

JERSEY / JUDGMENT

Planning and Environment v Lesquende [2003] JCA 130 (18 July 2003)

[2003] JCA 130

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COURT OF APPEAL 18th July, 2003 . Before: The Hon. M. J. Beloff, Q. C., President; Sir de Vic Carey, Bailiff of Guernsey; and D. A. J. Vaughan, Esq., C. B. E., Q. C. Between Planning and Environment Committee of the States of Jersey REPRESENTOR And Lionel Read, Q. C. FIRST RESPONDENT And D. H. Le Vesconte SECOND RESPONDENT And R. V. Perchard THIRD RESPONDENT And Lesquende, Limited FOURTH RESPONDENT Application for leave to appeal by the REPRESENTOR against the Order Royal Court of 15th October, 2002, whereby it was ordered that the Board of Arbitrators state a case on Issue 1 only, namely whether the Board erred in law in concluding that the re-zoning of Area 1 for Category A Housing on 31st July, 1990, was not part of the scheme, but refused to order the Board to state a case on Issue 2, namely on what basis it found in the no scheme world there would have been a 5% discount in respect of uncertainty. Leave to appeal was refused by the Royal Court on 10th January, 2003, and by a Single Judge of the Court of Appeal on 30th January, 2003. Advocate G. S. Robinson for the REPRESENTOR. Advocate M. L. Preston for the FOURTH RESPONDENT. The First, Second, and Third Respondents did not appear in the court below and were not represented.

judgment

BELOFF JA: This is the judgment of the Court. The decision was given on 16th July 2003 and this reasoned judgment has been handed down today, the 18th July 2003.

Introduction

1. This is a renewed application by the Planning and Environment Committee of the States of Jersey ("the Committee") for Leave to Appeal Against the Decision of the Royal Court dated 15th October 2002 refusing to Order the Board of Arbitrators to State a Case on what was described in the context of the Arbitration as "Issue 2".
2. On the 10th January 2003 the Committee applied to the Royal Court for leave to appeal. The Royal Court refused to grant leave while ordering the Board to State a case on what was described in the same context as "Issue 1". We shall explain the meaning of these issues later in this judgment.
3. On the 30th January 2003 a renewed application was heard by Southwell JA, sitting as a single Judge of the Court of Appeal, over a video link. He refused the application.
4. The Committee now renews its application to the Full Court.
5. There are two preliminary issues which must be

disposed of: first, whether there is jurisdiction to entertain the appeal; secondly, if so, whether permission is required. Jurisdiction to entertain this appeal 6. The Royal Court "inclined to the view" that the Court of Appeal had no jurisdiction to entertain the proposed appeal. [para 13]. Southwell JA, however, held that the Court of Appeal does have jurisdiction under Article 13 of the Court of Appeal (Jersey Law ("the Appeal law") [para 22]. 7. Article 12 of the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961 (the 1961 Law") provides: 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 of 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. 8. It is clear, in our view, that Article 12(2) only prohibits an appeal which is otherwise available under the Appeal Law in respect of "a decision of the inferior number of the Royal Court on any case so stated". The Royal Court's decision was that no case should be stated on issue 2. It was not therefore a decision caught by the prohibition. In our view, as a matter of plain language, the prohibition on an appeal under Article 12 of the 1961 Law only applies once (1) a case has been stated and (2) the Royal Court has pronounced upon the correctness in law of the case so stated. 9. Accordingly, in our respectful view, Southwell JA was correct in holding that the Court of Appeal has jurisdiction to entertain the proposed appeal. Permission 10. Before the Royal Court and before Southwell JA the Committee contended that permission to appeal is not necessary. Both the Royal Court in its Judgment dated 10th January 2003 and Southwell JA (para 21) found against the Committee on that point. The contention is sensibly not now repeated. It is obvious that the Royal Court's decision was not final but interlocutory - in Southwell JA's vivid phrase "only one of many interlocutory steps on the long and laborious road to finality in this matter."

Background

11. We gratefully adopt the summary of what Southwell JA called with similar pungency "the long and lamentable legal history of this matter" (para 2) from the decision of the Royal Court on the 15th October 2002 on the subject of this application, at paras 3-15:
- (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 £4.9 million. 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 re-zoning 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, of 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 re-zoning 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 re-zoning of Area 1. Lesquende contended that the re-zoning 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 submission 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 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 JA 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 JA 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 £5.8 million on the one hand and £6 million on the other.
- (14) In its decision the Board held that the re-zoning 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." Principles 12. Against this background we now consider the approach which should be applied, under Article 12 of the 1961 Law, in respect of the ordering of a case stated. 13. Article 12 does not provide that the Royal Court shall order the Board to state its award in the form of a special case upon any application or representation that it should so do; the key words in Article 12 are: (i) "... if the Inferior Number of the Royal Court so directs..." 14. The Royal Court therefore is not bound to direct the Board to state a case even if it is of the view that the appropriate precondition i.e. that there is a "question of law arising in the course of the proceedings", is satisfied. It has a discretion which it must

axiomatically exercise in accordance with the relevant principles of law. 15. The language of Article 12 and the decided authorities on the analogous provisions of Section 2(1) of the Arbitration Act 1950 (England and Wales) [since repealed] enable the following propositions to be formulated: (i) A question of fact cannot be the subject of a special case: see Article 12; (ii) A point of law should be clearly and properly formulated so that the Royal Court knows what it is: see *Tradax Export SA v Andre et Cie* (The Times, 3rd March 1978); (iii) The point of law must be real, substantial, relevant, clear cut and one which ought to be decided by the Royal Court: see *The Lysland*

[1973] 1 Lloyd's Rep 296 at 306; (iv) The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case

- as distinct from a side issue of little importance: see *The Lysland*

[1973] 1 Lloyd's Rep 296 at 306. (v) There is an error of law where either there is no evidence to support a conclusion or where the true and only reasonable conclusion from the evidence contradicts the determination: see *Edwards v Bairstow*

[1955] 3 All ER 48 per Lord Radcliffe at p. 57F. In the context of the case stated jurisdiction, there is an essential and clear demarcation line between questions of law and questions of fact, as is emphasised by the opening words of Article 12. A Court should be astute not to allow a point of fact to fly under the false flag of a point of law. Merits of the Appeal 16. In paragraphs 229 and 230 of its Decision on Issue 2 the Board held 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 [for the Committee] discounts heavily on assumptions which do not match our conclusions, and Mr Trevor [for Lesquende] does not contemplate the possibility of any discount. We have nevertheless to make a valuation which follows from a decision on this question. 230. We do not believe that a prospective purchaser would have offered the same price for Area 1 without a rezoning for Category A housing and without a development permission for such a development as he would have done if the land had been so rezoned and with the certainty of a 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%" (emphasis added). 17. The Committee essentially contend that the Board's finding was based on no evidence (one of Lord Radcliffe's categories of legal error) and was flawed by a misdirection of law in as much as the Board confused its role by acting as its own expert and in breach of the rules of natural justice. In their Representations dated 27th March 2002 the Committee state specifically "There was no evidence to support their finding and it was contrary to the evidence which was placed before the Board". 18. We

accept that it is well settled (1) that an arbitral award must be based solely upon the evidence and argument presented by the parties (see Russell on Arbitration 22nd edition paragraph 6-085 at page

257) unless an inquisitorial approach is adopted (2) by corollary that an expert arbitrator should not in effect give evidence to himself: per Dunn L. J. in *Annie Fox v P. G. Wellfair Ltd*

[1981] 2 Ll. R. 514 at pp 528 and 529.

(3) Fairness requires that any new point not raised by either side be put to the parties for comment - per Donaldson J. in *Thomas Borthwick (Glasgow) Ltd v. Faure Fairclough Ltd* [1968] 1 Ll. R. 16 at page 29, Bingham J. in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*

[1985] 2 EGLR 14 at p. 15. 19. We do not demur from these principles: the question we have to consider is whether they are relevant to this case and, if so, whether the Board's determination illustrates any departure from them. 20. We do not consider on a fair reading of the Board's elaborate and comprehensive determination that the principles relied on were directly engaged. Issue 2 necessarily and naturally arose on one of two views of Issue 1, and the Board properly dealt with it against the contingency that their view of Issue 1 was incorrect. Neither party should therefore have been taken by surprise. They did not miss the point, at most they bypassed it. Therefore the Board did not deny the parties the chance to deal with the issue. 21. Even by reference to the test for arguability, appropriate to an application for leave, we find no detectable material - or indeed any - error of law. 22. The vocabulary of the paragraphs 229 and 230 relied on by the Committee is the vocabulary of fact. It was so construed by the Board itself (see para 232) "We have indicated what our findings of fact would have been if we had determined as a fact that rezoning for Category A housing was part of the scheme". 23. It is indisputable that the Board had before it conflicting evidence: see para 229. Lesquende's expert contended that there should be no discount. The Committee's expert's assessment of discount was based on assumptions inconsistent with the Board's conclusions. In our view the Board was manifestly entitled, as the Royal Court held (para 42) "to conclude that the true figure lay with neither expert but somewhere in between", by reference to evidence usefully aggregated by Advocate Preston in his written submission, referring notably to evidence from the two experts but also to the testimony of Mr Grainger, a former Chief Planning Officer for Lesquende and Mr Thorne, Chief Planning Officer for the Committee which we have read but do not need to repeat. Far from being an usurpation of the judicial function it was its proper exercise. Southwell JA succinctly summarised the position at para 29 of his Judgment. "The reality is that the arbitrators clearly had before them extensive evidence of valuation from both the 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." We agree. The Board's finding was one of fact, not law, reached in the proper manner. 24. In truth Advocate Robinson's elaborate arguments are founded on the single sentence in para 229 of the Board's decision "we have no evidence from either valuer on this question". Such a decision is not to be construed as if it was a statute: it should be construed in bonam partem. The Board might, with the benefit of hindsight, have chosen their words differently had they realised the weight sought to be placed on them, but it is only errors of law, not of language, which can engage a case stated. There was, in short, ample evidence from which the Board could draw their conclusion of fact, even if the precise point at issue had not been specifically answered by the rival experts, for reasons the Board referred to. 25. Advocate Robinson also submits on the Committee's behalf that the findings purportedly made were contrary to the evidence. In that regard she identified the single most significant piece of evidence which was a letter dated 14th February 1990 from Mr Trevor, Lesquende's valuer, to Lesquende before the land was vested in the Committee in which he made it clear (contrary to his evidence before the Board) that a substantial discount would be expected by a prospective purchaser in the absence of rezoning. In cross-examination Mr Trevor admitted that he had changed his mind. In our view the Board was entitled to prefer Trevor 2002 version to Trevor 1990 version: it was entirely a matter for them. The Committee have failed to establish that this alleged error of law was something other than a preference for one view of the facts over another. 26. Advocate Robinson also made other criticisms of the Board's reasoning as to the assumption which underlay their assessment of the discount i.e. that there was no evidence to support the Board's finding (at para 226) that the valuer would value the land in question on the basis of the Development which actually formed part of the Scheme. She made a number of assaults on both the assumption and its premises by reference to certain observations of the Board in paragraph 224-5 both as to their inherent lack of logic and their absence of evidential foundation. Her point of departure was unpromising, since the Board introduced its observations at paragraph 224 with the words "In view of the history of this matter." We intend no disrespect to Advocate Robinson when we do not overburden this judgment by detailed analysis of her points. Advocate Preston has taken us to various items of evidence which shows, as we would anticipate, that this highly experienced Board were doing no more than selecting what evidence they preferred, and what they rejected, rather than merely speculating. Their assessment of probabilities and chances, of course, involved judgment but it was a judgment that they were both entitled and obliged to make. 27. This application is dismissed with costs on a standard basis. 28. CHRONOLOGY LESQUENDE LIMITED P83/90 re rezoning and compulsory purchase of the Lesquende land - lodged au Greffe 5 June 1990 P83/90 debated in the States and approved: 31 July 1990 States approval of the Housing (General Provisions) Amendment No. 9 (Jersey) Regulation 1991 abolishing price control: 29 January 1991 Act of the Royal Court vesting the Lesquende land in the public of the Island: 11 December 1992 Sitting of the first board

of arbitrators: April-September Award of the first board of arbitrators: 2 February 1995
 Judgment given by Commissioner Kempster on application for judicial review of the
 decision of the first Board: 17 February 1997 Substantive judgment given by the Court of
 Appeal on the Committee's appeal against the Commissioner's judgment: 13 February 1998
 Sitting of the second board of arbitrators: April 2000 Decision of the second board of
 arbitrators: 17 August 2001 Committee's Representation seeking an order that the second
 board state a case: 27 March 2002 Royal Court judgment ordering the Board to state a case
 on Issue 1, but not Issue 2: 15 October 2002 Royal Court judgment turning down the
 Committee's application for leave to appeal on Issue 2. 10 January 2003 Judgment of a
 single judge of the Court of Appeal turning down the Committee's application for leave to
 appeal on Issue 2: 30 January 2003 Committee's valuation evidence filed: 26 February 2003
 Lesquende's valuation evidence filed: 26 February 2003 Statement of Case by the Board on
 Issue 1: 28 February 2003 Authorities Planning and Environment Committee -v- Read and
 others (30 th January 2003) Jersey Unreported; [2003]JCA021. Planning and Environment
 Committee -v- Read and others (10 th January 2003) Jersey Unreported; [2003]JRC004.
 Planning and Environment Committee -v- Read and others (15 th October 2002) Jersey
 Unreported; [2002/196]. Planning and Environment Committee -v- Lesquende Limited
 [1998] JLR85. Planning and Environment -v- Lesquende Limited

[1998] JLR 1 . Lesquende Limited -v- Planning and Environment Committee

[1997] JLR 56 . Compulsory Purchase of Land (Procedure) (Jersey) Law 1961 and amendments.
 Court of Appeal (Jersey) Law 1961 and amendments. Court of Appeal (Civil) (Jersey) Rules
 1964 and amendments. Island Planning (Jersey) Law 1964 and amendments. R -v- Criminal
 Injuries Compensation Board Ex parte A 2AC [1999]. Haron Bin Mohammed Zaid -v-
 Central Securities (Holdings) BHD [1983] 1. A. C.16. Unit Four Cinemas Ltd -v- Tosara
 Investments Ltd [1993] 44EG 121. Handley -v- Nationwide Anglia Building Society [1992]
 29EG123. Zermalt Holings SA -v- Nu-Life Upholstery Repairs Ltd [1985] 2EGLR14. Fox -v-
 Welfair Ltd [1981] 2LLR514. Becker -v- City of Marion Corporation and Another

[1977] AC 271 . Tampion -v- Anderson (1973) 48 ALJR11. Salter Rex and Co -v- Ghosh

[1971] 2 Q. B. 597. Thomas Borthwick Glasgow Limited -v- Faure Fairclough Ltd [1968] 1LLR.16.
 Edwards -v- Bairstow [1995] 3 All ER. Bozson -v- Altrincham Urban District Council

[1903] 1 KB 547 . Section 60 Supreme Court Act 1981. Russell on Arbitration, 2 nd Edition p.257.
 The Lysland [1973] 1LLR 296 CA. Tradax Export SA -v- Andre et Cie (3 rd March

1978) "The Times". Salaman -v- Warner and ors

[1891] QBD 734. Phipson on Evidence (14 th Ed'n): paras 32-39, 40:pp.829-832. Page Last Updated:
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