

MUKTA BEN & ANOTHER

v.

SUVA CITY COUNCIL

[COURT OF APPEAL, 1977 (Gould V. P., Marsack J. A., O'Regan J. A.)
5th, 6th, 7th, 8th, 9th, 12th, 13th, 14th July 1976, 14th
February 1977]

Civil Jurisdiction

Compulsory purchase order—ultra vires—whether land sufficiently identified—whether power to acquire land outside boundary of Suva—whether order properly advertised—whether Council able to purchase land by agreement and on reasonable terms—whether consent of Subdivision of Land Board necessary prior to taking possession—whether breach of natural justice by Council in utilising only small proportion of land acquired—Suva Electricity Ordinance (Cap. 87) ss. 3, 15—Towns Ordinance (Cap. 106) ss. 132, 133(1)(2), 136(1)(2)—Crown Acquisition of Land Ordinance (Cap. 119) ss. 3, 5, 6, 7(1)(2)(4), 8, 10, 18—Subdivision of Land Ordinance (Cap. 118) ss. 3, 5, 6, 7, 9(4)(5), 14(2)(b), 17, 18(1), 19(1)—Land Transfer Act 1971 s. 18—Surveyors Ordinance (Cap. 234)—Fiji Constitution Order 1966 s. 6(2)—Transport Regulation Act 1958 (Victoria) s. 31—Public Works Act (N.Z.) 1928 s. 1.

In 1967 twenty acres of the appellants' land were compulsorily acquired by the respondent for the purposes of building a power station which was in due course constructed together with some flats on 2 acres of the land.

The appellants sought declarations that the purported acquisition of the land was unlawful and ultra vires and that the respondent was a trespasser. A number of grounds of appeal were raised, and after due consideration the court held: (Marsack J. A. dissenting in part).

1. The land to be acquired had been determined with certainty and all parties agreed prior to the commencement of building operations. The four boundaries had been plotted, and only one boundary needed minor adjustment.
2. Towns Ordinance s. 133(2)(a) provided for the purchase of land within or without the boundaries of Suva. S. 136(1), although not specifically referring to the location was functioning by reference to the earlier section.
3. Although the respondent had failed to comply with statutory requirements to advertise notice of the Order in the Gazette and in a newspaper, the appellant had been personally served and had, therefore, suffered no substantial prejudice.
4. Provided the respondent acted in good faith, the fact that it may have erred in its estimate of what constituted reasonable terms under Towns Ordinance s. 136(1) did not invalidate either the representations made by the respondent or the approval given by the Governor-General.
5. There was no legal requirement to seek or obtain approval of the Subdivision of Land Board.

6. (Marsack J.A. dissenting) Although the respondent had only utilised 6.1 acres out of the 20 acres acquired, it was not beyond reason in an expanding city and therefore not a ground for invalidating all or part of the Order.

7. (Per Marsack J.A.) The area of 20 acres was substantially in excess of the area reasonably required by the respondent for the power station, and, therefore, 15 acres of the land should remain the freehold property of the appellant.

B Cases referred to:

- Savmots Investments Ltd v. Secretary of State for the Environment* [1976] 2 W.L.R. 73; [1976] 1 All E.R. 178.
Ashcroft v. Walker [1902] 2 S.R. (N.S.W.) Eq. 131.
Vitosh v. Brisbane City Council (1955) 93 C.L.R. 622.
Havenbar Pty. Ltd v. Butterfield (1974) 48 A.L.J. 225.
- C** *Berger Paints N.Z. Ltd v. Wellington City Corporation* [1973] 2 N.Z.L.R. 739.
Auckland Harbour Bridge v. Kaihe [1962] N.Z.L.R. 68.
Montreal Street Railway Co. v. Normandin [1917] A.C. 170; 116 L.T. 162.
Jolly v. District Council of Yorkstown (1968) 119 C.L.R. 347.
Sandringham Corporation v. Rayment (1928) 40 C.L.R. 510.
- D** *Cullimore v. Lyme Regis Corporation* [1962] 1 Q.B. 718; [1961] 3 All E.R. 1008.
Corporation of Parkdale v. West (1887) 12 App. Cas. 602.
Northshore Railway Co. v. Pion (1889) 14 App. Cas. 612.
Saunby v. Water Commissioners of City of London (Ontario) [1906] A.C. 110.
- E** *Gaiman v. National Association for Mental Health* [1971] 1 Ch. 317; [1970] 2 All E.R. 362.
Hounslow London Borough Council v. Twickenham Garden Developments [1971] 1 Ch. 233; [1970] 3 W.L.R. 538.
Furnell v. Whangarei High Schools Board [1973] 2 W.L.R. 92; [1973] 1 All E.R. 400.
- F** *Maxwell v. Department of Trade* [1974] 2 All E.R. 122; [1974] Q.B. 523.
Ridge v. Baldwin [1964] A.C. 40; [1963] 2 All E.R. 66.
Cooper v. Wandsworth Board of Works (1863) 143 E.R. 414; 14 C.B.N.S. 180.
De Verteuil v. Knaggs [1918] A.C. 557.
Attorney-General v. De Keyzers Royal Hotel [1919] 2 Ch. 197; [1920] A.C. 508.
- G** *Amstad v. Brisbane City Council* (No. 2) (1967) 16 L.G.R.A. 379.
Coles v. County of Matamata [1976] N.Z.L.R.
Hoggard v. Worsborough U.D.C. [1962] 2 Q.B. 93; [1962] 1 All E.R. 468.
Attorney-General v. Pontypridd U.D.C. [1906] 2 Ch. 257; [1906] L.J.R. 578.
Pike v. Wellington City Corporation (1910) 30 N.Z.L.R. 179.
Attorney-General v. Hanwell U.D.C. [1900] 2 Ch. 377; [1900] L.J.R. 39.
- H** *London & Westcliffe Properties Ltd. v. Minister of Housing & Local Government* [1961] 1 W.L.R. 519; [1961] 1 All E.R. 610.
Gard v. Commissioners of Sewers of the City of London (1885) 28 Ch. D. 486.

- Clanricarde v. Congested Districts Board for Ireland* (1914) 79 J.P. 481. A
Lynch v. Commissioners of Sewers (1885) 32 Ch. D. 72.
Patel v. Premabhai [1954] A.C. 35; [1953] 3 W.L.R. 836.
McCurrie v. Naria (1900) 2 W.A.L.R. 15.
Taylor v. Harris [1953] V.L.R. 105.
Collins v. Willoughby Municipal Council (No. 2) (1967) 14 L.G.R.A. 256.
Horners Co. v. Barlow (1688) 3 Mod. Rep. 158.
Pellas v. Neptune Marine Insurance Co. (1879) 5 C.P.D. 34. B
Great Central Gas Consumers Co. v. Clarke (1863) 13 C.B. (N.S.) 838.
Manakau City v. Attorney-General ex relatione Burns [1973] 1 N.Z.L.R. 25.
Banks v. Transport Regulation Board (Victoria) (1968) 119 C.L.R. 222.
Brettingham Moore v. St. Leonards Corporation [1969] A.L.J.R. 343.
Pearlberg v. Varty [1972] 1 W.L.R. 534; [1972] 2 All E.R. 6.
Board of Education v. Rice [1911] A.C. 179.
Russell v. Duke of Norfolk [1949] 1 All E.R. 109; 65 T.L.R. 65. C
Delta Properties Ltd. v. Brisbane City Council (1955) 95 C.L.R. 11.
Lower Hutt Council v. Bank [1974] 1 N.Z.L.R. 545.
Haynes v. Haynes (1861) 30 L.J. Ch. 578.
Tiverton & North Devon Railway Co. v. Loosemore (1884) 9 A.C. 480.
Liverpool Borough Council v. Turner (1860) 29 L.J. Ch. 827.
Howard v. Bodington [1877] 2 P.D. 203. D
New Zealand Institute of Agricultural Science v. Ellesmere County [1976] 1 N.Z.L.R. 630.
Coney v. Choyce [1975] 1 W.L.R. 422; [1975] 1 All E.R. 979.
Howard v. Secretary of State for the Environment [1975] Q.B. 235; [1974] 1 All E.R. 644.
Assets Co. Ltd. v. Mere Roihi [1905] A.C. 176. E
Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd; Fraser v. Walker [1967] N.Z.L.R. 1069 (J.C.)
Pickard v. Sears (1837) 6 Ad. & El. 469.

Appeal against the dismissal by the Supreme Court of the appellants' action for declarations that the compulsory acquisition by the respondent of the appellants' land was unlawful and ultra vires. F

K. H. Gifford Q. C. and *Mr Tapoo* for the appellants.
T. E. F. Hughes Q. C. and *Mr Jamnadas* for the respondent.

The following judgments were read: (14th February 1977)—

JUDGMENT OF GOULD V.P. G

In an action in the Supreme Court of Fiji the appellants claimed against the Suva City Council (hereinafter referred to as "the Council") declarations that a purported acquisition by the Council of part of the appellants' freehold land was unlawful and ultra vires, and that the Council was trespassing on the property—an injunction was asked for. The learned judge in the Supreme Court dismissed the action and this appeal is against that judgment. H

A The Council required land for a new power station and commenced enquires about 1963. The appellants becoming aware of this, offered the Council in 1964 a gift of five acres out of 90 acre block they had recently agreed to buy from one Sukhichand. They also offered to negotiate with the Council for the sale to it of some 50 acres. Neither offer was accepted at the time.

B In 1966 the matter was re-opened and the appellants made a further offer; the parties were unable to agree on the price to be paid. The Council was thinking in terms of acquiring a substantial area—some 80 acres, of which 40 was to be from the appellants' land which was comprised in Certificate of Title 8316.

C The Council had authority to acquire land (subject to the approval of the Governor in Council) under the Electricity Ordinance (Cap. 57—Laws of Fiji, 1955) but it did not act under this Ordinance. Under section 133(1) of the Towns Ordinance (Cap. 106—1967) it had power to acquire land by agreement but no agreement had been reached. So the Council sought to act under section 136 of the last mentioned Ordinance which is as follows:

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

E (2) The provisions of the Crown Acquisition of Lands Ordinance shall apply to the compulsory acquisition of land by a town council under the provisions of this section, and in the application of the provisions of that Ordinance to such acquisition reference to “the Crown”, “the Governor” or “Government” shall be deemed to be reference to a town council authorised to acquire land under the provisions of this section and reference to “The Director of Lands” shall be deemed to be reference to the Town Clerk.”

F By letter of the 8th September 1966, the solicitors for the Council wrote to the Chief Secretary asking for approval under that section for the acquisition of 40 acres of the appellants' land, and enclosing a sketch plan. There was correspondence with Government departments (during which the Council's solicitors were advised that it would be more appropriate to apply under the Electricity Ordinance, but this was not done). On the 16th March 1967, the Town Clerk was advised that the Governor in Council had approved acquisition of 20 acres of the appellants' land. The terms of that letter are material and it reads as follows:

“Sir,

Acquisition of Land for Power Station, Vatuwaqa

H I am pleased to advise that on the 1st March 1967, the Governor-in-Council agreed that in the terms of section 137 of the Local Government (Towns) Ordinance, Cap. 78, the Suva City Council be authorised to acquire

20 acres of land compulsorily for a power station. The Governor-in-Council considered that 20 acres was sufficient land for the purpose. A

2. It is realised that 20 acres is substantially less than the area of land applied for and regarding the balance, the Governor-in-Council further agreed that it would be prepared to consider an application for the compulsory acquisition of a larger area of land on its merits for other purposes, e.g. industrial, within the terms of the Ordinance." B

Section 137 of the Local Government (Towns) Ordinance (Cap. 78) later became section 136 of the Towns Ordinance abovementioned.

The Council gave the matter further consideration and on the 7th June 1967, their solicitors wrote to the appropriate department asking that the approval be given in respect of twenty acres at the eastern end of the appellants' property; another sketch plan was enclosed. Roading was mentioned in this letter and a request made for permission to give less than three months' notice of intention to take possession—14 days was asked for. The final approval was given by letter of the 18th July 1967, as follows: C

"Sir, D

Acquisition of Land for Power Station Site

I am pleased to advise that the Governor-in-Council on the 5th July 1967, signified his approval of the compulsory acquisition of the 20 acres of land on CT. 8316 applied for by the Suva City Council under section 137(1) of the Local Government (Towns) Ordinance, being satisfied in accordance with the provisions of that subsection. In giving his approval, however, the Governor-in-Council expressed the view that the Suva City Council should give the owner of the land a longer period of notice of intention to acquire his land compulsorily than the 14 days proposed. I trust that your Council will be able to agree with this expression of view. E

2. The Governor-in-Council also gave his approval to the compulsory acquisition of such land as is necessary, following either of the two routes proposed, to give access to the new power station site from the King's Road. Following upon discussion (Balfour/Sanders/Williams) you have advised that the Council will follow the access route from the King's Road, through the Kinoya Subdivision and further that the Council has agreed to provide a tar sealed surface of that portion of the access road from the King's Road through the Kinoya Subdivision to the border of the Crown land. The road will then pass through Native land on as direct a route as is practicable to the power station site." F G

After this the Council gave notices under the Crown Acquisition of Lands Ordinance (now Cap. 119) dated the 27th July 1967, which were addressed to Sukhichand, the registered proprietor, and to the appellants respectively, served personally on the former, and sent to the solicitors for the latter. The contents are as follows: H

A “
CROWN ACQUISITION OF LAND ORDINANCE
CAP. 140

NOTICE OF ACQUISITION OF LAND BY SUVA
CITY COUNCIL FOR PUBLIC PURPOSES

B NOTICE IS HEREBY GIVEN that the land described in the Schedule hereto being part of Certificate of Title No. 8316 is required by the SUVA CITY COUNCIL for public purposes absolutely, namely for a site for the electrical power station.

C Any person claiming to have any right or interest in the said land is required within three months from the date of this notice to send to the Town Clerk a statement of his right and interest and of the evidence thereof, and of any claim made by him in respect of such right or interest.

D And notice is also hereby given that the Suva City Council intends to enter into possession of the said land at the expiration of eight weeks from the date of this notice. Any person who shall wilfully hinder or obstruct the Suva City Council or any person employed by it from taking possession of the said lands is liable under the provisions of the Ordinance abovementioned to imprisonment for three months or to a fine of twenty-five pounds or to both such imprisonment and fine.

Dated the 27th day of July 1967.”

The Schedule is as follows:

E “ THE SCHEDULE
(hereinbefore referred to)

F ALL that piece of land containing 20 acres situated at the Eastern end of Certificate of Title 8316 being part of the land known as “Naivoce” (part of) and being part of the land contained in Certificate of Title No. 8316 in the district of Suva on the island of Vitilevu as delineated on the sketch plan hereinafter appearing.”

G The sketch plan is an outline plan of the land in C.T. 8316, there being an enclosed portion at the eastern end marked “20 acres to be acquired”—the eastern boundary itself is a wavy line which, it is common ground, indicates the high water mark. The north and south boundaries of the 20 acre portion appear to be parallel but, according to the evidence, are not entirely so, and the western boundary is a straight line joining the north and south boundaries, seemingly intended to be a right angles to both, although, if the latter are not quite parallel this cannot be exactly the case. It might be interpolated here that evidence was given that the areas of parcels of the land having registered titles in this area and having sea boundaries have been known to vary by reason of accretion and there is reason to believe that this had happened in relation to this particular eastern boundary.

H On the 25th October 1967 Messrs Munro, Warren, Leys and Kermode, who were then solicitors for all three of the persons who received the notices, wrote to the Council advising that the appellants had registered their transfer from

Sukhichand and had given a mortgage back to secure the balance of purchase price. A claim dated the 24th October 1967, was put in by the appellants for compensation for the fee simple "at the rate of £400 per acre, computed on the surveyed area." The claim indicated that the transfer to them was registered on the 16th October 1967. Sukhichand, who, it is clear from the claim notices, was as between himself and the appellants entitled to retain possession until the 31 December 1968, put in a comparatively small claim for his loss—this, the court was informed, has been paid. By the 31st October 1967, the Council's solicitors had reached the conclusion that there was little prospect of settlement of the appellants' claim of £8,000 for the 20 acres as the Council's offer was only a little over £2,000; it would therefore be necessary to take out an originating summons under the Crown (Acquisition of Land) Ordinance to fix the compensation. Some time after this the appellants changed their solicitors and Messrs Koya & Co commenced these proceedings in the Supreme Court. The originating summons had not then been issued but we are informed that that step has since been taken.

In the Supreme Court and here, Mr Gifford has argued at great length that the purported acquisition of the piece of land is unlawful and void, with the consequence that the Council, which has entered onto the land and erected electric works and residences upon part of it, is a trespasser. The grounds relied upon are various and at the risk of tedium it will be necessary for me to go back and set out some of the facts and letters relevant to the dealings between the various parties. It will help to elucidate some of the references, to know that Mr D. J. Warren, a member of the legal firm of Munro, Warren, Leys & Kermode, acted for the appellants during the negotiations, and Mr D. M. N. McFarlane of Grahame & Co. acted for the Council. Mr Jethalal Naranji who is the husband of appellant Mukta Ben and brother-in-law of Shanta Ben appeared to be authorised to act in their interests.

Mr Warren gave evidence that Jethalal Naranji approached him about the 9th October 1964, with the proposal of the gift of 5 acres abovementioned. He had conferences with Mr McFarlane and with the Town Clerk and Electrical Engineer. On the 14th October, he wrote to the Town Clerk a letter containing (inter alia) the following paragraphs:

"As the writer explained, our client, in the belief that 5 acres might be sufficient land for a site for the Council's proposed new power house, were prepared to offer the Council a gift of such an area, at such part of the abovementioned property as was best suited to the Council's requirements. You explained that the site will have to contain from 50 to 70 acres, depending on the nature of the country and how much of the site can be used.

Our clients have asked us to inform you that they are prepared to enter into negotiations with the Council for the sale of 50 acres or so of the abovementioned property, if it is of use to the Council for a power house site. They envisage subdividing and developing the property for residential, and, if permitted, industrial use."

Mr McFarlane re-opened the matter with a letter of the 19th April 1966 and the reply was (in part) as follows:

A "Our clients regret that they would not be willing to sell the whole 90 acres 2 roods to the Council, as they contemplate subdividing the western end of the property for industrial use, subject of course to such use having town planning approval. They think that it is likely to be approved if the Town Planning Board permits part of this property to be used for an electric power station.

B We attach a copy of the plan on C.T. 8316. Our clients offer to sell the eastern portion of Lot 2, which is edged red and should be roughly 50 acres, on the following terms.

1. Price—£200.0.0 per acre, computed on the surveyed area. Terms of payment to be the subject of further negotiation if agreement on other points is reached.

C 2. Survey—the Council to do all necessary surveys at its expense.

3. Access—

D (a) the vendors would provide without cost the land necessary for a road through the residue of Lot 2, connecting the existing bridge over Wainivula Creek with the land offered for sale. The Council should meet all the cost of forming and maintaining this road, which should be so sited, designed and constructed that it may be used to advantage by our clients in connection with their proposed subdivision of their residue of Lot 2."

It is to be noticed that the appellants have used a copy of the plan on Certificate of Title 8316 to indicate the area, the price to be assessed on the "surveyed area".

E On the 27th April 1966, there was a conference between the two solicitors, Jethalal Naranji and the Council's electrical engineer at which the question of access to the land was important and was fully discussed. The appellants were intent on obtaining access from the balace of their land to King's Road. However, a 'phone call from Mr McFarlane to Mr Warren on the 12 May, indicated that the Council then preferred about 40 acres of the land towards the West. According to Mr Warren the Council recognised the importance of the access question and he was invited to submit another offer. This was done in a letter of the 13 May 1966, the text of which is as follows:

"Messrs Grahame & Co.
Solicitors
SUVA

G Dear Sirs

No. 8626—MC/jc
MUKTA BEN & ORS.—SUVA CITY COUNCIL

H With reference to our letter of 22.4.66 and our subsequent conversations, we have informed our clients of the Council's definite preference for the western part of their land and they have instructed us to make the following offer.

They are prepared to sell some 40 to 50 acres more or less of the western end of Lot 2 D.P. 2957. The position of the dividing line could presumably

be influenced by what other land the Council might desire or be able to acquire, either from the Crown or from Chanik Prasad. For instance, if the V-shaped piece of Crown land is of use and can be obtained, the Council may like to move the dividing line to the east of the tip of the V, so as to square-off the block. A

For this land, which they had wished to retain for subdivision, their price is £300 per acre. They would be willing to negotiate terms of £6,000 and the balance, with 6% interest, over a period of say three years. B

Other terms and conditions which our clients propose are:

- | | | | |
|------------|---|---|---|
| Survey | — | the Council to pay for all necessary surveys, including a plan on which our clients may obtain a balance title; | |
| Access | — | the Council to provide formed public road access from King's Road to the western end of the balance of our clients' land, without cost to them; | C |
| Possession | — | Refer to 4 on page 2 of our letter of 22.4.66. Mr Sukhichand has his milking shed on the area which the Council wants. | D |
| Costs | — | Refer to 5 on page 2 of the same letter. Add provision of a Balance title. | |
| Zoning | — | The Council to obtain town Planning approval for the use of the balance of our clients' land for heavy industrial use. | E |

We will be happy to discuss the foregoing matter at any time.

Yours faithfully

MUNRO, WARREN, LEYS & KERMODE F
(SGD) D. J. WARREN

The reply, dated the 12th August 1966, was a counter offer at a much lower price. It reads:

"Messrs Munro, Warren, Leys & Kermode G
Solicitors
SUVA

Dear Sirs

Suva City Council re Mukta Ben & Another

We refer to your letter of the 13th May and subsequent telephone conversation, and have now received further instructions from the Suva City Council. H

- A 1. The Council regards the value placed on the land by your client is very high, and after careful consideration, having regard to prevailing prices, considers that £110 per acre is a fair and reasonable price today for such land having regard to its present use and therefore we are instructed to offer that rate for approximately 40 acres of land more or less out of your client's total. The area of course would be subject to survey.
- B 2. The Council would form the public road assess to the western end of your client's land.
3. We note the requirement in regard to possession of the land and arrangements would have to be made with Mr Sukhichand.
4. All legal costs would be paid by the Council, including costs of survey and the transfer of title and balance title for your client.
- C 5. *Zoning*: The Council does not consider that there is any obligation on it to obtain Town Planning approval for the use of the balance of your client's land for heavy industrial use, and we are instructed to say that that is a matter for your client to take up with the relevant authority.

D We shall be glad if you will put the above before your client and let us know his answer as soon as possible, as the Council now wishes definitely to proceed.

If your client cannot accept the above price, then we are instructed to serve the appropriate notice of acquisition and proceed compulsorily to acquire and use the procedure set out in the Ordinance.

Thanking you,

E

Yours faithfully
GRAHAME & CO. "

F The appellants emphasize the agreement to give road access and the definite indication of an end to bargaining contained in the last paragraph. The appellants lost no time in refusing this offer in equally emphatic terms. The text of Mr Warren's letter of the 17th August is as follows:

G We thank you for your letter of 12th August, which has been carefully considered by our clients. They instruct us to say that they find the Council's offer £110 per acre for about 40 acres at the western end of their property quite unacceptable. Considering the potential of this property, not its present use, they regard the offer as quite unrealistic.

As there seems to be no prospect of further negotiation on price, the Council will presumably now proceed with a compulsory acquisition."

H It will have been noted that section 136(1) of the Towns Ordinance, set out above, only comes into play when a council is unable to purchase land by agreement and on reasonable terms. When, therefore, the Council approached the Governor-in-Council the Director of Lands asked a number of pertinent questions in a letter dated the 19th September 1966, to the Council's solicitors. Among them were:

- “(c) full details of the reasons why City Council consider it necessary to acquire as much as 40 acres for a Power Station; A
- (d) if the 40 acres will not be wholly utilised to accommodate a new Power Station what other uses the Council propose to put the land;
- (f) whether or not the Council has obtained an assessment of the value of the 40 acres from a professional valuer in terms of 1966 land prices, and if so, what this amounts to; B
- (g) whether or not any attempt has been made to reach an agreement on a compromised price somewhere between Council’s offer of £110 an acre and owner’s demand of £300 an acre;
- (h) whether or not the owners have raised any objection to Council’s proposal to use the 40 acres as a Power Station site. In other words, whether or not it is reasonable to conclude that the only point of disagreement between the parties is the matter of price to be paid for the land; C
- (i) if the price to be paid is the only point of disagreement between the parties, has any consideration been given to reaching a settlement by means of arbitration? D

Details of access were also requested. Answers were embodied in a letter of the 26th October 1966 from Messrs Grahame & Co.—

“2. Re: Access. The Electrical Engineer has shown alternative routes. Route A through adjacent Crown land and Route B marked red along the boundaries of the second area out of Title 8315 to be acquired. This would entail the acquisition of the existing private road from the owners, and coming along the strip or right-of-way already shown on the plan that you have. E

It was agreed with the owner of Title 8316 that if the Council acquired that area out of the title that a road would be provided to give access to the balance area.”

The appellants emphasize the second paragraph of that extract. Concerning valuation the letter continues: F

“5 Re the value of the land. In 1964 Mr Tetzner gave the City Council a valuation of the land in C.T. 7243, which is adjacent to the area proposed to be taken. That also is a dairy farm, very similar to those conducted on the other land. Mr Tetzner’s valuation was in respect of the land under grass, comprising 36 acres—was £75.0.0 per acre. We spoke to Mr Tetzner recently in regard to the two areas in question, and he considered they would be about the same value and that £300 asked by the owner to Title 8316 was ridiculous. G

We enclose an original stamped agreement between Sukhichand and Mukta Ben and Shanta Ben dated 22nd July 1964 for your perusal. You will note that an estimated area of 88 acres was sold for £8,100 on terms, the vendor retaining about 6 acres for his house site, which is shown on the plan you already have. This sale price works out at approximately £92 per acre. H

A We therefore offered £110 an acre, being an advance over £92 per acre, which the Council considered to be the ultimate price they could offer. The dairy farm land in that area is worth no more than £100 an acre today, having regard to the use to which it is now put, which £100 an acre is an increase on Mr Tetzner's valuation two years ago. So it was considered £110 was the limit to which the Council could go, and this was done in order to attract the vendor and to allow something for displacement.

B It was pointed out to the vendors that the balance areas in the title would be considerably increased in value due to the Council erecting a Power Station there and giving good road access, thus enabling the vendors to subdivide.

C Mr Warren is acting for the vendor of C.T. 8316, and there is no hope of a compromise, and indeed the Council would not give any more than £110 an acre, which it considers is above the present market value."

The Council's price was thus based upon what the appellants had paid and upon the opinion of a valuer, Mr S. A. Tetzner, who approached the question on the basis of the use of the land as a dairy farm. Two more excerpts from that letter are relevant. One is:

D "There is no objection to the Council's proposal to acquire by either owner, but each wants as much as possible, so that the only point of disagreement is one of price."

The reference to "either owner" is explained by the fact that the Council was concurrently negotiating with the owner of adjoining land. The second excerpt contains an indication that, to the knowledge of the Council, uses for the land other than that of dairy farming were becoming likely:

E "As we pointed out to you the Electrical Engineer considers this is the most suitable site, and the Council must have room for expansion and requires the land proposed as a buffer area. We also mentioned to you that it was considered that Samabula/Vatuwaqa is expanding rapidly, and the growth of Suva is towards Nausori, and that eventually that area along the road to Nausori will become a suburb of Suva, and the proposed site for this power station will be really in another decade more or less in the centre of Suva and its environs.

F It is virtually impossible to get any suitable land inside the present City boundary, and indeed it is far too congested."

G The reference to room for expansion and a buffer area touch on the Council's desire for a larger area, and a passage from the notes of Mr Warren's evidence which touches on the same subject reads:

".....I knew that existing power house in City caused noise and air pollution had caused protests by nearby occupiers and I knew that defendant wanted to acquire a large amount of land because of these claims and objections."

H

A further matter to which great importance was attached by the appellants also emerges from the evidence of Mr Warren. After the service of the notices of

acquisition the Council proceeded with a survey and a survey plan was prepared. Mr McFarlane handed it to Mr Warren with a request that it be signed by the registered proprietors, who were by that time the appellants. This was for the purposes of registration. Mr Warren on the instruction of Jethalal Naranji then borrowed from Mr McFarlane a locality map (Ex. N) which had been before them when they discussed access earlier, and which showed in red a suggested access road which, if constructed, would have provided good access to the balance of the appellants' land after the acquisition. According to the evidence Jethalal Naranji signed the survey plan (apparently as attorney) and on his instructions Mr Warren returned it and the locality map to Mr McFarlane with this letter dated the 26th October 1967:

"Dear Sirs,

8626 MC/jc—Suva City Council—Mukta Ben & Or.

We return herewith the survey plan which Mr McFarlane left with the writer on the 24th instant. It has been signed by our clients without prejudice to their claim for compensation and on the understanding that it is the Council's intention to establish access from King's Road to the 20 acre area by means of a public road as shown red in the map returned herewith, portion of which will run along and touch the northern boundary of our clients' land for a distance of about 18 chains."

It will be remembered that the question of access had been mentioned in earlier correspondence, particularly in the letter of Grahame & Co. to the Director of Lands of the 26th October 1966, quoted above. It is common ground that the road in fact constructed by the Council did not follow the route indicated by ex. N, nor did it serve the appellants' remaining land. The road stipulated for by Jethalal Naranji did not appear on the survey plan he had signed on that understanding. The Council did not advise the appellants of a change of intention regarding the access road and though by the 13th May 1968, Jethalal Naranji had heard of the change and informed Mr Warren, there appears to have been nothing in writing on the subject until Messrs Koya & Co., on the 16th September 1968, wrote to Messrs Grahame & Co., advising that they were acting for the appellants. The letter included this passage:

"It appears that our clients were led to believe that the Council would establish, at its expense, an access from King's Road to the 20 acres in question by means of a Public Road. This road, we understand, has been shown in red in the said Survey Plan. No satisfactory explanation has been given as to why the Council has not taken any action in this regard when it has already taken steps to construct the Power House and carried out other works on the land in question. In addition, the Council has not yet accepted our clients' claim for compensation. Our clients also wish to place on record that the claim for compensation was based on the express understanding that the Council would construct the said Public Road."

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

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

- A (a) challenge the validity of the purported compulsory acquisition of their property.
- (b) claim damages for trespass and interference of their proprietary rights."

The reply from Grahame & Co. was dated the next day and contains an offer to seek a solution. The text is as follows:

B

"Dear Sirs,

Suva City Council re: Mukta Ben and Santa Ben

We have your letter of the 19th instant and it would appear that you have not been fully instructed by your clients. We comment as follows:

C

1. The Suva City Council did not undertake that the access road would be in any particular place, but the road outside the northern boundary of the land was shown on a plan as "suggested access road."
2. It is noted that your clients expected an access road on the northern boundary and based their claim for compensation on that.
- D 3. The Statutory Notice of Intention to Acquire was issued to your clients through Mr Warren who was then acting.
4. Mr Sukhichand, the tenant on the land, gave up possession of the 20 acres to be acquired and was paid compensation as claimed by him through Mr Warren.
- E 5. By arrangement with Mr Warren the Council's Electrical Engineer took possession of the 20 acres.
6. Your clients' claim of £400 an acre was always regarded as exaggerated, and was rejected by the Council. It was clearly understood that the matter would have to go before arbitration under the Crown Lands Acquisition Ordinance, which is applicable.
- F 7. The only matter left for determination was the amount of compensation payable to your Company for the 20 acres.
8. There is no doubt about the validity of the handing over of the 20 acres, which was not done under compulsion, and therefore trespass does not arise.
- G 9. Recently Mr Warren saw the writer in reference to the road, which has been constructed by Council and suggested that Council might extend this road to meet the eastern boundary of your clients' land.
10. Immediately after that we saw the Electrical Engineer, who made the suggestion that such an extension of the road probably could be made if your clients would undertake that their main subdivisional road would link up with the Council's road at the common boundary. Before we had time to continue this discussion with Mr Warren we received your letter.
- H

We deny that your clients have any claim for damages or right to any injunction against our client.

We intend to proceed with the Originating Summons to be issued out of the Supreme Court for the determination of the amount of compensation. A

However, in the meantime we are prepared without prejudice to discuss with you the question of suitable access. The writer would be happy to discuss the matter further with you, if you would telephone him of a convenient appointment.

Yours faithfully B

GRAHAME & CO."

Apparently no advantage was taken of this offer, as a writ was served on the Council on the 4th October 1968.

Some reference to the evidence may be necessary later. All I propose to say at this stage to complete this narrative is that some preparatory work for the power house had been commenced before the writ was issued and that it was continued and completed after that date. Evidence called by the appellants indicated that a number of residential type buildings had been erected and that the land occupied by the power house and the buildings was in total only about 1½ acres. The appellants called expert evidence as to the value of the appellants' land and can be said to have established that it was substantially in excess of the figure offered by the Council, based on Mr Tetzner's earlier valuation and other considerations. The value as put forward by the appellants, as at the date of the notice of acquisition was about \$2,000 per acre. C D

One important concession is to be noted at the outset. It is agreed between counsel that there is no allegation of bad faith against the Council or any person. E

Coming now to the submissions of counsel for the appellants in his attack upon the validity of the compulsory acquisition by the Council, I will consider first the allegation that the notice of acquisition lacked the fundamental requirement of certainty. There was insufficient definition of the land to be taken. In the schedule to the notices the land was described as twenty acres situated at the eastern end of Certificate of Title 8316, being part of the land known as Naivoce and being part of the land contained in Certificate of Title 8316—as delineated on the sketch plan annexed to the notices. No measurements were shown on the sketch plan. This, in counsel's submission, would not enable the appellants to know what land had been taken and might expose them to penalties for obstructing the Council, particularly in view of the fact that the eastern boundary was high water mark and affected by accretion. F

Mr Gifford referred to *Savmots Investments Ltd. v. Secretary of State for the Environment* [1976] 2 W.L.R. 73, where, at p. 100, Forbes J. made a distinction between acquisition by mutual agreement and by compulsion. In the latter, Forbes J. said, it was necessary to specify precisely what is required beyond the strictly legal easements which are appurtenant to the land described. That was not, however, a question of boundaries, but of what rights automatically went (without mention) with the land being taken. *Ashcroft v. Walker* [1902] 2 S.R. (N.S.W.) Eq. 131 is merely an authority for the proposition that when the Crown is exercising a statutory power of resumption it must definitely describe the land it is resuming.

A *Vitosh v. Brisbane City Council* (1955) 93 C.L.R. 622 was decided by the High Court of Australia. The power being exercised was to declare a "defined" part of the city to be a residential district, and in its judgment the court said:

"The ordinance contemplates the definition by metes and bounds or by streets or by some other sufficient topographical description of an area forming part of the city."

B This serves only to suggest that whether or not a description is sufficient may depend upon the wording of the particular legislation but is otherwise a question of fact.

C Another decision of the High Court of Australia is concerned with a problem having some aspects of similarity to the present one, though it was not a case of compulsory acquisition. The case is *Havenbar Pty. Ltd. v. Butterfield* (1974) 48 A.L.J.R. 225 in which the land in a sale and purchase agreement contained thirty acres and was shown in a sketch plan annexed to the contract; it was a part only of the vendor's holding. Three boundaries of the land sold were fixed, but the northern (dividing the land sold from the part retained) was to be "at right angles" to the subject land. The east and west boundaries were almost but not quite parallel, as is the case in the present instance with the north and south boundaries. It was held that the expression used called for a line at right angles to the general north-south axis of the land as a whole; i.e. a line running midway between the eastern boundaries of the portion sold. Thus the High Court found that there was no uncertainty, as only a line in one particular position would meet the two requirements, that thirty acres should be enclosed, and that the northern boundary should be at right angles to the north-south axis of the land. I will return to this case shortly.

E Not much is to be gained from a study of the form of notice prescribed by section 5 of the Crown Acquisition of Lands Ordinance and set out in the Schedule thereto. Section 5 merely enacts that the notice may be in that form or to the like effect. The instruction given in the form is "describe lands giving measurements and showing boundaries wherever practicable". No measurements were given in the present case and it was argued that it was practicable to do so by having the land surveyed before giving notice, there being ample power to enter land for the purpose of a survey contained in the Surveyors Ordinance (Cap. 234). This is so, and it may be that the Council would have been better advised if it had taken this course. In the event, however, the notices were given before a survey was put in hand and therefore at a stage when it was not practicable to give measurements. It is appropriate to mention, while dealing with the form of the notice, that Mr Gifford made great play with the final paragraph, which contains a warning of the penalty of fine or imprisonment for obstructing the Council in taking possession. I do not think this aspect of the matter adds any weight to counsel's argument. G Clearly, on the authorities the land to be taken must be sufficiently described, and, if it is not ascertainable, I would think it unlikely that an owner would be convicted of "wilful" obstruction for disputing an entry.

H The question is whether the land to be taken was, at the time of the notices, sufficiently identifiable from the description therein and the accompanying sketch plan. The learned judge appears to have accepted the evidence that the eastern boundary of the area taken was subject to change by reason of accretion. Accepting

for the purposes of the case that the true boundary is the actual high water mark for the time being and not necessarily the line shown in the plan on the Certificate of Title, I think this is a factor relevant only to the measuring off of the 20 acres to be taken, which is in turn determinative of the position of the western boundary of that land. The high water mark, at the time of the notices was, not a broken but a wavy line, joining the two straight lines forming the northern and southern boundaries, and it was definite and ascertainable. Any problem as to area created by accretion would be no more than might arise on a straight out transfer of the whole of the land in Certificate of Title 8316. As to the northern and southern boundaries, they clearly purport to be the same boundaries as are shown on the plan on Certificate of Title 8316—as that must in the ordinary course of Torrens system procedures be based on survey, those boundaries are also definite and knowable, leaving to be ascertained only the point at which they are to be intersected by the west boundary of the land being taken.

Mr Gifford relied upon evidence that the sketch plan, as it was admitted to be, annexed to the notices, could not be successfully superimposed upon the official series of maps of the district, or the official plan in the office of the Registrar of Titles, or various aerial photo maps taken for the purpose of the case. With all respect to counsel's detailed argument on this point I do not consider that it has weight, on the question of certainty, to off-set the fact that the north, east and south boundaries were definite and knowable. Perhaps more to the point is the evidence of Mr R. G. Knuckey, the surveyor called for the appellants to the effect that he would have been unable to define the western boundary without carrying out a high water mark traverse on the eastern side.

That, in my view, pinpoints the real difficulty in this aspect of the case. The western boundary had to be so adjusted that the required 20 acres would be enclosed, and this could only be done when the eastern boundary had been defined. But the necessity of plotting that boundary and making the calculation do not render the area to be taken uncertain—*certum est quod certum reddi potest*. The plotting of the eastern boundary in fact was done by the Council's surveyors for the purpose of the plan known as D.P. 3265, purporting to show for the purpose of registration the land being acquired. The area shown on that plan was 20 acres 2 perches. Mr Knuckey was inclined to challenge the accuracy of the survey of the eastern boundary but conceded that if the plan was correct all that needed to be done to show an exact area of 20 acres, was to move the western boundary rather less than one foot towards the east.

With these considerations in mind, the facts are seen to be very close to those in *Havenbar Pty. Ltd. v. Butterfield* (*supra*) with the exception that there is here no direction that the western boundary is to be at right angles to the subject land. Mr Knuckey's evidence was that the north and south boundaries were not parallel. He was not asked to state the degree of divergence but it is obviously very small. As I would read the bearings shown on the plan on Certificate of Title 8316 the divergence would be just over two degrees, but counsel did not refer to this and I may be mistaken. It was, however, the manifest intention of the maker of the sketch plan that the west boundary should be a straight line without any diagonal tendency, with the result that the angles at the north and south ends of the western boundary would be equal. On that basis there would be no surveying difficulty, as

A Mr Knuckey's evidence shows, in the cutting off of an area of 20 acres. I agree therefore with the learned judge that the notice was not invalid on the ground of uncertainty. Such uncertainty as could be said to exist was temporary and due to the operation of natural processes on the eastern boundary. It would need to be resolved for the final adjustment of boundaries and compensation but in the absence of clear authority I would not hold that the notice as a whole lacked the particularity required to indicate to the minds of the appellants what land was being taken. That they were content on this score is evidenced by the fact that Mr Jethalal B Naranji signed D.P. 3265 at the request of the Council, making only a stipulation as to roading unconnected with the question of area or boundaries, in October 1967, after the notices of acquisition had been given but before any material work had been done on the site. I think that this action indicated that so far as metes and bounds are concerned the minds of the parties were at that stage *ad unum* and that C the appellants should not be permitted later to rely on what is shown to be an artificial objection.

I would add that I also agree with the observations of the learned judge on the subject of a statement by the Council's engineer in a letter dated the 14th May 1969, that 22 acres was being acquired, and on the fact that D.P. 3265 indicates an area some 2 perches in excess of 20 acres. The former is apparently an error and the D latter is still capable of adjustment if it is regarded by the parties as sufficiently material.

I turn now to Mr Gifford's submission that the Council had no power under the Towns Ordinance to acquire compulsorily land beyond the boundaries of the city of Suva. Under section 6 of that Ordinance the Council has power (*inter alia*) to purchase, hold and dispose of real property. Section 132 gives power to establish and maintain public utility services within or without the city boundaries. Section E 133 is as follows:

"133(1) A town council may for the purpose of any of their functions under this or any other law by agreement acquire, whether by way of purchase, lease, or exchange, any land, whether situate within or without the boundaries of the town.

F (2) Subject to the consent of the Governor-in-Council, a town council may—

(a) acquire whether by way of purchase, lease, exchange or otherwise, any land whether situate within or without the boundaries of the town, and to lay out building plots upon or otherwise subdivide such land for the purpose of housing schemes or for the purpose of G factory, residential, business or workshop sites; and

(b) sell, let or otherwise dispose of any such plots or subdivisions of land and any buildings thereon."

That gives power to acquire land in two cases, one of which requires the consent of the Governor-in-Council. The present case falls within subsection (1) as being an acquisition for the purpose of the Council's functions under another law i.e. the H Electricity Ordinance. A peculiarity of the wording used has been pointed to—in subsection (1) it is "may by agreement acquire, whether by way of purchase, lease or exchange", whereas in subsection (2) the words "by agreement"

do not appear. I do not consider this significant, as a purchase, lease or exchange will in the ordinary course be preceded by agreement. For convenience I repeat section 136(1)— A

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

I see no difficulty in this section. If the council fails to get by agreement the land it needs for an authorised purpose, compulsory acquisition may be authorised if the Governor-in-Council is satisfied upon a number of points. As a matter of construction I believe this section follows upon and is complementary to, section 133, and relates to the land contemplated by that section. Such land may be beyond the city boundaries. Mr Gifford has argued that there is room for the application of the maxim *expressio unius est exclusio alterius*, in that in both subsections of s. 133 the words “whether situate within or without the boundaries” are used, but do not appear in section 136(1). I am unable to agree. In my view section 136 provides, with safeguards, an alternative method of acquiring the land which the local body has failed to acquire by agreement under section 133, the only other method of acquisition authorised, and the maxim has no application where the indications are so clear. Section 136(1) is a section which can only function by reference to section 133 and action attempted thereunder. Another submission, that a compulsory power of acquisition must be given in express terms, I accept, but find that section 136(1) amply satisfied that requirement. C D E

Some difficult and related questions of construction arise from the consideration of the sections of the Crown Acquisition of Lands Ordinance which are intended to govern events following the resolution by the Governor, in exercise of his powers under section 3, to acquire particular lands for a public purpose. I will use the terms of the Ordinance as they stood at the relevant time without substituting “Council” for “Governor” and the like as indicated by section 136(2) of the Towns Ordinance. F

The questions are related to the notices authorised by sections 5 and 6 of the Ordinance after the Governor has decided upon acquisition, which may be for an estate in fee simple or for a term of years (s.3). Section 5 provides that the Director of Lands shall give notice to: G

1. The registered proprietors;
2. The mortgagees; and,
3. The encumbrancees; and,
4. The lessees. H

The content and form of the notice is indicated only by reference to a form in the Schedule, which specifies the land to be acquired, calls upon any person

- A claiming any right or interest in the land to send a statement of it and of any claim made by him in respect of it to the Director of Lands within three months of the date of the notice, and continues that the Governor intends to enter into possession after weeks from that date. There is also a reference to penalties for hindrance. Section 6 provides that the notice (or any subsequent notice) may direct the "person aforesaid" to yield up possession of the land after the expiration of the period specified (not to be less than three months from service unless urgently required). There follows provision that at the expiration of such period the Governor shall be entitled to enter and take possession. The notice in the present case indicated an intention to enter into possession eight weeks from the date of the notice but no point has been taken on this and I assume the reduced period reflected urgency grounds.
- B

- C The section actually providing for service of the notice is section 7, subsections (1) (2) and (4) of which are as follows:

- D "7(1) Every notice under the two last preceding sections shall either be served personally on the person to be served or left at their last usual place of abode or business, if any such place can after reasonable inquiry be found, and in case any such parties shall be absent from Fiji or if such parties or their last usual place of abode or business after reasonable inquiry cannot be found, such notice shall be left with the occupier of such lands or his agent, or, if there be no such occupier or agent, shall be affixed upon some conspicuous part of such lands.

- E (2) If any such person be a corporation, company or firm, such notice shall be left at the principal office of such corporation, company or firm in Fiji, or, if no such office can after reasonable inquiry be found, shall be served upon some officer, if any, or agent, if any, of such corporation, company or firm in Fiji.

- (4) All notices served under the provisions of this Ordinance shall be inserted once at least in the Gazette and in a newspaper circulating in Fiji."

It will be convenient also to set out sections 8 and 10:

- F "8. If at the expiration of three months from the service and publication as aforesaid of such notice no claim shall have been lodged with the Director of Lands in respect of such lands, or if the person who may have lodged any claim and the Governor shall not agree as to the amount of the compensation to be paid for the estate or interest in such lands belonging to such person, or if such person has not given satisfactory evidence in support of his claim, or if separate and conflicting claims are made in respect of the same lands, the amount of compensation due, if any, and every such case of disputed interest or title shall be settled by the Court, which shall have jurisdiction to hear and determine in all cases mentioned in this section upon an originating summons taken out by the Director of Lands, or any person holding or claiming any estate or interest in any land named in any notice aforesaid.
- G

- H 10. The Registrar of Titles shall upon presentation to him of a certified copy of any judgment or order of the Court made under the provisions of section 8 of this Ordinance register the Crown as proprietor and issue a

Certificate of Title according to the judgment or order in the name of the Director of Lands."

A
B
C
A good deal of argument both in the Supreme Court and on appeal was directed to whether the respondent was obliged to serve upon the appellants the notice of acquisition which it did in fact serve. It is said that the appellants, who were at the material time the equitable owners of the land in question, in that capacity were not among the persons enumerated in section 5 as being entitled to notice. The consequence was, in the respondent's argument, that the appellants had no standing to bring an action based upon deficiencies in the notice they did in fact receive. The learned judge in the Supreme Court was inclined to the view that the term "registered proprietor" should be construed as being wide enough to include other persons who have proprietary interests. While I agree with the learned judge when he says it would be strange to find an Ordinance conferring such powers and yet neglecting the interest of an equitable owner, I think the term "registered proprietor", derived as it is from the Torrens system of land registration, cannot possibly include an unregistered proprietor. Recent amendments of sections 5 have, I understand, removed this difficulty.

D
It may well have been that the legislature took the view that the registered proprietor was in a situation of trustee or agent in relation to any person holding under him by an agreement. There was a not dissimilar situation in *Berger Paints N.Z. Ltd. v. Wellington City Corporation* [1973] 2 N.Z.L.R. 739, though the back ground legislation is not the same. In delivering the judgment of the Court, at page 746, Cooke J. said:

E
"We now turn to the claim of Myers. Subject to the rights of the vendor, Myers were the owners of the property in equity; and it was not disputed that an equitable estate or interest may support a claim under the Public Works Act. Conceivably the vendor could have made a claim as trustee for Myers, but the respondent did not contend that, if there is a valid claim for the loss of Myers' interest over and above the amount recoverable by Bergers for themselves, that procedure should be insisted upon; nor do we consider that it should."

F
G
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Being in a position of trust it would be the duty of the registered proprietor to bring the notice to the attention of his purchaser, of whose existence the acquiring authority may have been unaware. The form of the notice in the Schedule supports this approach as it requires any person claiming a right or interest in the land to establish his interest and claim: and there is no limitation upon the nature or quality of the interest and claims to be dealt with under section 8 as regards compensation. Certainly if an equitable owner had a notice brought to his attention in some such way, and so worded, it must have been the intention of the legislature that he should act on it, and a fortiori, where, as here, the acquiring authority in fact serves a notice upon an equitable owner, the authority cannot be heard to say that the recipient, having any undoubted claim, may not rely on any deficiencies to which the notice may be subject. This was the finding of the learned judge below and I agree with it. The position is, I think, unaffected by section 18 of the Ordinance which provides that service of such a notice is not an admission by "the Governor" that the person served has any estate or interest.

- A The next question upon this part of the legislation arises from the fact that the council did not comply at all with the requirements of section 7(4) as to publication of the notices in the Gazette and in a newspaper. Mr Gifford's argument was that (contrary to the learned judge's finding) the requirements of section 7(4) were not directory but mandatory; that even if the requirements were directory only they must be fulfilled substantially; and that they amounted to a condition precedent in which case any discussion of the distinction between mandatory and directory requirements was futile and the notice was invalidated by the breach.
- B

The court was referred to a dictum of Gresson J. in *Auckland Harbour Bridge v. Kaihe* [1962]—N.Z.L.R. 68, 83 when he said:

- C "The words of a statute which plainly express a condition precedent are not lightly to be qualified or modified by treating them as merely directory. The principle is that, since the ordinary sense of enacting words is primarily to be adhered to, provisions which appear on the face of them to be imperative cannot, without strong reason, be held to be directory."

That was a Workmen's Compensation case and a minority judgment—the majority based themselves (*inter alia*) on the statement that no general rule could be laid down—*Montreal Street Railway Co. v. Normandin* [1970] A.C. 170. Mr Gifford relied also on *Jolly v. District Council of Yorkstown* (1968) 119 C.L.R. 347, at 350:

- D
- E "Whilst we agree with their Honours that it is not always easy to decide whether a particular statutory provision is mandatory or directory, we have no doubt that if compliance with a statutory requirement is made a condition precedent to the maintenance of an action then, as Higgins J. said in *Sandringham Corporation v. Rayment* (1928), 40 C.L.R. 510, at p. 533, 'all arguments to the effect that it is to be treated as directory, not imperative, become futile. Courts cannot ignore a condition precedent imposed by the legislature...'"

- F *Cullimore v. Lyme Regis Corporation* [1962] 1 Q.B. 718 was a case in which a council performing certain works was authorised to levy charges on owners and was required to determine the charges within 6 months. It was held that as the work scheme was formulated in exercise of statutory powers and not merely in performance of statutory duties the requirement was mandatory, and failure to determine the charges until the expiration of 23 months rendered the notice null and void. The same result would have followed had the requirement been merely directory, as the delay was such that it could not amount to substantial compliance with the requirement.

- G Mr Gifford referred also to three cases in the Privy Council in which he submitted that failure to comply with a requirement of publication of notice invalidated a purported compulsory acquisition. They are *Corporation of Parkdale v. West* (1887) 12 App. Cas. 602, *Northshore Railway Company v. Pion* (1889) 14 App. Cas. 612 and *Saunby v. Water Commissioners of the City of London (Ontario)* [1906] A.C. 110. The facts and law involved in these cases differ substantially from the present. In the *Parkdale* case the Act provides specifically that until a map, plan and book of reference was deposited the execution of the railway could not be proceeded with. Such deposit and notice of it in a newspaper were made general notice to all parties concerned and were the foundation for all steps assessing compensation; further p. 113 of the report) compensation had to be paid before the land was taken or the right interfered with. Both of these matters were deemed conditions precedent by their Lordships.
- H

notice to all parties concerned and were the foundation for all steps assessing compensation; further (p. 113 of the report) compensation had to be paid before the land was taken or the right interfered with. Both of these matters were deemed conditions precedent by their Lordships. **A**

In the *Northshore Railway* case consequential damage was caused to a riparian owner by an embankment made by the appellant company. The map and plans had been duly deposited in this case, but no special notice offering compensation and nominating an arbitrator had been served as required. Only when the compensation agreed upon or awarded had been paid or tendered did the power to "take possession of the lands, or to exercise the right" vest in the railway company. This failure, therefore, to inaugurate the arbitration procedure was held to be a breach of a condition precedent. **B**

In *Saunby's* case the legislation authorised the Commissioners to enter upon land required for waterworks, and to appropriate any river etc. and to contract with the owners of the land and those having rights in the water, for purchase. In case of disagreement the matter was to go to arbitration. The Privy Council held that this meant that before the Commissioners could appropriate any land or water they must endeavour to contract with the owner—give him a notice to treat for some definite subject matter. Before lack of arbitration could be put forward as a defence by the Commissioners to an action for an injunction and damages they must have proceeded in the mode prescribed by the legislature. In the present case the Council says it has given the requisite notices and has always been ready and willing to have the compensation determined in the proper manner. **C**
D

There can be no doubt that the failure to observe the respective legislative requirements specified in those cases was a failure in a true condition precedent. The question is whether there is a complete parallel in this case. Clearly the requirement of giving notice pursuant to section 5 is mandatory though the class of persons to receive it is rendered to some extent indefinite by the qualification "or to such of them as shall after reasonable inquiry be known to him." Unless such a notice is coupled with the notice authorised by section 6 it is doubtful whether it would operate so as to confer any actual rights in the land upon the Governor. **E**

The notice under section 6, either coupled with the section 5 notice or as a second notice, is clearly a condition precedent to the right to enter and take possession. These notices must in the nature of things precede the assessment of compensation under section 8, but, unlike some of the legislation in the case to which reference has been made, and though section 3 requires the Governor to pay compensation, neither the assessment for the payment of compensation is a condition precedent to the right to possession. The assessment, by the combined effect of sections 8 and 10 is a condition precedent to the Council's right to become registered proprietor. I agree with Mr Hughes' interpretation of section 8 in that the opening words "if at the expiration of three months from the service and publication as aforesaid of such notice"; apply only to the case where no claim shall have been lodged. I do not find that the search for implications fit to be attached to the words "service and publication" in section 8 is helpful—the language used in the enactment is not meticulous, as is indicated by the reference in section 6 to "the service of such notice" and the corresponding reference in the prescribed form in the Schedule to "the date of this notice." **F**
G
H

I come then to section 7. The "giving" of notice is a condition precedent to the
A accrual of a right to enter into possession. Section 7 lays down how the notice is to be given. It is undoubtedly mandatory to the extent that it requires service but beyond that I do not think that subsections (1) (2) and (3) are more than directory or enabling in that they prescribed modes of service to fit different circumstances. If the acquiring authority chose an inappropriate mode of service for the mortgagee, could the registered proprietor, properly served, be heard to say the acquisition
B was bad on that account. I think not.

Section 7(4) differs from the three preceding subsections in that it has no enabling element. It is an additional requirement and its object is not entirely clear. Probably it is intended as an additional safeguard in the case where there has been no personal service e.g. if the notice has been left on the land. It does not seem to have been designed for the benefit of unknown possible claimants as it is limited to
C notices already served, though it may serve factually for that secondary purpose. It may help to acquaint other interested parties with the names of those seeking compensation. By virtue of section 8 it has a bearing upon the court's jurisdiction over compensation assessment when there is no claimant. I acknowledge the weight of authority indicating that local bodies exercising statutory powers must conform to the statutory requirements but I do not find this case on all fours with those where there must be a giving of public notice by advertisement (*e.g. Scurr v. Brisbane City Council* [1973] 47 A.L.J.R. 532). The possible claimants in such a case as the present
D one are usually more definite and knowable. For these reasons I would find that it is the giving of notice which is the condition precedent and that the condition was sufficiently complied with by personal service. On that the appellants acted by lodging a claim, and there is no suggestion that they were damaged in any way by the failure to gazette and advertise. In my view they cannot now rely upon that failure as a vital
E part of a condition precedent. It may be said that this finding amounts to a licence to a local authority to disregard the requirements of the legislation but I consider it is more the severance of the essential from the unessential, and to hold otherwise in the circumstances of this case would be to raise artificiality to an unjustifiable level. There may be other circumstances in which the failure to gazette the notices would be fatal to an acquisition but as between the present parties and on the present facts I
F do not think that the interests of justice would be well served by such a consequence.

It is convenient to deal next with a number of submissions upon which Mr Gifford relied strongly, based on section 136(1) of the Towns Ordinance, which has been set out earlier in this judgment. Under the terms of that section before the Council could represent "the case" to the Governor-in-Council for the purpose of
G obtaining authority to acquire land compulsorily, the position must have arisen that the Council was unable to purchase the land by agreement and on reasonable terms. The Governor-in-Council must be satisfied that such was the case before granting approval.

The first contention under this head was that the Council had never really negotiated with the appellants over the price. Its attitude had been uncompromising; as the correspondence showed, it had fixed a maximum offer at £110 per acre
H and communicated its decision that if the figure stated were not acceptable it would proceed to acquire compulsorily. This is correct, but it may be added that the appellants were fully in agreement that there was no advantage to be gained by

further negotiation. Mr Warren's letter to that effect is set out above. The Governor-in-Council, it was claimed, was misled when the Council's solicitors, in their letter dated the 8th September 1966, to the Acting Chief Secretary, referred to negotiations with the owners. There is, in my opinion, nothing in this point. A full explanation was given in the solicitors' later letter to the Director of Lands, dated the 26th October 1966, and quoted (in part) above. I think the learned judge in the Supreme Court was right when he rejected the suggestion that no negotiations took place and said that the parties realised that there was a gulf between them over which neither was prepared to pass.

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The next matter, which arises from the use in section 136(1) of the words "on reasonable terms" poses questions of difficulty. One accepted fact is that the land in question could have been acquired by the Council by agreement from the appellants at £300 per acre, plus the cost of an access road which would serve the appellants' remaining land. Brief mention has been made above of the evidence of value tendered on behalf of the appellants. Mr Uday Singh valued the land as industrial land and as at July 1967 at \$2,240 per acre, and Mr J. D. Robinson, a valuer from Australia of very considerable experience, made what he described as a conservative estimate of \$2,000 per acre. Mr Tetzner's valuation was based on rural use and resulted in the offer by the Council of £110 per acre. There is no finding by the learned judge that he accepted the appellants' valuation in full but he quite evidently regarded that of Mr Tetzner as wrong. In his judgement he said:

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"On the whole of this aspect of the case the plaintiffs contend that the Council's valuation was so hopelessly inadequate and so contrary to all recognised principles of valuation that the Governor-in-Council was inevitably misled and that the Council must take the responsibility for so misleading the Governor-in-Council. To that intent considerable evidence of valuation was led, and it became quite apparent that the Council's valuer had not approached the matter with the care which might have been expected of him. That is not, however, to condemn the Council who had employed a valuer with high credentials, and might have expected a somewhat more competent valuation than they in fact received. I think also, although no point of it was made in argument, that in the matter of the price payable by the Council, it should be borne in mind that they were to construct an access road, and the cost of that road might be expected to reduce the amount payable by way of compensation. Nor am I prepared to accept the contention that the Council misled the Governor-in-Council by omitting to disclose that the plaintiffs had offered 5 acres free of cost. The Council's attitude all along had been that they required a large area, and they regarded 5 acres as quite inadequate. I cannot see that they misled the Governor-in-Council by failing to mention the matter of the suggested gift."

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At that stage the learned judge was considering whether the Council had misled the Governor-in-Council on this subject, in relation to ability to acquire on reasonable terms. Earlier in his judgment he had said:

"I think that the expression 'on reasonable terms' means not only that the Council must consider the terms reasonable but that they must appear reasonable according to the actual facts. The way in which the matter was put to the Governor-in-Council was that the plaintiffs had bought the land in

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A 1964 at £92 or \$184 an acre, that the Council's valuer in that year had valued the adjoining land at £75 or \$150 an acre, and that it was being used as dairy land, and that in offering £110 or \$220 the Council were making a fair offer. There was no evidence that the value of the land was being enhanced by subdivision at that time, but it was quite obviously the Council's expectation that the value would be enhanced by their use of the land as a power station and perhaps by the development of the surrounding land as industrial land. I have come to the conclusion that the Council might fairly say that they were unable to purchase the land required on reasonable terms."

B The proper construction of section 136(1) presents a difficult problem, accentuated in the present case by the extreme nature of the estimates of value involved. I would assume that "on reasonable terms", in the present context means "at a fair price". If the valuation put forwarded at the hearing of the action by the appellants (say \$2,000 per acre) is accepted as correct, not only was the Council very misguided in its own estimate but the value put by the appellants themselves on their land in dealing with the Council was markedly below its true worth. Even if Mr Robinson's valuation is scaled down to some extent it is clear that, by paying what the appellants asked, the Council could have obtained the land it wanted upon reasonable terms.

D The difficulty is that this was not apparent to the Council at the material time. When the Council approached the Governor-in-Council the appellants were asking £300 per acre (plus a road) for land purchased by them only two years earlier for £92 per acre. The land was in fact being used as a dairy farm at the time, as was the land on either side of it. In all quite a large area of land was involved and the Council might well have thought that the subdivision potential was a fairly remote one. The valuations of Mr Uday Singh and Mr Robinson, though they purported to relate back to the material time, were done later and for the purposes of this case. They were not extant when the Council had to decide whether or not to seek approval for compulsory acquisition. I do not in the circumstances consider that the Council was blameworthy if it reasoned that no potential for subdivision could have arisen within the space of two years which would more than treble the value of the land in question. On Mr Gifford's interpretation of section 136(1) of the Crown Acquisition of Lands Ordinance, however, these considerations would be irrelevant as in his submission the approach to "reasonable terms" must be completely objective.

G Mr Hughes' argument on behalf of the Council was that the intention of the section was to make available the compulsory acquisition procedure in any case where the two parties—landowner and Council—were unable to agree on what was a reasonable price. Such disagreements were of daily occurrence between vendors and purchasers. The objective construction urged by the appellants would mean that if in the event of compulsory acquisition proceedings it was decided that the compensation payable should be as much as or more than the owner had asked for the land, the owner could have the whole proceedings set aside. This would entail that a Council would have to predict whether the land owner's asking price would be held to be reasonable. If the Council considered it would, of course the price could be accepted and section 136 becomes irrelevant. If the Council considered the asking price too high and was later shown to be wrong the proceedings could be rendered nugatory: such an interpretation would stultify the legislation.

The alternative construction, that is, that the section applies if the parties are unable to agree upon what are reasonable terms, would render it workable.

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In my opinion the construction urged by Mr Hughes is to be preferred. As the matter appears to me the first part of section 136(1) merely authorises a council to represent a case to the Governor-in-Council. It does not authorise the Council to make any decision. To "represent" a case may mean a number of things—to present again the evidence upon which the Council decided to apply for approval may be one. Among many meanings given in the *Shorter Oxford English Dictionary* is "To describe as having a specified character or quality", which might apply in that the case is submitted to the Governor-in-Council as one in which a council considers it is unable to acquire land on reasonable terms. What the Council cannot do is to say as a *fait accompli*—"This land cannot be purchased on reasonable terms" or, "The terms offered are not reasonable" as these are the very questions to which the Governor-in-Council must find the answer for itself. The Council might represent that it was satisfied that the terms proposed were not reasonable and the question is then immediately shown as subjective. The Governor-in-Council might give weight to the Council's opinion as evidence but is under a duty to make up his own mind on the question.

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Section 136(1) contains two safeguards. First the council concerned must be of opinion that it cannot purchase land on reasonable terms; if it were of the contrary opinion it would not invoke the section. Second, the Governor-in-Council must be satisfied before giving approval that such is the case, clearly a subjective opinion to be formed upon consideration of the case as represented and such inquiry as the Governor-in-Council may make. If a council could only represent a case to the Governor-in-Council if terms offered are in fact not reasonable, who is to decide that fact, and what purpose would there be in asking the Governor-in-Council to adjudicate upon it. I would add that I think one of the purposes of the section is to ensure that the possibility of obtaining land from other sources is not overlooked, and the bargaining position between the particular owner and council is only one of a number of matters to be considered.

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In my view therefore, if the Council erred in its estimate of what constituted reasonable terms that is not a matter (there being no suggestion of *mala fides*) which invalidated either the representation by the Council under section 136 or the approval given by the Governor-in-Council. As to the offer of five acres as a gift, this was made in 1964 and there is no evidence that it was repeated when negotiations began again in 1966. Apparently it was rejected as unsuitable, as a much larger area was wanted by the Council. If the Council's estimate of the amount of land required was erroneous (and this is a matter to which I shall return) it must be accepted that the error was made bona fide, and for the reasons I have given in relation to the "reasonable terms" question the *de facto* availability of this area would not invalidate the representing of a case by the Council under section 136.

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In my judgment, therefore, there is nothing in the appellants' argument on this particular aspect of the interpretation of section 136 of the Crown Acquisition of Lands Ordinance which should result in the appeal being allowed.

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- I turn next to the question of natural justice and Mr Gifford's argument on the
- A *audi alteram partem* rule. The learned judge in the Supreme Court gave careful consideration to this question. Among other authorities he considered *Gaiman v. National Association for Mental Health* [1971] 1 Ch. 317, 333, *Hounslow London Borough Council v. Twickenham Garden Developments* [1971] 1 Ch. 233, 259, *Furnell v. Whangarei High Schools Board* [1973] 2 W.L.R. 92, *Maxwell v. Department of Trade* [1974] 2 All E.R. 122, *Ridge v. Baldwin* [1964] A.C. 40,
- B *Cooper v. Wandsworth Board of Works* (1863) 143 E.R. 414 and *De Verteuil v. Knaggs* [1918] A.C. 557. He commented on the fact that the two cases last mentioned were cases of deprivation of property without compensation, and also noted that recent cases, such as *Furnell* and *Maxwell* construed the requirement as a duty to act fairly. The learned judge then considered such cases as *Attorney-General v. De Keyser's Royal Hotel* [1919] 2 Ch. 197 and [1920] A.C. 508, and placed considerable weight on the judgment of the Queensland Supreme Court in
- C *Amstad v. Brisbane City Council* (No. 2) (1967) 16 L.G.R.A. 379. He commented that there was no provision for conflicting claims or for objecting in the Crown Acquisition of Lands Ordinance: in fact section 8 provides for conflicting claims to be settled by the Supreme Court on the application of the Director of Lands or a person interested. There is certainly no provision for objections. The learned judge concluded that the *audi alteram partem* principle had no application to a *bona fide*
- D acquisition of land under that Ordinance. I do not propose to examine the authorities listed (which are in general well known) in detail but will make brief reference to the *Amstad* case. The passage quoted by the learned judge was from p. 384 of the report:

- "Whether the council is obliged to comply with the principles of natural justice depends fundamentally upon the legislative intention as expressed in the provisions of the statute. An examination of these provisions shows that
- E the acquisition of land by the council entitles persons who have any estate or interest therein to adequate compensation for any loss flowing from such acquisition. The acquisition of property in these circumstances cannot be equated to the deprivation of proprietary rights such as was considered in
- Cooper v. Wandsworth District Board of Works*. The substitution of compensation for the loss of property taken by a public or local authority
- F acting under statutory power takes away, in my opinion, the element of prejudice upon which the rule of natural justice is based."

- The case was one in which the Act relied upon authorised the local authority to
- "take any lands within the area of the City which the Council, by resolution, declares to be required by the Council". Those are strong words and the provision regarding
- G compensation in the Act was very specific; it stated that the estate being taken would be deemed to have been converted into a claim for compensation. The case resembled the present one to some extent in that there had been much correspondence attempting to agree compensation, but of course every case must be construed in the light of its own facts and the particular legislation with which it is concerned.

- H I do not think that the learned judge, by his finding abovementioned, meant that in relation to a compulsory acquisition under the Crown Acquisition of Lands Ordinance the provision for compensation eliminated the necessity for the observance of the principle of fairness in the acquisition proceedings. In the case of

Coles v. County of Matamata (C.A. 69/74–1976 not yet reported) recently decided by the New Zealand Court of Appeal it was held that the requirements of natural justice (treated in the judgments as being synonymous with fairness) had to be observed in addition to such procedural rules for objectors as had been prescribed. Compensation was claimable in that case, and it may be well to quote the following succinct passage from the judgment of Cooke J.: A

“In my opinion many natural justice cases, this among them, reduce to a fairly simple question: in the light of the statutory background and all the circumstances of the particular case, was the procedure adopted fair?” B

On the question whether the procedural provisions of the particular Act, relating to objections, was intended to be a complete code, Richmond P. in the same case said:

“I do not think that the statutory duty, to disclose at the hearing, the reasons which have led the council to a preliminary decision to take the land should be interpreted as removing from the council a duty, as a matter of ‘fairness’ to disclose to an objector material in the possession of the council which is relevant to the issue raised by the objector and is to be considered by the council when deciding whether to allow or disallow the objection.” C

I have referred to this case as it indicates how all pervading the principles of “fairness” has become, and that in the pursuit of that principle emphasis must be given to the particular facts of each case. The learned judge in the Supreme Court did not neglect this aspect of the matter: his judgment continued with a finding that there was no conflict with the (then) Constitution of Fiji and a finding that the appellants were not unfairly treated by the Council. The appellants had, in his view, with which from my perusal of the record of evidence I respectfully agree, given the Council “the green light to go ahead.” D E

Coming to the question of the approval given by the Governor-in-Council, the learned judge, correctly in my view, directed himself as follows:

“What is really to be decided here is not so much whether the plaintiffs were entitled to be heard, but rather whether in all the circumstances they have been unfairly treated by not being heard.” F

The learned judge’s conclusion on the three matters which the Governor-in-Council was called upon by section 136 to consider, namely, that suitable land could not be purchased on reasonable terms by agreement, that the circumstances justified the compulsory acquisition for the intended purpose and that the purpose was a public purpose as defined, was that in the state of the evidence none of these matters demanded an inquiry as to whether the land should be taken. Considering the question of possible unfairness to the appellants, the learned judge expressed his conclusions as follows: G

“By contrast, in this case, when the plaintiffs received the notice of acquisition, they did not repudiate it indignantly, and aver that they wanted to be or should have been heard, they lodged a claim for compensation. In my view there is nothing in this correspondence, or indeed in any evidence placed before the Court to indicate that there was any issue between the plaintiffs and the Council save that of compensation for the land to be taken, H

A whether by payment of money or the building of an access road. I would say also, with all deference to the plaintiffs' present arguments, that I am somewhat doubtful if they would have objected, even had they been given the opportunity. They were quite satisfied until sometime about the middle of 1968 to rely upon the Council's promise to provide them access in the event of compulsory acquisition. It seems to me that the Governor-in-Council was entitled to act upon such information as to him seemed fit, and that his action cannot be challenged unless it were shown that he had acted unfairly. In my view that has not been done."

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In argument before this court on this subject Mr Gifford's submissions included the complaint that the Council had misled the Governor-in-Council into believing that it could not purchase the land on reasonable terms, and had failed to disclose the earlier offer of 5 acres free. I have already dealt with these matters. Then it was claimed that the Council should not be permitted to retain the benefit of the Governor-in-Council's approval because of its failure to implement its undertaking concerning the access road. The learned judge found this failure most reprehensible but found that there had been no misleading by the Council. I do not see that this is a matter which should go to the root of the question of approval. It is a financial matter and no doubt did influence the appellants in the price they would have been willing to accept for part of their land by way of sale and the amount of their claim for compensation. Once there was compulsory acquisition the question of compensation would be at large and presumably the award would be full and fair. The question whether the appellants and the Council were proposing to implement a collateral undertaking affecting the quantum of compensation does not seem to be relevant to the decisions the Governor-in-Council had to make before deciding to approve. I do not think the point goes to unfairness when all that the appellants are entitled to by law is compensation agreed or determined under the Crown Acquisition of Lands Ordinance.

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The next submission under the heading of "fairness" was that if the Council had notified the appellants of its application to the Governor-in-Council they would have been placed in a different position because they could have drawn the attention of the Governor-in-Council to the fact that they had bought the land for subdivision and could have lodged evidence to show the market value of the land and drawn attention to the land's potential. The answer to this is that the appellants could not at that stage have had at their disposal the very high valuations later relied upon; otherwise the price they were asking must have been much higher. Then it was submitted that the appellants could have made submissions to the Governor-in-Council that the Council did not require the amount of land it was asking for, or even the five acres it had been offered. I will return to this matter, but on the question of the fairness of the acquisition proceedings I think that on the particular facts of the case the finding of the learned judge that there was no unfairness is to be supported. The case was not put forward to the Governor-in-Council as one in which there were two competing parties, one the Council asking for approval, and the other, the appellants, resisting the application. It was not a case, like *Hoggard v. Worsborough Urban District Council* [1962] 2 Q.B. 93, where two parties were in dispute on the issue the authority had to decide. The case was represented as one in which there was only one basis of disagreement, which was the amount of compensation to be paid; and in my opinion the evidence amply

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shows that that was in fact the case. The Governor-in-Council would not be absolved from the need to decide whether the requirements of section 136 were fulfilled, but as a matter of procedural fairness he was justified in not asking for submissions from the appellants, when the only matter in issue was one for the Supreme Court to decide. In my opinion the subsequent change of mind on the part of the appellants, even keeping in mind the fact that the change of mind appears to have been caused by an act of the Council which was strongly criticized by the learned judge, does not justify a finding that the Governor-in-Council acted less than fairly to the appellants in approving the acquisition. Looking at the natural justice question entirely from the point of view of fairness related to the particular facts of the case, I am therefore of the opinion that the appeal cannot succeed on this ground. A B

The matter of the area compulsorily acquired however, remains to be considered, from the point of view of jurisdiction. As the correspondence indicates, the application for approval was made on the basis that the land was required for a power station, some mention being made of residential quarters for staff. The approval given was expressed to be for 20 acres of land "for a power station", out of the 40 acres of the appellants' land which had been applied for. After the Council took possession it proceeded with the building of a power station and also erected four blocks of flats for the accommodation of the power house staff. This has been challenged as a use of the land for a purpose not authorised by the approval given. The case of *Attorney-General v. Pontypridd Urban District Council* [1906] 2 Ch. 257, in which an injunction was granted to prohibit the use of a refuse destructor on similar grounds, was relied upon. Having considered that case, the learned judge in the Supreme Court held that the question was whether the housing of employees for the electricity undertaking was reasonably incidental to the carrying on of that undertaking; that what was reasonably incidental was a question of fact; and that the provision of the housing was reasonably incidental and therefore the use of the land for housing was not *ultra vires*. C D E

With this finding I agree, and I do not think the implication from words used in the pleadings that the two purposes were separate, rightly pointed out by Mr Gifford, is sufficiently cogent to induce a contrary view. My interpretation of the correspondence between the Governor-in-Council and the Council is that the reference in the letter of the 16th March 1967, to a further application for a larger area for other purposes, "e.g. industrial", is not intended to refer to such matters as housing for the power station employees. The example given illustrates what was in mind. F

However, the matter does not end there. The evidence of Mr Knuckey indicated that the total power house area enclosed by fencing was 6.1 acres, the greater part of which was unused land. The total area actually occupied by buildings, including the flats and their gardens was only 1.6 acres. This being the position some seven years after the notice of acquisition it is submitted for the appellants that it is clear that much more land was taken than was necessary for the only public purpose relied upon—the electrical undertaking. As I have indicated when discussing the question of natural justice, the taking of an area of 20 acres was never in issue between the parties until this litigation began. Mr Gifford has contended strongly that because the approval given by Mr Jethalal Naranji to the G H

- A survey plan, was given on a condition which the Council failed to fulfil, the approval should not in equity be held against the appellants. That is of course only part of the evidence and I do not agree that the whole of the facts should not be before the court. If, however, this particular argument can successfully demonstrate that the approval of the Governor-in-Council was given without jurisdiction as to a large portion of the area, the earlier apparent acquiescence of the appellants would not cure this. In *Pike v. Wellington City Corporation* (1910) 30 N.Z.L.R. 179, 192 it was observed that where it is plain that a proclamation has been issued without statutory authority, and therefore without jurisdiction, the court can declare it to be void, and can act as if it had never been made, but where the Governor has acted within his jurisdiction the court could not review his acts.

- B Most of the authorities, like the *Pontypridd* case, are directed to circumstances where a local body has acquired land for one purpose and has used it or proposes to use it for another purpose not authorised. The court has been asked to restrain the local body from such unauthorised user. In *Grice v. Dudley Corporation* [1958] Ch. 329, 339 it was said:

- C "Thirdly this court has an inherent jurisdiction to control the exercise of statutory powers if, but only if, it can see that the powers are being exercised not in accordance with the purpose for which the powers were conferred. In such a case it has the power, and the duty at the instance of the Attorney-General on behalf of the public or of a person damnified, to restrain the further exercise of those powers not in accord with the special Act."

- D There is reference in *Grice's* case to *Attorney-General v. Hanwell Urban District Council* [1900] 2 Ch. 377, where the property had actually been conveyed to the council but the council was restrained from using the property for a hospital when it had been acquired for a sewage works. There was a reference in that case to it being clear that if land acquired was not immediately required for the purpose of its acquisition it could be used temporarily for other not inconsistent purposes. In England various Acts have governed the disposal of land acquired but then not required for a particular purpose, and in Fiji section 135 of the Towns Ordinance provides that such land may be sold with the consent of the Governor-in-Council.

E The following dictum is taken from *London & Westcliff Properties Ltd v. Minister of Housing and Local Government* [1961] 1 W.L.R. 519, 528:

- F "If a local authority seeking confirmation of a compulsory purchase order makes it plain before confirmation is given that it proposes to use the land to be acquired in a way which directly involves a contravention of the Act, it seems to me that the acquisition of itself can be called *ultra vires*..... If it is a matter of anxiety or suspicion it might be that the court would be very slow to interfere, taking the line.....that one can normally rely on local authorities to observe the law."

- G In *Gard v. Commissioners of Sewers of the City of London* (1885) 28 Ch. D. 486 the Commissioners had power to take land for the widening of streets. It was conceded that they needed only 5½ feet of a section for this purpose but contended that they were justified in taking the whole section with a view to making a profit.

They were restrained from proceeding on their notice to treat. At first instance Kay J. said, at p. 499:

"I must not omit to say that the section I have been considering(is) open to this observation, that there may be very often cases where, at the moment of the adjudication the Commissioners do not know exactly how much they will want, and therefore *bona fide* they cannot say whether they really will want the whole or only part of a house—whether they will want five feet of a piece of land or five yards, and they may therefore adjudicate *bona fide* and rightly and within the meaning of the Act so much is wanted, either the whole or part of a house. But to say that after they have come to the conclusion exactly what they will want, they can claim more, would I think be wrong."

The following, from the judgment of Baggallay L. J. at p. 507 puts emphasis on honest belief:

"Now it appears to me that if the Commissioners honestly (..... in the sense of believing they may require the entirety of the property for the purpose of improvement) come to the conclusion that the possession of the whole of the property, and not merely the part of it which would interfere with the improvement, is necessary for the purposes of the improvement, the words of this section are wide enough to enable them to make an adjudication to that effect."

Bowen L. J. summed up that case very clearly, at p. 511:

"Now, first of all, with regard to the finality of the adjudication. Supposing that the Commissioners are not entitled to take the whole when they only want a part, it seems to me to be obvious that they cannot by simply asserting what is admittedly an untruth, clothe themselves with jurisdiction. They have, no doubt, a right to take what is necessary for their purposes, but the adjudication must bear some relation to reason. I do not say they must always be right, but there must be a probable ground which a reasonable person could take in support of their decision. If they have not the right to take the whole when they do not want it, their saying that they want the whole, when in the same breath they admit they only want one-fourth of it, will not help them."

Another case in which it was alleged that land had been acquired for a purpose not authorised is *Clanricarde v. Congested Districts Board for Ireland* (1914) 79 J.P. 481. Lord Dunedin referred to *Gard's* case and to *Lynch v. Commissioners of Sewers* (1885) 32 Ch. D. 72, and in his judgment at p. 482, said:

"I do not think (those cases) established the proposition (for which they were cited) namely this, that a body like the Congested Districts Board having power to acquire lands compulsorily for certain purposes, must to justify the exercise of those powers, not only have a real and bona fide intention to acquire the lands for those purposes authorised and a real and bona fide belief in their suitability for the same, but must, in addition, have reasonable grounds for their belief. The presence or absence of such reasonable grounds is, in my opinion, evidence on the reality and bona fides of the alleged belief, but not a necessity in addition to such belief. From this

- A it follows that the absence of all grounds on which a person endowed with ordinary human reason would have a belief, in the case of bodies such as this Board, may be conclusive evidence that the pretended belief is not a real and bona fide one at all. I doubt very much if the judgments delivered by Lord Bowen in the cases cited meant anything more than that."

- With these dicta in mind the evidence in the present case falls to be considered. In the majority of cases either the new and unauthorised purpose has been actually embarked upon or the local body has made no secret of its intentions. In the present case nothing has been embarked upon that is outside the authorised object, but it is suggested that this very failure to utilize so much of the land is in itself evidence that it was land not required. There was, of course, the best of reasons for not spending more money on the land; the fact that the whole basis of the acquisition was being challenged in these proceedings. The Council was not deterred by that factor from spending what must have been a substantial sum on the existing works; one may indeed wonder at that, but the failure to spend more can hardly be censured. Then it is said that the Council did not call evidence to prove its intentions with regard to the remaining land. I do not think that this question of excess land, as distinct from the question of the housing of employees was made a clear issue in the Supreme Court. The learned judge did not mention it when dealing, at some length, with the blocks of flats.

- D There is, as I mentioned earlier, some evidence from Mr Warren as to why the Council might wish to acquire a larger area than might *prima facie* appear requisite. He referred to protests and objections from occupiers in the vicinity of the existing power house in the city; and the Council represented its need to the Governor-in-Council for a buffer area and room for expansion. I think that the strongest aspect of the evidence against the Council on this point is the fact that it asked for substantially more than twenty acres, but the question of area was clearly to the fore in the deliberations of the Governor-in-Council and his decision of twenty acres is in terms related exclusively to the electricity project. In my judgment this whole matter resolves itself into a question of bona fides; that of the Council is admitted and in any case I do not find sufficient evidence of the lack of it to induce me to take another view. The bona fides of the Governor-in-Council is not and cannot be challenged. The decision to acquire twenty acres may seem excessive at first glance, but is not surely, in an expanding city and territory in process of acquiring independence, beyond reason. I would therefore reject this ground of appeal.

- It remains to consider two further grounds of appeal based on statutory provisions. The first is that the appellants, as registered proprietors of the land in question have an indefeasible title to it by virtue of the provisions of the Land Transfer Act, 1971. The short facts relevant to this point are that when, on the 27th July 1967, the notice of acquisition was given, Sukhichand was the registered proprietor of the land, and the appellants, had an equitable interest in it under the agreement for sale with Sukhichand mentioned earlier in this judgment. Sukhichand was entitled to remain in possession of the land until the 31st December 1968. On the 16th October 1967, a transfer from Sukhichand to the appellants was registered, as well as a mortgage back to Sukhichand to secure the balance of the purchase money. On the 25th October 1967, Messrs Munro, Warren, Leys & Kermode sent to Messrs. Grahame & Co. the appellants' claim for

compensation with a covering letter advising that the transfer (and mortgage back) abovementioned had been registered, "in order to simplify the claims", and that the claim was made by the appellants "as registered proprietors of the affected land". The same firm of solicitors put in Sukhichand's claim on the same date, confirming that he was mortgagee and basing his claim in the main upon the loss of his right to remain in possession until the end of 1968. A

I am quite unable to see that the principle of indefeasibility of title can assist the appellants in these circumstances. The right of compulsory acquisition is conferred by statute and is effective as against any registered proprietor. I do not think that the appellants can put their case any higher than to say to the Council—"When you gave us notice of intended acquisition we were equitable owners, but before the acquisition was complete we became registered proprietors; therefore you must start again with a new notice". Whether that could in any circumstances be a valid argument I do not need to consider. In my judgment it cannot be so in the present case where the appellants, by putting in their claim as registered proprietors have clearly agreed to waive any defects which the change of status might be thought to have brought about in the proceedings prior to the registration of the transfer. The solicitors' letter of the 25th October 1967, explaining the reason for the registration of the transfer, with the wording of the claim itself, provide a clear basis for an estoppel, when it is considered that, at that stage the Council could easily have served a new notice. B C D

I consider this submission to be of no avail to the appellants; had I thought otherwise, I would have been of opinion that the learned judge ought to have acceded to the application, late though it was, for leave to amend the pleadings to raise the issue of fraud.

The other statutory provision which the appellants seek to call in aid is the Subdivision of Land Ordinance (Cap. 118—Laws of Fiji, 1967). Section 5 of that Ordinance provides that notwithstanding the provisions of any other law no land to which the Ordinance applies shall be subdivided without the prior approval of the Subdivision of Land Board constituted by the Ordinance. The Council did in fact apply for the approval of the Board and that was granted subject to conditions. These were that the road work had to be done within two years from the 18th July 1968, and a plan registered within that time. These conditions, according to the evidence given in September 1974, had not then been fulfilled, and section 9(5) of the Ordinance provides that any person who fails to comply with any condition imposed by the Board is deemed to have contravened or failed to comply with the provisions of the Ordinance. It is Mr Gifford's submission that the failure by the Council in this case has invalidated the compulsory acquisition. E F

In the Supreme Court the learned judge found that the Ordinance was not apt to include a compulsory acquisition, because every act referred to in the Ordinance appeared to be a consensual act. This is not quite accurate if the words of the judgment are read literally, as can be seen from the definition of the term "subdivide" in section 3: G

".....Dividing a parcel of land for sale, conveyance, transfer, lease, sublease, mortgage, agreement, partition or other dealing or by procuring the issue of a certificate of title under the Land (Transfer and Registration) Ordinance in respect of any portion of land, or by parting with the H

- A possession of any part thereof or by depositing a plan of subdivision with the Registrar of Titles under the last-mentioned Ordinance;"

- B It will be seen that there are at least two possible actions within the definition which are unilateral i.e. obtaining a certificate of title for a part, or depositing a plan of subdivision. Yet there is force in the learned judge's approach as both of the actions mentioned are normally taken in preparation for or expectation of future consensual transactions—otherwise there would be no possible point in including them in the definition.

- C There are aspects of the wording of the Ordinance which indicate with some strength that the view the learned judge took of the construction of the Ordinance was the correct one. Before coming to these I will set out three passages from the judgment of the Privy Council in *Patel v. Premabhai* [1954] A.C. 35, an authority which was mentioned by the learned judge in the Supreme Court and in which the Ordinance now under examination was considered. Their Lordships said, at p. 45:

"The Ordinance throughout speaks of subdivision, and its object appears to be to prevent the subdivisonal of land into such small portions as are uneconomical or undesirable."

And at page 48:

- D "Nor is the definition of 'subdivide' in s. 3(a) inimical to this opinion. All that that definition means is, that a division or subdivision takes place within the meaning of the Ordinance, if the land is in fact divided, whether it is divided for the purpose of sale or conveyance or transfer or lease or sublease or mortgage, making an agreement, partition or otherwise dealing with the property. But it is not divided merely because an order for partition is made:
- E What is forbidden is the carrying out of the order by actual partition unless and until the approval of the board, set out by the Ordinance, has been obtained."

- F "...on the true construction of the ordinance all that is forbidden is the actual division of the land or the carrying out of a decree for partition without the consent of the board."

- G As can be seen from those passages *Patel's* case was concerned with the distinction between a decree or order for partition and an actual partition or subdivision. It is not directly helpful on the present question, which is whether the Ordinance as a whole is applicable in the present circumstances, but the case does serve as a guide to the approach of their Lordships to the scope and object of the legislation.

- H To return to the wording of the Ordinance, I would mention first section 6, by which the application to the Board is to be made by "a person who desires to subdivide land"; and, by section 3, "applicant" means the owner, lessee or sublessee of any land. It is obvious that what the draftsman has in mind is an owner of land wishing to subdivide his own land—not the case of powers which fortuitously may enable a non-owner to divide some other persons property. In the present case the Council has become the applicant, contrary to the definition; it could perhaps be argued that the special power to acquire land compulsorily,

implies that the acquiring authority can stand in the shoes of the owner to this extent. But that would not necessarily be enough, as the Board might impose conditions affecting the other portion of the subdivision, that retained by the owner, over which the acquiring authority would have no jurisdiction. A

Section 7 of the Ordinance requires the Board to send a copy of the application for approval to the local authority, which is empowered to make recommendations. In most cases the local authority would be the acquiring authority, though this may not be so in the present case as the acquisition is outside the limits of the Council's area. Where the acquisition was within the area of a local authority, as I imagine would usually be the case, the local authority would have the right to make recommendations upon its own application. Section 17 also might occasion difficulty. It empowers an applicant to appeal to the Governor-in-Council against the refusal of approval by the Board. Such an appeal, in a case where the Governor-in-Council had originally approved the acquisition might be an awkward one if the appellant were the acquiring authority. B C

There are other provisions which appear incompatible with the idea of a local authority occupying the position of applicant for approval. Section 9(4) requires the Board to communicate its decision to the local authority, which shall "forthwith take such steps as are necessary to enforce the observance of the decision of the Board". This provision can hardly have contemplated that the local authority could be an applicant. Section 19(1) gives a local authority power to order demolition of and to demolish buildings erected on a subdivision made contrary to the Ordinance. It is alleged that has happened in the present case. Assuming that the power house had been within the city area could the Council have been asked to adjudicate upon its own buildings? Finally I would mention section 14(2)(b) as a further indication that the Ordinance contemplates subdivision in the ordinary way, as being in the course of or in preparation for consensual transactions. The subsection provides that, after approval by the Board, the applicant is to receive a copy of the certified plan, and then may sell, lease, sublet or otherwise convey the land. D E

For the reasons given I am of the view that the Subdivision of Land Ordinance is not intended to, nor does it apply to a compulsory acquisition of land such as the one under consideration in these proceedings. In spite of the firm wording of section 5 I think the tenor of the Ordinance as a whole supports this construction. I am conscious that what may appear to be an anomaly follows. It is that if the Council had purchased the land in question from the appellants in the usual way without recourse to compulsory acquisition there would not be so much reason for holding that the Ordinance would not apply. The persons desiring to subdivide would then be the appellants and they would also be the applicants for approval. I agree that there may be some lack of logic in such a situation but it is not a serious one in the light of the Privy Council's assessment of the object of the Ordinance as, "to prevent the subdivision of land into such small portions as are uneconomical or undesirable". A project important enough to merit a compulsory acquisition of land would be unlikely to do damage to that object. F G

Finally I would add that, on the view of the facts I have taken, and except to the limited extent to which I may have called it in aid in relation to the question of metes and bounds, I have not found it necessary to consider the doctrine of estoppel. H

A For the reasons I have given in this judgment I consider that all of the grounds of appeal fail and that the appeal should be dismissed with costs. This being the opinion of the majority of the court it is so ordered. There was a cross appeal which was withdrawn by Mr Hughes, he submitting to any order for costs that might be made. The cross appeal is accordingly dismissed with costs against the Council, the appellant therein.

B During the hearing of the appeal Mr Hughes gave an undertaking in the terms of a resolution by the Council of which the following is a copy:

C "RESOLVED that counsel appearing for the Council in the current appeal in the Fiji court of Appeal be authorised to give an undertaking to the court that the Council will, in the event of the appeal and any final appeal to the Privy Council by the present appellants being dismissed and the present appellants being refused any relief in the action pay to the appellants within a time to be agreed, or if not agreed, to be fixed by the court the sum of \$11,000 as reparation for the failure of the Council to abide by the understanding as to the provision of an access road along the line set out in ex. AC to serve the balance of the appellants' land in Certificate of Title 8316, provided that such sum may be set off against the amount of the costs (if any) that may be ordered to be paid by the appellant to the Respondent Council in connection with the appeal and any such final appeal."

D

I have reproduced this undertaking for the purpose of record only. It was not relevant to the issues before the court on the appeal.

E JUDGMENT OF O'REGAN J.

The facts and the issues involved in this appeal are set out in the judgment of Sir Trevor Gould V.P., which I have read and I will not repeat them.

F The land which the respondent purported to take compulsorily under the powers invested in it by the Towns Ordinance (Cap. 106) is outside the boundaries of the city of Suva. The appellants submitted both in the court below and this court that the purported taking was *ultra vires* the Ordinance.

Section 15 of the Suva Electricity Ordinance (Cap. 87) which was first enacted in 1920 provided that the respondent was:

G ".....authorised subject to the approval of the Governor-in-Council to exercise the powers of the Crown Acquisition of Lands Ordinance for the acquisition of such land as they may require for the purpose of the works hereby authorised."

Section 3 deals with the works authorised. It provides:

H "It shall be lawful for the Council to acquire construct operate.....works within and for a distance of four miles beyond the boundaries of the City of Suva."

In my opinion (but subject to what later appears), these provisions were sufficiently wide to authorise the Council (subject to the approval of the Governor-in-Council and to compliance with the provisions of the Crown Acquisition of Lands Ordinance) to acquire compulsorily land for the purpose of erecting a power station within a distance of four miles beyond the boundaries of the City. A

The Council, however, did not seek to exercise its power pursuant to the Electricity Ordinance. It made application expressly pursuant to the Towns Ordinance the relevant provisions of which it becomes necessary to consider. Section 132 empowered the Council: B

".....with the approval of the Governor-in-Council whether alone or in conjunction with the Government or any other statutory public body, and whether within or without the boundaries of the town: C

- (a) promote or establish and maintain public utility services;
- (b) construct and maintain any public works which in the opinion of the Council may be necessary or beneficial to the town."

It was common ground that this section was sufficiently wide to confer power to construct a power station. D

Section 133 provides:

- "(1) A town council may for the purpose of any of their functions under this or any other law by agreement acquire whether by purchase, lease, exchange any land whether situate within or without the boundaries of the town. E
- (2) Subject to the consent of the Governor-in-Council.....a city council may: F
 - (a) acquire whether by way of purchase, lease, exchange or otherwise, any land whether situate within or without the boundaries.....and to lay out building plots upon or otherwise subdivide such land for the purpose of housing schemes or for the purpose of factory, residential, industrial business or workshop sites, and
 - (b) sell, let or otherwise dispose of any such plots or subdivisions of land and any buildings thereon."

Section 136 deals with compulsory acquisition and prescribes prerequisites and procedures. It provides:

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

A The contrast between this section and s. 133 to which Mr Gifford invited notice is that the powers conferred by both subsections of s. 135 authorize purchase "within or without the boundaries" whereas s. 136 is silent on the topic. He argued that by application of the "*expressio unius*" maxim and by reason of the territorial limitation of power in a local body (unless expressly extended by statute) the power conferred by s. 136 could be exercised only in respect of land within the boundaries of the City. The power station, is some 3½ miles outside the boundaries. In support of his submission, Mr Gifford cited *McCurrie v. Naria* [1900] 2 W.A.L.R. 15; *Taylor v. Harries* [1953] V.L.R. 105; *Collins v. Willoughby Municipal Council* (No. 2) (1967) 14 L.G.R.A. 256; and *Horners Co. v. Barlow* (1688) 3 Mod. Rep. 158.

B Mr Hughes submitted that s. 136 of the Towns Ordinance conferring, as it did, power to the respondent to acquire compulsorily land "for any purpose which they are authorised to acquire land" was sufficiently wide to encompass the provisions in that behalf contained in sections 3 and 15 of the Suva Electricity Ordinance. Section 15, he submitted conferred power to acquire land compulsorily for the purposes of the works authorised by s.3—"works within and for a distance of four miles beyond the boundaries of the city of Suva." This submission, in my opinion, overlooks that the power conferred by s.136 is exercisable, only in respect of land which a council is unable to purchase by agreement. The Electricity Ordinance does not confer power on the respondent to purchase lands by agreement. In my view, therefore s.136 does not relate to works authorised by s.3 of the Electricity Ordinance.

C In my opinion, s.136 applies only to instances where a council is unable to purchase by agreement any lands that it is authorised to acquire by subsections 1 and 2 of s.133. Both subsections refer to land "whether situate within or without the boundaries." Subsection 1 expressly refers to acquisition "by agreement". Subsection 2 deals with methods of acquisition which necessarily involve agreement. I conclude, therefore, that s.136 gave the necessary power to the respondent to acquire compulsorily land outside its boundaries.

E The learned trial judge held that the words "or otherwise" in s. 133(2) were intended by the Legislature to confer power of compulsory acquisition. Mr Hughes did not seek to support that part of His Lordship's judgment and accordingly I say no more of it save that, in my view, there was warrant for his not doing so.

F In view of the stress laid by the respondent of the inter-relation of the Electricity Ordinance with the Towns Ordinance in this head of the argument, I record that I am inclined to the view that s.15 of the former was impliedly repealed on the enactment of the latter. If this be not so, we have the absurd situation where there co-exist powers to acquire land for the one purpose with one authorising such within four miles of the city boundaries and the latter any distance outside such boundaries and the one authorising the exercise of the power in accordance with the powers of the Crown Acquisition of Lands Ordinance (subject to the approval of the Governor-in-Council) and the latter subject also to the additional and more onerous requirements prescribed by s.136. I am mindful that the Suva Electricity Ordinance is a special Act and the Towns Ordinance is general. I think, however, that the maxim "*generalia specialibus non derogant*" notwithstanding, the palpable absurdity which results if s. 15 is left subsisting led to the conclusion that it has been repealed by implication. The maxim is not of universal application. In *Pellas v.*

Neptune Marine Insurance Co. (1879) 5 C.P.D. 34, 40, Bramwell L. J. observed that "a general statute may repeal a particular statute". In *Great Central Gas Consumers Co. v. Clarke* (1863) 13 C.B. (N.S.) 838, Pollock C. B. (at p. 840), in holding that a provision in a private act limiting the price of gas was impliedly repealed by a subsequent public act allowing a higher price, said:

"Although that section is not in terms repealed, yet it becomes a clause in a private Act of Parliament quite inconsistent with a clause in a subsequent public Act. That is sufficient to get rid of the clause in the private Act."

I think that the same considerations apply in the present case.

This point, however, was not argued before us and for the present purposes I make nothing of it. I advert to it only because a deal of the argument proceeded on the footing that the two provisions co-existed and to proffer the opinion that such is not the case.

Section 136(1) provides that the Council on fulfilment of the conditions therein set forth "may represent the case to the Governor-in-Council." It therefore is invested with a discretion in the matter.

Professor de Smith in the section of the third edition of his book dealing with the question of excess or abuse of discretionary power conferred by statute on local or other authorities has pointed out, at p. 281, that:

"If the source of authority relied on is statutory, the courts begin by determining whether the power has been exercised in conformity with the express words of the statute and may then go on to determine whether it has been exercised in a manner that complies with certain implied legal requirements. In some contexts they have confined themselves to the question whether the competent authority has kept within the four corners of the Act and whether it has acted in good faith. Usually they will pursue their inquiry further and will consider whether the repository of a discretion, although acting in good faith, has abused its power by exercising it for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness."

Before the Council "may represent the case" a condition precedent must be fulfilled. It must be "unable to purchase on reasonable terms suitable land for any purpose for which they are authorised to acquire land." The fulfilment of that condition requires that the Council must consider and decide a question of fact entrusted to it for decision by the Ordinance. In *Manakau City v. Attorney-General ex relatione Burns* [1973] 1 N.Z.L.R. 25, the Court of Appeal of New Zealand, was concerned with the exercise of powers to dispose of land originally taken at the instance of a local authority for a local public work but no longer required for such. The power was contained in subs. (1) of the Public Works Act 1928, the part of which relevant for purposes reads:

"If it is found that any land acquired at any time under this or any other Act or Provincial Ordinance or otherwise howsoever for any public work is not required for that public work, the Governor-General may cause the land to be sold under the following conditions:

- A (a) A recommendation or memorial as the case may be shall be laid before the Governor-General by the local authority at whose instance the land was taken....."

Turner P., at p. 31, had this to say:

- B "I will begin by summarizing what I conceive is the effect of the subsection, insofar as it deals with land originally taken at the instance of a local authority for a local public work.

- (1) As a pre-requisite of the operation of the section it must be found that land taken for such a work is no longer required for that work.
- (2) It is implicit in the section that the person and the only person entrusted by the statute with the function of 'finding' on this matter is the local authority at whose instance the land was taken."

- C He went on to say (at pp. 32, 33);

- D "In finding the land not required for the public work the Council was in my opinion doing no more than deciding a question of fact entrusted to it for decision by the statute. It was not exercising a power. The determination of this question of fact by the Council is no doubt a pre-requisite to the exercise, by someone else, of further powers given by the section; but in deciding whether the land is or is not required I am of opinion that the Council is doing no more than decide a question of fact. It may of course be said that whether it is required is a matter of opinion quite as much as one of fact; but in so far as this may be so it is the opinion of the Council which will decide the matter, and whether the Council has such an opinion is again a question of fact.

- E In the same case (pp. 36, 37) Richmond J., cited with approval the last sentence of the passage from Professor de Smith's work (*supra*). He held that "it is implicit in the section that it is empowering of the local authority to present a memorial to the Governor-General if it finds that any land taken under the Act for any public work is not required for that public work". After eliminating from consideration bad faith on the part of the Council, he went on to say:

- F "In these circumstances, the "finding" of the Council as to the land in question could in my opinion only be attacked either:

- (i) by showing that the members of the Council did not honestly address their minds to the question whether or not the land was still required for recreational purposes and arrive at an honest judgment or
 - (ii) possibly, on the grounds that no reasonable Council could arrive at such a conclusion."
- G

In the present case, the appellants have expressly acquitted the respondent of acting in bad faith.

The only resolution of the respondent on the question was passed at a meeting held on 26 July 1966. It reads:

- H "It was resolved that Messrs Grahame and Coy be requested to offer the owners of Cs. T. 8315 and 8316 £110 per acre for the land required and in the event of non acceptance to take whatever action is necessary to have the land compulsorily acquired."

The negotiations and correspondence which preceded this resolution were conducted on the footing that the respondent would provide road access to the appellants' remaining land. The respondent, no doubt, would in the course of its works have had to provide road access to its power station but what additional costs would have been involved in providing such road access to the appellants' land and its bearing on the effective cost of acquiring the appellants' land, were never considered.

The respondent neither before the resolution nor before its submission to the Governor-in-Council sought or obtained a valuation of the appellant's land. It had in its possession a valuation made of comparable adjoining land by Mr S. A. Tetzner, Registered Valuer, on 15 January 1964,—that is, two and a half years before the date of its resolution—in which the land was valued at £75 per acre. That valuation records that no potential subdivisional value had been ascribed because in the opinion of the valuer the land was too remote from proper access to have such.

The respondent called no evidence as to its acts in this aspect of the case and accordingly the only material concerning them before the court was that recorded in correspondence and minutes. There is no record of the advice of Mr Tetzner having been sought as to the relationship between the value he placed on comparable adjoining land in 1964 and the value of the subject land in 1966. On 26 October 1966, the respondent's solicitors in a letter to the Director of Lands adverted to the topic. They wrote:

"Re: value of the land. In 1964 Mr Tetzner gave the City Council a valuation of the land in C.T. 7423 which is adjacent to the area proposed to be taken. That also is a dairy farm, very similar to those conducted on the other land. Mr Tetzner's valuation was in respect of the land under grass, comprising 36 acres—was £75 per acre. We spoke to Mr Tetzner recently in regard to the two areas in question and he considered that they would be about the same value and that £300 asked by the owner of Title 8316 was ridiculous.

We enclose an original stamped agreement between Sukhichand and Mukta Ben and Shanta Ben dated 22 July 1964 for your perusal. You will note that an estimated area of 88 acres was sold for £8,100 on terms, the vendor retaining about six acres for his house site which is shown on the plan you already have. This sale price works out at approximately £92 per acre.

We therefore offered £110 per acre, being an advance over £92 per acre, which the Council considered to be the ultimate price they could offer. The dairy farm land in that area is worth no more than £100 an acre today, having regard to the use it is now put, which £100 an acre is an increase on Mr Tetzner's valuation two years ago. So it was considered £110 was the limit to which the Council could go and this was done in order to attract the vendor and allow something for displacement.

It was pointed out to the vendors that the balance areas in the title would be considerably increased in value due to the Council erecting a power station there and giving good road access, thus enabling the vendors to subdivide.

A Mr Warren is acting for the vendor of C.T. 8316 and there is no hope of a compromise, and indeed the Council would not give any more than £110 per acre, which it considers is above the market price."

Later in the same letter, the solicitors for the respondent wrote:

B "We also mentioned to you that it was considered that Samabula/Vatuwaqa is expanding rapidly and the growth of Suva is towards Nausori, and that eventually that area along the road to Nausori will become a suburb of Suva, and the proposed site for this power station will be more or less in the centre of Suva and its environs."

C The attitude and approach of the respondent can be gleaned from this letter. There was no evidence that the conversation between its author and Tetzner preceded the respondent's resolution of 26 July 1966 or if it did that the burden of it was conveyed to the respondent before the resolution was passed. The letter demonstrates that the question as to whether the subject land could be "purchased by agreement on reasonable terms" was approached—if approached at all—having regard to the use to which the land was being put and this notwithstanding that "it was considered that the area was expanding rapidly." This latter factor was obviously of greater moment than either the appellants or the respondent realised.

D The values given by the valuers at the trial demonstrate that. Considering the situation, however, as at 26 July 1966 (the date of the respondent's resolution) it is beyond peradventure that the respondent took no proper steps to inform itself as to what was a reasonable price to pay for the land. I think that, in failing so to do, it deprived its members of the opportunity of addressing their minds to and of making a judgment upon the question, insofar as it related to the subject land, set for their consideration by the Ordinance namely whether the subject land could be acquired by agreement on reasonable terms. I am, therefore, of the view that the condition precedent to its

E representing the case to the Governor-in-Council was not fulfilled.

In *Banks v. Transport Regulation Board* (Victoria) (1968) 119 C.L.R. 222, the High Court of Australia had to consider section 31 of the Transport Regulation Act 1958 (Vict.) which, insofar as it is of present moment, provided:

- F "(1) No decision of the Board revoking any such licence shall have any force or effect until such decision is reviewed by the Governor-in-Council:.....
- (2) In reviewing any decision as aforesaid the Governor-in-Council may by order within six months of the Board giving a decision
- G (a) Approve the decision of the Board
(b) disapprove the decision of the Board
(c) make any determination in the matter which the Board might have made—and every such order shall be given effect to as soon as may be by the Board."

Barwick C. J. (p. 240) had this to say as to this provision:

H "It is quite clear that the Act by s. 31 contemplated that there should be an effective review by the Governor-in-Council of the Board's decision The statute therefore placed upon the Governor-General in Council an obligation to consider the matter for himself and reach a conclusion, upon

all the material available to the Board, whether or not the Board's decision should be approved or disapproved or whether the circumstances called for some other action on the part of the Council within s. 32(c) That Council was by the statute given both the power and the duty to consider the matter for itself." A

I interpolate that the Board's decision to revoke a particular licence—a decision which was ultimately held to be void—had been approved by the Governor-in-Council. Barwick C. J. observed (p.241): B

"of course, certiorari will not go to the Governor-in-Council but that does not deny that the proceedings of the Governor-in-Council in performance of a statutory function may be void and in an appropriate case be so declared."

And, again, at p. 242: C

"If the decision of the Board be void, as I think it is, its approval by the Governor-in-Council does not, in my opinion, prevent the court from quashing it."

In the instance case, s. 136 of the Towns Ordinance ordained two steps. The first, the taking of a decision by the respondent and the exercise of a power to "represent the case"; the second the Governor-in-Council making a decision on the substantive issue on the criteria therein laid down. In the *Banks* case, the situation was significantly different. Again two separate steps were laid down. The first, that the Board make a decision on the substantive issue; the second that the Governor-in-Council conduct an effective review of the Board's decision. In the *Banks* case, the first step was declared void. It was held that "so to do does not directly impinge upon the ineffective action of the Governor-in-Council in having approved it"—per Barwick C. J. at p. 242. The learned primary judge in the present case expressed himself as loathe to go so far as to declare the decision of the Governor-in-Council invalid without the Attorney-General being a party to the action. In so doing he, I think, with respect, wrongly distinguished *Bank's* case and overstated the effect of the observations in that behalf of the High Court of Australia in *Brettingham Moore v. St. Leonards Corporation* [1969] A.L.J.R. 343. In my view, the latter case is clearly distinguishable on the facts, inasmuch as the case dealt with preliminary points of law one of which sought answer to a question as to whether or not a statutory commission was bound to observe the rules of natural justice. The case did not touch a question as to the actions of the Governor-in-Council. Indeed the stage had not been reached where the Council had set about the exercise of its functions. It was in relation to the future conduct of the proceedings that Barwick C.J. remarked on the question as the whether or not the Attorney-General should be a party. It seems to me that in this case if the first step, as I have termed it, falls, the decision of the Governor-in-Council must needs fall with it. That, I think, is the burden of the decision in *Banks'* case which I respectfully follow. D E F G

If my decision as to the first step were otherwise, the submissions of the appellants that the Governor-in-Council had neglected to observe the rules as to natural justice would next have fallen for consideration. My views as to such submission can be shortly stated. H

- The requirements of the Ordinance were that the Governor-in-Council be
- A "satisfied, after such inquiry, if any, as he may deem expedient," that:
- (a) that suitable land for the purpose cannot be purchased on reasonable terms by agreement;
 - (b) that the circumstances are such as to justify the compulsory acquisition of the land for the purpose;
 - (c) that the purpose is a public purpose.

- B The matters encompassed by the requirements set out in paragraph (b) and (c) could not affect adversely the appellants and indeed it was not so suggested. The same, I think, must be said for the general aspect of the matters involved in paragraph (a) viz. the availability of suitable land for purchase. It is in respect to the particular land—the appellants' land—and the question as to whether it could or could not be purchased "on reasonable terms by agreement" that the submission
- C falls to be considered.

- On this question, I look first to the Ordinance itself. This I do in compliance with what Lord Hailsham of St. Marylebone L.C. referred to in *Pearlberg v. Varty* [1972] 1 W.L.R. 534 at p. 540 as "the general proposition that decisions of the courts in particular statutes should be based in the first instance on a careful, even meticulous construction of what that statute actually means in the context in which it was
- D phrased." The Ordinance decrees that the Governor-in-Council "may authorise" if he "is satisfied after such inquiry, if any, as he may deem expedient." The words "if any" connote that there may be an inquiry or there may not be one. The inquiry may be "such" as the Governor-in-Council "may deem expedient". Whether or not there is any inquiry and if so, the nature of the inquiry, then, is left by the Legislature for the determination of the Governor-in-Council.

- E But that does not conclude the matter. Whatever the prescription of the statute, the general requirement of fairness may superimpose a further requirement giving any persons affected opportunity "for correcting or contradicting any relevant statement prejudicial to their view."—*Board of Education v. Rice* [1911] A.C. 179, 182; *Coles v. Matamata County*—N.Z. Court of Appeal 69/74; 30 April 1976 (unreported). The Governor-General in Council did not enlarge the inquiry to include an opportunity
- F to the appellants to be heard and the question is whether he should have done so. The answer to that question depends on the further question whether the circumstances of the case, the nature of the inquiry, the rules under which he was acting and the subject matter being dealt with so required,—*Russell v. Duke of Norfolk* [1949] 1 All E. R. 109, 118. The failure of the respondent to address itself to the question it had to resolve before representing the case and the resultant deficiencies in the material it submitted to the Governor-in-Council tend to cloud this issue. The
- G appellants submitted that had they been heard they could well have corrected those lacks. That may well be so, but to consider such factors is to import material provided by hindsight which, despite its conscientious inquiries, was not available to the Governor-in-Council. Such matter, in my view, cannot properly be taken account of in judging the propriety of the conduct of the Governor-in-Council.

- H In many of the cases to which we were referred on the topic, the rights of the party aggrieved were gravely affected and save for a review of the decision by the courts, such party was left without redress.—*Delta Properties Pty. Ltd v. Brisbane City Council*

(1955) 95 C.L.R. 11; *De Verteuil v. Knagg* [1918] A.C. 557; *Lower Hutt City Council v. Bank* [1974] 1 N.Z.L.R. 545 are examples of cases in that category. In the present case, the appellants' right to compensation and their right to be heard thereon are provided for by the Ordinance. A

It seems to me that, having regard to the nature of the topics prescribed by the Ordinance, upon which the Council was to be satisfied before exercising its discretion to authorise the compulsory acquisition of the land, no element of unfairness such as to require the Council in its inquiry to go beyond the prescription of the statute, manifested itself. I think that the primary judge was right in rejecting the appellant's submissions on this aspect of the case. B

I pass to a consideration of the contents of the notice to treat and the statutory requirements as to notice of it. The approval of the Governor-in-Council was "of the compulsory acquisition of 20 acres at the eastern end of C.T. 8316." The approval thus did not precisely define the metes and bounds of the land. C

The respondent's notice of acquisition was served on Sukhichand, the registered proprietor of the land, and on the appellants. It followed the form prescribed in the schedule to the Ordinance. It called upon "Any person claiming to have any right or interest in the said land within three months from its date "to send to the Town Clerk a statement of his right and interest." It was in respect of "the land described in the schedule hereto" The description of the land in the schedule was: D

"All that piece of land containing 20 acres situate at the eastern end of Certificate of Title 8316 being part of the land known as "Naivoce" (part of) and being part of the land contained in Certificate of Title No. 8316 in the district of Suva on the island of Vitilevu as delineated on the sketch plan hereinafter appearing." E

The eastern boundary on the sketch shows the high water mark of the sea—not as it was at the date of the notice but as it was depicted on the plan of the land drawn on C.T. 8316 and thus as it was when the survey plan (from which the plan on the title was taken) was made. The northern and southern sides of the sketch plan are part of the northern and southern boundaries of the plan on the title. The western side of the sketch—the purported boundary between the land to be taken from the appellants and the land they would retain—appears to be at right angles to both the northern and southern bounds of the land to be taken. That, however, was not possible as those boundaries are not parallel. Its length is not given. Its bearings to the northern and southern bounds are not shown. The lengths of the northern and southern bounds are not shown. In fact no dimensions of any of the boundaries are shown. Within the bounds are printed the words "20 acres to be acquired". It was common ground that it was possible to survey off 20 acres at the eastern end of the land in question. Such a survey would involve a definition of the actual high water mark on the eastern boundary and the plotting of the western boundary so as to enclose 20 acres. That could, however, be done in many different ways. Twenty acres could be enclosed for instance by a straight line at various angles from say the northern boundary or by two lines meeting at different angles at different distances from the northern and southern boundaries or by a curved line. Even if an attempt were made to plot the western boundary as near as may be to the sketch plan in the notice of acquisition such could be done with only one extremity of it at right angles F
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to a side boundary and it would be an arbitrary decision to decide which one.

A Furthermore the western boundary required to enclose 20 acres of the land, could not be placed with accuracy until the high water mark at the eastern side was defined. It follows, therefore, that neither the notice of acquisition nor the plan accompanying it defined the metes and bounds of the land which the respondent purported to take. The notice of acquisition contained the following provision:

B "And notice is hereby given that the Suva City Council intends to enter into possession of the said land at the expiration of eight weeks from the date of this notice. Any person who shall wilfully hinder or obstruct the Suva City Council or any person employed by it from taking possession of the said land is liable under the provisions of the above Ordinance to imprisonment for three months or to a fine of twenty-five pounds or to both—such imprisonment and fine."

C Having regard to the lack of definition of the land in the notice, how, one may well ask, could the respondent take possession "of the said land" and how could "any person" avoid hindrance and obstruction of such.

In *Haynes v. Haynes* (1861) 30 L. J. Ch. 578, 581 Kindersley V. C. said:

D "I consider that a notice to treat constitutes the relation of vendor and purchaser to a certain extent, and for purposes that some of the consequences flowing from an actual contract might also flow from a notice to treat. The particular lands are fixed: if the company and the landowner after the notice come to an agreement that is an enforceable contract."

E Lord Watson in *Tiverton & North Devon Railway Co. v. Loosemore* (1884) 9 A.C. 480, 503 referred to the parties to a notice to treat being placed by the notice "in a position analogous to that of vendor and purchaser."

F Assuming for the moment, that subsequent to service of the notice the appellants and respondent had agreed as to price but later for some reason, became at odds, the notice to treat and the agreement as to price would ex facie constitute a binding contract which could be enforced by specific performance. In my view, in the circumstances here obtaining the uncertainty as to the metes and bounds of the land would preclude a decree for specific performance being granted. It would be impossible, too, to perfect such a contract by conveyance or transfer without further agreement as to metes and bounds by the parties. These considerations, I think, impel acceptance of Mr Gifford's submission that the notice did not define the land to be taken and that the purported authorization was accordingly void for uncertainty. For reasons which will later appear I am of the view, however, that

G such in the present case is not fatal.

H The respondent served the notice to treat on the appellants (who were at the date of service equitable owners of the land by virtue of their agreement for sale and purchase) and on Sukhichand, the registered proprietor. Section 3 of the Crown Acquisition of Land Ordinance (Cap 119) provides that notice shall be given to the registered proprietor, mortgagee, encumbrancees and lessees. There is no statutory requirement that notice be given to equitable owners. The respondent submitted that notwithstanding its having served them, the appellants were not within the category of persons required to be given notice and that accordingly they

lack *locus standi* to challenge the acquisition. The primary judge was disposed to think that the term "registered proprietor" should be construed widely to include equitable owners. I find myself unable to agree with such a construction. The term "registered proprietor" in jurisdictions where the Torrens system of land tenure operates both by statutory definition and inveterate construction denotes the holder of the legal estate as opposed to and distinct from the holder of an equitable interest and any derogation from that in any context would give rise to untold difficulties. A

Subsection 2 of s.6 of the Fiji (Constitution) Order 1966 provides: B

"Every person having an interest in or right over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the Supreme Court for: C

- (a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled and
- (b) the purpose of obtaining prompt payment of that compensation."

This provision clearly embraces the equitable owner. I am constrained to say that this solemn declaration of his right of "direct access to the Supreme Court for the determination of the legality of the acquisition" of his property would have but an empty and hollow ring if those invested with power to take land compulsorily might lawfully leave him to find out by his own devices of their depredations upon his lands or encroachments upon his rights. D

This respondent clearly knew that the appellant were the equitable owners of the land. It had treated with them as to purchase of the lands and related matters. E

Having regard to the provisions of the Constitution Order and the respondent's notice of the appellants' interest in the land, and of their right to be compensated, the respondent, in my opinion was obliged to give them notice. The notice prescribed requires any person claiming right or interest to send a statement of it and of any claim in respect of it within three months of its date. Section 6, although it refers to the "person aforesaid"—that is, a person in one of the categories listed in s.5, makes a general provision for the taking authority to enter and take possession of the lands. The rights of an equitable owner in possession are thus affected. By virtue of the provisions of s.8 time runs "from the service and publication as aforesaid of such notice". I leave aside, for the moment, the matter of publication. For present purposes, it suffices to note that "service of such notice" is one of the elements in the calculation of the time within which a claimant is to lodge a claim. If he does not lodge it within the time stipulated, the process of determining the quantum of his compensation can be proceeded with in his absence and without his being heard. F G

Sections 5, 6, 7 and 8 prescribe a code of procedure to be adopted by the acquiring authority in an exercise which manifestly affects the rights of all persons with both legal and equitable interests in the land. In my view those sections do not provide a complete code as to the procedure. I think that the principles discussed in *Furnell v. Whangarei High Schools Board* [1973] 2 N.Z.L.R. 705, 717 are of H

- application. Adherence by the respondent to the provisions of s.5 only, would give
- A "scope for unfairness" and I think that the provisions of that section must be supplemented. The code is not "one that has been carefully and deliberately drafted to prescribed procedure which is fair and appropriate" (*Furnell's case, supra*) and I think "the justice of the common law will supply the omission of the legislature"—*Cooper v. Wandsworth Board of Works* (1863) 14 C.B.N.S. 180, 194.) In my view, the appellants were properly served with the notice to treat and I
- B reject the submission that they lacked *locus standi*.

Subsection 4 of s.7 of the Crown Acquisition of Lands Ordinance provides:

"All notices served under the provisions of this ordinance shall be inserted once at least in the Gazette and in a newspaper circulating in Fiji."

- C The respondent caused neither of these things to be done. The appellants contend that the words "all" and "shall" render the provision mandatory and that non compliance with it invalidates the purported compulsory acquisition. They cited in support of this submission *Scurr v. Brisbane City Council* (1973) 47 A.L.J.R. 532; *Corporation of Parkdale v. West* (1887) 12 App. Cas. 602; *North Shire Railway Company v. Pion* (1889) 14 App. Cas. 612 and *Saunby v. Water Commissioners of the City of London (Ontario)* [1906] A.C. 110. The respondent, on the other hand, submitted that the provision was merely directory.

- D With regard to the cases cited by the appellants and indeed the host of other cases there are on the topic I think it appropriate to allude to the observations of Lord Penzance in *Howard v. Bodington* (1877) 2 P.D. 203 where, after referring to the fact that many cases had been cited to him, he said:

- E "Since the matter was argued I have been very carefully through those cases, but upon reading them all the conclusion at which I am constrained to arrive is, that you cannot glean a great deal that is very decisive from a perusal of those cases. They are on all sorts of subjects. It is very difficult to group them together and the tendency of my mind, after reading them is to come to the conclusion which was expressed by Lord Campbell in the case of *Liverpool Borough Council v. Turner* (1860) 29 L. J. (Ch.) 827 His
- F Lordship said this:

"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied modification for disobedience. It is the duty of the courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

- G In *New Zealand Institute of Agricultural Science v. Ellesmere County* [1976] 1 N.Z.L.R. 630 Cooke J. who delivered the judgment of the Court of Appeal described the terms "mandatory" and "directory" as lacking precision. He said (at p. 636):

- H "Nevertheless, it is generally understood that the broad distinction is between a nullity and a mere irregularity Whether non compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non compliance."

On this topic I think sections 5, 7 and 8 must be looked at together and the scheme and scope of them considered. They have to do with notice to persons affected by the proposed compulsory acquisition of the land. Section 5 decrees categories of persons to be served. Section 7 provides for the mode of service on persons other than Corporations and on Corporations (ss. 1 and 2). Subsection 4 of s.7 provides that all notices so served shall be advertised. Sections 5 and 7, in essence, make provision for due notice to parties affected. That is their whole purpose and scope.

The appellants were given notice and indeed they acted upon it by filing a claim pursuant to s.8.

Professor de Smith 3rd Edition 1973 p. 123 in a passage cited with approval in *Grey v. Choyce* [1975] 1 W.L.R. 422, after citing part of the passage from *Howard v. Bodington* printed above, said:

"Furthermore, much may depend upon the particular circumstances of the case in hand, although 'nullification is the natural and usual consequence of disobedience' breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the Court is for any reason disinclined to interfere with the Act or the decision that is impugned."

In my opinion, it is clear that the appellants have suffered no substantial prejudice by the failure of the respondent to comply with s. 7(4). If "substantial compliance" is a prerequisite to my holding that the failure does not invalidate the subsequent steps taken by respondent (see *Howard v. Secretary of State for the Environment* [1975] Q.B. 235 and *Scurr v. Brisbane City Council* (1973) 47 A.L.J.R. 532) we have in this case personal service of the notice to treat which more than meets that requirement.

The appellants submitted also that the respondent's submissions to the Governor-General in Council as to the access road and its conduct generally in relation to the access road vitiated both its application to the Governor-in-Council and the Governor-in-Council's purported approval of the compulsory acquisition, and precludes the respondent from relying on such approval. In my view, the appellant's submissions in all aspects touching upon the question of access to their land are misconceived. This I hasten to say, is not to say that the strictures of the learned primary judge as to the respondent's conduct in respect of it were not without warrant. The provision of the access road loomed large in the attempts of the parties to reach an agreement for sale and purchase. It was a condition of all the various offers and counter-offers except the initial offer of a gift of five acres by the appellants. It was not a condition of the respondent's resolution as to its final offer but in fact its solicitors again included such a condition in the formal offer made pursuant to such resolution. That offer, of course, was rejected. The negotiations were then at an end and the conditions attaching to the various offers were thereafter irrelevant. The respondent next put in train the process of acquiring the land compulsorily. It seems to me that it was not only beyond the power of but also impracticable for the respondent to apply for approval to take the land subject to a condition that

- A appellants' adjoining land be serviced by a road. It was likewise beyond the power of the Governor-in-Council to approve a taking of land subject to such a condition. It was beyond the power of both of them because s. 136 of the Towns Ordinance goes no further than to authorise the respondent to make its application to acquire land and no further than to authorise the Governor-in-Council to authorise the acquisition of such. It was impracticable for both for the reason that the proposed access was over land not owned by either the respondent or the appellants and its route was not defined. If the authorization had been made subject to a condition as to access, any contract concluded by a subsequent agreement as to compensation, would lack certainty and would be incapable of enforcement. If an authorisation had been so given the route of the access road would require subsequent agreement between the appellants and the respondent and in the event of disagreement it seems to me that it would be beyond the powers of the Governor-in-Council to make any decision for the resolution of such. It is true that the Governor-in-Council in pursuing his inquiries, through his delegates, the Director General of Lands, sought details of the access to both the subject land and remainder of the appellants' land and that such inquiry evoked the reply:
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- D "Re: access. The Electrical Engineer has shown alternative routes. Route A through adjacent Crown land and Route B marked red along the boundaries of the second area out of Title 8315 to be acquired. This would entail the acquisition of the existing private road from the owners, and coming along the strip or right of way already shown on the plan.

It was agreed with the owner of Title 8316 that if the Council acquired the area out of the title that a road would be provided to give access to the balance area."

- E As to the second paragraph of this passage, the evidence disclosed no such an agreement. It disclosed no more than that such was a term of various offers none of which was accepted.

- F On 24 October 1967, the respondent's solicitor delivered a survey plan to appellants' solicitor with a request that it be signed by the appellants. On being requested so to do, the appellants' attorney instructed their solicitor to borrow from respondent's solicitor a locality map which he had seen previously and upon which there were some markings as to the position of a proposed access road to the subject land and its relation to the remainder of the appellants' land. The map was provided. On 26 October 1967 the survey plan, executed by the appellants was returned to the respondent's solicitor with a covering letter which stated:

- G "It has been signed by our clients without prejudice to their claim for compensation and on the understanding that it is the council's intention to establish access from Kings Road to the 20 acres by means of a public road as shown red on the map returned herewith, portion of which will run along and touch the northern boundary of our clients' land for a distance of about 18 chains."

- H The respondent made no reply to this letter. At some time subsequently it took a decision to lay the road in a different position. When such a decision was made, the respondent did not deign to inform the appellants of it. Later, the respondent altered the survey plan to show the position of an access road in a position different

from that described in the letter of 26 October 1977. The alteration was made without reference to the appellants. Local bodies, fortunately, do not usually conduct their business in this fashion. A

The letter of 26 October 1967 was clearly an attempt by the appellants to ensure that the access road to the power station serviced the residue of their land. From their point of view, this was commercially advantageous. The legal consequences of the respondent accepting and acting upon the survey plan without commenting upon or disavowing "the understanding" may fall for consideration in other circumstances. It may give rise to rights and remedies. It may be a basis for the appellants amending their formal claim for compensation or submitting a new claim. In passing I observe that the failure of the respondent to advertise pursuant to s.7(4) of the Crown Acquisition of Land Ordinance may have left the door open for such. Be all that as it may—and none of those questions arise for consideration in these proceedings—I do not think that the validity of the acquisition is affected by the respondent's conduct in these matters. True, there was a reference to such access in the respondent's submissions to the Governor-in-Council. That, it appears to me, resulted from a confusion by the solicitor for the respondent between a term in an offer and a term in a contract. The events commencing with the letter of 26 October 1967 and subsequent to it, in my view, give rise to considerations of their own but do not touch the validity of the notice of acquisition. I accordingly agree with the learned primary Judge that the submissions of the appellant on this aspect of the case must be rejected. B C D

The appellants submitted that the respondent having erected workers' flats on the land taken, the purported acquisition was for purposes beyond those authorised by the Governor-in-Council. The burden of their submissions on this point is fully traversed in the judgment of the learned primary Judge and I will not repeat them. I content myself by saying that I agree with his conclusions. The appellants relied strongly upon *Attorney-General v. Pontypridd Urban District Council* [(1906)] 2 Ch. 257. In that case, the respondent acquired land compulsorily for an electricity station under the Electric Lighting Acts. Before the formalities were completed it resolved to erect and set about erecting a refuse destructor on the land. In a relator action, it was restrained from so doing. The two purposes were quite distinct from each other. In the present case, the compulsory acquisition was authorised for a power station. That power, in my view, encompasses the power to do all such acts and things as may be necessary for and incidental to it. The *Pontypridd* case itself is authority for that—(op cit. p. 264 and 265). Whether the erection of workers' accommodation on the site falls within the description of necessary and incidental matters is an issue of fact which the learned Judge decided in the affirmative. I think that the evidence justified his so doing. E F G

After the service of the notice to treat, the appellants registered the memorandum of transfer to them of the whole of the land purchased from Sukhichand and a duplicate Certificate of Title in their names was issued by the Registrar of Titles on 16 October 1967. Section 18 of the Land Transfer Act 1971 provides:

"Every duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence H

- A that the person named in such instrument or in any entry therein as seized of or as taking an estate or interest in the land described in such instrument is seized or possessed of such land for the estate or interest so set aside....."

It was open to the respondent to lodge a caveat against the title giving notice of its rights pursuant to the Notice of Acquisition. It did not do so until 24 December 1968—that is subsequent to the registration of the transfer to the appellants.

- B The legal effect of registration under the Torrens system of land tenure has been long settled.—*Assets Co. Ltd. v. Mere Roihi* [1905] A.C. 176; *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.*; *Fraser v. Walker* [1967] N.Z.L.R. 1069 (J.C.). The principles they establish and settle are well known and need not be restated.

- C The appellants contended—and rightly—that they have an indefeasible title to the land. They contend further that their acquisition of such title vitiated the notice to treat. Mr Gifford put it that if the respondent had rights thereunder, "it has slept on them and has allowed the registration of the transfer with full knowledge that it was being requested". In developing this limb of his argument, he submitted that if the respondent was to take the land lawfully it should have served a fresh notice on the appellants after they perfected their equitable interest by registration.

- D In my opinion, the argument advanced overlooks the fact that the respondent has made no attack upon the appellants' title. I think that in essence the appellants' position qua the respondent is no different from what it would have been had they been on the register at the date of service of the notice to treat. The notice placed on the parties "in a position analogous to that of vendor and purchaser" (*Tiverton and North Devon Railway Co. v. Loosemore*; *Haynes v. Haynes* both *supra*) and that situation obtains whether the person served is merely an equitable owner or holds the legal estate. It seems to me to remain unaltered when, as here, the equitable owner, subsequent to the receipt of notice, perfects his interest by registration. I accordingly reject the submission.

Section 5 of the Subdivision of Land Ordinance (Cap. 118) provides:

- F "Notwithstanding the provisions of any other law for the time being in force no land to which this Ordinance applies shall be subdivided without the prior approval of the Board."

"Subdivide" is defined in s.3. So far as the definition is material, it reads:

- G "Dividing a parcel of land for, sale conveyance transfer lease sub-lease mortgage agreement partition or other dealing or by procuring the issue of a certificate of title in respect of any portion of land or by parting with possession of any part thereof or by depositing a plan of subdivision with the Registrar of Titles under the last mentioned ordinance.

- H The appellants contended that there was an obligation on the respondent to obtain the consent of the Subdivision of Land Board to the Subdivision which they submitted was involved in the compulsory acquisition; that it failed to do so and that its failure invalidated the compulsory acquisition. The argument submitted dealt in depth with the question whether or not the appellants' land was subdivided but no authority was offered for the proposition that if it was the acquisition was invalidated by the failure to obtain the consent of the Board. In my view, none of the words "sale, conveyance, transfer lease sublease mortgage agreement

partition" are apt to describe the effect of the notice to treat. "Other dealing" falls perhaps for separate consideration but in my view those words do not encompass the compulsory taking. "Dealing" in the context involves consensual treating and there was nothing such. The issue of a certificate of title was not procured. A plan of subdivision was prepared by the respondent but it was of the appellants' land and it required their signature before it could be presented for deposit. Practical considerations may have moved the respondent to have it prepared but, in my view, there was no legal obligation upon it to do so. When the appellants signed the plan it became their plan of subdivision of their land it seems to me that any obligation to obtain consent of the Board would necessarily have been with them and not with the respondent. The ultimate vesting of the land in the respondent depends upon presentation to the Registrar of Titles of a certified copy of any judgment or order of the court made under the provisions of section 8 of the Crown Acquisition of Lands Ordinance. In such event, the Registrar of Titles is required to register "the respondent as proprietor and issue a certificate of title according to the judgment or order."—s. 8. Until that is done, the appellants and respondent are "in a position analogous to that of vendor and purchaser". The "parting with possession of any part" of the land by Sukhichand or by the appellants—if they did part with possession—may fall within the prescription of the section. If it does—and I refrain from expressing any opinion thereon—it seems to me that the obligation thereby created to seek the approval of the Board was their obligation.

In my view, there was no legal obligation on the respondent to seek or obtain approval of the Subdivision of Lands Board and accordingly I think the submission fails. The fact that it did in due time apply for such consent is in my view irrelevant to the present issue. I repeat that practical considerations and not legal requirements may have moved it so to do.

It remains to consider the respondent's submission that the appellants are estopped from challenging the validity of the purported compulsory acquisition or any acts done in pursuance of it.

As early as October 1964, the appellants evinced a keenness to have the then proposed power station erected on the land they had acquired from Sukhichand. On 14 October 1964 their solicitors wrote to the Town Clerk first mentioning that appellants had been disposed to make a gift of some five acres of such land for the purpose (which they had by then come to know was insufficient) and expressing a willingness to treat for the sale of 50 acres. In that letter it was stated that they, appellants, envisaged "subdividing and developing the property for residential, and if permitted, industrial use". There is nothing to suggest that the suggested gift had its genesis in altruism or public spirit. The erection of a power station on part of the land would likely hasten the day when permission for industrial use of adjoining land would be granted. On 22 April 1966 when the question of sale had been re-opened with them the appellants wrote:

"Our clients regret that they would not be willing to sell the whole 90 acres 2 roods to the Council, as they contemplate subdividing the western end of the property for industrial use, subject of course, to such use having town planning approval. They think that it is likely to be approved if the Town Planning Board permits part of the property to be used for an electric power station."

A On 13 May 1966, appellants made an offer of sale of part of the land to the respondent. A term of such offer was that the respondent obtain town planning approval of the balance of appellants' land for heavy industrial use.

On 17 August 1966 appellants after rejecting a counter-offer made by the respondent went on to say:

B "As there seems to be no prospect of further negotiations on price, the Council will presumably now proceed with a compulsory acquisition."

On 24 October 1967, appellants' having received the notice of acquisition gave notice of their interest and made their claim for compensation. The notice, *inter alia*, stated:

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

The italics are mine.

On 25 October 1967, the solicitors for appellants wrote to respondent's solicitors:

D "With reference to your letter of 25th July last, we confirm our advice that, *in order to simplify the claims*, we have registered the transfer from Sukhichand to Mukta Ben and Shanta Ben and the mortgage back....."

The italics again are mine.

E It was about that time their attorney signed the survey plan prepared by the respondent defining the metes and bounds of the land and establishing its "surveyed area" for it was on the next day, 26 October 1967, they returned it so signed to the respondent's solicitors. The covering letter is printed above and its contents discussed. For present purposes it suffices to say that appellants set their hand to a plan defining the land and making possible the computation of the compensation that might be assessed on an acreage basis.

F In my view, all these matters constitute both words and conduct on the part of the appellants which justified the respondent in believing as facts that the appellants accepted the validity of the notice of acquisition and that the land to be taken was that contained in the plan subscribed by them in October 1966. On 19 September 1968, the appellants for the first time challenged the validity of the compulsory acquisition and on 4 October 1968 served their writ in the present action. In the meantime, the respondent had set about preparatory work on the site and incurred a deal of expense prior to the intimation that the validity of the acquisition was under challenge. I pay no present regard to the work done and the expense incurred since notice of such challenge. However it is beyond gainsaying that if the appellants' contentions in the present case are sustained it acted to its prejudice in doing the work and incurring the expense of it prior to such challenge. I think that these facts bring the case within the dictum of Lord Birkenhead in *MacLaine v. Gatty* [1921] 1 A.C. 376, 386:

H ".....Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of

facts existed at the same time. Whether one reads the case of *Pickard v. Sears* 1837 6 Ad. & El. 469, or the later classic authorities which have illustrated this topic, one will not, I think, greatly vary or extend this simple definition of the doctrine." A

On the same topic Spencer Bower on *Estoppel by Representation* (2nd Ed.) p. 218 has this to say:

"Where any act, transaction, or proceeding is, by words or conduct or inaction, represented or treated as valid and regular, the representor is estopped, as against the representee, from afterwards setting up its invalidity or irregularity.....a party may so conduct himself in respect of the orders and proceedings of a local or public authority as to raise the implication of his having recognized their legality, in which case he is estopped, as against that authority, from subsequently questioning such legality." B C

I consider, therefore, that the appellants are estopped from setting up the invalidity of the respondent's acquisition by reason both of its non-compliance with the requirements of s.136 of the Towns Ordinance and the lack of definition of the land in its notice of acquisition.

In the result, I am for the dismissal of the appeal with the consequence as to costs proposed by the Vice President. The respondent's cross-appeal was withdrawn at the hearing. It, too, must be dismissed with costs. D

MARSACK J.A.

The relevant facts in this case have been fully set out in the comprehensive judgment of the learned Vice President, which I have had the advantage of reading, and I do not find it necessary to repeat them here. In my view it has been established that, in connection with the taking over by the respondent of the land involved in this case, the Council has been at fault in six different ways. These may be set out briefly as under: E

- (1) That the Council misled Governor-in-Council in its application for approval of compulsory acquisition, by stating that the Council was unable to purchase the land required, by agreement and on reasonable terms; F
- (2) That at no time did the Council accurately define the land it was desired to acquire;
- (3) That the Council failed to gazette and advertise the notice of the intended compulsory acquisition of the lands concerned; G
- (4) That the Council did not obtain the consent of the Subdivision of Land Board prior to taking possession;
- (5) That the Council failed to carry out the undertaking it had given to the appellants to construct an access road bounding on appellants' lands; H

- A** (6) That the Council received approval to acquire 20 acres for the purpose of a power station, but has used less than 2 acres for that purpose and also for the building of a number of residential flats.

The question for determination by this court—and, it must be stated at the outset, a very difficult one—is this: what are the legal consequences which must follow the defaults enumerated above?

- B** At the hearing of the appeal it was suggested from the bench of counsel for the respondent that substantial justice might possibly be done by the application of the equitable rule which has been considered and applied in a number of cases such as *Ramsden v. Dyson* [1866] L.R. 1 H.L. 129, to the effect that if a person built on land under the mistaken belief that he was entitled to it, and the real owner while aware of what was happening took no steps to prevent the erection of the building, then equity would intervene to prevent the real owner from asserting his title to the land so taken. In the present case there is a finding by the learned trial judge that the respondent entered into possession in September 1967. In the statement of claim the appellants alleged that the respondent by its servants and agents entered the land and took possession thereof in September or October 1967 and thereafter the respondent commenced construction of an electric power station on the land. I have
- D** been unable to find from the evidence exactly when the construction of the station itself began; but it seems a fair inference that it was commenced not long after the entry of the surveyors and engineers on the land in September or October 1967. Not until the issue of the present writ on the 3rd October 1968 did the appellants raise any objection to the work being done by the respondent on the land. The negotiations which took place between the parties during that period related solely to the question of compensation. In these circumstances it might well be considered that
- E** in accordance with the equitable doctrine cited the respondents would be entitled to retain the land upon which they have built, subject to the payment of appropriate compensation. Counsel for respondent was however not prepared to consider this suggestion; and as this aspect of the matter was not argued by either party at the hearing of the appeal, I am not in a position to consider it further.

- F** Regarding No. 1 above, the relevant legislative provision is contained in Section 136(1) of the Towns Ordinance which provides that the Council may make an application to the Governor-in-Council only if the Council is unable to purchase suitable land by agreement and on reasonable terms; and in this case the Council so certified in its application. But the evidence shows little if any effort to purchase the land on reasonable terms. The Council had a valuation made on the basis of the
- G** land being used as a dairy farm, though it had been made perfectly clear to the Council that the appellants had purchased the land for subdivision. This valuation assessed the land at \$220 per acre. The appellants offered to sell 50 acres at the eastern end of their land at \$400 per acre; and later offered 40 to 50 acres at the western end at \$600 per acre. The Council refused to negotiate but said, in effect, either you sell at our price or we will acquire compulsorily through the Governor-in-Council. A subsequent valuation by a highly qualified valuer made at
- H** the request of the appellants in September 1970 assessed the value at \$2,000 per acre as at the date of the notice to treat; and stated in his evidence that he regarded that valuation as conservative.

In view of the evidence I would have no hesitation in holding that the appellants were prepared to sell at a reasonable price; and the Council accordingly was not justified in reporting to the Governor-in-Council that it was unable to purchase at a reasonable price. A

Counsel for the appellants contended that the inevitable legal consequences of the misleading of the Governor-in-Council must be that the compulsory acquisition was invalid. In support of his argument counsel cited the case of *Banks v. Transport Regulations Board* (1968) 119 C.L.R. 222 at p. 241 in which the High Court of Australia set aside a decision of the Governor-in-Council and he quoted Barwick C.J. in that judgment: B

"Of course certiorari will not go to the Governor-in-Council but that does not deny that the proceedings of the Governor-in-Council in performance of a statutory function may not be void and in an appropriate case be so declared." C

In that case a decision of the Board to revoke a taxi licence was based on erroneous grounds, and it was held that a writ of certiorari would issue to the Board to quash it notwithstanding that it had been approved by an order of the Governor-in-Council. Here, in counsel's submission the decision of the Governor-in-Council was based on erroneous grounds—namely, that the Council could not purchase the lands required on reasonable terms—and therefore by the same reasoning the decision of the Governor-in-Council could be and should be quashed. The argument is attractive but does not, in my view, take into account the difference in circumstances between this and *Banks* case. At no stage, prior to the issue of the writ in October 1968 was any objection raised by the appellants to the acquisition of part of their land by the Council. The only dispute between the parties was over the matter of price. Accordingly in my view it would not be appropriate to set aside the approval of the Governor-in-Council *in toto* on this ground. It may well be one of the considerations to be taken into account when the amount of compensation payable to the appellants is being assessed. D E

The matter of the failure of the Council to define accurately the boundaries of the land it desired to acquire, and of the land included in the compulsory acquisition authorised by the Governor-in-Council, was argued very fully before this Court by counsel on both sides. I do not however find it necessary to express an opinion as to the legal consequences of the Council's failure in this respect, in view of the conclusion to which I have come with regard to No. 6. F

I turn now to No. 3, that is to say the Council's failure to gazette and advertise the notice. Under Section 5 of Crown Acquisition of Lands Ordinance (Cap. 119) notice must be given to the "registered proprietors of the said lands and to the mortgagees, encumbrancees and lessees thereof or to such of them as shall after reasonable inquiry be known to him". As appellants were not registered proprietors, mortgagees, encumbrancees or lessees it would appear that notice to them personally would not have to be given under section 5. G

Under Section 7(4) all notices served under this Ordinance shall be inserted once at least in the Gazette and in a newspaper circulating in Fiji. It is common ground that no such advertisement took place in this case. The question then arises as to what will be the legal consequence of failure to comply with section 7(4). H

- A The first point to consider is whether the requirement in section 7(4) is mandatory or directory. The learned primary judge held that the "requirements of advertising in the Ordinance are directory and not mandatory and I am not prepared to hold the acquisition invalid on this ground."

- B My own view is that the requirements of section 7(4) are mandatory. The object of the section would appear to be to ensure that all persons having an interest in the land—including, as in this case, the equitable owners—receive notice of the intended acquisition and can then take such steps as they deem necessary to protect their interests. It is to be noted that the provisions of section 5 do not include all persons having such an interest in the land as to render it equitable that they should have notice.

- C Even, however, if the requirements of section 7(4) are held to be directory only, the passage quoted by the learned primary judge from *Scurr v. Brisbane City Council* (1973) 47 A.J.L.R. 532 is strictly relevant to the present case:

"It is well established that a directory interpretation of a statutory requirement still necessitates, as a condition of validity, that there should be substantial compliance with the requirements."

- D Here there is no suggestion of any such substantial compliance. The obligation under the section was ignored completely by the respondent.

With regard to the legal consequences following the failure to comply with section 7(4), it was argued on behalf of the respondent that the provisions of section 8 of the Ordinance make it clear that the obligation to advertise concerns, not the acquisition of the land, but the resulting claims for compensation. Counsel said:

- E "The requirement as to the publication of the notice is intended as no more than a condition precedent to the settlement of the question of compensation in a case where no claim has been lodged."

- F In my view there is nothing in section 7(4) directly or inferentially linking it only to claims for compensation. As I have said I feel that section 7(4) was designed to ensure that all person having an interest in the land should have notice of the proposed acquisition, so that they might be in a position to protect those interests generally and not only in the matter of compensation.

The important point to be determined is: What is the legal effect of failure to comply with the obligation under section 7(4)? Appellants relied heavily on the judgment of the Privy Council in *Saunby v. Water Commissioners* [1906] A.C. 110 where on page 115 their Lordships say:

- G "In this instance the Commissioners have not proceeded in accordance with the directions of their Act; and consequently the appellant has not lost his ordinary right of action for the trespass on his property."

- H Counsel for the respondent points out that the statute in *Saunby's* case provides that, as a condition precedent to the taking of land, the acquiring authority should first survey the land required. In counsel's contention, it cannot be held that the failure to advertise would entail the same consequences as a failure to "survey, set out and ascertain the land required". It can, I think, properly be contended that the legislative provision in *Saunby's* case is, at least in its object, markedly different from that

in issue here. In my view it is necessary to examine the basic purpose of the statute concerned. In *Saunby's* case the enactment is clearly intended to ensure that the landowner should know exactly what land the Commissioners are seeking to acquire. The object of section 7(4) of the Crown Acquisition of Lands Ordinance is to ensure that all persons having an interest in the land which the Council wishes to acquire should have notice of the steps the Council proposes to take. The object of the former enactment cannot be fulfilled unless the provision quoted is complied with; and this failure on the part of the Commissioners was held to give the landowner a right of action for trespass against the Commissioners. Non-compliance with section 7(4) however need not in my view, be necessary fatal; if for example it can be shown that all interested parties have in fact received notice of the Council's intention. It is common ground that direct notice was given by the Council to the appellants; and they cannot now be heard to say that they have in any way been prejudiced by the failure to advertise and gazette that notice.

No doubt it was most reprehensible that the Council should ignore its statutory obligation under section 7(4), and in certain circumstances the Council's disregard of that obligation might well have been sufficiently serious in its consequences to result in the invalidation of the compulsory acquisition. Those circumstances however, in my opinion, do not exist here.

With regard to No. 4 some question arises as to whether the consent of the Subdivision of Lands Board is necessary for the cutting off of portion of appellants' land and transfer of title to it to the Council. The learned primary judge held that this was not necessary as the Ordinance did not apply to compulsory acquisition. Section 6 of the Subdivision of Land Ordinance provides that any application for the approval of the Board shall be made by "a person who desires to subdivide land. In the present case there is no suggestion that the owner desired to subdivide it. An application was made to the Subdivision of Lands Board by the respondent Council and approval was on terms, according to the evidence of Mr Knuckey the surveyor, *inter alia* that a 40-foot road should be constructed to the satisfaction of the Board, and that the approval was valid for two years. This meant according to Mr Knuckey, that the road work had to be done within two years and a deposited plan registered within that time. This approval was given on the 18 July 1968. At the hearing of the case in September 1974 Mr Knuckey testified that the road had not yet been completed accordingly to the specifications. The conditions upon which the approval was granted were thus not complied with; and in counsel's submission this nullified the conditional consent given by the Board. Counsel for the respondent argued that there was no obligation on the part of the respondent Council to apply for the Board's consent, and consequently the fact that the terms attached to the consent had not been fulfilled would not affect the Council's title to the land. Moreover, Counsel drew attention to section 18(1) of the Subdivision of Land Ordinance which provides that failure to comply with the provisions of the Ordinance renders the person responsible liable to a monetary penalty only, and does not in any way invalidate the dealing in the land. This argument in my view had merit, and I would hold that the failure of the respondent Council to comply with the terms of the Board's conditional approval cannot result, of itself, in upsetting the compulsory acquisition of the land.

With reference to No. 5 it is not disputed that the Council during the negotiations with the appellants had given an undertaking that in the event of their

A acquiring the land they desired for a power station the Council would construct an access road serving the balance of the appellant's property. The learned primary judge in the course of his judgment says:

B "I accept the evidence of Surveyor Knuckey that he was instructed to survey the access road so as not to abut on plaintiffs' land, and in the absence of refutation it is difficult not to draw the inference from that evidence that the Council had formed the intention of dishonouring their under-taking to give plaintiffs access."

At the hearing of the appeal before this court counsel for the respondent stated:

C "I am authorised to give an undertaking to the Court that in the event of this appeal being dismissed, the Council will pay to the appellants \$11,000 as reparation for the failure of the Council to abide by the understanding with regard to the access road. The Council has so resolved."

There appears therefore no doubt that the appellants have a remedy against the Council under this head; but such remedy must in my view be in the nature of compensation and not such as to entitle the appellants to have the compulsory acquisition set aside on that ground.

D There remains for consideration No. 6 under which I conclude that the appellants are entitled to some relief, though not to the complete invalidation of the acquisition of the land by the Council. The authority given by the Governor-in-Council was to acquire 20 acres for the purpose of a power station. The letter forwarding this authority contains a second paragraph to the effect that the Governor-in-Council would be prepared to consider an application for the compulsory acquisition of a larger area of land for other purposes e.g. industrial. No such further application was made. In a letter from the Council's solicitors to the Chief Secretary, Government written on 8th September 1966 it was stated:

"The site would be used exclusively for erection of buildings in connection with the power house and all the purposes incidental thereto."

F The Council has in fact erected not only a power station but also three blocks of two-storey flats and one block of single-storey flats. The contention of the appellants is that so much of the purported compulsory acquisition as relates to an unauthorised purpose is invalid. The learned primary judge held that the building of the flats was a purpose ancillary to the main purpose of supplying electricity; and that therefore no part of the acquisition could be invalidated on the ground that the Council had exceeded the authority given to it. It is certainly true that the Governor-in-Council did not specifically include the erection of flats in the terms of its approval. It is at least arguable that the Council acted without authority in erecting the flats. However, I feel that there are reasonable grounds for the learned primary judge's finding that the building and housing accommodation for the staff was a purpose ancillary to the erection of the power station.

G One more important point arises with regard to the actual use made by the Council of the land in issue. The authority given by the Governor-in-Council covers an area of 20 acres *for the purpose of a power station*. After being in possession for over 7 years the only portion of the land occupied by the Council is, according to the

evidence, 1.64 acres. Of this area .59 acre is taken up by the power station and 1.05 acres by the flats and the gardens surrounding the flats. It may well be that the Council has in mind to extend the present power station building in the future, but there is no evidence to that effect. It is therefore difficult to avoid the conclusion that in taking over 20 acres—more or less—the Council is laying claim to a substantially greater area than is required for the purpose set out in the application to the Governor-in-Council and formally approved. A

In the course of his argument in reply learned counsel for the respondent argued that what the Council had put on the land was within the Council's powers; and that if the court held that the land taken was in excess of the area needed for this purpose, then any such acquisition would be invalid only to the extent that it was not reasonably required for the purposes laid down. B

This to my mind was a reasonable submission. I think this court must hold that the area of 20 acres was substantially in excess of the area reasonably required by the Council for the erection of a power station, plus possibly, other buildings which, in the primary judge's phrase, could be ancillary to the general purpose. C

The judgment in *Attorney-General v. Pontypridd Urban District Council* [1906] 2 Ch. 257 on which Counsel for the appellants strongly relied in his argument under this heading, does not decide that the acquisition of the land or any part of it, was invalidated by the use of part of it for an unauthorised purpose namely, the erection of a refuse destructor. The Court of Appeal issued an injunction prohibiting the Council from using any part of the land for a refuse destructor although the erection of the destructor had commenced some months previously. The application of that judgment to the present would appear to be this: that a council acquiring land under a statutory authority is not entitled to use that land for any other purpose than that specifically set out in the authority. Applying that principle, which I think this court should do, we should have to hold that the respondent Council may not use the land acquired for any other purpose than that of the erection of the power station; with perhaps the buildings which have been found to be ancillary to that purpose. As has been stated the Council, after seven years in occupation, has made no use whatever of that part of the land outside the 1.67 acres above referred to; no evidence has been given that any further occupation of the land may well be required for that purpose in the future. D E F

In the result I would hold that the approval of the Governor-in-Council should be set aside, not *in toto*, but to the extent that it covers a greater area than that required by the Council for the specific purpose for which that approval was granted. No doubt it would be reasonable to allow the Council to retain a certain area surrounding the actual buildings. To avoid sending the matter back to the court below for the assessment of the area I would fix that at what was originally offered to the Council as a gift by the appellants, namely 5 acres. The remaining 15 acres should remain the freehold property of the appellants. The appellants would be entitled to compensation for the 5 acres acquired by the Council. The question whether the appellants would be entitled to compensation in respect of the Council's failure to carry out its undertaking as to road access would be one of the matters that could be taken into consideration by the court when compensation is being assessed. G H

As the appellants would have substantially succeeded on this appeal, I would order that their taxed costs of the appeal and in the court below be paid by the respondents.

Appeal dismissed.