

JERSEY / JUDGMENT

Planning and Environment v Lesquende

[2003] JCA 021 (30 January 2003)

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judgment

(delivered using the video conference link) Southwell JA: 1. This judgment is being delivered as if it were being delivered in open court and therefore it must be transcribed and be available not only to the parties and to the Royal Court but also to anybody who wishes to have a copy of it. 2. This matter has a long and lamentable legal history which, I regret to say, brings no credit on anyone who has been involved in it. Land belonging to Lesquende Limited was compulsorily purchased by the States of Jersey in December 1992. We are now in January 2003, over ten years later, and the amount of compensation has still not been determined. 3. The first Arbitration Board appointed to determine compensation sat for forty six days from April to September 1994 and delivered its award on 2 nd February 1995. Both parties, and I emphasise both parties, no doubt duly advised by their lawyers, applied for the award to be quashed. The Royal Court, on the 17 th February 1997, quashed that award and this had the effect of wiping the slate clean, as the Court of Appeal held in a judgment which I delivered on behalf of this Court on th February 1998. The parties accordingly had to start off all over again. 4. I did not and do not understand how it could have been in the interests, either of Lesquende or of the people of Jersey, to have the award quashed, rather than proceeding by the normal statutory procedure of asking the arbitrators to state a case on points of law to be determined by the Royal Court. 5. One question which arose at the time the Court of Appeal was considering the matter was this. The Board had, when setting compensation, to ignore the effect of the scheme of development for which the compulsory purchase was carried through. The question was whether the rezoning of part of the land for housing development, before the compulsory purchase took place, was or was not part of the scheme, because if it was part of the scheme the rezoning should also be ignored. 6. I now go to the judgment of the Court of Appeal

[1998] JLR 85 to set out what the Court of Appeal then said on this very question. The Court of Appeal, having referred to a large number of relevant authorities from England and Wales and from the Privy Council, and to Article 9 of the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961 , drew the following conclusions -and I need only refer to (e) and (f): "(e) It is a question of fact [and I emphasise as strongly as possible 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 the judgment of the Royal Court a direction was given to the Board, when making a fresh award, that it should take into account the rezoning in July 1990. Though the wording of the judgment is not entirely clear (1997 JL R at 70; at 76-77), I have no doubt that this is what the Royal Court meant and the judgment has been interpreted in this way by both parties. In my judgment, the Royal Court was, in this respect, in error. In saying this, 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) was 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." 7. Following this history of fiasco, a second Arbitration Board was appointed. It sat for sixteen days in April 2000. It produced a "decision" dated 17 th August 2001 - so that is a very long time after the date of the hearing before the second Arbitration Board - running to 235 paragraphs. But it did not produce an award determining the amount of compensation payable, which is what it was appointed to produce. It asked for rival valuations from each side on a different basis to before, in advance of deciding how much the compensation should be in an award. 8. We are now in January 2003, seventeen months later, and there is still no award. I was told by Advocate O'Connell, who appeared before me on behalf of the Committee of the States, that though the rival valuers have produced their rival valuations, no doubt some time ago, they have still not been sent to the arbitrators so that the arbitrators can make their award. I am afraid that it is necessary for me to state, putting the matter simply and bluntly, that this is not acceptable. There is not and cannot be any excuse for the appalling delay which has taken place in this case, and particularly both the delay in producing the arbitrators' decision, and the delay since August 2001 in failing to supply to the arbitrators the rival valuations for which they had called. 9. In 2002 the Committee of the States, having asked the arbitrators to state a case, but the arbitrators having refused, then went to the Royal Court asking for an order that the arbitrators state a special case for the opinion of the Royal Court on two points of law under Article 12 of the 1961 Law. 10. On 15 th October 2002 - and by then fourteen months after the decision had been produced - the Royal Court ordered a special case to be stated on one such point of law which was called Issue 1, but not on the other, which was called Issue 2. Issue 1, broadly speaking, relates to the question which I have already mentioned: whether rezoning was or was not part of the scheme. The point of law was defined at the end of the Royal Court's

judgment as follows: "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." 11. As this Court has made clear, by the passage of my judgment in this Court which I have already quoted, whether rezoning was or was not part of the scheme is a question of fact, not one of law. The Royal Court seems, in its judgment, to have thought that the arbitrators had, in paragraphs 122 to 127 (inclusive) of their decision, decided that rezoning was not, as a matter of law, part of the scheme. But my understanding, reading the decision, is that the arbitrators made it abundantly clear in those paragraphs that they were deciding that rezoning was not part of the scheme on the facts, including the factual history which they set out at great length in their decision. 12. It follows that I have some difficulty in understanding how a relevant point of law arises on Issue 1, having regard to what this Court had previously said. I naturally express no concluded view, as I have not heard argument on this matter, and indeed it is a matter which is going to have to be decided by the Royal Court alone, on the basis that under Article 12 of the Compulsory Purchase (Procedure) Law there is no appeal to the Court of Appeal. 13. Further, as I have already stated, there is as yet no award. The compensation determined in the award may be equally satisfactory or equally unsatisfactory to both sides. So to proceed to order a case to be stated in advance of having an award and a figure of compensation, and to do so so many months after the decision was published, does seem to me to be rather unfortunate. That is a matter of which I think that I should take some, at least small, account. I add that in any event it is at least a theoretical possibility, as Mr O'Connell recognised, that, once the award has been delivered, the parties may wish to, and may conceivably be able to, take a second bite of the cherry by asking for a case to be stated on the basis of the award when it finally appears. 14. I turn to Issue 2, which is that with which I am primarily concerned today. Issue 2 is broadly speaking related to the question: what discount, if any, should be made if the rezoning was part of the scheme, contrary to the finding on the facts of the Board of Arbitrators. Issue 2 is formulated by the Committee of the States as follows: "On what basis the Board found that in the No Scheme World there would have been a 5% discount in respect of uncertainty." 15. The arbitrators decided on the facts in paragraph 230 of their decision that the discount in those circumstances would be 5%. The Royal Court refused to order the arbitrators to state a case in relation to Issue 2 because, inter alia, the Royal Court took the view that this was entirely a matter of fact for the arbitrators to decide, as indeed they had. I observe that it is a little puzzling that the Royal Court considered that Issue 1 was different from Issue 2 in this regard. 16. The next stage was that the Committee of the States applied to the Royal Court for leave to appeal against the refusal to order a case to be stated in relation to Issue 2. On 10 th January 2003 the Royal Court refused leave to appeal. The Royal Court held that the decision to refuse to order a case to be stated was an interlocutory matter so that under Article 13(e) of the Court of Appeal (Jersey) Law 1961 leave of the Royal Court or of the Court of Appeal was required. 17. The Royal Court referred then to the legal position under Article 12 of the Compulsory Purchase (Procedure) Law that the decision of the Royal Court on any case stated is final and conclusive and not subject to appeal to any other court. I interpose here that the absence of such an appeal may or may not accord with the European Convention on

Human Rights or the Human Rights Law of this Island, once in force: that is a matter which may have, in the future, to be considered. The Royal Court seem to have decided that Article 12 barred any appeal to the Court of Appeal on the question whether the arbitrators should be ordered to state a case. 18. The Royal Court further considered that it would be illogical to give leave to appeal from its refusal to order a case stated when its decision on a case stated could not be appealed to the Court of Appeal. The Royal Court, for these reasons, and in addition having regard to the merits, refused leave to appeal. 19. The application for leave has been brought before me sitting as a single judge of the Court of Appeal. Advocate O'Connell has presented the case for the Committee of the States with his customary skill and courtesy. I did not call on Advocate Preston, who appeared for Lesquende, save in respect to the position under Article 12, but I am grateful also for his submissions. 20. Three questions arise for me to decide today:

- (i) whether leave is needed to appeal to the Court of Appeal from the refusal to order a case to be stated; (ii) whether an appeal is in any event barred by Article 12 of the Compulsory Purchase (Procedure) Law, and (iii) whether on the merits leave to appeal, assuming it is needed, should be given to the Committee of the States. 21. Taking the first point, whether leave is needed, in my judgment, it is abundantly clear that leave is needed for the reasons formulated by the Royal Court. I need not set out in any detail the reasons because they have been set out well by the Royal Court. The matter is not one which is decisive of the rights of the parties, but is merely one of many interlocutory steps on the long and laborious road to finality in this matter. 22. Secondly, there arises the question whether Article 12 of the Compulsory Purchase (Procedure) Law excludes a right of appeal in these circumstances. In my judgment, the wording of Article 12 is clear. On its express wording it excludes only a right of appeal from a decision of the Inferior Number of the Royal Court on any case stated in the form of a special case for the opinion of the Court. Such a decision is to be final and conclusive and is not to be subject to appeal to any other court. In my judgment those words cannot be read as excluding the right to appeal from other orders of the Royal Court, not being orders made by way of a decision on questions of law stated in the form of a special case. 23. The third point is whether on the merits leave, which in my judgment is needed, should be given to the Committee of the States to take the matter further. On the merits I consider that the position is reasonably clear. Mr O'Connell based his primary reliance on these paragraphs in the decision of the arbitrators - the paragraphs being 229 and 230: "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%." 24. As appears from those paragraphs, the arbitrators were dealing with the question - assuming they were wrong on Issue 1 (that is to say that rezoning was to be treated as part of the scheme)

- what discount was to be made from the valuations to take account of that fact. They said in one sentence: "we have no evidence of either valuer on this question" and then went on in the next sentence to deal with the way in which each of the valuers had approached the matter, which was different from the approach of the arbitrators. 25. The valuer for the Committee of the States, Mr Owen, had proposed a heavy discount based on factual assumptions which were different from those on which the arbitrators had reached their decision. The valuer for Lesquende, Mr Trevor, considered that there should be no discount at all. But, rightly, the arbitrators then said that they had to make an assessment of value for the purposes of their decision on this question; and in paragraph 230 they came to the conclusion that the prospective purchaser would have thought that the risk in relation to Area 1 without rezoning would have been, as they put it, not "more than slight". So they reached the view that the purchaser would have discounted the full development value of Area 1 by 5%. 26. The Royal Court dealt with the merits in their judgment at paragraphs 36 - 43. I am not going to quote the reasoning which the Royal Court went through in reaching the conclusion that it was inappropriate to order a case to be stated on Issue 2, not least because I entirely agree with it. They concluded, correctly, that this was a matter for the arbitrators to determine upon the evidence which was before them, as was to be expected. The assumptions at which they arrived did not precisely match those which had been made either by Mr Owen for the Committee or by Mr Trevor for Lesquende. So naturally they had to assess the evidence before them and arrive at a conclusion as to what discount there should be, if any (because Mr Trevor had said there should be no discount at all). 27. The arbitrators, having looked at all the evidence, came to the conclusion that the discount was to be put at 5%. They found that as a fact. They did so on the evidence before them. It is not for the Court, whether the Royal Court or the Court of Appeal, to second guess the arbitrators on questions of fact. 28. Nevertheless, Mr O'Connell has sought to put the matter before the Court on the basis that the Court should take the sentence in the paragraph 229 of the Board's decision - the sentence which reads: "We have no evidence from either valuer on this question"
- in effect in complete isolation from what follows, and therefore the Court should proceed on the basis that the Board had no evidence before it on the basis of which it could arrive at its finding of fact, and so the arbitrators had been wrong in law in reaching a decision on no evidence. Like the Royal Court I do not consider that that sentence can be wrenched out of

its context. 29. The reality is that the arbitrators clearly had before them extensive evidence of valuation from both valuers, who were no doubt cross-examined for days in order to draw out all the relevant evidence from both sides, in addition to their written reports, and it was in the light of that evidence that the arbitrators reached their conclusion that the discount should be 5%. Like the Royal Court, I consider that there is no basis whatever for ordering the arbitrators to state a case on a decision which turns entirely on the facts before them, drawn from the evidence before them, and which they reached in circumstances in which there is no material before the Court to suggest that they were not entitled to arrive at such a finding having regard to the totality of the evidence. 30. I therefore agree on questions 1 and 3 with the Royal Court. I agree that leave to appeal is needed either from the Royal Court, which has refused it, or from the Court of Appeal. I disagree with the indication which the Royal Court gave that such an appeal is barred by Article 12. But on question 3, whether on the merits such leave should be given, I entirely agree with the conclusions which the Royal Court reached. Issue 2 concerns only matters of fact which were for the arbitrators, not the Court, to decide; and there is no indication that the arbitrators did not have sufficient factual evidence to enable them to reach the conclusion of fact which they did reach. I note again, at this stage, that it is conceivably the case that proceedings in relation to Issue 1 or Issue 2 would be premature before any award has been made, but I hope that that will not be the case in relation to Issue 1. 31. I also express the hope that the Courts of Jersey will not countenance any further waste of time and money in these proceedings, and I emphasise waste of money in a case which should have been brought to a close several years ago, and which continues in circumstances to which I have already adverted in rather strong terms. 32. Before I leave this matter I want finally to say this: I have expressed my deep concern that the further valuations which the arbitrators asked for in their decision at paragraphs 213 and 233 so as to enable them to make an award have still not been supplied to them. Their decision was in August 2001. We are now in January 2003. I have no doubt that it would have been possible for both valuers to present their rival valuations for the edification of the arbitrators within a relatively short space of time after the decision came forward, even though it came forward so belatedly. I wish to express the hope that those valuations will be placed before the arbitrators at the earliest possible moment, and that the arbitrators will be asked to produce their award at the earliest possible moment. I would also hope that, with regard to the question which has been ordered to be stated in relation to Issue 1, the arbitrators will be able to state their case within a relatively short period of time, and that this can then be brought before the Royal Court for its final determination at as early a date as possible. This is because I bear in mind that if, and I stress if, the Royal Court were to decide that the arbitrators had erred, then the matter would have to go back to the same arbitral tribunal to reconsider this part of their award and to reach a fresh award to that extent, taking account of the views of the Royal Court on the Issue 1 question of law. If that were to be the case, then one can contemplate some not inconsiderable time elapsing before this matter is brought to a conclusion. I do not in any way resile from what I said when I started this judgment: it is totally unacceptable that a matter of this kind can still be argued about more than ten years after land was compulsorily

purchased and taken away from Lesquende, so that it is not possible for compensation yet to be paid, and it appears that compensation is not likely to be paid, for some considerable period after today. Authorities. Planning and Environment Committee v. Read and Others [2003] JRC004. Compulsory Purchase of Land (Procedure)(Jersey) Law 1961 and amendments. Bozson

- v. Altrincham Urban District Council [1903] 1K. B. 547. Planning and Environment Committee - v- Lesquende

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