

JERSEY / JUDGMENT

P and E v Lesquende [2002]

JRC 196 (15 October 2002)

[2002] JRC 196

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judgment

the Deputy bailiff: 1. This is a further instalment in the long running saga of the Lesquende litigation. On this occasion the Planning & Environment Committee ("the Committee") seeks an order under Article 12 of the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961 ("the 1961 Law") requiring the Board of Arbitrators to state a special case for the opinion of the Court. THE BACKGROUND 2. We propose to summarise the relevant factual background as briefly as possible bearing in mind that this is only an application for a case to be stated, not a decision upon a case which has been stated. 3. At the material time Lesquende Limited ("Lesquende") owned certain land at Les Quennevais. It is not necessary to describe it in detail. The relevant part of Lesquende's land for the purposes of this application is that part known as Area 1. In November 1987 the States adopted the Island Plan. Various parts of Area 1 were comprised respectively in the Agricultural Priority Zone, the Special Landscape Area of the Agricultural Priority Zone, and the Green Zone. Before and after November 1987 Lesquende attempted to obtain consents for developments of various kinds in respect of various parts of Area 1 but none of them succeeded, no doubt because the application would have involved rezoning. The existing zoning carried with it substantial restrictions on permitted use. 4. In November 1988 Lesquende applied for permission to develop Area 1 for early retirement homes and sheltered homes for the elderly. This application was refused in July 1989 but the Committee recognised that this part of the land had a potential for Category A housing and would be better developed for that purpose in the public interest. The department was requested by the Committee to produce a draft report and proposition to the States on the basis that Area 1 be re-zoned for Category A housing so that the provision of houses for first time buyers could be more immediately satisfied. 5. On 31st July 1990 the States, adopting a proposition of the Committee, (a) agreed to re-zone Area 1 for Category A housing development; (b) agreed to the Committee, in the event of a proven need, allocating a suitable portion of Area 1, where appropriate, for small-scale community facilities, including accommodation and specialised facilities to meet the requirements of pre-school and primary school children and elderly and handicapped people; (c) authorised the Committee to negotiate with Lesquende for the purchase of the land; and (d) empowered the Committee to acquire the land by compulsory purchase in the event of no agreement being reached between the parties as to a fair and proper price for the purchase of the land. 6. At the time, it was highly

unlikely that Lesquende or any other private developer would have wished to build Category A housing because it was uneconomical to do so by reason of longstanding price controls and limits on States loans. This changed in 1991. In January 1991 price controls were removed and in November 1991 the limits on States loans were relaxed. 7. On 28th November 1991 the Committee adopted a development brief for the re-zoned part of the land as the basis for a master plan to be prepared by consultant architects. The Committee contemplated in this brief a mixed development of houses and flats together with community buildings. 8. The parties did not agree a price for the land and accordingly on 11th December 1992, on the application of the Committee, the Royal Court made an order vesting the land in the public of the island and ordered that the purchase price be determined by arbitration by a Board of arbitrators in accordance with the provisions of the 1961 Law. 9. A Board of arbitrators was appointed and on 2nd February 1995 that Board made its award. We are informed by Mr O'Connell that the award for the whole of the land was approximately £4.9million. Lesquende subsequently instituted proceedings before the Royal Court seeking to judicially review the award of the Board. One of the key matters for decision by the Board was whether, in determining the price as at 11th December 1992 (being the date of the vesting order) it should take into account the fact that on 31st July 1990, namely two and a half years before the vesting date, Area 1 had been re-zoned by the States for Category A housing development. The Royal Court held that that rezoning should be taken into account and directed the Board to do so. The Committee then appealed to the Court of Appeal. 10. After a preliminary skirmish as to whether there was jurisdiction to proceed by way of judicial review in the light of the existence of the case stated procedure under Article 12 of the 1961 Law, the Court of Appeal turned to consider the merits and delivered a decision on 13th February 1998 reported at

(1998) JLR 85 . The Court of Appeal allowed the Committee's appeal on the basis that it was a question of fact for the Board of arbitrators to decide whether the rezoning was or was not part of the scheme and the Royal Court had therefore been wrong to direct the Board that it was. The Court of Appeal ordered that the matter be referred completely afresh to a second Board. 11. The Court of Appeal summarised the opposing submissions on this point. In effect, the Committee contended that the "scheme" included everything in the States resolution of 31st July 1990 and, in particular, the rezoning of Area 1. Lesquende contended that the rezoning of Area 1 was an independent legal act giving rights and benefits to any owner of the land, independent of any proposals to acquire compulsorily the land. The Court of Appeal, in a judgment delivered by Southwell JA. summarised the submissions at 94 by saying:- "There is clearly much to be said for the main contentions on either side on the question whether the rezoning in July 1990 was or was not part of the scheme. On the one hand the rezoning took place in July 1990, 2½ years before the vesting in December 1992, and was therefore an attribute of the land during that period. On the other hand, the rezoning in July 1990 was in the context of a resolution of the States which contemplated compulsory acquisition and could at the least be said to be closely connected with the compulsory acquisition scheme." 12. Having considered at some length the various cases on what is known as the Point Gourde principle (which provides

that one excludes from the valuation of the land any increase or decrease in value attributable solely to the existence of the scheme in question) Southwell J A summarised the legal position as follows at 97:- "From Art.9 of the 1961 Law, to be applied or interpreted in the light of these authorities, I draw the following conclusions;

- (a) the land taken is to be valued on the basis of a hypothetical open market sale by a willing seller at the date of vesting.
- (b) The value of the land taken is to be assessed by reference to all its then attributes, both physical and legal, including its then potentialities for development, having regard to the assessment of the possibilities or probabilities of being permitted or otherwise able to develop the land.
- (c) Insofar as the value of the land has been increased or decreased solely by reason of the existence of the scheme, undertaking or project for compulsory acquisition, that increase or decrease in value is to be left out of account.
- (d) The Committee, although the acquiring authority, is not to be left out of account as a potential voluntary purchaser of the land.
- (e) It is a question of fact, to be determined by the Board, whether the rezoning was purely a part of the scheme (as the Committee contend) or was a factor having an existence independent of the scheme (as Lesquende contend).
- (f) Since the question in (e) is one of fact, not law, it is not open to the Royal Court or to this court to direct the Board what answer should be given to this question" In relation to the points at (e) and (f) Southwell J A went on to say on the following page:- "In my judgment, whether or not the rezoning was purely part of the Scheme (and therefore, to be ignored) is a question of fact for the Board to determine without direction either way by the courts. Which party's contention the Board will ultimately accept will depend on the evidence placed before the Board. This court has seen only the tip of the iceberg of the evidence previously placed before the Board. The newly constituted Board will have to make its own assessment of the evidence before it and it is not for this court to prejudge the Board's own assessment." Southwell JA. went on to conclude that the Committee 's contention that the Court of Appeal should decide that no Board acting reasonably could decide as a matter of fact that the rezoning was not an integral part of the compulsory purchase scheme was an argument without merit. 13. A second Board of arbitrators ("the Board") was duly appointed and on 17th August 2002 issued a decision. It was called a decision rather than an award because, whilst resolving fully the principles upon which the land was to be valued, the decision required certain further calculations to be undertaken and, hopefully, agreed between the parties before it could state an award in the form of a specific figure. We were informed by Mr O'Connell that the difference between the parties in applying the decision lies in the area of £5.8million on the one hand and £6million on the other. 14. In its decision the Board held that the rezoning of Area 1 for Category A housing in July 1990 was not part of the scheme. Accordingly any increase in value attributable to the rezoning did not fall

within the Pointe Gourde principle. This finding has been described by all parties as Issue 1. 15. The Board went on to consider the valuation of the land in case it was subsequently held to have been wrong in concluding that the rezoning was not part of the scheme. It considered what value the market would have placed on the land in a "No Scheme World". The Board held that, even absent rezoning in 1990, the market would have concluded by December 1992 (the vesting date) that the States would have agreed to re-zone Area 1 for Category A purposes and the Committee would have granted development permission for a development of the type contained in the scheme. It held therefore that the market would only have made a discount of 5% from the full development value to take account of uncertainty. This decision to confine the discount for uncertainty in the No Scheme World to 5% is referred to as Issue 2. 16. The Committee does not accept that the Board's findings on Issue 1 or Issue 2 were correct. It argues that the Board erred in law in reaching its conclusions on both issues. The Board has refused to state a case for the opinion of the Court and accordingly the Committee now applies to this Court for an order that the Board should state a case on Issues 1 and 2. THE TEST FOR ORDERING THAT A CASE BE STATED 17. Article 12 of the 1961 Law is in the following terms:- "Article 12 FINALITY OF AWARD AND STATEMENT OF SPECIAL CASES

- (1) The decision of the Board on any question of fact shall be final and binding on the parties and the persons claiming under them respectively, but the Board may, and if the Inferior Number of the Royal Court so directs shall, state at any stage of the proceedings in the form of a special case for the opinion of the Court, any question of law arising in the course of the proceedings, and may state its award as to the whole or part thereof in the form of a special case for the opinion on the Court.
- (2) The decision of the Inferior Number of the Royal Court on any case so stated shall be final and conclusive, and shall not be subject to appeal to any other court." 18. The decision for the Court at this stage is not whether the Board has erred in law. That will be for decision in due course if we order a case to be stated. At this stage the Court is merely concerned as to whether there are sufficient grounds to justify ordering the Board to state a case for the opinion of the Court. In our judgment the Court only has only to be satisfied at this stage that there is an arguable case that the Board has erred in law. It is not necessary for the applicant to show, for example, that it is more likely than not that it will ultimately succeed in showing that an error of law has been made. It is sufficient to show that there is a serious issue to be tried, i.e. that there is an arguable case. Advocate Voisin did not dissent from this proposition but emphasised that, by analogy with the cases decided in relation to Section 21(1) of the Arbitration Act 1950 of the United Kingdom, the Court had a discretion as to whether to order that a case be stated. That discretion should not be exercised unless there has arisen a point of law which is real, substantial, relevant and such as ought to be decided by the Court. Furthermore, due regard should be paid to the expertise of the arbitrators. We accept that these principles are applicable by analogy. WHAT IS FACT AND WHAT IS LAW? 19. Article 12 specifically provides that decisions of fact by the Board are final. The Court may only become involved on a point of law. It cannot therefore intervene merely because it

thinks the Board went wrong on the facts. However there comes a point when an error in relation to the facts becomes so serious that it becomes an error of law. Two cases are of assistance in defining the necessary level to be attained. 20. In *Walters -v- States Housing Authority*, (23 rd July 1997) the Guernsey Court of Appeal, in a judgment delivered by Beloff, J A, considered the role of the Royal Court and the Court in Appeal in Guernsey in relation to the Housing (Control of Occupation) (Guernsey) Law 1994, which provided for a right of appeal to the Royal Court on the grounds that the decision of the Housing Authority was ultra vires or was an unreasonable exercise of the Authority's powers and provided for a further appeal to the Court of Appeal on a question of law only. Having analysed the position at some length Beloff J A held (at a passage reported on page 46 of the Guernsey Law Journal) that it was a question of law as to whether a decision was "Wednesbury unreasonable". Another term for a decision which is Wednesbury unreasonable is that it was irrational (see *Planning & Environment Committee -v- Lesquende Limited*

- (1998) JLR 1 at 7). A decision is Wednesbury unreasonable or irrational if it can be categorised as a decision to which no reasonable decision maker could have come. It is a higher test than concluding merely that the decision was unreasonable. As Beloff, J A made clear in *Walters*, a conclusion as to whether a decision is unreasonable is a conclusion of fact. A finding that a decision was unreasonable requires in turn more than simply that the members of the Court would have come to a different decision had they been the decision maker in the first place. 21. The Court was also referred to *Edwards-v- Bairstow*
- (1955) 3 All ER 48 . That concerned an appeal from the Commissioners of Income Tax which could only be allowed on a case stated if the determination was erroneous in law. The issue in the case was whether the transaction in question was an adventure in the nature of trade. The High Court and the Court of Appeal had held that the determination by the Commissioners was purely a question of fact and the courts could not therefore intervene. The House of Lords disagreed. The head note reads:- "Although an appellate court may allow an appeal from the Commissioners' determination only if it was erroneous in law, yet, where a case stated shows on the face of it no misconception of law, if it should appear to the appellate court that no person, if properly instructed in the law and acting judicially, could have reached that particular determination, the court may proceed on the assumption that a misconception of law has been responsible for the determination." 22. The leading speech was that of Lord Radcliffe who said as follows at 57:- "I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before Commissioners expresses dissatisfaction with that determination as being erroneous in point of law, it is for them to state a Case, and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the Case comes before the court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously erroneous in point of law. But,

without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the

determination.

Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when, in cases such as these, many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur." (emphasis added) Interestingly, Lord Diplock referred to this dicta when defining what he meant by "irrationality" in the GCHQ case (Council of Civil Service Unions -v- Minister for the Civil Service

(1984) 3 All ER 935 at 951). 23. In our judgment Beloff, JA. in Walters & Lord Radcliffe in Edwards were saying the same thing. Even if no misconception of law appears on the face of a decision, it is erroneous in law if the court concludes that no reasonable tribunal acting judicially and properly instructed could have come to the determination in question. It is the test of Wednesbury unreasonableness or irrationality. That is the level of error in relation to the facts which is required before the error becomes one of law. THE GROUNDS OF THE APPLICATION Issue 1 24. Mr O'Connell put forward two grounds for saying that the Board had erred in law in relation to Issue 1. First he submitted that the reasoning of the Board disclosed on its face an error of law. Secondly he submitted that the decision was one to which no reasonable Board could have come. 25. The first ground arises in the following way. The Court of Appeal made it clear that it was a question of fact as to whether, in this particular scheme, rezoning formed part of the scheme or not. It is clear from the passages in the judgment of Southwell JA to which we have referred earlier, that the Board had to consider the evidence and decide this issue on the basis of the evidence produced to it in relation to this particular scheme. But this, said Mr O'Connell, was not what the Board had done. It had in effect adopted a legal principle that, because rezoning was merely a step in the implementation of the scheme, it could not form part of the scheme. To appreciate Mr O'Connell's point, it is necessary to set out certain passages from the decision of the Board on this aspect:- "122 We also conclude, and find as a fact, that the rezoning of Area 1 for Category A housing was not part of the scheme. Our reasons follow. Rezoning was not the purpose, nor part of the purpose, for which Area 1 was compulsorily acquired. Self-evidently it was not the Category A housing development for which purpose the land was acquired. It was in effect a procedural step in the

achievement of that purpose. Rezoning is only regarded by the Committee as necessary where the land to be developed for Category A housing is not zoned for that purpose on the Island Plan Hence a question is whether a zoning for Category A housing on the Island Plan which was followed by compulsory acquisition would be part of the scheme underlying that acquisition. We do not see why or how it could be. Development for Category A housing could take place without the need either for compulsory acquisition or for an Act of the States conferring a power of compulsory acquisition. So the approval of the Island Plan with a Category A housing zoning could not, in our view, make the zoning part of a scheme for a compulsory acquisition which might or would never take place. The zoning on the Island Plan is a planning proposal. A rezoning of land for Category A housing is similarly a planning proposal." 26. In essence, says Mr O'Connell, the Board has held as a matter of general principle that rezoning cannot be part of the scheme. That that is the reasoning of the Board is confirmed, he says, by reference to the remaining paragraphs dealing with this point, namely paragraph 125 - 127. In paragraph 125 the Board refers to a submission of Mr O'Connell that the Category A rezoning was part of the scheme because it was inextricably linked to the compulsory purchase and was an integral and necessary part of the compulsory purchase. Paragraph 126 articulates the principle that compulsory purchase itself is only a step in the implementation of a scheme and is not a scheme or undertaking itself, nor can it be included as part of a scheme or undertaking. In the first sentence of paragraph 127 the Board concludes that any linkage between compulsory purchase and rezoning does not therefore assist because compulsory purchase itself is never part of a scheme. In the remainder of paragraph 127 the Board goes on to find that, on the facts of this case, the rezoning was not in fact inextricably linked to the compulsory purchase. However that was in effect an academic finding because it had already held that any linkage between rezoning and compulsory purchase could not make rezoning part of the scheme. 27. In summary, says Mr O'Connell, the Board held that the scheme was the development of Category A housing. Both rezoning and compulsory purchase were merely steps in the implementation of the scheme and therefore they could not be part of the scheme. In effect, says Mr O'Connell, the Board, whilst saying that it was a finding of fact, had in fact held as a matter of law that rezoning cannot be part of any scheme because, by definition, the object of a scheme is not to rezone but to carry out a development or project of some nature. 28. Mr Voisin submitted that the Board had correctly set out the legal test in relation to the Pointe Gourde principle by reference to the various relevant authorities (see paragraphs 110 - 117 of the decision) and that it must be taken to have correctly applied those principles to the facts of the case. However Mr Voisin was forced to concede that in some circumstances rezoning could form part of a scheme. He gave as an example a situation, (common in the last century) where a railway company needed to exercise compulsory purchase powers in order to build a railway and land was rezoned in order that the railway could be built. He accepted that such rezoning would be part of the scheme because the scheme could only be undertaken by the particular purchaser i.e. the railway company; no other purchaser could undertake the scheme. 29. It was also put to him that, immediately following the

rezoning in this case, the value of Area 1 had been decreased as a result of the rezoning because Category A development at the time was wholly uneconomic. It was only following the lifting of price control and relaxation of the States Loan Scheme in 1991 that the effect of the rezoning had been to increase the value of the land. Mr Voisin asserted that, if the vesting date had taken place in, say, December 1990, the rezoning should have been treated as part of the scheme. He accepted that it would have been quite unfair for Lesquende to find that the value of its land had been decreased simply because the States wished to build Category A housing thereon and had rezoned the land accordingly. The legal reason why it would have been right to have taken rezoning into account in that case was because, like the earlier example of the railway companies, there was at that stage no one who would undertake the scheme other than the person given the compulsory purchase power i.e. the States. This was because it was uneconomic to carry out Category A Development at this time. Consistently with the principle which he had outlined earlier, it would therefore have been correct to have regarded the rezoning as part of the scheme in those circumstances. But once price control was lifted Category A development became profitable. As a result it was immediately a case where persons other than the States would have been able and willing to undertake the development. Accordingly from that moment onwards rezoning was no longer to be regarded as part of the scheme. He emphasised that the Pointe Gourde principle only applied where it was solely the acquiring authority which could carry out the scheme. If others could carry out the type of development envisaged in the scheme, the Pointe Gourde principle had no application. In reply Mr O'Connell did not accept this submission. It was not possible he said, for rezoning in effect to waft in and out of the scheme depending upon subsequent events. Either it was or it was not part of the scheme. 30. The difficulty is that Mr Voisin's submissions are quite inconsistent with the reasoning of the Board. It seems to us that Mr O'Connell is on strong ground in arguing that the Board has in effect held as a matter of law that rezoning can never be part of a scheme because it is not an end in itself; it is merely a step in the implementation of a scheme in the same way that compulsory purchase is merely a step and cannot therefore be part of the scheme. 31. Again, it seems to us that Mr O'Connell is on strong ground in arguing that such an approach is quite inconsistent with the position as described by the Court of Appeal, which was to the effect that whether or not the rezoning in this case was part of this scheme was a question of fact to be decided by reference to the specific evidence produced before this Board of arbitration. We therefore have no difficulty in concluding that Mr O'Connell's first ground passes with ease the threshold of showing that there is an arguable case that the Board erred in law in the reasons which it gave for finding that rezoning was not part of the scheme. 32. We find Mr O'Connell's second ground - namely that no reasonable Board could have found that rezoning was not part of the scheme - more difficult. Mr O'Connell sought to argue, as did his predecessor Mr Bailhache before the Court of Appeal, that one only had to look at the proposition brought to the States in July 1990 and the other surrounding circumstances to conclude that the only decision which could properly be arrived at was that the rezoning was part of the scheme. However the Court of Appeal made it clear that the rezoning issue was a question

of fact for the Board to be considered in the light of the evidence brought before it. The difficulty with this second ground is that, as described earlier, the Board has not in fact addressed the question of why, by reference to the evidence put before it, the rezoning in this particular case was not part of the scheme. This is because it seems to have adopted a general rule to which we have referred earlier that rezoning can never be part of a scheme. Because it has adopted a general rule, we do not know what it would have decided if it had had considered the specific facts of this case. 33. We do not wish to encourage the Committee unnecessarily. It will face an extremely high hurdle in seeking to show that a finding that rezoning was not part of the scheme is a finding at which no reasonable Board could arrive. Nevertheless, having already decided to order that a case be stated on Issue 1 on the basis of Mr O'Connell's first ground, we think it would be undesirable to restrict argument to the first ground. We therefore agree to the second ground being part of the case stated. 34. We emphasise that, although we have heard argument from both sides over two days, it has to be remembered that this is only an application for an order that a case be stated. In particular Mr Voisin made clear that he would wish, if a case is stated, to take us specifically to the cases referred to by the Court of Appeal on the Pointe Gourde principle. Nevertheless, it may be helpful to the parties and to the Board to explain how we see things at present. If, after the case stated, the Court were to uphold Mr O'Connell's first ground - namely that the Board had erred by acting on the basis of an erroneous general principle - the Court would have to decide what to do next. If the case stated were to contain only the decision of the Board in its present form, it would seem quite possible that the Court would have no alternative but to remit the matter to the Board with a direction that it proceed to consider, in accordance with the principles set out in the decided cases and by reference to the evidence put before it, whether this particular rezoning was or was not part of this particular scheme. 35. In his skeleton argument, Mr O'Connell suggested that the Board should be invited, when stating its case, to set out any further findings of fact (and the evidential basis for those findings) which it might think appropriate. He made particular reference to that part of the evidence recorded in the exhibit to Mr Thorne's affidavit produced to the Court. It is of course entirely a matter for the Board as to whether it chooses to accede to Mr O'Connell's invitation, but the possible outcome which we have described at paragraph 34 above in the event of the Court upholding Mr O'Connell's first ground may point towards the desirability of further findings of fact. Issue 2 36. Although it had concluded that the rezoning was not part of the scheme (so that any increase in value attributable to the rezoning did not fall to be ignored) the Board went on to consider at paragraphs 216 - 231 what its decision on valuation would have been if it had found that the rezoning of Area 1 had been part of the scheme. Having undertaken this exercise, it found in effect that, by the vesting date in December 1992, even in the absence of the scheme, the Committee would have wanted Category A housing on Area 1 and the market would have been aware of this. It summarised the position at paragraph 226 of its decision as follows:- "226... The facts in short, as we find them, are that the market would have expected to obtain development permission for the very same development which the Committee proposed in the scheme

underlying the compulsory acquisition, and would accordingly have bid for the land on the basis of its development value for Category A housing. Hence the value of the land is not increased by that scheme: it would have had that value, subject to any question of discounting for uncertainty, if there had been no such scheme." 37. The Board went on to consider what discount should be given to allow for uncertainty. It dealt with this at paragraphs 229 and 230 as follows:- "229 The last question which arises in the scenario we are currently considering - Area 1 not rezoned for Category A housing in the No Scheme World - is whether, and if so by how much, the market would have discounted a full development value to take account of the fact that Area 1 was not rezoned

- the single factor which distinguishes this scenario from one in which that land was rezoned in the No Scheme World. We have no evidence from either Valuer on this question. Mr Owen discounts heavily on assumptions which do not match our conclusions and Mr Trevor does not contemplate the possibility of any discount. We have nevertheless to make a valuation which follows from a decision on this question. We do not believe that a prospective purchaser would have offered the same price for Area 1 without rezoning for Category A housing and without development permission for such development as he would have done if the land had been so rezoned and with the certainty of development permission. He would have discounted to reflect the risk of not obtaining what he hoped and expected to achieve. But, in our view, he would not have thought that risk was more than slight. Accordingly we are of the view that he would have discounted the full development value of Area 1 by 5%." 38. Mr O'Connell conceded in argument that the evidence before the Board showed that, by the vesting date, there would have been no uncertainty in the market's mind as to whether the Committee would support a development along the lines of that envisaged in the scheme. The sole uncertainty in the market's mind would have been whether the States would have agreed to rezone the area in a No-Scheme World upon the proposition of the Committee. 39. On this, the Board had before it conflicting evidence. Mr Trevor, the expert valuer for Lesquende, refused to accept that there was any uncertainty and therefore refused to consider any discount to reflect uncertainty. Conversely, according to paragraph 229 of the decision, Mr Owen, the expert valuer for the Committee, discounted heavily on assumptions that did not match the Board's conclusions. Mr O'Connell elaborated this in argument by telling us that for Field 95 Mr Owen accepted that there was no uncertainty; in relation to Field 91 he stated that the market would have discounted 50% for uncertainty; and in relations to Fields 91A and 92 the market would have discounted 90% for uncertainty. All of these fields fell within Area 1. 40. As we understood Mr O'Connell's argument, he submitted that it was not open to the Board to make a finding between the figures contended for by the rival experts. So, to take a simple example, if one expert had said that there should be no discount for uncertainty and the other had said that there should be a 10% discount for uncertainty, it was not open to the Board to make a finding that 5% was the correct discount. The Court put it to Mr O'Connell that this could not be right. What if the Board saw weaknesses in the reasoning of both experts and concluded that the true discount for uncertainty should be in between. Was it really not open to the Board to make a finding to

that effect? Mr O'Connell's response was that, in such a situation, the parties would have to be told to go away and provide further evidence. However it seems to the Court that that would be unlikely to provide an answer to the difficulty. The parties had, after all, already called evidence on the point. Were they now simply to call different evidence in order to try and accord with the Board's provisional view? What happened if the further evidence on each side re-enforced the original evidence? Mr O'Connell repeated that it was not open to the Board to make a finding of, say, 5% unless some expert had proffered that as being the correct figure. 41. We have to say that we found this argument of Mr O'Connell wholly untenable. We were not entirely certain as to whether he held steadfastly to it throughout or whether he eventually opened the door to the possibility of the Board being able to find a figure in between provided that it gave detailed reasoning to support that figure. 42. Whichever way he put it, we find that there is no arguable case. We remind ourselves that, in order to succeed on Issue 2, the Committee would have to satisfy the Court that the decision to give only a 5% discount for uncertainty was a decision to which no reasonable Board could have come on the evidence. It is conceded by Mr O'Connell that the only uncertainty was whether the States would have agreed to rezone in a No Scheme World. There was no uncertainty about the Committee's position. One expert said that there should be no discount and the other gave a varying but larger figure. In our judgment it was entirely open to the Board to conclude that the true figure lay with neither expert but somewhere in between. We have read and re-read the reasoning of the Board on this aspect and we find it to be coherent and tenable. 43. The decision as to the correct level of discount was entirely a matter of fact to be found by the Board in the light of the evidence. It is irrelevant what decision we ourselves might have reached. We are satisfied that there is no prospect of the Committee succeeding in arguing that no reasonable Board could have concluded that the market, as at the vesting date, would have discounted the full development value by only 5% in order to allow for such uncertainty as existed. We therefore refuse to order the Board to state a case on Issue 2.

CONCLUSION

44. We therefore order the Board to state a case on Issue 1 only, namely whether the Board erred in law in concluding that the rezoning of Area 1 for Category A housing on 31 st July 1990 was not part of the scheme. Authorities. Compulsory Purchase of Land (Procedure) (Jersey) Law 1961: Article 12. Planning & Environment Committee-v-Lesquende

(1998) JLR 85 CofA. Arbitration Act 1950: s 21(1). Walters -v- States Housing Authority, (23rd July 1997) the Guernsey Court of Appeal. Edwards-v- Bairstow

(1955) 3 All ER 48 . Council of Civil Service Unions -v- Minster for the Civil Service

(1984) 3 All ER 935 at 951. Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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