

JERSEY / JUDGMENT

P and E v Lesquende Ltd [2003]

JRC 167 (19 September 2003)

[2003] JRC 167

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judgment

the DEPUTY bailiff: 1. The Court has before it a case stated under Article 12 of the Compulsory Purchase of Land (Procedure) (Jersey) 1961 ("the 1961 Law") by a board of arbitrators appointed under that Law following an order made by this Court on 15th October 2002. THE BACKGROUND

2. 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 hearing 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. 3. 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 Planning & Environment Committee ("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. 4. 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. 5. The rezoning of Area 1 naturally had a legal effect, including its relevance to the proposed compulsory purchase of all the land. Once Area 1 was re-zoned for Category A housing, it was possible for Lesquende or any purchaser from Lesquende to seek planning and development consents for the construction of

Category A housing. So the specific legal effect was, in terms of planning, an effect given by the Committee and the States, so to speak, with their planners' hats on. The rest of the proposition, as accepted by the States at the behest of the Committee, was with their acquiring authority's hat on. However, at the time, it was 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. 6. 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. 7. 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. 8. A board of arbitrators was appointed and on 2nd February 1995 that board made its award. Lesquende subsequently instituted proceedings before the Royal Court (Commissioner Kempster Q. C.) 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. 9. The Court of Appeal (

[1998] JLR 85) 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. 10. The Court of Appeal summarised the opposing

submissions.

The Committee contended that the rezoning of Area 1 was an essential part of the "scheme" for the purposes of which compulsory acquisition of the land was effected and that accordingly the rezoning had to be ignored by the board. 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." 11. Having considered at some length the various cases on what is known as the Point Gourde principle (which I will consider in more detail later but 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:- "..... I do not accept either the Committee's contention that the board should be directed to ignore the rezoning or Lesquende's first contention that the Royal Court correctly directed the board to take the rezoning into account on the ground that the rezoning had an independent legal effect. 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." (emphasis added). 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. 12. 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 Board required certain further calculations to be undertaken before it could state an award in the form of a specific figure. 13. 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 referred to as Issue 1. 14. 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 that 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. 15. The Committee did not accept that the Board's findings on Issue 1 or Issue 2 were correct. It argued that the Board erred in law in reaching its conclusions on both issues. Following an application under Article 12(1) of the 1961 Law this Court ordered the Board to state a case on Issue 1 but declined to make such an order in respect of Issue 2. That decision was upheld by the Court of Appeal. 16. The Board has now stated a case on Issue 1, namely whether the Board erred in law in concluding that the rezoning of Area 1 for Category A housing was not part of the scheme. It has also finalised the award and has valued Area 1 at £6,010,928. It follows that, should the Committee be successful in its contention that the rezoning should be ignored, the award would be 5% less. Accordingly the amount at issue between the parties is £300,546 (plus interest). 17. Interestingly, this issue would not have arisen in the United Kingdom. Since 1959 the relevant statute has provided that, for the purposes of valuing the land which is being compulsorily purchased, it should be assumed that planning permission will be granted such as would enable development in accordance with the proposals of the acquiring authority. Such an assumption is clearly more specific than mere rezoning. Thus, if this compulsory purchase had taken place in the United Kingdom, Lesquende would have been entitled to receive the 5% which is in dispute. However, an equivalent provision is not to be found in the 1961 Law and I must therefore consider the matter without reference to the UK position. THE FINDINGS OF THE BOARD IN RELATION TO RE-ZONING 18. In order that the arguments of the parties may be properly understood, I must set out the passages from the decision of the Board which explain why it has found that the rezoning was not part of the scheme. 19. Having summarised the history of the matter in detail the Board turned, from paragraph 105 onwards, to consider the identification of the scheme. It began by reviewing and quoting from a number of decisions of the English courts dealing with the Point Gourde principle which, as the Court of Appeal explained, is equally applicable in Jersey. Having done so, it set out its test for defining the scheme at para 116 as follows:- "Looking at these authorities with the dictum of Widgery LJ particularly in mind helps us to an understanding of what was meant by the use of the word "scheme" in Lucas, Cedars Rapids and Fraser which effectively settled the rule which Lord Macdermott in Point Gourde restated without any intention to modify it (per Ormrod LJ in Birmingham at p38). Compulsory purchase powers are normally given to enable the acquiring authority to use or develop the acquired land, or to cause it to be used or developed, for a particular purpose. In such a case the scheme underlying the compulsory acquisition is the particular use or development for which purpose the land is acquired. To define the scheme in this case we have, accordingly in our view, to determine the use or development of the Subject Land for which purpose the States gave power to acquire it compulsorily. (emphasis added). 20. The Board set out its findings at paragraph 118 onwards which we must quote in full:- "118 In our view, the scheme, project or undertaking in the case with which we are concerned (and hereafter

for brevity only we use the single expression "scheme") similarly evolved, grew and became more certain over time. It started on the 13th July 1989 when the Committee conceived and published its belief that Area 1 should be developed for Category A housing. It was then vague and uncertain. It became increasingly more certain with the Officers' report to Committee on the 24 April 1990, their draft report and proposition to the Committee on the 3 May 1990, and then with the Committee's decision on that date and on the 24 May 1990 to approve a Report and Proposition to be lodged au Greffe. That Report and Proposition is the primary source for identification of the scheme which underlaid the compulsory acquisition subsequently effected by the Vesting Order made on the 11 December 1992. But it is not the only source. 119 Advocate O'Connell submitted in Opening that the "scheme is contained" in the Report and Proposition P83/90. We do not agree. If and in so far as the Committee subsequently, but before the Vesting Date, varied the description of the Scheme in that Report, we must pay attention to the variation. We instance the abandonment of the primary school. Hence, in our view, regard must also be had to the President's statement to the States on the 31 July 1990 and to the Development Brief adopted by the Committee on the 28 November 1991, subject to an Addendum dated November 1992. None of these documents or decisions, either by themselves or in combination, is or is part of the scheme. They serve to identify the scheme. The scheme evolved and became more certain after November 1992 with the preparation of the Masterplan. But this took place years after the Vesting Date and cannot, therefore, affect the valuation of the Subject Land at that date. It is not in issue, and we find as a fact, that the principal purpose for which Area 1 was compulsorily acquired was for its development for Category A housing. This development was the scheme which underlaid the compulsory acquisition of Area 1. Comprised in the scheme was, as we find: The construction of Category A houses on Area 1. A theoretical yield, based on an assumed housing "mix", of some 655 habitable rooms, or 171 dwellings, comprising 52 x 3 bedroom houses, 60 x 2 bedroom houses, 34 x 2 bedroom flats and 36 x 1 bedroom flats at a net residential density of 65 hra to a housing area of 10.1 acres. There remained, however, the possibility of a significant alteration in housing mix and type. The construction on approximately 1.5 acres of Area 1 of community facilities comprising: a nursery centre for a maximum of 50 children; a community hall/meeting place; a branch library; a day centre serving 20 elderly persons and 10 elderly mentally inform persons, together with a unit of 20 continuing care beds. The provision of approximately 2.0 acres of public open space within Area 1 as an integral part of the scheme, some of which would comprise a central village green. The development was to be a model village. It did not include a primary school which the Education Committee no longer regarded as essential. The scheme underlying the acquisition of Area 2 was its use for agricultural and amenity purposes, including a football pitch on Field 89. 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. We are unclear whether rezoning actually achieves an alteration of the Island Plan. Article 3(2) of the Planning Law

makes no provision for alteration of the development plan, and neither P83/90, nor any other Proposition to rezone which we have seen, including P57/89, is expressed as an alteration of the development plan. If rezoning did achieve an alteration in law to the development plan, the resultant position would be the same as if the land had originally been zoned for that purpose in the Island Plan; if it did not, the result would be the same in practice, if not in law. (emphasis added) 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 for 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 not zoned for Category A housing is similarly a planning proposal. Advocate O'Connell submitted in Opening that "the scheme included the rezoning and the compulsory purchase" because - "..... the rezoning of the land was an integral and necessary part of the compulsory purchase and these two elements are inseparable from one another." In Closing he submitted that: " The circle is completed; you have the purpose namely the provision of Category A housing, which falls squarely within Article 2(b); and you have the exercise of compulsory purchase powers to facilitate that purpose ." Later, and in the same context of his argument that rezoning is part of the Scheme, he concludes that "Category A rezoning and compulsory purchase powers are inextricably linked". We understand him then to be elaborating on the point made in Opening, not to be advancing a different argument. Strictly, the compulsory purchase was effected by the Act of the Royal Court dated the 11 December 1991 and is to be distinguished from the States' approval of Proposition (d) of 83/90 which gave the Committee power to acquire compulsorily, and from the procedural steps towards acquisition required to be taken by Articles 4 and 4A(1) of the Procedure Law. Whether Advocate O'Connell's submission was intended to refer to one or more or all of these separate elements, we do not agree that any of them are part of the scheme. They are steps in the implementation of the scheme . In the English and Privy Council cases we have above referred to, it was not the compulsory purchase of the land in question which the Courts described as the scheme or as part of the scheme. Compulsory purchase is not a scheme or an undertaking, and we think it beyond the meaning of those synonymous expressions, in particular as they have been used in the cases which have led to the "well settled" Pointe Gourde principle, to include it as part of the scheme, project or undertaking of, for example, an electric light works or a naval base. By a parity of reasoning we do not agree that either the compulsory acquisition of Area 1, or the conferment of powers to acquire it compulsorily, can be regarded as a part of the scheme for Category A housing. (emphasis added) It follows accordingly that, in our view, any linkage between the rezoning and the compulsory purchase of Area 1 does not, and cannot, make rezoning part of the Scheme. We agree that as a matter of practice submission and approval of Proposition (a) of P98/90, rezoning was necessary to approval of Proposition (d), the grant of compulsory purchase powers. But rezoning is not inseparable from or inextricably linked to compulsory acquisition. Proposition (a) was separate. The States could have approved the Proposition to rezone and withheld its consent to the

Proposition for compulsory powers. We know from P57/89 that Category A rezoning can be approved without the grant of compulsory purchase powers and the rezoned sites were then developed for Category A purposes. We know from the evidence that the Committee tried, and tried hard, to reach a voluntary agreement with the Claimant to purchase the Subject Land; and we have no doubt would have purchased it by private treaty without recourse to compulsory acquisition if a price could have been agreed." FACT AND LAW 21. 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." 22. 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. 23. 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. 24. 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." 25. 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- Minster for the Civil Service

(1984) 3 All ER 935 at 951). 26. In my 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 ALLEGED

ERRORS OF LAW 27. Miss Robinson submits that the Board erred in law in two respects:- (i) There is an error on the face of the record in that the Board applied an incorrect test for ascertaining whether or not the rezoning was part of the scheme. (ii) The Board reached a decision which no reasonable tribunal, acting judicially and properly instructed, could have reached. 28. I will deal first with the alleged error of law on the face of the decision. Miss Robinson submitted that it was clear from the decision of the Court of Appeal that it was a question of fact whether, in relation to this particular scheme, the rezoning was or was not part of the scheme. She asserted that the Board had not undertaken such an exercise but had adopted a definition of a scheme which would mean that rezoning could never fall within a scheme in any circumstances. Mr Voisin, on the other hand, submitted that the Board had correctly defined the test for ascertaining the scheme by reference to the various authorities on the Point Gourde principle set out in the decision and had also reached its decision as a matter of fact in relation to this particular scheme. The Court could not therefore interfere as it was entirely a matter of fact for the Board. 29. I am convinced by Miss Robinson's argument that the Board defined a scheme in such a way as it could never include rezoning. The key paragraph is 116 where it held, having reviewed the various authorities on the Point Gourde principle, that, in order to define the scheme, it had to determine the 'use or development' of the land for which purpose the States gave power to acquire it compulsorily. The Board accepted in its case stated that this was a conclusion of law which then guided its approach in connection with its findings of fact. Miss Robinson submitted that this test was incorrect as a statement of law and was too narrow. 30. Mr Voisin conceded during the hearing that rezoning could never itself be a 'use' or 'development' of land. It was merely a procedural step with legal consequences which would permit a particular 'use' or 'development' of land. He accepted therefore that the consequence of the manner in which the Board had defined a scheme in paragraph 116 meant that rezoning could never form part of any scheme. In my judgment he was clearly right to make that concession. 31. The Board went on to give reasons at paragraphs 123-127 as to why it found as a fact that the rezoning in this case was not part of the scheme. I have already set out the relevant paragraphs from the decision. 32. Para 123 confirms the approach in para 116. It emphasises (correctly) that rezoning was not the purpose (namely Category A housing development) for which the land was acquired. It was a procedural step in the achievement of that purpose. 33. In para 124 the Board supposed a case where the Island Plan had originally zoned the land for Category A housing and there had subsequently been a compulsory purchase scheme. The Board stated that it did not see why or how such a zoning could be part of the scheme underlying the acquisition. Again I agree, but that is not the position here. 34. The Board seems to have reasoned that because, in such a case, zoning was not part of the scheme but was merely a planning proposal, rezoning could similarly not be part of a scheme because it was a planning proposal. In para 125 the Board refers to a submission of Mr O'Connell (advocate to the Committee) 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. Para 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 para 127 the Board therefore concludes that any linkage between compulsory purchase and rezoning could not make rezoning part of the scheme. In the remainder of para 127 the Board goes on to suggest that, although accepting that as a matter of practice submission and approval of the proposition to rezone was necessary to approval of the proposition to grant compulsory powers, rezoning was not inseparable from or inextricably linked to compulsory purchase. The States could have approved the proposition to rezone and withheld its consent to the proposition for compulsory purchase and that had occurred in the case of a previous proposition (P57/89) concerning Category A development. However that would appear not to be a relevant finding because it had already held that any linkage between rezoning and compulsory purchase could not make rezoning part of the scheme. Finally the Board referred at the end of para 127 to the fact that the Committee tried to reach a voluntary agreement with Lesquende on price and no doubt would have gone ahead by private treaty without recourse to compulsory acquisition if a price had been agreed. I have to say that I cannot see the relevance of this remark. It is the invariable practice for the States, when deciding to authorise compulsory purchase powers, to pass a resolution in the form in which it was passed in this case, namely to authorise the acquiring Committee to negotiate for the purchase and for compulsory purchase only to be used in the event of a fair and proper price not being agreed. Negotiations clearly take place against the backcloth of the decision to authorise compulsory purchase and I do not see how a decision to try and reach agreement on price against such a background can be relevant to the question of whether or not rezoning is part of a scheme. 35. In my judgment these passages from the Board's decision can be summarised by saying the Board concluded that rezoning could never be part of a scheme because:- (i) rezoning was not a 'use' or 'development' of land; (ii) something which is merely a step in the 'achievement' (para 123) or 'implementation' (para 126) of a scheme is not part of the scheme and rezoning is such a step. ERROR OF LAW ON THE FACE OF THE RECORD 36. In my judgment the Board erred in law in this conclusion and I so find for three main reasons. 37. Firstly, the Board's approach is inconsistent with the views of the Court of Appeal. That court made it clear that rezoning might or might not be part of this particular scheme for the purposes of the application of the Point Gourde principle (see the extracts referred to in paragraph 11). It would depend upon the evidence placed before the Board (see in particular the passage on page 98 emphasised in paragraph 11). The Board's decision did not turn on the evidence produced to it. It adopted a general principle of law that a scheme comprised only the 'use' or 'development' of the land and that steps in the implementation of a scheme could not form part of the scheme. Application of that test would lead inevitably to a finding that rezoning was not part of any scheme regardless of the evidence concerning the connection (or lack of it) between that rezoning and the particular scheme in question. The Board therefore departed from the approach required by the Court of Appeal. 38. Secondly, one must have regard to the underlying rationale of the Point Gourde principle rather than try and define what is meant by the word 'scheme'

in the abstract. The general principle is clear. A landowner should receive the market value of his land if it is to be compulsorily purchased. He is not to receive a bonanza if the value of the land is increased solely as a result of the particular scheme, nor is he to be prejudiced if the value of the land is decreased because of the scheme. Rezoning, as a concept of Jersey planning law, was of course not in the minds of the judges who decided the cases on the application of the Point Gourde principle. But, with respect, it seems to me that the Court of Appeal was obviously right to say that, when trying to apply the underlying rationale of the principle to the concept of rezoning under Jersey planning law, whether such rezoning should be treated as forming part of the scheme would depend upon the circumstances of the particular case. 39. One can test this by taking hypothetical examples. I would emphasise that these examples may be somewhat unlikely and the type of rezoning may not be accurate but it seems to me that the principle is what is important. Let us assume a case of a farmer who has some fields in a valley zoned for agricultural use. He is a shrewd man and thinks that, with the growing population, the States may need to acquire his land for a reservoir in the foreseeable future. He therefore persuades the States to rezone the land for use as a reservoir. Two years later he is proved right and the States pass a proposition resolving to compulsorily purchase the land for the construction of a reservoir. Clearly there is no connection between the rezoning and the project to build a reservoir because the particular scheme was not in existence in any way at the time of the rezoning. The farmer is entitled to have his land valued on the basis that it is zoned for use as a reservoir. 40. At the other extreme, the States might decide with little warning they wish to purchase the farmer's land in order to build an urgently needed reservoir. They pass the usual resolution rezoning the land so that it can be used for a reservoir, authorising the acquiring authority to negotiate a price and further authorising compulsory purchase in event of a failure to proceed voluntarily. Let us assume further that, because of the urgency, only seven days are allowed for negotiation, following which a vesting order is made so that the land is to be valued in its state seven days after the States passed its proposition. Nevertheless, at that date it was zoned for use as a reservoir and let us assume that the land was therefore much more valuable than as agricultural land. On the Board's interpretation, rezoning can never be part of a scheme and accordingly, to the extent that rezoning has inflated the value of the land, the farmer is entitled to such increase. It seems to me that this is quite inconsistent with the underlying rationale of the Point Gourde principle. In this example the value of the land has only been increased because the States have decided to build a reservoir on the farmer's land. That increase ought therefore to be disregarded. I appreciate that questions may arise on the facts of a particular case as to whether it is the rezoning of the land or the knowledge that the States proposes to build a reservoir which has added value but the principle seems to me nevertheless to be valid. 41. One must also consider a case where the value of the land is reduced by the rezoning. Let us assume a headland which for some reason has historically been zoned for development for housing purposes but the States realise that this is unacceptable. The States decide instead to acquire the headland and build a conservation park. The usual resolution of the States is passed rezoning the land for this

new use, authorising negotiations to take place and agreeing to compulsory purchase if negotiations fail. Let us assume further that the value of land zoned in such a way that it can be used for a conservation park is less than land which can be developed for housing purposes. Let us assume again that the vesting date is only seven days after the States resolution because the States is in a hurry. Mr Voisin was forced to concede that, on the Board's test, such a reduction in value would have to be ignored. Yet it is surely clear that the value of the land has only been reduced because the States has decided to buy it for a conversation park and has rezoned it accordingly for such use. Were it not for the decision of the States to rezone and acquire for this purpose, the land would have been much more valuable. Surely the Point Gourde principle was intended to secure that, in such circumstances, the landowner should not be prejudiced so that the acquiring authority could, in effect, acquire his land on the cheap. 42. Interestingly, Mr Voisin's approach at this hearing was somewhat different to that which he had adopted at the time of the application for an order that the Board starts a case. At that hearing I put to him the possibility that, immediately following the rezoning in the present 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 at that hearing 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 the States wished to build Category A housing thereon and had rezoned the land accordingly. He said that the legal reason why it would have been right to have taken rezoning into account in that case was because there was at that stage no one who would have undertaken the scheme other than the person given the compulsory purchase power i.e. the Committee. This was because it was uneconomic to carry out Category A development at the time. 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 Committee 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 Point 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 Point Gourde principle had no application. As I say, Mr Voisin withdrew that concession at the present hearing and submitted that the Board had applied the correct test notwithstanding that this meant that rezoning could never be part of a scheme, regardless of whether the rezoning had the effect of increasing or diminishing the value of the land. 43. It seems to me quite inconsistent with the underlying rationale of the Point Gourde principle that rezoning in the above example should be taken into account. The land would have declined in value only because the States had rezoned the land in order that it might acquire the land and construct its conservation park. The

diminution in value was entirely due to the project and to the necessary steps in connection with that project. 44. In my judgment these hypothetical examples are strongly supportive of the views of the Court of Appeal that, when considering the underlying rationale of the Point Gourde principle, it may be right to treat rezoning as part of the scheme in some cases but not in others. It will depend upon the closeness of the connection of the rezoning with the project and will therefore turn upon the circumstances of the particular scheme. 45. Thirdly, it seems to me that an analysis of the various authorities on the Point Gourde principle lead to the conclusion that the principle is not so narrowly drawn that rezoning can never form part of a scheme for the purposes of the principle. The cases were thoroughly reviewed by the Court of Appeal and by the Board and I propose only to refer to those which assist on this particular point. 46. The underlying basis of the principle was helpfully summarised by the Privy Council in *Cedars Rapids Manufacturing and Power Company -v- Lacoste*

- (1914) AC 569 at 576:- "For the present purpose it may be sufficient to state two brief propositions:- (1) the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realised possibility." 47. In *Wilson -v- Liverpool Corporation*
- (1970) 1 WLR 302 Lord Denning M R had this to say about a scheme at 309:- "A scheme is a progressive thing. It starts vague and known to few. It becomes more precise and better known as time goes on. Eventually it becomes precise and definite, and known to all. Correspondingly, its impact has a progressive effect on values. At first it has little effect because it is so vague and uncertain. As it becomes more precise and better known, so its impact increases until it has an important effect. It is this increase, whether big or small, which is to be disregarded at the time when the value is to be assessed." This suggests that various steps along the way may affect the price in different degrees. So, as a scheme becomes more definite the impact will be greater. An outline proposal will probably not have much impact but a detailed master plan stating exactly what is proposed will probably have a greater impact. If these interim steps in the planning and implementation of a scheme are to be considered as part of a scheme, as Lord Denning seems to have envisaged, surely a rezoning as part of the implementation of a scheme, could be similarly regarded if it is sufficiently linked to the proposed scheme. 48. In the same case *Widgery L J* said at 310:- "Whenever land is to be compulsorily acquired, this must be in consequence

of some scheme or undertaking or project. Unless there is some scheme or undertaking or project, compulsory powers of acquisition will not arise at all, and it would, I think, be a great mistake if we tended to focus our attention on the word "scheme" as though it had some magic of its own. It is merely synonymous with the other words to which I have referred, and the purpose of the so called Point Gourde principle is to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition. The extent of the scheme is a matter of fact in every case, as is shown by the decision in *Fraser -v- Fraserville City* to which Lord Denning M R has referred. It is for the tribunal of fact to consider just what activities - past, present or future - are properly to be regarded as the scheme within the meaning of this proposition." 49. I find Widgery L J's explanation helpful. The first part of his comment makes it clear that there is no magic in the word "scheme" and I think that the Board has fallen into error in this respect. Secondly, it is helpful as to the underlying purpose of the Point Gourde principle and it seems to me that this is what has to be borne in mind when focusing on what should or should not be disregarded for the purposes of the application of the principle. He goes on to make it clear that past, present and future activities may be included and this wording is clearly wide enough to include something such as rezoning if, on the facts, this is found to be sufficiently closely related to the scheme and its implementation. 50. In *South-Eastern Railway Company -v- London County Council*

- (1915) 2 Ch 252 Eve J said at 258:- "In answering such enquiry the following propositions may, I think, be treated as established by authorities binding on this Court: (4) increase in value consequent on the execution of the undertaking for in connection with which the purchase is made must be disregarded;" The expression "execution of the undertaking" means much the same as the 'implementation' or 'achievement' of the undertaking. The Board has found as a fact that the rezoning in this case was a procedural step in the achievement of the purpose for which the land was being purchased and it is therefore, in my judgment capable of falling within the scheme on the application of the test laid down by Eve J. 51. In *Fraser -v- City of Fraserville*
- (1917) AC 187 the judgment of the Privy Council states at 197:- "The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *In Re Lucas and Chesterfield Gas and Waterboard*, *Cedars Rapids Manufacturing and Power Co -v- Lacoste* and *Sidney -v- North-eastern Ry. Co.* The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case." Clearly the rezoning of the land in this case was, at the vesting date, an existing advantage of the land but the question is whether it should be excluded as being an "advantage due to the carrying out of the scheme". The expression "carrying out" of the

scheme means much the same as 'implementing' the scheme and is clearly capable of including steps taken as part of the implementation of the scheme. 52. I conclude therefore that the Board misdirected itself in law by interpreting the expression 'scheme' so narrowly. In my judgment, steps taken as part of the implementation of a scheme are capable of being treated as part of the scheme for the purposes of the application of the Point Gourde principle if they are so closely connected with the scheme that any increase or decrease in the value of the land attributable to such step should, in accordance with the underlying rationale of the Point Gourde principle, fall to be disregarded. The Board has found as a fact that the rezoning in this case was a procedural step in the achievement of the project (see para 123 of the decision) and it must therefore now consider whether that step was sufficiently closely connected with the scheme in the way I have described. That will turn upon its view of the evidence produced to it. THE ONLY REASONABLE DECISION?

53. Miss Robinson's second submission was that the Board had erred in law because no reasonable board could have found that the rezoning in this case was not part of this scheme; in other words that the only reasonable conclusion on the facts was that the rezoning was part of the scheme and should therefore fall to be disregarded. The Court should direct the Board to find accordingly. 54. This submission seems to me to be almost identical to that made to the Court of Appeal by Advocate Bailhache when he was acting on behalf of the Committee. That submission was described by Southwell J A at 98 as being 'without merit'. I have listened carefully to the submissions of Miss Robinson and the passages in the evidence to which she has referred me but I reach a similar conclusion in relation to her arguments. As Southwell J A said in the Court of Appeal, there is much to be said for the submissions of both sides on the argument as to whether the rezoning should or should not be regarded as part of the scheme for the purposes of the Point Gourde principle. Thus Miss Robinson submitted that the rezoning would never have been approved other than as part and parcel of the compulsory purchase resolution for the scheme required by the States. The rezoning only took place so as to enable the States to carry out the development which it wished to undertake. It was therefore so closely connected with the proposed development that it should be treated as part of the scheme for the purposes of the Point Gourde principle. Mr Voisin, on the other hand, submitted that, in other cases, the States had resolved to rezone land for Category A housing purposes without conferring compulsory purchase powers and they might therefore have done so on this occasion. Furthermore Senator Shenton had lodged a proposition seeking to revoke both the rezoning and the conferring of compulsory purchase powers and the States might well therefore have agreed to revoke the compulsory purchase powers whilst leaving the rezoning in place. The rezoning was an independent act which had effect for some 2½ years before the vesting date regardless of whether the particular development intended by the States proceeded or not. Furthermore it was not the rezoning itself which increased the value of the land; it was the rezoning coupled with the fact that the States subsequently removed price controls and the limits on building loans. These subsequent matters were nothing to do with the scheme. Thereafter any private developer might have undertaken the particular development and it was therefore not something which only the

acquiring authority could undertake. 55. It will be for the Board to consider these and all the other arguments which the parties have submitted. I have no hesitation in concluding that, on the material to which I have been referred, there is no one reasonable answer so that any decision in the opposite sense must be considered as being reached irrationally. SUMMARY 56. I would summarise my conclusions as follows:- (i) Rezoning is capable of being regarded as falling within a scheme for the purposes of the application of the Point Gourde principle if it is so closely connected with the scheme as to lead to the conclusion that it should be so treated if the underlying rationale of the principle is to be satisfied. (ii) Whether in a particular case it is to be so regarded is a matter of fact for the board of arbitration. Thus this Board must decide that issue on the evidence presented to it. The task for the Board is to decide whether the evidence before it in this case leads it to conclude that this rezoning should be treated as part of this scheme. (iii) There are tenable arguments on both sides and there is therefore no question of the Court holding that the only reasonable conclusion is that the rezoning was part of the scheme. 57. The matter must therefore go back to the Board for it to proceed to make the necessary findings of fact in the light of the guidance offered in this judgment. It will of course be for the Board to consider how to proceed but this matter has been going on for too long and needs to be brought to an early

conclusion.

I would therefore urge the Board to proceed as speedily as possible. Nevertheless it would probably be prudent to offer the parties one final opportunity to make written submissions within an appropriate timescale on this specific issue in relation to the evidence which was led before the Board at the hearing. 58. Finally, I urge the parties to accept the decision of the Board whichever way it goes. Assuming the Board follows the approach laid down in this judgment its finding will be one of fact and therefore final and binding. Any losing party would, for the reasons given earlier, face almost insuperable difficulty in arguing that the Board's finding was one to which no reasonable board could come. *Authorities Planning Committee-v- Lesquende* [1998]JLR85. *Compulsory Purchase of Land (Procedure)(Jersey) Law, 1961, Article 12. Walters-v- States Housing Authority* (23 rd July 1997) *Guernsey Court of Appeal. Edwards -v- Bairstow*

(1955) 3All ER58. *Council of Civil Service Unions-v-Minister for the Civil Service* (1984) 3AllER 935 at 951. *Cedars Rapids Manufacturing & Power Company-v- Lacoste*

(1914) AC569 at 573. *Wilson-v-Liverpool Corp*

(1970) 1 WLR 302. *South Eastern Railway Company-v-London County Council* (1915) 2Ch.252. *Fraser-v-City of Fraser*

(1917) AC 187 . *In Re Arbitration between Lucas and Chesterfield Gas & Water Board*

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