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

CIVIL APPEAL NO. ABU0114 OF 2006S
(High Court Civil Action No. HBC 83 of 2006)

BETWEEN:

ATENDRA SINGH

Appellant

AND:

THE ATTORNEY GENERAL OF FIJI

Respondent

Coram: Devendra Pathik, JA
Andrew Bruce, JA
Izaz Khan, JA

Hearing: Tuesday, 24th June 2008, Suva

Counsel: O'Driscoll for the Appellant
A. Pratap for the Respondent

Date of Judgment: Friday, 11th July 2008, Suva

JUDGMENT OF THE COURT

Introduction

1 The Appellant in this matter, Mr Attendra Singh, was the owner of a parcel of land comprising 1.1108 ha. It appears in Certificate of Title 17196 being part of Lot 1 on Deposit Plan number 4287. The land is located at Sawakasa, Tailevu. This land was compulsorily acquired by the State under the State Acquisition of Land Act.

2 The acquisition was for the purpose of upgrading the Lodoni Road.

Procedural History

3 There was no challenge by the Appellant to the acquisition itself. However, the parties were not able to agree on the appropriate level of compensation for the compulsory acquisition. Accordingly, the Attorney General of Fiji, for and on behalf of the Director of Lands took out an Originating Summons in order to have the issue of compensation determined by the High Court of Fiji. (Record, page 17) In those proceedings, the Attorney General was the Plaintiff and Mr Attendra Singh was the Defendant. In the present proceedings, Mr Singh is the Appellant and the Attorney General is the Respondent. They are referred to in this judgment as Appellant and Respondent respectively.

4 On 28 April 2006 Singh J ordered that the relevant parcel of land be compulsorily acquired and the matter be set down for hearing to fix the compensation to be paid to the Appellant.

5 On 7 September 2006 the High Court heard the proceedings in respect of compensation. On 19 October 2006 Singh J gave judgment in the matter. The Court ordered:

(a) that the state pay the defendant in the sum of $50,000 or 1.1108 ha of compulsorily acquired land

(b) A survey of the area acquired be done within three months completion of the road by the plaintiff

(c) in the event that it is found on survey that the road covers more than 1.1108 ha, then the plaintiff is to pay to the defendant further compensation at the rate of $4-50 per square metre what land in excess of 1.1108 ha which is taken by the resumption.

(d) There be no order as to costs.

The appeal

6 The Appellant appeals by way of notice of appeal against the orders made by the High Court.

7 The grounds of appeal as argued before the Court of Appeal are as follows:

(a) The judge erred in law and in fact in not considering the various claims by the Appellant and, in particular, no allowance had been made for compensation for loss of quarry material.

(b) To the extent that the judge relied on comparative sales as a basis for determining a fair market value, the comparative sales upon which the judge relied were not truly comparable.

(c) The judge erred in law and in fact in not awarding costs to the Appellant.

Principles governing compensation for compulsory acquisition

8 The principles which govern compensation for land which is compulsorily acquired by the State start with section 40 of the Constitution. That section provides for compulsory acquisition of property by the State but requires compensation which is just and equitable by taking into account all pertinent factors including:

(a) the use to which the property is being put;

(b) the history of its acquisition;

(c) its market value;

(d) the interests of those affected; and

(e) any hardship to the owner.

It is self-evident that section 40 contemplates that other factors may be taken into account. The scope of what other factors may be taken into account need not be determined for the purpose of these proceedings.

9 The principles relating to the compulsory acquisition of land by the State which are established under the Constitution are brought into effect by the State Acquisition of Lands Act. In particular, section 12 of the Act provides as follows:

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

10 The principles established by the Constitution and the Act are also informed by authority. In ***Cedar Rapids Manufacturing & Power Company v Lacoste*** [1914] AC

569, 576, the Privy Council held that in determining the proper level of compensation for a compulsory acquisition:

(a) the value to be paid for is the value to the owner as it existed at the date of the taking not the value to the taker.

(b) The value to the owner consists of all the advantages which the land possesses, present or future, but it is the present value alone of such that falls to be determined.

The measure of the value of the land to be taken is the amount which the land might be expected to realise if sold by a willing seller, in the open market. The concept of compensation for not only the use to which land is currently being put at the time when its value is ascertained but also the use all uses to which it is reasonably capable of being put in the future was reinforced in ***Raja Vyicheria Narayan Gajapatiraju v Vizagapatam*** [1939] AC 302. The concept of future used in this context includes not just probable future use but possible future use: ***Frazer v City of Frazervill***e [1917] AC 187. However any increase to the value of the land due to the development carried out by the State, is to be disregarded: section 12(b)(v) of the State Acquisition of Lands Act. These principles were also recognised in ***Attorney-General of Fiji v Ivan Harm Nam*** [2000] FJHC 41.

11 At the trial, the learned trial judge considered as a working definition of the concept of market value (which is critical to section 12 of the State Acquisition of Lands Act) a definition proffered by the valuer for the Appellant. The working definition he accepted is that market value is the "estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in arm's height and length transaction after proper marketing wherein the parties as each acted knowledgeably, prudently and without compulsion". Slightly adjusted for syntax, this appears to be an appropriate working definition for this case.

Ground 1 - the quarry

12 In relation to the first principal ground argued on appeal, the central core of the point taken is that the judge was wrong to refuse to take into account the value of the quarry or the quarry material on the land. It is common ground that there is a quarry on the land. At pages 61 and 62 of the record there are some photographs to demonstrate the extent of the quarry. It is clear from photograph 4 (Record, page 62) that there is machinery on the site which is consistent with the site being used for the excavation of quarry materials. It is not plain from the evidence, but it appears that the case for the Appellant was that the compulsorily acquired land was partly on the quarry and partly affected the balance of the quarry on the land still held by the Appellant after the compulsory acquisition.

13 A valuation report tendered on behalf of the Respondent in the course of the trial makes no reference to the quarry at all. Counsel for the Respondent at the hearing before the Court of Appeal valiantly sought to argue that while not mentioned explicitly in the valuation report, this was implicit. With great respect to counsel, this cannot be accepted.

14 However, that is not the end of the matter. During the course of the hearing in relation to compensation, the notes of the learned trial judge of the examination of the valuer called on for people Respondent reveal that the valuer testified that he had seen property physically. (Record, page 66) Given the circumstances of this particular piece of land there is no way that anybody could attend on the site and fail to see the quarry. Further reference to a site inspection appears in the cause of cross-examination (record, page 68). However, more critically, in cross examination the valuer and accepted that he had not taken into account the quarry site. (Record, page 69)

15 The evidence at trial tendered on behalf of the Appellant by way of a valuation report referred to the issue of compensation for the quarry on the parcel of land. Indeed, the valuer suggested that compensation for this aspect of the parcel of land should amount to something of the order of $140,000. (Record, page 26) The body of the

report refers to the quarry at page 32 of the record and, specifically at page of the record. In this latter reference the valuer estimates that there are 26,902.43 cubic metres of rock available in the quarry and that this is valued at $5-50 per cubic metre. It appeared during the course of submissions that $5-50 per cubic metre was what the previous tenant of the quarry had been paying. During the hearing of the appeal, the Respondent did not demur to this observation and it seems reasonable in all circumstances. However, there is no real evidence as to how the valuer came to the volume of remaining material in the quarry. There was a somewhat cursory calculation which was obviously flawed. Photographs of the quarry are to be found within Appendix 7 of the valuer's report (record, page 61 & 62). While it is clear from these photographs of the quarry is by no means small, it does not provide any insight into whether or not the estimation of the valuer is correct. Although no point appears to have been taken during the course of the proceedings on behalf of the Respondent, it would appear that the estimation of the quantity of material available in the quarry is a matter outside the expertise of the valuer.

16 The valuer instructed by the Appellant testified at the hearing as well. In examination in chief, the valuer indicated that the acquisition area encroaches into the quarry area. (Record, page 72) In cross examination on the half of the Respondent, the valuer asserted that the quarry was not in use. (Record, page 73) Cross-examination also revealed that the quantity of rock that was estimated was done on the basis that the valuer took an approximate area and worked back. (Record, page 74) In re-examination, the witness testified that the quarry stone is there but will not be able to be used. (Record, page 74) It is not absolutely clear from the record what the valuer meant by this. The most likely explanation is that if the land was to be used for the stated purpose for which the land was acquired by the State, that this would preclude any further use of the quarry.

17 In his reasons for decision, the learned trial judge was clearly aware of the quarry. The judge approached the issue of the quarry from two standpoints. The first concerns the possible damage sustained by other property held by the Appellant or

the effect on his earnings. In this regard, the judge had in mind section 12(a)(iv) of the State Acquisition of Lands Act. In this regard, the judge noted the calculation of the quantity of rock available in the quarry and the value quoted by the valuer called on behalf of the Appellant. In this context the judge noted that the quarry was not in use. He added: (record, page 11)

> I do not have evidence as to what the quarry machinery was there, I do not know when the lease to Covert will expire and whether the [Appellant] ever operated the quarry himself or not and if he did operate the quarry, then how much did he earn from it and the figures required would be nett figures.

Covert was, of course, a contractor involved in the building of the road. Later, the judge added: "I do not know who runs the quarry at present and the nature of the arrangement between Covert and the [Appellant]." (Record, page 12) It appears that the judge was, in reality, saying that the Appellant had not proved his case in relation to the head of compensation provided by section 12(a)(iv) of the State Acquisition of Lands Act.

18 The judge observed that it was not clear on the evidence what was the extent of the encroachment of the compulsorily acquired land. However, it seems implicit in what the judge said that there was an encroachment to some extent. However, in that context it is difficult to understand precisely what the learned judge meant by the passage: (Record, page 12)

> A separate calculation for the quarry would also result in a "double dipping". He kept state by acquiring after allowing for injuriously fiction would acquire and pay for everything on and beneath the acquired portion of the land will stop so why should it pay for the rocks which come on to the path of the Road?

The reference to "double dipping" in the notes of proceedings appears at the record page 79. It appears that counsel for the Respondent is first making the point that material from the quarry was first used for the Road will stop counsel then says, according to the notes, "It does not affect his land. If we acquire land, we take rocks as well." If what counsel for the Respondent meant by that passage was, to put it in simple terms, that the Appellant cannot sell rock to the government and then seek to be compensated for it when the land that he and where the rock was placed (in this case for the Road) is compulsorily acquired then that makes perfect logical sense.

However, it does not address either the issue of compensation under the rubric provided by section 12(a)(iv) of the State Acquisition of Lands Act or compensation for that part of the quarry which was taken up by the acquisition itself. Plainly, if part of the compulsorily acquired land took up all or part of the quarry area then that has to be considered as part of the fair market value of the land even if the quarry is not being actively exploited at the time of the compulsory acquisition. That is consistent with the principles set out earlier in his judgment.

19 There has to be some limit to this concept because the Appellant is also claiming compensation for the loss of prospects subdivision. It is conceivable in a world where all things are possible that the land could be subdivided and the quarry potentially operate in the future. However sight must not be lost of the fact that the parcel of land which is the subject of these proceedings is just a fraction over 1 ha in size. Quite how a subdivision and in the quarry could operate together in a parcel of land of that size requires, perhaps, careful treatment.

20 In the submissions on behalf of the Appellant, after reciting the effect of section 12(a)(iv) of the State Acquisition of Lands Act, counsel for the Appellant then made the point that there was a site visit during the course of the hearing of the matter in the High Court at which the quarry was pointed out to the learned judge. Counsel for the Appellant submitted that the quarry was clearly affected by the land to be acquired as "a good portion of the quarry was to be traversed by the road." Counsel for the Appellant submitted that the judge did not quite go that far although, as has been noted there would appear to be implicit in his reasons for judgment some recognition of encroachment of the acquisition into the quarry.

21 The written submissions of the Respondent seek to address this issue in part 4 of the written submissions for the Respondent. "The Respondent reiterates that allowing for further allowance for quarry, would indeed be double dipping as this has been calculated in the Respondent's valuer in his valuation in respect of all the lots affected by the acquisition." The problem with this proposition is that nowhere in the

valuation of the valuer called by the Respondent was there any reference to the quarry at all.

22 The Respondent is on slightly stronger ground when it is pointed out that there was a paucity of evidence as to what loss, if any, arose from the quarry.

23 Despite the paucity of evidence as to the impact of the road on the quarry, it seems that some allowance should have been made for the quarry - at least in so far as the land that was acquired took over a part of the quarry. The quarry may not have been in operation at the time. However, that does not take the matter very far. It was capable of being re-opened even if it is correct that it was not being operated at the time. There was certainly no suggestion that the quarry had been stripped of quarryable material. As indicated above, the concept of future use in this context includes not just probable future use but possible future use: ***Frazer v City of Frazerville*** (above). Taking account of the other potential uses and, given the size of the land the subject of these proceedings would not be amenable to multiple uses, some allowance should have been made in relation to the quarry, but not much. The notion of the allowance that should be made being not much is reinforced by the absence of any substantial body of evidence to provide any real basis for evaluating the quantum of such allowance. That allowance should be $10,000.

24 In making the finding that there should be further allowance for the quarry, sight has not been lost of the firmly expressed observations of the learned trial Judge in which he made the point that, in effect, the object of the exercise is compensatory and should not be viewed otherwise. In the specific circumstances of this case, there appears to be great force in those observations. Those observations were not lost sight of and, indeed, informed the variation in the preceding paragraph.

Ground 2 - comparatives

25 The second principal submission by the Appellant complained is about the approach to comparative land sales adopted by the judge. As the submission developed, it appears that there was not a great deal of complaint about the principle of using

comparative sales. The complaint was really about the choice of properties as a basis for determining comparative values. The complaint developed in argument before the Court boiled down to the proposition that the valuer for the Respondent (which was the valuer preferred by the judge in this respect) did not take into account land which had a coastal aspect but rather took into account only rural land without a coastal aspect. In response to this submission, counsel for the Respondent pointed out by reference to the valuation submitted by the Respondent that in fact three out of the five properties used as a basis for comparison by the valuer employed by the Respondent were in fact coastal. (Supplementary record, page 18) The valuer retained by the Appellant referred to a number of coastal properties in appendix 1 of her report. (Record, page 42) however the difficulty with this was that all but two of the properties referred to by the valuer for the Appellant were on an entirely separate island. Only two of the values referred to were close to the land the subject of the compulsory acquisition. It is difficult to fault the approach of the learned trial judge in this regard and the second principal ground fails.

26 During the hearing, there was initially some suggestion that the judge may have gone wrong in connection with issues with the potential of the land or subdivision. However, in the course of argument counsel for the Appellant expressed himself as satisfied with the treatment of this issue by the learned judge.

27 During the course of argument it was suggested by counsel for the Appellant that the learned trial Judge adopted the incorrect method of valuing the property. He suggested, based on an article entitled *The Special Value of Land in Compulsory Acquisition Cases* which was a paper delivered by Dr John Keogh at the Pacific Rim Real Estate Society in Brisbane. It is to be regretted that the paper was not made available in the ordinary way to counsel for the Respondent and the Court before the hearing of the case. Nevertheless the effect of the paper is that the appropriate method to fix the level of compensation is to ascertain the market value and the the special value to the owner and give the claimant the higher or the two figures. Special value appears to have been defined in ***Pastoral Finance Association Ltd v Minister***

[1914] AC 1083. That would appear to declare that a person was entitled to be compensated for what land was worth to him. The Privy Council suggested that "the most practical form in which the matter can be brought is that they were entitled to that which prudent men in their position would have been willing to give the land so now than failed to obtain it." The argument for the Appellant is that this has been incorporated into the law of Australia in the decision of the High Court of Australia in ***Spencer v Commonwealth of Australia*** (1907) 5 CLR 418. Dr Keogh in his paper notes the qualifications to this principle as follows:

(1) special value does not justify a ransom value that might be extracted from a hypothetical register with a special made to the land;

(2) value to the owner is the value of the land at the time of the expropriation with all its existing advantages and possibilities including any advantage due to the carrying out of the scheme forward to the land has been acquired; and

(3) special value cannot be used to compensate an owner for the sentimental value of the land.

28 Both Dr Keogh and, implicitly, counsel for the Appellant accepted that whether this principle is to be applied in assessing compensation very much depends on the statutory framework which governs compensation per compulsory land acquisition. The Court was not directed to the statutory framework in either Australia or any other relevant common law country to make good this submission. It may be that this line of authority may be appropriate in the context of Fiji in some circumstances. Nevertheless, even if that was so there would have to be a real and proper evidentiary foundation for it. On the findings of the learned trial judge, given what he accepted from the valuer's evidence called and whose reports were tendered before the High Court, it is difficult to see how this mode of valuation could have added to the amount which should have been given for compensation in the specific circumstances of this case. Sight must not be lost of the simple and unavoidable fact that we are talking about a very small parcel of land of just a fraction over 1 ha. The learned judge applied that the correct test in the circumstances of this case.

Costs

29 The third principal submission concerns the issue of costs. The judge refused to order costs because the State authorities had made an offer to the Appellant of a sum which was the same as that which the court finally found was the appropriate level of compensation. (Record, page 16)

30 The award of costs is governed by sections 7(4) of the State Acquisition of Lands Act. There provides as follows:

> The acquiring authority shall pay all costs reasonably incurred by any other party in connection with the proceedings before the Court under the provisions of this and section **6** and including any appeal not made unreasonably or frivolously from any decision of the Court or the Court of Appeal given for those purposes.

For present purposes, it seems that the critical issue is whether the costs were "reasonably incurred" in the case. The learned judge below would appear to have taken the position that if there was an offer on the table which was the same as or greater than the compensation awarded then the costs of the Appellant should not be awarded. It is not proposed in this judgment to examine in detail the meaning of this phrase.

31 In the course of argument before the Court of Appeal, it was not immediately clear what the learned judge was referring to when at page 16 of the record he referred to the offer made by the plaintiff to the defendant. At page 80 of the record - which is a typescript of the learned Judge's notes of proceedings - counsel for the Appellant asks for reasonable costs. At page 81 of the record the judge has recorded "last offer was $50,000 which is fair." There statement is attributable to counsel then appearing for the Respondent. Mr O'Driscoll, who appeared for the Appellant both in the Court of Appeal and below, said that this was on the basis of a letter. The letter was produced to the Court of Appeal and another copy of the letter appears in the Supplementary Record of the High Court of Fiji as Exhibit BN1 to the affidavit of Barma Nand, sworn on the 1 March 2006. This affidavit would appear to have been sworn in support of

the Originating Summons and so the relevant letter "BN1" was before the court at all material times.

32 It is to be noted in the letter which was shown to this Court that the offer which is expressed to be a final offer was $50,000 for 2.4560 ha. Events would appear to have overtaken this matter and by the time the matter came on for hearing before the High Court the issue concerned 1.1108 ha which is, of course, less than half of the offer mentioned in exhibit "BN1". However, in the result, it would appear from the affidavit to which reference has been made that the lawyers acting for the Appellant were advised in or about August 2005 that the offer of $50,000 was for 1.1108 ha of land. This affidavit was used in the course of proceedings on the 28th of April 2006 when the learned judge made an order permitting the State to acquire the land the subject of these proceedings. In making the order that the land be acquired, the judge refers to the affidavit. However, (Record, page 20) the reference is limited to exhibit "BN3" in the affidavit. If counsel for the Respondent had wanted to rely on the affidavit or on exhibit "BN1" the affidavit should have been specifically referred to. However, that did not occur.

33 It is not necessary to finally decide what the phrase "reasonably incurred" means in section 7(4). Adopting what the judge seems to have thought it meant as the basis for analysis, it seems costs incurred in proceeding to a hearing before the High Court in the specific circumstances of this case to determine the proper level of compensation were reasonably incurred. Given that the Appellant had a valuation report (which was prepared in good faith) and which supported a level of compensation which was substantially greater than the position of the Respondent, the decision to proceed to a hearing was not unreasonable. This is to some extent reinforced by the fact that the valuation report of the Respondent did not explicitly take into account the value of the quarry material on the property. The report of the Appellant did take that into account. In all the circumstances, it would appear perfectly reasonable for the Appellant to have challenged the offer that was made on that basis alone. In these circumstances, the mere fact that the award comes to precisely the figure offered by

the Respondent does not provide a justification for depriving the Appellant of his costs.

34 It may be that section 7(4) provides a right to costs on the part of a person in the position of the Appellant and, on the true construction of the section, that the only discretion reposed in the courts under this section is as to quantum. It is not necessary to resolve the construction of this section for present purposes. Two arguments which might be arrayed in connection with this construction include the fact that sight must not be lost of what is at stake in these proceedings. On any view it is a serious thing to deprive a person of land that he or she owns. This is so regardless of whether the basis for holding the land is based on acquisition by purchase or upon a form or forms of holding being based on an indigenous connection with the land. (That there may different - or even possibly broader - dimensions in relation to land with an indigenous connection may be right but these considerations do not detract from the fundamental basis of this argument.) Accordingly, whatever the historical connection of the landowner with the land in question, there appear to be sound policy reasons for him getting reasonable legal and other advice as to the appropriateness of the taking of that land and the level of compensation for the loss of that land. As the State uses coercive powers under the law to acquire that land to which it otherwise has no right to acquire, it is strongly arguable that the State should pay for the advice and, if appropriate, the conduct of any litigation testing issues such as the appropriateness of the levels of compensation. However, against that there can be imagined cases where the process of the courts might be sorely tested or court time badly wasted and the deprivation of all or part of the costs of a person who was found to have wrongly tested the process of the courts or wasted time may be an appropriate expedient. These issues need not be determined in the instant case because, as has been indicated above, the Appellant should have had his costs in the specific circumstances of the case even if the discretion to award costs is not general and unfettered.

35 Costs should have been awarded below. In this regard, the appropriate order of this Court would be that the costs of the Appellant of an incidental to the trial and the negotiations which appear to have preceded that trial should be awarded to the Appellant then should be taxed if not agreed. Lest there be any doubt about it, the order should extend to reasonable disbursements which should include (but which may not be limited to) the fees of the value preparing the report of the valuer called by the Appellant.

Disposition

36 The idea of removing the matter to the High Court further determination in the light of the conclusions expressed in this judgment is not attractive. Further and unnecessary costs would be incurred and that would be particularly unattractive given the sum at stake in this case is, in relative terms, a relatively small one. Accordingly the Court orders:

(1) appeal allowed;

(2) sum awarded as compensation for the compulsory acquisition in the High Court be varied from $50,000 to $60,000;

(3) in the event that the survey referred to in holding number (3) of orders made by Singh J in the High Court has not been undertaken and in the event that the land actually taken in the resumption is greater than 1.110 hectares that the Respondent must pay to the Appellant additional compensation calculated by reference to the award in holding (2) herein;

(4) the Appellant to have his costs within the meaning of section 7(4) of the State Acquisition of Lands Act of and in connection with the proceedings below as if those had been ordered by Singh J;

(5) the Appellant to have his costs within the meaning of section 7(4) the State Acquisition of Land Act of the appeal;

(6) the costs order as referred to in holdings (4) and (5) be taxed if not agreed; and

(7) liberty to apply as to the precise terms the order of this Court.

Pathik, JA

Bruce, JA

Khan, JA

Solicitors:

O'Driscoll and Company, Suva for the Appellant
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