NIVIS MOTORS AND MACHINERY CO LTD v MINISTER FOR LANDS AND MINERAL RESOURCES (HBJ0033J of 1997S)

HIGH COURT — CIVIL JURISDICTION

JITOKO J

3 November 2004

Administrative law — judicial review — whether Minister exceeded jurisdiction, acted unfairly and with abuse of discretion — whether Minister's decision unreasonable or arbitrary — audi alteram partem rule — Constitution of the Republic of Fiji ss 4 5, 6, 9, 11, 40 — High Court Rules O 53 r 3 — State Acquisition of Lands Act (Cap 135) ss 3 5.

This was an application for judicial review by the Applicant against the decision of the Minister for Lands and Mineral Resources (the Minister).

In October 1990, the government approved the Nabua Bypass concept which proposed the construction of a new roundabout adjoining the King's Road junction. On 28 August 1997, the Minister exercised his powers to compulsory acquire the Applicant's land by virtue of s 3 of the State Acquisition of Lands Act (Cap 135) (the Act). On 4 February 1998, the Applicant's claim for judicial review was dismissed. On appeal, the Court of Appeal allowed the appeal and leave was given to the Applicant for judicial review. In addition, the court made specific orders for discoveries and filing of affidavits by the Respondent including the amended statement of claim by the Applicant.

After subsequent delays for one reason or another, the matter was finally heard on 18 September 2003.

The issues raised by the Applicant were: (1) unfairness/denial of natural justice in not giving the Applicant the opportunity to be heard; (2) abuse of discretion in not taking into consideration relevant matters; (3) that the Respondent's action was arbitrary and/or unreasonable; (4) the Respondent exceeded its jurisdiction; and (5) the Respondent acted contrary to legitimate expectation.

Held — (1) The Minister merely exercised his statutory powers after negotiations with the Applicant. Evidence produced showed that there were several meetings conducted between the Applicant and the officials of the two Ministries involved in which the views of the Applicant were taken into consideration by the authorities. Thus, the Applicant had opportunity to represent his case directly to the Minister.

(2) The Minister attended to all matters which he was bound to do and consider and did not consider matters which were not relevant. First, there was evidence that Mr Sofield who was acting in behalf of the company was aware of the roundabout scheme and the effect on the Applicant's land. There was also evidence from the affidavit of one Deve Taurogo that discussions were made with the Applicant concerning acquisition of part of the Applicant's land that had been breached. Second, the alternative designs from the Traffic Design Group commissioned by the Applicant, were fully considered by the Ministry's engineers and their consultants although later it was rejected. Third, it was clear from the evidence presented by the officials of the Ministry of Works that the issue of public safety was paramount to the Respondent's decision to reject the Applicant's counterproposals. Finally, the Applicant's land would not suffer considerable hardship if acquired by the government because there was evidence that the Applicant had a large area still left for it to continue as display area for its motor vehicles.

(3) As to unreasonableness, based on the evidences presented that the Respondent had not only given the reasons for the acquisition but was also equally satisfied that such reasons were adequate. The final representation by the Applicant was made at its meeting with the Ministry of Works officials and as a result of the representation, the Applicant's proposals were rejected for the reasons discussed in the various meetings.

(4) Evidence, even with additional affidavits filed, clearly showed that the Respondent and his officials had explored every proposal and scheme that may lead to a compromise, and that in the end, all efforts failed. Evidently, the Minister was guided by those considerations that are defined as public purposes. The question of public interest and public safety and health had been a central consideration in arriving at the Minister's decision. Thus, there was no merit in the Applicant's argument that the Minister exceeded his jurisdiction.

(5) The Minister did not, in his personal capacity, consider in greater details the alternative proposals submitted by the Applicant, the fact however remained that they were considered by the Ministry of Work's officials. The doctrine of legitimate expectation was simply a means of testing whether a person had been denied his legitimate expectation of a procedural protection or legitimate expectation to substantive benefit. It was the court's view that the Applicant's argument did not strictly come within the confines of the doctrine. In the end, the court reiterated that it had no role to examine the Applicant's counterproposals but it was the court's role to ensure that in arriving at his decision to exercise his powers under s 3 of the Act, the Respondent had conducted himself within the law. The Applicant's grounds for judicial review represented public law wrongs alleged to have been committed by the Respondent. The Respondent had done all that had been required of him by law to acquire the Applicant's property which was properly done.

Application dismissed.

Cases referred to

Bushell v Secretary of State for the Environment [1981] AC 75; [1980] 2 Al ER 608, approved.

Akbar Buses Ltd v TCB (Appeal No 0007); *Copper v Wandsworth Board of Works* (1863) 14 CB (NS) 180; *Creednz v Governor-General* [1981] 1 NZLR 172; *Durayappah v Fernando* [1967] 2 AC 337; [1967] 2 All ER 152; *Fiji Public Service Association v Registrar of Trade Unions* [1994] FJCA 8; *Pacific Transport Co Ltd v Mohammed Jalil Khan* [1997] FJCA 3; *R v Kensington and Chelsea Royal London Borough Council; Ex Parte Grillo* (1995) 94 LGR 144; *R v Secretary of State for the Home Department; Ex Parte Doody* [1994] 1 AC 531; [1993] 3 All ER 92; *State v Transport Control Board, Ex parte S Nair Transport* (HBJ0020), cited.

Du Preez v Truth and Reconciliation Commission [1988] 1 LRC 86; *Stefan v General Medical Council* [1999] 1 WLR 1293; [1999] UKHL 6; *Reid v Secretary of State for Scotland* [1999] 2 AC 512; [1999] 1 All ER 481; *R v Brent London Borough Council; Ex parte Baruwa* (1997) 29 HLR 915; *R v Panel on Take-Overs & Mergers; Ex parte Datafin Plc* [1987] QB 815; [1987] 1 All ER 564; *R v Somerset County Council; Ex parte Fewings* (1995) 1 WLR 1037; [1995] 3 All ER 20; *Raceway Motors Ltd v Canterbury Planning Authority* [1978] 2 NZLR 605; *Kanda v Government of Malaya* [1962] AC 322; *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124, considered.

Jabbar Mohammed v Director of Lands [2003] FJCA 69, distinguished.

H. Nagin for the Applicant

K. Keteca for the first Respondent

Jitoko J. This is a claim for judicial review by the Applicant against the decision of the Minister for Lands and Mineral Resources (the minister) to compulsory acquire part of the Applicant's land described as Lot 1 on Plan SO 3404 comprising an area of 455 sq metres being part of CL 9007 and abutting the King's Road junction commonly known as the Nabua roundabout. The reliefs sought are first an order of certiorari to remove the decision of the minister into court and to quash it and second, for a declaration that:

the Minister had acted unfairly and/or abused his discretion and/or arbitrarily and/or unreasonably and/or acted in breach of the Applicant's legitimate expectations and/or exceeded his jurisdiction under the State Acquisition of Lands Act and the Constitution of Fiji.

The grounds to support the claim as set out in the Applicant's statement filed into court pursuant to O 53 r 3(2) of the High Court Rules, on 6 October 1997, say as follows:

(a) That the Minister for Lands and Mineral Resources had acted unfairly in making the decision to acquire the Applicant's land without giving the Applicant an opportunity to be heard.

(b) That the Minister for Lands and Mineral Resources abused his discretion under the State Acquisition of Lands Act in that he did not take into consideration the following relevant elements:—

(i) The Public Works Department did not mention the issue of land acquisition to the Applicant at the time when the new showroom premises were approved.

(ii) The Permanent Secretary for Lands had made a false allegation in his letter of 4th June 1997 that the acquisition of land was a condition of the approval of the new showroom extension when this was not so.

(iii) The Report by Traffic Design Group showed the Nabua Roundabout did not require the acquisition of the Applicant's land.

(iv) The re-designing of the Nabua Roundabout in terms of suggestion of Traffic Design Ground would mean a substantial saving to the Government of Fiji.

(v) Even the Report of Kingston Morrison suggested that the Nabua Roundabout could be relocated and that acquisition of the Applicant's land could be avoided.

(vi) There would be no public benefit in acquiring the Applicant's land when safe and cheaper alternatives were available.

(vii) The Applicant's business is that of selling motor vehicles and the land in question is the display area which has generated most of the Applicant's sales and that the Applicant's business would collapse if the land was compulsory acquired.

(c) that the Minister for Lands and Mineral Resources acted arbitrarily and/or unreasonably

(d) That the Minister for Lands and Mineral Resources exceeded his jurisdiction under the section 5 of the State Acquisition of Lands Act and section 9 of the Constitution of Fiji.

(e) That the Minister for Lands and Mineral Resources had acted contrary to the legitimate expectations of the Applicant in that he had failed to properly consider the alternatives to the acquisition of the Applicant's land.

On 4 February 1998, Fatiaki J (as he then was) dismissed the Applicant's claim for judicial review. The matter went on appeal and on 13 November 1998. The Court of Appeal allowed the appeal and leave was given to the Appellant for judicial review. In addition the court, noting the diffused nature of the grounds for relief relied upon by the Applicant and the delay already caused by the cumbersome nature of the procedures adopted, made specific orders for inter alia, discoveries and filing of affidavits by the Respondent including amended statement of claim by the Applicant. The Plaintiff was further directed that it, in filing its amended statement, "will have to be far more concise and precise than the present pleadings indicate".

The Respondent on 8 December 1998 sought clarification of the court on the specific orders made by the Fiji Court of Appeal, submitting in the affidavit in support that the nature of the orders made were not necessarily compatible to the judicial review procedures of the country. An amended notice was filed on 11 March 1999. It appears from the record that the Respondent's application was abandoned when it came before Pathik J on 23 April 1999.

On 14 May 1999, the Respondent through the Minister for Lands and Mineral Resources filed its affidavit pursuant to the orders of the court, setting out the background to the government's intention to compulsory acquire the property in question. There were also affidavits filed by one Dennis Maxwell, the Respondent's Design Engineer, and one Deve Turogo, Valuer. The Applicant's reply was filed on 1 December 1999.

On 25 January 2000, when the matter came before Shameem J, the parties indicated that the process of discovery was still to be completed and after further adjournments the Applicant on 11 May 2000 filed a further affidavit, seeking, in view of its dissatisfaction with the documentary evidence produced to it by the Respondent, leave to call expert witness from New Zealand. In addition, leave was sought to cross-examine the Minister for Lands and Mineral Resources. No formal application had been filed by the Applicant for leave. However, leave was denied by Shameem J in her ruling on 14 March 2001.

On 11 April 2001, the Respondent filed its notice of appointment to hear the judicial review application. However the case remained unlisted for more than a year until it came before me on 31 May 2002. There were subsequent delays for one reason or another until the matter was finally heard on 18 September 2003.

I have gone into great length to detail the background of this case, if only to show how long it has taken to go through the various stages before hearing contrary to the very essence of the judicial review procedure being that of prompt and speedy hearing, and how everyone, including counsel and the court, have contributed to the delay.

Background facts

The facts can be briefly described as follows. In October 1990, the government approved the Nabua Bypass concept as part of its Asian Bank-sponsored Fiji Road Upgrading Project — Stage 2. This Bypass concept was linked to the Nabua Commercial Centre Scheme (the upgrading of the Nabua/"3 miles" Shopping Centre), which proposal was put to and approved by the Suva City Council in July 1991. These proposals and specifically the construction of a new roundabout in the intersection of Ratu Mara/Golf Link/Mead Roads, would involve acquisition of part of the Applicant's leasehold property.

There is no question that the Respondent had complied fully with the legal requirements of the procedures necessary for the implementation of the scheme. The scheme was approved in July 1992 and gazetted a month later. Public hearing for the scheme was conducted in August 1993. In 1995 the Director of Town and Country Planning gave approval to the Ministry of Public Works to prepare the title surveys for all the properties that will be affected by the Nabua bypass including the new roundabout. The land that will be required from the Applicant's leasehold was, according to the Respondent, first made known to the Applicant at a meeting of 2 June 1995. The Applicant however qualified this by saying that it was not until on 19 September 1996 letter from the Permanent Secretary for Lands, that the issue of acquisition made known to it in writing.

While there appears to be some differences in the details of what transpired at the various meetings and negotiations between the parties, the sum total all these efforts only resulted in an impasse. On 28 August 1997, the Minister for Lands purported to exercise his powers to compulsory acquire the Applicant's land, under s 3 of the State Acquisition of Lands Act (Cap 135) (the Act).

The arguments

Although the Applicant has failed to comply with the Court of Appeal order that its pleadings be reformulated "to be more concise and precise", it's arguments can be summarised along the line adopted by its counsel in its written submission before this court, namely,

— unfairness/ denial of natural justice in not giving the Applicant the opportunity to be heard;
— abuse of discretion in not taking into consideration relevant matters;
— action was arbitrary and/or unreasonable
— exceeding jurisdiction;
— acting contrary to legitimate expectation

I shall deal with each of them in turn.

Whether the minister had given an opportunity to the Applicant to be heard

A fundamental requirement of procedural fairness is the recognition on the one part, of a person's basic right to be heard, and the other, the consequential duty to give the opportunity to make representation. Procedural fairness is the modern expression of the more traditional term commonly known as the rules of natural justice.

The concept of natural justice is founded on two principles or "pillars" as referred to by Lord Denning in *Kanda v Government of Malaya* [1962] AC 322 at 337:

> The rule against bias is one thing. The right to be heard is another. These two rules are the essential characteristics of what is often called natural justice. They are the two pillars supporting it. The Romans put them the two ways, Nemo judex in causa sua: and Audi alterum partem. They have recently been put into two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations.

Similarly in *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124, Lord Diplock, after discussing the considerable procedural disadvantage in the pre-1977 O 53 situations, of applicants who wished to challenge the lawfulness of the determination of a statutory tribunal or any other body of persons having legal authority to determine the question affecting the common law or statutory rights or obligations of other persons as individuals, in the light of the narrow interpretation given by such bodies to the phrase "having the duty to act judicially", stated, at AC 279; All ER 1130:

> Wherever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described, it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded to him by the rules of natural justice or fairness, viz to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made.

The changes in the English O 53 post-1977, including the provision for discovery are now part of our rules and indeed law as laid down by the Court of Appeal in the hearing of this case in November 1998. Whereas previously it was not possible to challenge the validity of a decision on the ground of an error of law in the reasoning by which the decision has been reached, the discovery process, including the production of the minutes of the deliberation of the body, makes possible for an aggrieved party to ascertain whether the right questions has been asked.

Copper v Wandsworth Board of Works (1863) 14 CB (NS) 180 has long established the principle that no man is to be deprived of his property without having the opportunity of being heard. The House of Lords in *Durayappah v Fernando* [1967] 2 AC 337; [1967] 2 All ER 152, said the Cooper principle applied equally to a statutory body having a statutory power as well as to authorities. The Supreme Court of South Africa in *Du Preez v Truth and Reconciliation Commission* [1988] 1 LRC 86 referred to the Audi alteram partem rule as:

> a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary.

In this case, the Applicant argued that the Minister of Lands had not given it the opportunity of being heard. The gist of counsel's argument appears to be that while there had been many exchanges and meetings between the Applicant and the officials of the Ministries for Works and Labour, the minister who is responsible for and has the powers to compulsory acquire the land in question, had not been "involved" at all in the matter until it was advertised in the Gazette of 5 September 1997. Followed to its logical conclusion, the contention is that, an aggrieved party has the right to be heard and maintains that right, throughout the administrative stages of the decision making process. Thus when the negotiations broke down and the minister was called upon to exercise his powers to compulsory acquire, the Applicant, in counsel's view, should have been accorded by the minister the opportunity of being heard and re-present his case. The Applicant relies for this proposition on the Court of Appeal decision in *Jabbar Mohammed v Director of Lands* [2003] FJCA 69. The court in that case decided that the Applicants should have been allowed to make fresh submissions at the time the decision to cancel the tenancy was made, notwithstanding the fact that they had made submissions previously.

I am not persuaded by the Applicant's argument that the minister's omission to grant opportunities to the Applicant to make further representations before he exercised his powers under s 3 of the Act, was in breach of the audi alterum partem rule. The Jabbar Mohammed decision is distinguished on the ground that the Director of Lands still had discretion not to cancel the tenancy. In this case, the minister is merely exercising his statutory powers after negotiations with the Applicant had irretrievably broken down. There in fact are sufficient evidence produced before this court showing that there had been many meetings between the Applicant and/ or its agents and the officials of the two ministries involved, specifically Mr Dennis Maxwell, Senior Design Engineer with the Ministry of Works and Mr Deve Turogo, then Senior Valuer with the Lands Department beginning with Applicant/Turogo meeting of 2 June 1995 and the Applicant (Sofield & Associates, Architects/Maxwell meeting of 26 October 1995) in which

the views of the Applicant were made known to the authorities. Negotiations through meetings and correspondence from 1996 to 1997 are well documented in all the affidavits filed. There is evidence for example to show that it was only after the Applicant had made representations that the original total land required for the roundabout was reduced. There is also enough evidence to satisfy this court that the counter-proposals by the Applicant, including alternative roundabout designs, the offer of $2 million compensation, as well as the proposal for the exchange with a 2 acres of land at the Government Garment Training Centre further down the road, arose out of the negotiations, and indeed the representations, made by the Applicant to the Respondent.

The representations, it is true, were made to the officials of the Ministries of Works and Lands. They however represent the minister and the government in this Road Upgrading Project. The minister would have been fully briefed at the various stages of the negotiations, and he, no doubt, having satisfied himself that no further progress towards a voluntary surrender of the Applicant's portion of land was possible, finally as a last act, exercised his powers to compulsory acquire. There is no question here of the Applicant having a second or further opportunity to re-present his case directly to the minister, which the latter may otherwise be unfamiliar with.

In the end, I am satisfied that the Applicant had been granted every opportunity to be heard by the Respondent. This ground fails.

Whether the minister had not taken relevant matters into consideration

The Applicant submitted that the minister, in the exercise of his discretion under the Act to compulsory acquire, had failed to consider a number of relevant matters. First, according to the Applicant, the Public Works Department had omitted to make known of the future acquisition of part of the Applicant's land, at the time its new showroom premises was approved. Second, the minister failed to consider the report of the Traffic Design Group, Consultants commissioned by the Applicant, which stated that the roundabout could still be constructed without the need for the acquisition of the Applicant's land. Furthermore, according to the Traffic Design Group's remodelled plan of the roundabout, considerable savings would have been made to the government if its alternative proposal was adopted. The minister, the Applicant argued, had failed to consider that it was for the good of the public that the cheaper alternatives offered by its consultants, had been adopted. Finally the Applicant claimed that the minister had not fully considered the loss that would accrue to its business, if the piece of land that formed part of its showroom and display area was to be taken by the government.

The principle that a public body or office must have regard to all and to only legally relevant consideration is well-established. To avoid the danger of the courts substituting their own views for that of the decision-maker in the considerations under the relevancy principle, the courts have distinguished between two types of relevance. First are what can be termed as obligatory relevance, that is, those matters which must as a matter of legal duty, be taken or not taken into account. Second are the residual matters which may as a matter of discretion be taken into account. In *Creednz v Governor-General* [1981] 1 NZLR 172, Cook J stated the categories thus, at 183:

> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor

> even that it is one which many people, including the Court itself, would have taken into account if they had to make a decision.... [T]here will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the Ministers collectively would not be in accordance with the intention of the Act.

Lord Justice Simon Brown defined the types of relevance further in *R v Somerset County Council; Ex parte Fewings* (1995) 1 WLR 1037; [1995] 3 All ER 20. He said, at WLR 1049; All ER 32:

> It is important to bear in mind, however … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those equally clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he think it is right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just which consideration should play a part in his reasoning process.

In this instance, the minister purports to act under the authority vested in him under the State Acquisition of Lands Act (Cap 135). Section 3 of the Act allows the minister to acquire any land for any public purpose. "Public purpose" as defined under s 2 includes the construction of road. The acquiring power under s 3 is subject to the provisions of the 1990 Constitution which was applicable at that time and in particular s 9 prohibiting the compulsory taking of possession of any property except as authorised under any law. The compulsory acquisition of land for public purpose under s 3 of the Act is clearly permissible under s 9 of the 1990 Constitution. There are procedural requirements such as preliminary investigation (s 4), notice of intention to take possession (s 5) application to the court (s 6) and compensation factors (s 11), that fall into the category of obligatory relevance of factors that the minister must ensure they are complied with before the final act of acquisition.

From the evidence before this court, there is no question of the minister not adhering to the procedural requirements under the Act. They had all been complied with by government. There remains however the discretionary relevance, which includes matters that are obviously material to the decision to acquire and/or deprive a person of his proprietary right, that the minister ought to have taken them into consideration. In this instance, the two obvious matters are the Applicant's Traffic Design Group counter-proposal or alternative roundabout schemes and arising from it, the issue of the total costs of the project to government.

The Traffic Design Group was commissioned by the Applicant on 7 July 1997 and its report on the alternative design and options of the roundabout that did not necessitate the acquisition of the Applicant's land, made available to the Respondent by the end of July. Yet, according to the Appellant, the Acting Director of Roads had written on 4 July 1997 rejecting the alternatives which had yet to be produced by the Traffic Design Group. Clearly from the evidence, the Appellant is in error. What the court, believes, is the subject matter of the Acting Director of Roads letter of 4 July 1997, was alternative sketch plan of the roundabout, given to him by the Appellant a day earlier, on 3 July 1997.

The Traffic Design Group's report and specifically its "alternative conceptual designs" for the roundabout was however, the subject of a meeting between the Ministry of Works officials and the Appellant on 4 August 1997. The alternative designs were, according to the Respondent, fully considered by the Ministry's

engineers and their consultants, Kingston Morrison. In the end they were rejected and this was conveyed to the Appellant in a letter of 24 September, 1997. There is no grounds for the Applicant's claim that the report was not considered.

The Appellant further contended that the minister had failed to consider as a relevant factor the fact that piece of land to be acquired represents the display area and showroom of the Appellant in the business of selling motor vehicles, and its business would suffer considerable hardship and collapse should the land be acquired. Counsel referred to *Raceway Motors Ltd v Canterbury Planning Authority* [1978] 2 NZLR 605 (*Raceway Motors*) in support. Casey J said at 612:

> It must be accepted, of course, that virtually every planning decision is likely to cause individual hardship to somebody, and in the great majority of cases this cannot in any sense be a special factor to weigh against the planning advantages. It would seem that, before it can be regarded as a matter relevant to public interest, an applicant's hardship should be such that he is likely to suffer significant economic consequences differentiating him from the general public, the question being one of fact and degree.

In counsel's view, government's acquisition of part of its land will result in the Applicant's suffering significant economic consequences differentiating him from the general public. In his affidavit of 30 November 1997, the Managing Director of the Applicant company stated that the losses to the Applicant would be more than the $2 million they had originally demanded as compensation. According to him the land represents the Appellant's prime display area.

As Casey J said in *Raceway Motors* almost every instance of planning decision is bound to cause some form of hardship to somebody. However the planning advantages and essentially the public interest factor remains of primary importance and consideration. The Applicant in this case has to convince this court that it falls under the category of those persons suffering "significant economic consequences" that differentiate him from the general public. The claim that it stands to suffer enormous amount of money from losing its prime display area is not enough. There is evidence in fact that the Applicant has still a large area still left both at the Ratu Mara and Golf Link Roads junction, for it to continue as display area for its motor vehicles. Obviously, the compensation scheme envisaged under the Act is intended to take into account the loss of use of this particular piece of leasehold to the Applicant as indeed to any other property owner whose land would have been acquired for the same project. It is at the end of the day, not the only person that had been adversely affected by the Nabua by-pass roundabout. There are property owners around the Appellant that had lost valuable pieces of land to make way for the project. This court is not convinced that the Appellant is any different from the general public as indeed in this instance from the owners of private properties and residences in the area, so as to be an exception and for which the minister must make special consideration. Public interest, and for which the minister's action is premised, remains the primary consideration.

There is also the Appellant's argument that the minister did not consider that the Appellant had not been informed of government's plan for acquisition when its proposed showroom was approved. A letter dated 10 November 1995, from the Ministry of Works to the Applicant's architects, Adrian Sofield, stated that the PWD did not have any objections to the proposed extention. However, in an earlier letter to the Permanent Secretary of Public Works of 16 October 1995 Mr Sofield was clearly very aware of the roundabout scheme and effect on the Applicant's land, stating that "The proposed roundabout encroaches onto our client's property." There is also evidence from the affidavit of Deve Taurogo of

4 May 1999, that there had been discussions as early as 2 June 1995 with the Appellant, in which the acquisition of part of the Appellant's land for the roundabout had been breached. A further affidavit of Gregory Telford Chambers who was a Senior Design Engineer with the Fiji Road Upgrading Project III between August 1990 and September 1993, and was at that time responsible for the planning of the Nabua Bypass/Roundabout project, stated categorically that he had during the planning stage, showed a copy of the layout plan showing "the proposed acquisition boundary of the Nivis Motors property" to Mr Adrian Sofield who was acting on behalf of the company.

I am satisfied from the evidence before me, that the Appellant had been made aware of the government's intention to acquire part of its lease, well ahead of the negotiation phase and that Mr Sofield in particular, had on behalf of the Appellant, raised their concern on the implication of the scheme with regards to his client's land and its proposed showroom and extension.

There is finally the question of whether the minister had considered, as argued by the Applicant, that there would have been considerable savings to government, if it had adopted the alternative scheme or options submitted by the Applicant. While the question of costs must, one would assume, remain a significant factor in the decision-making process of a public body or authority, it is not the most important factor. In the construction of amenities such as roads and bridges, the most important factor is issue of public safety. It is made very clear from the evidence presented by the officials of the Ministry of Works that the issue of public safety was paramount the Respondent's decision to reject the Appellant's counter-proposals. Implicit in this is the understanding that all other factors including costs to government would have been considered carefully by the Respondent and weighed against the others.

I am satisfied that the minister, before exercising his powers under s 3 of the Act, had attended to all matters which he was bound to do and consider, and did not consider matters which were irrelevant. This Appellant's ground fails.

Whether the minister's action was arbitrary and/or unreasonable

The Applicant's arguments under this ground are that no "proper" explanation was given why the minister decided to compulsory acquire the land, and such a decision unreasonable given the fact that government stood to gain substantial savings, if the Respondent had adopted the Traffic Design Group's alternatives. As to unreasonableness, this argument had been addressed by the court under the previous heading. It is sufficient to reiterate that the issue of public health and safety, both of which the Respondent argued proved persuasive in the decision to pursue the acquisition of the Applicant's land.

Although, as counsel for the Applicant readily concedes, there is no general common law duty to give reasons, there is now very strong argument supported by case law for the proposition that such a duty may in appropriate cases be implied. The momentum towards the recognition of such a general duty is seen in *Stefan v General Medical Council* [1999] 1 WLR 1293; [1999] UKHL 6 where Lord Clyde stated at 1300:

> The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current developments towards an increase openness in matters of government and administration. But the trend is proceeding on a case by case basis (*R v Kensington and Chelsea Royal London Borough Council; Ex Parte Grillo* (1995) 94 LGR 144), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers. It was reaffirmed in *R v Secretary of State*

for the Home Department; Ex Parte Doody [1994] 1 AC 531 at 564; [1993] 3 All ER 92 at 108, that the law does not at present recognise a general duty to give reasons for administrative decisions. But it is well established that there are exceptions where the giving of reasons will be required as a matter of fairness and openness. These may occur through the particular circumstances of a particular case.

Counsel also referred to several Fiji Court of Appeal decisions (*Akbar Buses Ltd v TCB* (unreported, FCA Appeal No 0007 1993); *Pacific Transport Co Ltd v Mohammed Jalil Khan* [1997] FJCA 3; *Fiji Public Service Association v Registrar of Trade Unions* (unreported, FCA Appeal No 0007 1993), as well as this court's decision in *State v Transport Control Board, Ex parte S Nair Transport* (unreported, HBJ0020/1996) per Scott J), where our courts have held that the decision-maker's failure to give reasons raised doubts that the decisions reached were results of proper exercise of statutory discretions.

In this case, the Applicant is claiming that the minister had given no "proper" explanation for wanting to acquire the Applicant's land.

The evidence, in the court's view, do not support the argument. There had been various exchanges of views and meetings between the Applicant and agencies of Adrian Sofield Architects and as well as its Consultants, Traffic Design Group, with the Ministry of Works officials and Consultants on the original design of the Nabua by-pass/roundabout. These exchanges resulted in the modification of the original design, and also included the consideration of the Applicant's counter-proposals (Traffic Design Group options).

The final representation by the Applicant was made at its meeting with Ministry of Works officials of 4 August 1997. The result of the representation, the rejection of the Applicant's proposals, was conveyed in a letter of 24 September 1997. The letter from the Acting Director of Roads, one Mr Mosese Nailumu, stated that

> we are unable to accommodate your request for reasons discussed in the various meetings we have had with you this year.

The letter went on to restate in details these reasons, namely:

1. Minimum disturbance — the proposed improvement creates the least disturbance to land in the area of the roundabout. In fact only 400m2 of extra land will be required from your property.
2. Size of the roundabout — your suggestion to reduce the size of the roundabout was considered by our design consultant and we submit comments in the attached report which justifies the size of the roundabout.
3. Relocating the roundabout — safety issues [sic: are] a major concern and is a contributing factor when deciding the configuration of a roundabout. This is the reason why the proposed new roundabout is positioned as suggested.

To clarify further the 3 aspects of the scheme, Mr Nailumu attached to the letter a copy of their detailed analysis by the Ministry's consultant, Kingston Morrison.

In my view there is no merit in the Appellant's argument that no proper explanation had been given. On the contrary, the Respondent had not only given the reasons for the acquisition, the court is equally satisfied that such reasons were adequate. In *R v Brent London Borough Council; Ex parte Baruwa* (1997) 29 HLR 915, Schiemann L J measured adequacy of reasons this way, at 929:

> It is trite law that where, as here, an authority is required to give reasons for its decision it is required to give reasons which are proper, adequate, and intelligible and

> enable the person affected to know why they have won or lost. That said the law gives decision makers a certain latitude in how they express themselves and will recognise that not all those taking decisions find it easy in the time available to express themselves with judicial exactitude.

In the light of the evidence referred to above and the conclusion drawn from them by this court, I find no substance in the Applicant's arguments under this ground, and is dismissed.

Whether the minister had exceeded his jurisdiction

The Applicant's submission on this ground is premised on its construction of s 3 of the Act and s 9 of the 1990 Constitution, arguing that both these provisions protected the individual from depravation of his property. Only in very exceptional cases and only as a last resort do these laws permit the State to take and deprive any of its citizens the proprietorship of his land.

This argument had been fully explored in the hearing of the Applicant's leave before Fatiaki J (as he then was) and I subscribe and endorse his conclusion.

Very briefly, s 9 of the 1990 Constitution protects a person's property from compulsory acquisition, "except under the authority of a law", and then elaborates on the recognised legal procedures then existing before acquisition as well as the circumstances such action is permissible (s 40 of the 1997 Constitution succeeds it in a more summary way). Section 3 of the Act states that:

> 3. Subject to the provisions of the Constitution and the other provisions of this Act, an acquiring authority may acquire any lands required for any public purpose for an estate in fee simple or for a term of years as he may think proper, paying such consideration or compensation as maybe agreed upon or determined under the provisions of this Act.

It is agreed that the Act and specifically s 3 above, satisfies the requirement of "except under authority of a law" of s 9 of the Constitution, under which compulsory acquisition is permissible. It is also agreed that the "acquiring authority" in s 2 of the Act, includes the minister, the Respondent in this instance, and "Public purposes" definition includes the building of highways and roads in the interest of"public safety, public order … public health, town and country planning, or the utilisation of any property in such a manner as to promote the public benefit": s 2.

The extra-jurisdictional argument advanced by the Applicant is in effect a reiteration of its earlier argument on allegations that the minister had failed to consider relevant matters by his failure to explore all the alternatives that were given him. Thus the submission that he could have only resorted to the exercise of his powers under s 3, after he had exhausted all other avenues available to him. But the overwhelming evidence, even with additional affidavits filed after the Fiji Court of Appeal decision, point to the very clear conclusion that the Respondent and his officials had explored every proposals and schemes that may lead to a compromise, and that in the end, all efforts failed.

In the exercise of his power under s 3 the minister is guided by those considerations that are defined as public purposes. There may be other considerations such as those raised by the Applicant, but they remain secondary to the public interest and benefit that is the motivating factor in taking such a decision.

While it is not for this court to examine whether the public interest and "public purposes" consideration had been correctly weighed vis à vis the other factors beneficial to individuals including the Applicant, it is clear from the evidence

before me, including Mr Peni Tuinona's affidavit of 31 October 2002 that the question of public interest and in particular public safety and health had been a central consideration in the minister's decision.

In the end I am satisfied that there is no merit in the Applicant's argument that the minister had exceeded his jurisdiction. This ground fails and is dismissed.

Whether the minister had acted contrary to the Applicant's legitimate expectation

On this ground, the Applicant claimed that its expectations were that the minister would have pursued and carefully considered all the alternatives to the acquisition of its land. The Respondent had, accordingly to the Applicant, failed to do so.

Again as this court has found after the Applicant's arguments on the other grounds already dealt with, there is no evidence to support this contention. It could well be that the minister did not, in his personal capacity, consider in greater details the alternative proposals submitted by the Applicant. The fact remains that they were considered by the Ministry of Work's officials. I endorse the views of Fatiaki J in his ruling at the leave stage and specifically the passage from Diplock L J's judgment in *Bushell v Secretary of State for the Environment* [1981] AC 75; [1980] 2 All ER 608 as follows (at AC 95; All ER 613):

> 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 intentions. Ministers come and go; departments, through their names may change from time to time, remain. Discretion in making administrative decision is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. *The Collective Knowledge, technical as well as factual of the civil servants of the department and their collective expertise is to be treated as the minister's own knowledge, own expertise*. It is they who in reality will have prepared the draft scheme for his approval; it is they who will in the first instance consider the objections to the scheme and the report of the inspector by whom any local inquiry has been held and it is they who will give to the Minister the benefit of their combined experience, technical knowledge and expert opinion on all matters raised in the objections and the report. This is an integral part of decision-making process itself; it is not to be equiparated with the Minister receiving evidence, expert opinion or advise from sources outside the department after the local inquiry has been closed. [Emphasis added.]

The doctrine of legitimate expectation at the end is simply a means of testing whether a person has been denied his legitimate expectation of a procedural protection or legitimate expectation to substantive benefit. The Applicant's argument in this case, do not strictly come within the confines of the doctrine. Nevertheless, even if this court were to go along with the Applicant's argument, it is bound to conclude as it has in its findings on the other grounds, that there is no evidence that the Respondent had denied the Applicant its legitimate expectations. This ground also fails

Conclusion

Judicial review bestows upon the court a special supervisory jurisdiction upon the way public bodies and the executive approach their functions. It is not, in doing so, for the court to sit in judgment and form its own views on the merits

of the case and whether the decision-maker was wrong. It is only for it to ensure that the decision-maker's approach is not flawed by some recognisable "public law wrong".

The central characteristics of this jurisdiction and public law wrong, is highlighted by Sir John Donaldson MR in *R v Panel on Take-Overs & Mergers; Ex parte Datafin Plc* [1987] QB 815 at 842; [1987] 1 All ER 564 at 580:

> There was some failure on the part of the [Claimants] to appreciate, or at least to act in recognition of the fact, that an application for judicial review is not an appeal. The panel and not the Court is the body charged with the duty of evaluating the evidence and finding the facts. The role of the Court is wholly different. It is, in an appropriate case, to review the decision of the panel and to consider whether there had been "illegality," ie Whether the panel had misdirected itself in law; "irrationality," ie whether the panel's decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it; or "procedural impropriety," ie a departure by the panel from any procedural rules governing its conduct or a failure to observe the basic rules of natural justice, which is probably better described as "fundamental unfairness", since justice in nature is conspicuous by its absence.

The same limitation of the court's supervisory jurisdiction under a judicial review is emphasised in *Reid v Secretary of State for Scotland* [1999] 2 AC 512; [1999] 1 All ER 481. Lord Clyde said at AC 541; All ER 505:

> Judicial review involves a challenge to the legal validity of the decision. It does not allow the Court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It maybe that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal, as for example, through the absence of evidence, or of sufficient evidence to support it or through account being taken of irrelevant matters, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case for review as distinct from an ordinary appeal, the Court may not set about forming its own preferred view of the evidence.

In this instance, the Respondent had purported to exercise his statutory powers to compulsory acquire part of the Applicant's land for public purpose, namely the construction of a roundabout that, according to the officials and Consultants to the Ministry of Works, is intended to ease the traffic congestion that presently plagues the Suva/Nausori traffic system. The Applicant in its efforts to save it land from being acquired, had presented to the Respondent alternative traffic system.

It is not the role of this court to examine the Applicant's counter-proposals and say that they were to be preferred, because according to the Applicant's evidence, they would have resulted in considerable savings to government and at the same time avoid depriving the Applicant of part of its land. This court's role is to ensure that, in arriving at his decision to exercise his powers under s 3 of the Act, the Respondent had conducted himself within the law. The Applicant's grounds for judicial review represents public law wrongs alleged to have been committed by the Respondent. In each one of them, this court had found no support for the

arguments that some legal error may have been committed by the Respondent. Instead, this court finds that the Respondent had done all that had been required of him by law, and that therefore the exercise of his powers under s 3 of the Act to acquire the Applicant's property was properly done under all the circumstances and that it was decisively in the public interest to compulsory acquire the said property.

The application is dismissed.

Costs to the Respondent to be taxed if not agreed.

Application dismissed.