ROYAL COURT
Inferior Number
(Samedi Division) 29.

17th February, 1997

Before: M.E.I. Kempster, Esq., Q.C., Commissioner,
and Jurats Bonn and Jones.

Between:	Lesquende Limited	Plaintiffs
And:	The Planning and Environment Committee of the States of Jersey	Defendant

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Compulsory Purchase of Land (Procedure)(Jersey) Law, 1961.

Applications brought by Order of Justice and Answer seeking Judicial Review of the Decision of the Board of Arbitrators, delivered on 5th February, 1995, valuing the plaintiffs' land.

Preliminary question of law considered by the Court pursuant to Rule 7(8)(1) of the Royal Court Rules 1992, as amended, namely:

"Has the Royal Court (Inferior Number) jurisdiction presently to grant the parties to these proceedings the relief which, by amended Order of Justice and amended Answer, they respectively seek?"

Whether the Royal Court has a discretion not to entertain proceedings and, if it has, should such discretion be exercised in the instant case also considered.

Held:-

(1) The Royal Court (Inferior Number) has jurisdiction to grant the parties the relief sought.

(2) Although the Royal Court has a discretion not to entertain proceedings such discretion was not to be exercised in the circumstances of this case. (The effect of Article 12 of the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961 explained).

(3) Section 15(1) of the Land Compensation Act 1961 has no equivalent in Jersey Law.

(4) In its decision the Board erred in law both in holding to the contrary and in finding that it could value land compulsorily acquired by reference to the scheme giving rise to such acquisition.

(5) The Decision should be quashed and the Board of Arbitrators required to revalue the plaintiffs' land in accordance with directions given.

Advocate M.M.G. Voisin for the plaintiff.
Advocate W.J. Bailhache for the defendant.

JUDGMENT

THE COMMISSIONER:

INTRODUCTION.

5 On 31st July, 1990, pursuant to Article 4 of the Island Planning (Jersey) Law, 1964 and to the Compulsory Purchase of Land (Procedure) (Jersey) Law, 1961 the States authorised the Island Development Committee ("IDC"), now the Planning and Environmental Committee, to negotiate with Lesquende Ltd ("Lesquende") for the 10 purchase of certain parcels of land at Les Quennevais in the Parish of St. Brelade ("the Land") and, in default of agreement, to acquire the Land by compulsory purchase. In the event no agreement was reached and no application for permission to develop was made by Lesquende. On 11th December, 1992, on the 15 application of IDC, this Court made an Order vesting the Land in that body for and on behalf of the States and public of Jersey; the price to be determined by the Board of Arbitrators constituted under Article 7 of the 1961 Law. Lesquende claimed the sum of £14,499,078 while IDC contended for a figure of £2,375,000.

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The Board heard evidence and submissions over a period of 46 days from 11th April to 30th September, 1994.

On 5th February, 1995, the Board gave its reasoned Decision 25 or Award, incorporating the evidence adduced and dated the second of that month, valuing the Land at £4,900,000. It was registered the following day.

Article 12 of the 1961 Law reads:

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"(i) 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 35 *Court 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.

5 *(ii) 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".*

At no time between 11th April, 1994, and 2nd February, 1995, did either party request the Board to state a special case on any question of law or to state its Award in the form of a special case for the opinion of the Court nor did the Board do so of its own motion. Instead both parties, now by Re- Re-Amended Order of Justice dated 16th March, and Amended Answer dated 14th September, 1995, respectively, seek the judicial review of the Award; relief which, if available and permissible, affords rights of appeal from this Court precluded by the case-stated procedure. In consequence the proceedings have not been conducted on a fully adversarial basis although, since jurisdiction cannot be conferred by consent, it has been necessary carefully to explore the relevant powers of the Royal Court.

PRELIMINARY QUESTION OF LAW.

The Royal Court Rules make no reference to judicial review and accordingly, on 4th November 1996, the first day of this hearing and with the agreement of the advocates, an Order was made for the determination of a question of law pursuant to Rule 7/8(1). The question was "Has the Royal Court (Inferior Number) jurisdiction presently to grant the parties to these proceedings the relief which by Amended Order of Justice and Amended Answer they respectively seek?"

In England jurisdiction to bring up and quash the decision of a statutory tribunal for error of law on the face of the record certainly exists. R. -v- Northumberland Compensation Appeal Tribunal ex parte Shaw [1952] 1 All ER 122 CA. At pp.127 and 128 Denning LJ said:

"...the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face on it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is

not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had.

...

But the Lord Chief Justice has, in the present case, restored certiorari to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction".

In Le Gros -v- The Housing Committee (1974) JJ 77 at p.86, the Bailiff, Sir Robert Le Masurier, also in the context of a challenge to the decision of the Board of Arbitrators under the 1961 Law, with unqualified assurance and apparently after argument claimed a wide jurisdiction for the Royal Court:

"The first issue raised before us was whether the Court has the power to interfere with an arbitration award and, in our opinion it undoubtedly has such a power if, for example, the arbitrators exceed their authority, are wrong in law, deny the parties justice, and reach a conclusion devoid of reason. In all such cases the Court has an inherent jurisdiction to have put right that which is wrong. What the Court cannot do is to interfere with an award which has been regularly made. A power of discretion properly exercised by a person or a body having the legal authority to exercise it is generally unassailable

...

There is, we think, an error on the face of the record".

The case was remitted by the Court to the Board with a direction as to the approach which it should adopt in relation to the valuation. Article 12 was not mentioned in the judgment.

The Bailiff's description of the supervisory jurisdiction of the Royal Court was in line with earlier authority. Le Masurier -v- Natural Beauties Committee (1958) 13 CR 139; Scott -v- Island Development Committee (1966) JJ 631. In Tett -v- States of Jersey and the Rent Control Tribunal (1972) JJ 1 Pt 4 2249 the Court of Appeal had found a decision of that tribunal, against which no appeal lay, to be *ultra vires*. A question of jurisdiction had been raised.

The decision in Le Gros -v- The Housing Committee has never been challenged in a succession of judicial review decisions, some of which have been cited to us, which followed. In at least two of these cases, Robert Archdale Ltd -v- HM Attorney General (1976)

JJ 355, and Mayo Associates SA & Ors. -v- The Finance & Economics Committee (6th March, 1996) Jersey Unreported, proceedings were begun not by Order of Justice, but by Representation. Significantly when an appeal relating to judicial review came before the Court of Appeal in Housing Committee -v- Phantasie Investments Ltd (1985-86) JLR 96 no question was raised as to the availability of such a jurisdiction.

A similar remedy, that of *Doléance*, has been available at least to the Superior Number of the Royal Court since the seventeenth century at the latest. In re *Doléance* of the Harbours and Airport Committee of the States of Jersey and In re Kenneth Aucrum Forster t/a Airport Business Centre (1991) JLR 316 the Deputy Bailiff explained that *"Before allowing a Doléance the Court has to be satisfied that there has been an excessive jurisdiction or a breach of natural justice which needs to be remedied as a Doléance is a remedy of last resort when all other doors are closed and a grave injustice will remain unless remedied... We agree that the Doléance is analogous to the writ of certiorari but the analogy is not complete because the Queen's Bench does not substitute its own views for those of the inferior tribunal, as a Court of Appeal would do; but exercises its control by means of a power to quash the decision, leaving it to the inferior tribunal to hear the case again and in a proper case commanding it to do so. In the case of the Doléance the Privy Council, or the Superior Number, does decide the issue between the parties. The Doléance provides an appeal where there is none".*

Writing in 1698 the Lieutenant Bailiff, Philippe Le Geyt, in his "Privilèges, Loix, et Coustumes de L'Isle de Jersey, avec un Essay sur les Règlemens Politiques," Livre Premier, Tome III: des Arbitrages, Article 4 wrote:

> *"Les Compromissions faites sans Appel ni Doleance, ou bien avec Soumission definitive, ne se revoquent point, si ce n'est que la Sentence Arbitrale soit notoirement injuste & la Lesion enorme, ou que les Aritres ayent evidemment passé leur pouvoir"*

in translation:

> *"Agreements to submit to arbitration without provision for appeal or doléance, or indeed with a provision that the decision shall be final, cannot be rescinded, unless the decision of the arbitrator is manifestly unjust or gives rise to substantial wrong, or that the arbitrators have clearly exceeded their powers".*

In the circumstances it was impossible to hold in 1996, even when, arguably, a statutory right of appeal existed and whether or not given effect by prerogative writ in right of the Duchy of

Normandy, that a jurisdiction at least analogous to judicial review was not exercisable by the Inferior Number of the Royal Court on the present pleadings in relation to a statutory arbitral tribunal. The question of law fell to be answered in the affirmative. The exact parameters of the jurisdiction were left for subsequent consideration.

DISCRETION TO REFUSE TO HEAR AN APPLICATION FOR JUDICIAL REVIEW.

In the course of argument on the question of law a somewhat diffident submission was made on behalf of IDC as to the discretion available to the Court, when an alternative remedy is or has been available, to refuse to entertain a claim for judicial review or to limit the ambit of enquiry. That the Royal Court, like the High Court of England, possesses an inherent discretion, defined as a residual reserve or fund of powers which may be called upon as necessary whenever it is just or equitable so to do, would seem to follow from the judgment of the Court of Appeal in Finance & Economics Committee -v- Bastion Offshore Trust Co Ltd (1994) JLR 370 at pp.382 and 383.

Article 12 provides an alternative and statutory remedy which the parties could have invoked. Thus reference may be made to the judgment of Sir John Donaldson, M.R., in R. -v- Epping and Harlow General Commissioners ex parte Goldstraw (1983) 3 All ER 257 at p.262 where, on an application for leave to apply for judicial review, he said:

> ***"But, it is a cardinal principle that, save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used."***

To like effect are the judgments in other persuasive English authorities: R. -v- Chief Constable of Merseyside Police ex parte Calveley (1986) 1 All ER 257. and R. -v- Secretary of State for Home Department ex parte Swati (1986) 1 All ER 717 C.A. But, on close examination, the remedy provided by Article 12 is at best an avenue of appeal subject to the discretion of the Board or of the Court and, as regards the form of the Award, of the Board only. A construction that would allow the Court to order the statement of the Award in the form of a special case, in contrast to a special case on any question of law arising in the course of the proceedings, is rendered unsustainable by the repetition of "may" and the absence of "and if the Inferior Number of the Royal Court directs shall", before the words "state its award..". Albeit either party could have sought the determination of specific questions of law prior to the conclusion of the proceedings it was uncertain whether the Board or the Court would have acceded to any such request. Perhaps more importantly from the point of view of the exercise of discretion to refuse to entertain proceedings both parties have sought judicial review, despite the alternative

available remedy, in reliance on the Le Gros case; an authority of 22 years standing. The Court therefore ruled that no sufficient grounds had been shown to warrant the exercise of its discretion.

5 PROCEDURE

To conclude these preliminary findings the lack of reference in the Royal Court Rules to judicial review renders the appropriate procedure uncertain and, as Advocate Bailhache for the
10 I.D.C. has suggested, a rule requiring an initial application for leave to be made *ex parte* by Representation might well provide the equivalent in Jersey of Order 53, Rule 3 of the English Rules of the Supreme Court. Whether or not any such amendment of the Rules would require statutory backing calls for consideration.
15 It would surely be helpful to have a procedure for filtering out unmeritorious applications at an early stage and the Representation procedure seems more consistent with existing practice than the alternative of requiring objection to be taken when an Order of Justice is tabled to be brought before the Court
20 *inter partes*.

Perhaps it may here be explained that many authorities reported in the official English Law Reports are referred to in this judgment only in the All England series because, it seems,
25 that series is the more readily available to advocates.

THE AMBIT OF JUDICIAL REVIEW IN JERSEY

As the hearing progressed it became apparent that the
30 supervisory jurisdiction claimed for the Royal Court by the Bailiff in the Le Gros case was equivalent to that which had developed in England since the decision of Browne J in Anisminic Ltd -v- the Foreign Compensation Commission & Anor [29th July, 1966] and upheld by the House of Lords [1969] 2 AC 147 [1969] 1
35 All ER 208. That decision, said Lord Diplock in O'Reilly -v- Mackman [1982] 3 All ER 1124 at p. 1129:

"... has liberated English public law from the fetters that the courts had heretofore imposed upon themselves so
40 *far as determinations of inferior courts and statutory tribunals were concerned by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction and errors of law committed by them within their jurisdiction. The breakthrough that*
45 *Anisminic made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by a statute or subordinate legislation mistook the law applicable to the facts as it had found them it must have asked itself the wrong question i.e. one into which it was*
50 *not empowered to enquire and so had no jurisdiction to determine. Its purported determination not being a*

determination within the meaning of the empowering legislation was accordingly a nullity".

And at p.108:

"Therefore a tribunal or inferior court acts ultra vires if it reaches its conclusion on a basis erroneous under the general law".

In Page -v- Hull University Visitor [1993] 1 All ER 97, Lord Griffiths stated at p.100:

"It is in my opinion important to keep the purpose of judicial review clearly in mind. The purpose is to ensure that those bodies that are susceptible to judicial review have carried out their public duties in the way it was intended they should. In the case of bodies other than courts, insofar as they are required to apply the law, they are required to apply the law correctly. If they apply the law incorrectly they have not performed their duty correctly and judicial review is available to correct their error of law so that they may make their decision upon a proper understanding of the law.

In the case of inferior courts, that is courts of a lower status than the high court such as the Justices of the Peace, it was recognised that their learning and understanding of the law might sometimes be imperfect and require correction by the High Court and so the rule evolved that certiorari was available to correct an error of law of an inferior court. At first it was confined to an error on the face of the record but it is now available to correct any error of law made by an inferior court".

It would be strange if Lord Griffiths' words did not apply also to a statutory tribunal. As Lord Browne-Wilkinson explained at p.107 of that case:

"In my judgment the decision in Anisminic Ltd -v- Foreign Compensation Commission ... rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires".

And at p.108:

"... The general rule is that decisions affected by errors of law made by tribunals ... can be quashed .... therefore

a tribunal ... acts ultra vires if it reaches its conclusion on a basis erroneous under the general law".

Following Le Gros and the English authorities, recognised as persuasive particularly when the wording of a Jersey Law is equivalent to that of an English statute, (Le Mottée -v- Wilson (1978) JJ 167) the Court finds that the Award of 5th February, 1995 may be quashed on the grounds of error of law whether or not on the face of the record. A decision which can be impugned as so aberrant that no reasonable tribunal could have come to it may also be regarded as showing errors of law and thus a want of jurisdiction. (Associated Provincial Picture Houses Ltd -v- Wednesbury Corporation [1947] 2 All ER 680). As it was put by Lord Radcliffe in Edwards -v- Bairstow [1956] AC 14 at p.36:

"... 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".

Similar considerations apply to the unfairness which results from failure adequately, even if briefly, to explain the reasoning behind conclusions reached. This, in Jersey as well as in England, by analogy with section 12 of the Tribunals and Inquiries Act 1958 and generally. In Re Poyser and Mills Arbitration [1964] 2 QB 467 and R. -v- Civil Service Appeal Board ex parte Cunningham [1991] 4 All ER 310. At p.318 Lord Donaldson MR said:

"I do not accept that, just because Parliament has ruled that some tribunals should be required to give reasons for their decisions, it follows that the common law is unable to impose a similar requirement upon other tribunals if justice so requires".

He went on to quote a passage from the speech of Lord Bridge in Lloyd -v- McMahon [1987] 1 All ER 1118 at p.1161:

"... My Lords the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative, or judicial, has to make a decision which

will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on anybody the power to make decisions affecting individuals the courts will not only require the procedure prescribed by the statute to be followed but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness".

At p.319 of R.-v- Civil Service Appeal Board Lord Donaldson MR went on to say:

"... The Board should have given outline reasons sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful. Any other conclusion would reduce the Board to the status of a free-wheeling palm tree".

The line between irrationality and unfairness is less than sharply defined.

Overall the Court finds that the Award of a Board of Arbitrators constituted under Article 7 of the 1961 Law may be reviewed on like grounds to those available in England and conveniently encapsulated in that part of the speech of Lord Diplock in Council of Civil Service Unions & Ors. -v- Minister for the Civil Service (1984) 3 All ER 935 at p.950 where, in the context of administrative action, he classified the grounds giving rise to judicial review as illegality, irrationality and procedural impropriety.

THE GENERAL APPROACH TO A VALUATION.

It will be convenient now to consider the law in Jersey governing the discharge of its duties by an arbitral tribunal required to value land compulsorily acquired. Turning first to the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961, Article 9 provides:

"(1) In assessing compensation the Board shall act in accordance with the following Rules -

(a) no allowance shall be made on account of the fact that the acquisition is compulsory; [this precludes compensation for the personal loss imposed on the owner by the forced sale].

(b) *the value of the land shall, subject as hereinafter provided, be taken to be the amount which the land might have been expected to realise if sold on the open market by a willing seller on the date on which the Inferior Number of the Royal Court made the order vesting the land in the public".*

In the instant case the date of the hypothetical transaction is taken to be 11th December, 1992, (the "vesting date") while the price expected to be realised would necessarily have depended on the market's perception of the permissions for the development of the Land then obtainable. A particular consent for one part might enhance the value of another.

Article 9 is in similar terms to section 5 of the English Land Compensation Act 1961 though that section is silent as to the date for the valuation. English decisions fix it at the time when notice to treat has been given. As from such date the owner can insist on the purchase of his land at a value to be assessed. Mercer -v- Liverpool etc. Corp. [1903] 1 KB 652 at p. 661.

In Horn -v- Sunderland Corp. (1941) 1 All ER 480 at pp.495 and 496 Scott L.J. stated:

"Prima facie the purchase price of the land to be taken... is the market value of the land... the rule of market value necessarily presupposes the presence of the seller in the market, there offering his land for sale in a normal state for that market - namely in a condition to attract the ruling price there. If its state is better than normal it should attract a better price."

Relying upon this proposition it is submitted on behalf of Lesquende that once planning permission became a pre-requisite of development, first in England and then in Jersey, the seller in the market would notionally have secured the most favourable permission he could before the vesting date and that the Board should so have assumed. Such an approach, however, departs from the principles established by the Privy Council in Maori Trustee -v- Ministry of Works [1959] AC 1 which binds us. There the meaning of the section of the New Zealand Finance Act 1944, couched in like terms to Article 9(1)(b) of the 1961 Law, was construed. It was held that Ministerial approval for subdivision of land, which would have enhanced its value, could not be assumed in assessing compensation for its compulsory acquisition. In consequence the Land must be valued as zoned and with all its characteristics and potentialities, prevailing on 11th December, 1992, when no consent for development had yet been given. As Lord Buckmaster put it in Fraser -v- Frazeville City [1917] AC 187 at p.194: *"The value to be ascertained is the value to the seller of the property at the time of expropriation with all its existing advantages and with all its possibilities ..."* Further, the Board

must bear in mind that probability and possibility are not identical with realised probability or realised possibility. In re Lucas -v- Chesterfield Gas and Water Board [1909] 1 KB 16 at p.28. It should also consider whether or not a potential buyer would make inquiries of the Education and Public Health Committees of the States.

It is common ground that rezoning, a condition precedent to permission for the development of the Land for housing, in whole or in part, in practice requires the assent of the (elected) States. This imports a political element to which the market would have had regard. To some extent this consideration qualifies the statement of Ralph Gibson L.J. at p. 132 of Christchurch Borough Council -v- Secretary of State (1993) 68 P & CR 116 that:

> *"Local opposition was not a ground for refusal of planning permission unless founded upon valid planning reasons supported by substantial evidence."*

Further, in Stringer -v- Ministry of Housing [1970] 1 WLR 1281 at p.1294 Cooke J. had observed that:

> *"In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration."*

Article 5 of the Island Planning (Jersey) Law, 1964 states that:

> *"(1) Subject to the provisions of this Law, the permission of the [Island Development] Committee shall be required in respect of the development of any land.*
>
> *(2) In this Law, unless the context otherwise requires "development" means -*
>
> *(a) the carrying out of building, engineering, mining or other operations in, on, over or under land....*
>
> *(c) the making of any material change in the use of any building or other land."*

On the sixteenth of the twenty days of the hearing in this Court the submission was advanced that, despite the express wording of this Article Jersey law recognises intermediary outline planning permission as well as development permission; itself requiring compliance with the Building Bye-Laws. Coopers & Lybrand -v- I.D.C. 1992 JLR 70 at p.81. That submission is upheld. It has implications for the time scale of any housing project.

Such approach accepts the principle, or interpretation of the term "value", referred to in Pointe Gourde Quarrying and Transport Co. Ltd. -v- Sub Intendant of Crown Lands [1947] AC 465, a Privy Council decision, the effect of which was stated by Lord McDermot, at p. 572, to be:

> *"... that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition."*

This decision, again approved by the Privy Council in Melwood Units Ltd. -v- Main Roads Commissioners (1979) AC 426, is properly to be regarded as law in Jersey. Hence the expressions "scheme world" and "non-scheme world" so well known here in a planning context. Only by ignoring the scheme which underlies an acquisition can consideration of any resultant increase, or decrease, in the value of the land resulting from it assuredly be avoided.

The 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."*

per Lord Denning M.R. in Wilson -v- Liverpool Corp. [1971] 1 WLR 302 at p. 309. As Widgery C.J. explained at p. 310:

> *"The extent of the scheme is a matter of fact in every case..."*

While an award stands this Court is bound by the Board's findings of fact as Article 12(1) of the 1961 Law provides.

In his reply Advocate Voisin, for Lesquende, contended that the principle expressed in section 15(1) of the Land Compensation Act 1961 *"would have been developed in England but for the earlier intervention of statute and can be propounded in Jersey"* although, in his opening address, he had submitted that the section was reflected in Jersey Law as the codified expression of an English common law principle. Nonetheless, paragraph 3.2.4 (a) of the Re- Re-Amended Order of Justice reads:

> *"...although the Board held correctly that under Jersey Law there is a principle of law (not enshrined in Jersey*

> *statute but founded on common sense and equity) that in ascertaining the value of land compulsorily acquired it shall be assumed that planning permission would be granted such as would permit development thereof in accordance with the proposals to the Respondent..."*

In his reply before the Board Mr. Horton Q.C., for Lesquende, had suggested that it would be inconsistent to find that the common law Pointe Gourde principle alone was part of the relevant Jersey law; thus excluding some equivalent to the statutory provisions found in section 15 (1). He then made the bold submission that the requirement to find the value of the land as at 11th December, 1992, allowed the introduction of any principle of law as a matter of judicial creation where the statute did not have it in terms; provided that the Board was satisfied that it was necessary "in order to get market value." But both the draftsman of the 1961 Jersey Law and the States may be expected to have had recourse to the Town and Country Planning Act 1959 which repealed the compensation sections of the Town and Country Planning Act 1947 and required compensation for compulsory purchase to be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act 1919; a statute which had introduced a system of compensation, calculated to preclude excessive payments to landowners, quite different from that afforded by the earlier Lands Clauses Acts. Article 9 (1) of the 1961 Law follows the wording of section 2 of the 1919 Act. It does not, however, reproduce section 3 (1): re-enacted in section 15 (1) of the 1961 Act. It is to be inferred that the omission was deliberate. In any event there was little scope for an equivalent common law principle to have developed in England since a general requirement for planning permission to develop land did not exist before the enactment of the 1947 Act and the Court is quite unable to find either that it would have developed in England "but for the earlier intervention of statute", or that it was necessitated by "commonsense or equity". *A fortiori* in this island where there was no general requirement for planning permission for the development of land until the enactment of Article 5 of the Island Planning (Jersey) Law 1964.

There is no equivalent to Section 15 (1) of the Land Compensation Act 1961 in Jersey Law.

THE LAND AND ITS RELEVANT HISTORY.

The Land, to which the principles of law outlined above had to be applied, comprises 55.79 vergées divided into 10 contiguous fields. Historically one field had been used as a go-kart track with related facilities, another for whippet racing and a third for motor-cycle scrambling. Four of the remaining fields were under cultivation at the material time but the rest were not. None were of high agricultural value. They had been acquired freehold by Lesquende between 1979 and 1982 as an investment. A

variety of uses for the land, in whole or in part, such as a golf course had been considered with some encouragement from IDC but successive planning applications for self-catering apartments and sheltered housing, for example, were refused.

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On 3rd November, 1987, the States approved an Island Map showing the Land divided into three zones within a "village/settlement plan area". The approved Island Plan to which it was annexed contained a number of obstacles to non-
10 agricultural development.

There was some change on 31st July, 1990, when the States adopted the proposal of IDC for the acquisition of the Land. 29 vergées (Area 1) were rezoned for "needed" States rental and loan
15 housing (Category A) to include, in the event of proven demand, community facilities for children, the elderly and the handicapped. Category A housing is to be contrasted with development for unassisted buyers or tenants and defined as "demand" housing (Category B). The remaining part of the land
20 (Area 2) remained and remains zoned under special landscape, green and agricultural priority headings as shown on the Island Map approved by the States on 3rd November, 1987. During January, 1991, control on the price of houses was lifted and on 28th November, subject to design and layout plans and other factors, a
25 Brief for the development of the Land was adopted by IDC. In the meanwhile, in the course of negotiation, IDC had not seemed averse to a density of 75 habitable rooms per acre for Category A housing on Area 1. Changes after 11th December, 1992, when the Court ordered the vesting of the land in the States, are irrelevant for
30 the purposes of valuation. So is the reserve, unpublished list of sites held by IDC for further consideration. Its existence would not have been known either to a buyer or to a seller on the vesting date and cannot be relied upon as showing an alternative means of satisfying any need found.

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WHAT WAS REQUIRED OF THE BOARD.

What was required of the Board was a determination, in a reasoned award, of the price which the Land might have been
40 expected to realise on 11th December, 1992, if sold in the open market by a willing seller. In other words the monetary equivalent of the land appropriated; no more and no less. In reaching its decision the Board should have:-

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(1) heeded both the provisions of Jersey law and the considerations explained above.

(2) evaluated all the evidence adduced between 11th April and
50 30th September, 1994; using its collective good sense and knowledge.

(3) defined the scheme, being the proposed development giving rise to the compulsory purchase, and then put it out of mind so as to make its valuation in "the non-scheme world".

(4) decided what were the changes in zoning and the planning and development consents, if any, with or without conditions and whether or not by stages or in association with other land not owned by Lesquende [such as that which has been described as Area 3] which, on the material date, a discerning buyer might well have thought obtainable in the immediate or longer term ("hope value") for the Land from the States and from a reasonable and well-informed planning authority acting lawfully.

(5) In so doing taken into account the physical characteristics of the Land, its intrinsic quality, suitability for any particular development, planning history and zoning as well as the need for houses or flats, traffic considerations, overall potential and the various detailed suggestions made by Professor Lock in the course of his evidence.

(6) made no assumptions.

THE APPROACH ADOPTED IN THE AWARD.

After a long hearing, during which it was faced with a mass of evidence and protracted submissions from leading counsel, the Board applied the Pointe Gourde principle, duly made findings of fact as to the parameters of the scheme and correctly found in law both that the relevant date for valuation was 11th December, 1992, and that it was required to value the land in the "non-scheme world". With the agreement of the parties its valuation was made by the "Residual" method.

Unhappily the Board then erred in law when, as appears on the face of the record, it went on to find that common sense and equity required the assumption that by the vesting date planning permission would have been granted to develop the Land in accordance with the proposals of the developing authority. From that error further errors of law derived. The Board qualified its earlier correct conclusion as to valuation in the "non-scheme world" in the belief that the assumption of planning permission for the scheme allowed Lesquende to base its claim either in the "scheme world" or in the "non-scheme world". It thereby purported to establish the minimum planning or development permissions which Lesquende could have expected and, since the acquisition was compulsory, sought to determine what the views of the IDC, as the planning authority, should (the Board's emphasis) have been. These, it found, would have been such as to have allowed, by the vesting date, planning and development permissions

for housing on Area 1 in excess of the proposals set out in the Development Brief by eliminating two of the four community facilities, namely a branch library and a day centre, which were "clearly designed to serve a far larger public" than the families which would dwell in Area 1. The same considerations might well have applied to the nursery centre and the community hall suggested in the scheme. The Board concluded that the full implementation of the proposals in that Brief would be unfair to Lesquende having regard to "the Essence of the Scheme"; being the use of Area 1 for Category A housing.

When the Board subsequently made a passing reference to the "non-scheme world" it significantly found that had there been no scheme and, by parity of reasoning, had it ignored the scheme as required in law, "Lesquende would not have obtained such a favourable planning approval." It may be observed that it is in the highest degree unlikely that independently of the scheme the market would have anticipated virtually identical permissions for the development of the Land.

In the premises the Board departed from its statutory duty to assess the value of the Land as at December 11th, 1992, in the "non-scheme world".

Save insofar as they may give rise to directions from the Court other complaints of unreasonableness and perversity relating, for example, to the provision of community facilities, open space, density and flats, all of which were keenly canvassed before the Court, become academic.

The errors of law, already described, are so fundamental as to vitiate all the conclusions reached.

CONCLUSION

An order must be made quashing the Award as being *ultra vires* and remitting the task of valuation to the Board with directions which are not so restrictive as to usurp the jurisdiction conferred on it by the 1961 Law. While the Board may well think it helpful to order fresh pleadings and written submissions based on this judgment it is to be hoped that neither party will add to its burdens by adducing yet more evidence.

The Court's directions, which in part derive from the submissions which it has not been necessary to recite, are:-

1. Now to do "WHAT WAS REQUIRED OF THE BOARD" as set out on pp.17 and 18 above; using the "Residual" method.

2. To explain its approach to "open space", Field 65, the possibility of a requirement to build flats as part of a "mix" and housing need.

3. If calculating density on parts of the Land not given over to open space to remember that on one possible basis the result may be a net figure.

4. To explain how its conclusions as to development period, infrastructure and interest costs, professional and planning fees and developer's profit are reached. No interest costs should arise in the first quarter of any cash flow projection.

5. To explain its reasoning in making a valuation of Area 2.

JUDGMENT ON COSTS

Both parties have succeeded on the preliminary point of law and in securing the principal relief sought, originally by Lesquende, namely the quashing of the award and the remission of the question of compensation to the Board with directions.

IDC have succeeded on the two major issues: first, in its claims that the land was to be valued as at the vesting date without any presumptions and, secondly, that permission for the development comprised in the scheme was not to be presumed either. On the other hand, Lesquende succeeded in relation to the relevance of the zoning as at the vesting date and to a number of matters that are reflected in the directions given in the judgment.

The conduct of Lesquende's case has been impugned. The Court does not in any way criticise Lesquende for pursuing its claim despite the letter from IDC's solicitors dated 8th November of last year, although there was certainly a degree of prolixity in the presentation of its case.

Three days were taken up with the preliminary point in which both parties succeeded in persuading the Court that it had jurisdiction and should exercise its discretion to hear the proceedings. That left seventeen days of argument on issues arising on the pleadings and, referring to notes, the Court finds that about four days were taken up in submissions relating to the significant issues upon which IDC succeeded. That was one quarter of the seventeen days, approximately one-fifth of the twenty days of the hearing overall. While this proportion is to be applied to the costs as a whole account must be taken both of Lesquende's prolixity and degree of success. So doing the order of the Court, on a rough and ready apportionment, is that IDC should have one-sixth of its costs of these proceedings to include any costs attributable to instructing English counsel; such costs to be taxed if not agreed.

Authorities

Island Planning (Jersey) Law, 1964.

Compulsory Purchase of Land (Procedure) (Jersey) Law, 1961.

R -v- Northumberland Compensation Appeal Tribunal, ex parte Shaw [1952] 1 All ER 122 CA.

Le Gros -v- Housing Committee (1974) JJ 77.

Le Gros -v- Housing Committee (1977) JJ 59.

Le Masurier -v- Natural Beauties Committee (1958) 13 CR 139.

Scott -v- I.D.C. (1966) JJ 631.

Tett -v- States of Jersey & Rent Control Tribunal (1972) JJ 2249 CofA.

Representation of Robert Archdale Ltd., HM Attorney General, Respondent (1976) JJ 355.

Mayo Associates -v- Finance & Economics Committee (6th March, 1996) Jersey Unreported.

Housing Committee -v- Phantesie Investments, Ltd., (1985-86) JLR 96 CofA.

Re Doléance of Harbours & Airports Committee; re Forster t/a Airport Business Centre (1991) JLR 316.

Finance & Economics Committee -v- Bastion Offshore Trust (1994) JLR 370 CofA.

Jersey Racing Circuits, Ltd -v- I.D.C. (1966) JJ 587.

Baker -v- Public Works Committee (1968) JJ 965.

JNWW -v- Rate Assessment Committee of Grouville & Ors. (1994) JJ 119.

Blackall & Danby, Ltd -v- I.D.C. (1963) JJ 273.

Burt -v- States of Jersey (1994) JLR 341.

Burt -v- States of Jersey (17th January, 1996) Jersey Unreported CofA.

Re Representation of McMahon Probets (1993) JLR 35.

4 Halsbury 37 : Chapter 14.

R. -v- Merseyside C.C. ex parte Calveley & Olles [1986] 1 All ER 257 CA.

R. -v- Secretary of State for Home Department ex parte Swati [1986] 1 All ER 717 CA.

R.S.C. (1997 Ed'n): Vol.1: O.53, r.14.

4 Halsbury 6: paras. 838-9.

Report of the Commissioners into the Civil, Municipal and Ecclesiastical Laws of Jersey (London, 1861): The Constitution of Tribunals: pp. xxxiii, xxxvi, xxxvii; The Mode and Forms of Procedure in the Royal Court: pp.xlv; Judgment and Appeal: pp.liv.

4 Halsbury 10: paras. 701-17,770,852.

F. de L Bois. Constitutional History of Jersey pp.203-206.

De Smith, Woolf & Jowell: Judicial Review of Administrative Action: pp. 237-266, 457-472, 549-563, 615-619, 650-1, 662-3, 813-5, 819-20.

Lord Denning: The Discipline of Law pp.116-117.

IH Jacob: Current Legal Problems, 1970: The Inherent Jurisdiction of the Court: pp. 23-52.

Acquisition of Land (Assessment of Compensation) Act 1919: 9 & 10 Geo. Chp.57.

Encyclopaedia of Law of Compulsory Purchase and Compensation (Brown) p.1035.

Racecourse Betting Control Board -v- Secretary of State for Air [1944] 1 Ch 114 C.A.

LC Pallot -v- Gechena, Ltd. (11th July, 1996) Jersey Unreported.

R -v- Epping & Harlow General Commissioners, ex parte Goldstraw [1983] 3 All ER 257.

Safeguard Business Systems -v- Finance & Economics Committee (1980) JJ 169.

Le Geyt: "Privilèges, Loix et Coustumes de L'Isle de Jersey, avec un Essay pour des Règlemens Politiques (Jersey, 1953): Livre Premier; Titre III: des Arbitrages; Article 4.

Royal Court (Jersey) Law, 1948: Article 14.

IRC -v- National Confederation of Self Employed [1981] 2 All ER 93 HL.

Royal Court Rules 1992, as amended.

Anisminic -v- Foreign Compensation Commission and Anor [1969] 2 AC 147; [1969] 1 All ER 208.

O'Reilly -v- Mackman [1982] 3 All ER 1124.

Page -v- Hull University Visitor [1993] 1 All ER 97.

Le Mottée -v- Wilson (1978) JJ 167.

Associated Provincial Picture Houses Ltd -v- Wednesbury Corporation [1947] 2 All ER 680.

Re Poyser and Mills Arbitration [1964] 2 QB 467.

R -v- Civil Service Appeal Board ex parte Cunningham [1991] 4 All ER 310.

Lloyd -v- McMahon [1987] 1 All ER 1118.

Land Compensation Act 1961.

Loi (1920) sur l'instruction publique: Article 6.

Council of Civil Service Unions & Ors -v- Minister for the Civil Service [1984] 3 All ER 935 HL.

Myers -v- Milton Keynes Development Corporation [1974] 1 WLR 696.

Melwood Units Ltd. -v- Main Roads Commissioners [1979] AC 426.

Town and Country Planning Act 1959.

Town and Country Planning Act 1947.

Horn -v- Sunderland Corp. [1941] 1 All ER 480.

Maori Trustee -v- Ministry of Works [1959] AC 1 PC.

Lucas -v- Chesterfield Gas and Water Board [1909] 1 KB 16 CA.

Coopers and Lybrand -v- I.D.C. (1992) JLR 70.

Christchurch Borough Council -v- Secretary of State [1993] 68 P & CR 116.

Stringer -v- Ministry of Housing [1970] 1 WLR 1281.

Hall -v- Shoreham [1964] 1 All ER 1 138.

Newbury DC -v- Secretary of State for Environment [1980] 1 All ER 731 HL.

Mercer -v- Liverpool etc. Corp. [1903] 1 KB 652 CA.

Wilson -v- Liverpool Corp. [1971] 1 WLR 302 CA.

4 Halsbury 9 pp.218-220.

Hertfordshire County Council -v- Ozanne & Ors [1991] 1 All ER 769 HL.

Countess Ossalinksy -v- City of Manchester [1883].

Trocette Property Co Ltd -v- GLC [1974] EGR 701.

Compulsory Purchase of Land (Procedure) (Amendment No. 3) (Jersey) Law, 1981.

Wade: Administrative Law (1988: 6th Ed'n) Clarendon Press: pp.547, 549, 936.

Loi (1912) sur l'Instruction Primaire.

Re Enoch and Zaretzky, Bock & Co [1910] 1 KB 327 CA.

Trojan Builders -v- Housing Committee (7th September, 1987) Jersey Unreported.

East End Dwellings Co Ltd -v- Finsbury Borough Council [1952] AC 109 HL.

Edwards -v- Bairstow [1956] AC 14 HL.

Camrose & Anor -v- Basingstoke Corporation [1966] 1 WLR 1100 CA.

Jelson Ltd -v- Minister of Housing and Local Government [1970] 1 QB 243 CA.

Birmingham Corporation -v- West Midland Baptist Trust Association [1970] AC 874 HL.

Rugby Joint Water Board -v- Footiff [1973] AC 202 HL.

Norton Toole Co Ltd -v- Tewson [1973] 1 WLR 45.

Niarchos (London) Ltd -v- Secretary of State for Environment [1977] 76 LGR 480.

Robert Hitchens Builders Ltd -v- Secretary of State for Environment & Anor [1979] 37 P & CR 140.

Fox -v- PG Wellfair [1982] 263 EG 589.

Top Shop Estates Ltd -v- C Danino [1985] 1 EGLR 9.

Zermatt Holdings Ltd SA -v- Nu-Life Upholstery Repairs Ltd [1985] 2 EGLR 14.

Rockhold -v- Secretary of State for Environment and South Oxfordshire DC [1986] JPL 130.

Peak Park Joint Planning Board -v- Secretary of State for Environment and Waller [1991] JPL 744.

Save Britain's Heritage -v- No. 1 Poultry Ltd [1991] 1 WLR 153 HL.

Fox & Ors -v- Secretary of State for Environment & Surrey Heath Borough Council [1991] 62 P & CR 459.

Land Securities -v- Westminster City Council [1993] 1 WLR 286.

R -v- Hull University Visitors [1993] AC 682.

AG -v- Contractors Plant Service Ltd (1967) JJ 785.

Abbott -v- Parish of St. Helier (1955) JJ 89.

Harris -v- Harris, née Vibert (1965) JJ 487.

Davest Investments Ltd -v- Bryant (1982) JJ 213.

Lewis Emanuel & Son Ltd -v- Sammut [1959] Lloyd's Reports Vol 2, 269.

Pulhofer -v- Hillingdon LBC [1986] AC 404.

R -v- Paddington & St. Marylebone Rent Tribunal ex parte Bell London [1949] All ER 720.

Simpson -v- Edinburgh Corporation [1960].

Givaudan & Co Ltd -v- Minister of Housing & Local Government & Anor [1967] 1 WLR 250.

Pehrsson -v- Secretary of State for Environment & Other [1990] 61 P & CR.

Gransden & Co Ltd & Anor -v- Secretary of State for Environment & Anor [1985] 54 P & Cr 86.

Horsham DC -v- Secretary of State for Environment & Margramy plc [1992] JPL 334 CA.

R -v- London Borough of Hillingdon ex parte Royco Homes Ltd [1974] 2 All ER 643.

Burwoods Ltd -v- Secretary of State for Environment [1972] Estates Gazette 224 pp.2022-2023.

Ynystawe, Ynyforgan and Glais Gypsy Site Action Group -v- Secretary of State for Wales and West Glamorgan [1981] JPL 874.

Britannia Ltd -v- Secretary of State for Environment [1978] JPL 554.

Charan Das & Ors -v- Amir Khan & Ors [1920] LR 255 PC.

R -v- Criminal Injuries Compensation Board ex parte Lain [1967] 2 QB 864.

R -v- Board of Visitors of Hull Prison ex parte St Germain [1979] 1 QB 425 CA.

Westminster City Council -v- Great Portland Estates plc [1985] 1 AC 661 HL.

R -v- Lord President of the Privy Council ex parte Page [1993] AC 682 HL.

Appeal by John Dixon Habin (1971) JJ 1637.

Daisy Hill Real Estates Ltd -v- Rent Control Tribunal (8th June, 1995) Jersey Unreported.

R -v- Secretary of State for Home Dept ex parte Al Fayed (18th November, 1996) The Times.

Cedars Rapids Manufacturing & Power Co -v- Lacoste [1914] AC 569 PC.

Raja Vyricherla Narayana Gajapatiraju -v- the Revenue Divisional Officer Vizagapatam [1939] 302 PC.

The Commonwealth -v- Reeve [1949] 78 CLR 410.

Turner -v- Minister of Public Instruction [1956] 95 CLR 245.

Emerald Quarry Industries Proprietary Ltd -v- Commissioner of Highways (South Australia) (1979) 142 CLR 351.

Le Masurier -v- IDC (1985-86) JLR 164.

Town and Country Planning Act 1944.

Compensation for Compulsory Purchase of Land (1947) 91 Sol J.

Nicholls on Compensation for the Compulsory Acquisition of Land (1st Ed'n 1952).

Hansard (13th November, 1958) pp.588-590.

Hansard (24th March, 1959) pp.1139-1150.

Costs

Re Elgindata Ltd (No. 2) [1993] 1 All ER 232 CA.