed over the intervening five months since the judgment.
- [13] Of particular significance in this respect is the following series of findings by His Lordship:

***“The urgency of ameliorating the traffic congestion at this roundabout cannot be over-emphasised. It needs immediate and quick resolution and not proposal after proposal. The defendant cannot force the plaintiff to place traffic lights if the plaintiff does not consider it to be appropriate now, in the same way that it cannot force the State to provide an overhead bridge just to stop the State from acquiring its land. It is for the State to decide on the mode of solution to the problem.***

***Every acquisition causes some inconvenience, some hardship or some disruption to business of an occupant. It is the extent of disruption that is important. If an acquisition is likely to cause an***

***economic ruin or affect the entire livelihood of a person, then the public interest element must be very strong and overwhelming. In the present case, the Crown Lease 9007 is 9368 square meters. The acquisition is approximately five percent of the total area. The business would not have to relocate. It could still continue operations from the existing premises."***

[14] In the light of the conditions at the roundabout, at the time when the matter came before the High Court, and the then existing and still current imperative to have the roadway properly opened up for the remaining citizens of Fiji, without further delay or risk to public safety, and without the additional delays and likely substantial costs in starting all over again, we are satisfied that the evidence before Justice Singh would have satisfied the requirements of s.3(2), and that no conclusion would have been reasonably open other than that an order for acquisition should have been made.

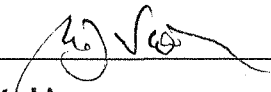
[15] This Court has the general powers provided in Rule 22 of the Court of Appeal Rules. That Rule provides:

***"22 (3) the Court of Appeal shall have the power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require.***

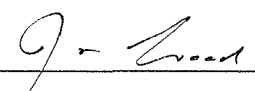
***(4) ....and the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties."***

[16] These are provisions of wide import, and we consider them sufficient to allow the dismissal of this appeal upon the basis that remitting the proceedings back to the High Court would have no utility.

[17] Accordingly we would dismiss the appeal. We agree for the reasons, identified by Justice McPherson that there should be no order as to costs.

  
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Scott, JA



  
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Wood, JA

Solicitors:

Sherani and Company, Suva for the Appellants  
Office of the Attorney General Chambers, Suva for the Respondent

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