# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Pfeiffer Nominees Pty Limited v Chief Executive, Department of Transport and Main Roads* [2019] QCA 101 |
| PARTIES: | **PFEIFFER NOMINEES PTY LIMITED**<br>ACN 005 073 549<br>(applicant)<br>**v**<br>**CHIEF EXECUTIVE, DEPARTMENT OF TRANSPORT AND MAIN ROADS**<br>(respondent) |
| FILE NO/S: | Appeal No 6786 of 2018<br>LAC No 6 of 2017 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal from the Land Appeal Court |
| ORIGINATING COURT: | Land Appeal Court at Cairns – [2018] LAC 2 (Henry J and Members Isdale and Stilgoe) |
| DELIVERED ON: | 28 May 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 22 November 2018 |
| JUDGES: | Morrison and McMurdo JJA and Mullins J |
| ORDERS: | **1. Grant leave to appeal.**<br>**2. Dismiss the appeal with costs.** |
| CATCHWORDS: | REAL PROPERTY – VALUATION OF LAND – OBJECTIONS AND APPEALS – QUEENSLAND – where the applicant's land was adjacent to a highway – where some of that land was resumed for the purpose of widening the highway – where a declaration from the Commissioner of Main Roads impeded access to the highway unless the Commissioner consented to the removal of the impediment – where the giving of such consent had not occurred and was unprecedented – where the applicant was entitled to compensation for the resumption based on the value of the resumed land – where the value of the resumed land was assessed as affected by the declaration – where the relevant scheme was said to be the specific instance of road widening that required the resumption, rather than some broader scheme for the maintenance and upgrading of the highway – whether the relevant scheme was properly determined – whether the value of the applicant's land should be assessed without regard to the declaration |

*Acquisition of Land Act* 1967 (Qld), s 20(2)

*Melwood Units Ltd v Commissioner of Main Roads* [1979] AC 426, considered
*Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565, applied
*Roads and Traffic Authority of New South Wales v Perry* (2001) 52 NSWLR 222; [2001] NSWCA 251, cited
*Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2007) 233 CLR 259; [2008] HCA 5, considered
*Waters v Welsh Development Agency* [2004] 1 WLR 1304; [2004] UKHL 19, considered

COUNSEL: C L Hughes QC, with M Jonsson QC, for the applicant
J M Horton QC, with E Hoiberg, for the respondent

SOLICITORS: Holding Redlich for the applicant
Clayton Utz for the respondent

[1] **MORRISON JA:** I have read the reasons of McMurdo JA and agree with those reasons and the orders his Honour proposes.

[2] **McMURDO JA:** In 2007, some of the applicant's land, which had a frontage to the Captain Cook Highway north of Cairns, was resumed. The purpose of the resumption was to upgrade the highway at that point. By s 12(5) of the *Acquisition of Land Act* 1967 (Qld) ("the Act"), the applicant became entitled to compensation, the amount of which was to be assessed according to s 20(2) of the Act, by reference to the value of the estate or interest of the applicant in the land taken on the date when it was taken.

[3] Although it was adjacent to the highway, there was a legal impediment to access to the highway from the land, because of what was called a Limited Access Declaration by the Commissioner of Main Roads, which had been made in 1983 ("the Declaration"). By s 11A(5)(a) of the *Main Roads Act* 1920-1979 (Qld), the effect of the Declaration was that direct access could not be obtained from the applicant's land to the highway unless the Commissioner first gave consent.

[4] The applicant claimed compensation for the resumption, upon the basis that it should be assessed by disregarding the effect of the Declaration. But the respondent said that what had to be assessed was the actual value of the land, affected as it was by the Declaration. The difference between those two positions became the issue for determination in this proceeding, both in the Land Court and the Land Appeal Court.

[5] At the hearing in the Land Court, conducted by Member Cochrane, the valuers who gave evidence agreed that, if the Declaration was brought into account, the value of the land (and thereby the amount of the compensation) should be assessed at $580,000, whereas if the Declaration was to be disregarded, the amount should be $2,170,000.

[6] Member Cochrane held that the Declaration should be disregarded and assessed compensation in the higher amount. The Land Appeal Court (Henry J and Members Isdale and Stilgoe) allowed the appeal, holding that the Declaration should be brought into account and that the compensation should be the lower amount.

[7] This is an application for leave to appeal from the judgment of the Land Appeal Court. By s 74 of the *Land Court Act* 2000 (Qld), a party may appeal a decision of that court only with this court's leave, and only on the ground of an error or mistake in law or an absence or excess of jurisdiction. As will appear, there are questions of law which are raised by this application. But for the reasons that follow, the Land Appeal Court was correct to conclude that the Declaration had to be brought into account and that compensation should be assessed in the lower amount.

**The principles of valuation under s 20(2) of the Act**

[8] What had to be assessed was "the value of the estate or interest of the claimant in the land taken on the date when it was taken."[1] Neither that expression, nor the word "value", is defined by the Act. It is well established that the value under s 20(2) is to be assessed according to the so-called *Spencer* test, which derives from the judgment of the High Court in *Spencer v Commonwealth*.[2]

[9] However, as is also well established, there is a qualification to the application of s 20(2) strictly according to its terms, where the actual value of the land being resumed has been affected, either by being increased or decreased, by the "very scheme of which the resumption forms an integral part", as Lord Russell of Killowen put it in *Melwood Units Ltd v Commissioner of Main Roads*,[3] a judgment of the Privy Council on appeal from this jurisdiction.

[10] This is commonly referred to as the *Pointe Gourde* principle, a name which derives from *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands*, where the Privy Council said that:[4]

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

[11] The reason for this rule was explained by Lord Nicholls of Birkenhead, in *Waters v Welsh Development Agency*, as follows:[5]

> "When granting a power to acquire land compulsorily for a particular purpose Parliament cannot have intended thereby to increase the value of the subject land. Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of the power [of resumption]."

[12] The same qualification has been applied to decreases in value caused by "the scheme", as well as increases in value. In *Melwood Units Pty Ltd v Commissioner of Main Roads*, Lord Russell said:[6]

> "Under the principle in *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands* [1947] A.C. 565 the landowner cannot claim compensation to the extent to which the value of his

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1 Section 20(2) of the Act.
2 (1907) 5 CLR 418.
3 [1979] AC 426 at 434.
4 [1947] AC 565 at 572.
5 [2004] UKHL 19 at [18]; [2004] 1 WLR 1304 at 1310.
6 [1979] AC 426 at 434.

> land is enhanced by the very scheme of which the resumption forms an integral part: that principle in their Lordships' opinion operates also in reverse. A resuming authority cannot by its project of resumption destroy the potential of the whole [of the land for a certain development], and then resume and sever on the basis that that destroyed potential had never existed."

[13] The authorities have frequently expressed this rule by reference to a "scheme". For example, in *Pointe Gourde*, what was to be disregarded was said to be the "scheme underlying the acquisition".[7] In *Melwood Units*, it was "the very scheme of which the resumption forms an integral part".[8] And in *Queensland v Murphy,* the High Court referred to "the scheme of which resumption is a feature".[9] The High Court also said in that case that the rule requires a disregard of planning restrictions which "can properly be regarded as a step in the process of resumption",[10] citing its judgment in *Housing Commission of New South Wales v San Sebastian Pty Ltd*.[11]

[14] The controversy in many cases, of which the present is yet another example, is in the identification of the relevant "scheme". A precise definition of the term, which would largely avoid the controversy has not been developed, or at least widely and authoritatively accepted. In *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*, the High Court (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) said:[12]

> "What was meant in *Pointe Gourde* and other cases by references to "the scheme" does not readily appear. As is illustrated by the reference earlier in these reasons to *Nelungaloo* [[1947] HCA 58; (1947) 75 CLR 495] the constitutional law of this country includes analysis in many decisions of this Court of statutory "marketing schemes" involving in particular the compulsory acquisition of wheat and other crops with the objective of market "stabilisation". In the context of statutory compulsory acquisition of land, a "scheme" may be taken to be a broad expression derived from the promotion in the nineteenth century of bills for a special statute to permit the construction of canals, railways, dams and other complex infrastructure. The "scheme" referred to the obtaining by the promoters of compulsory powers without which their proposal could not be implemented. With that background in mind, the description in *Pointe Gourde* of the resumption of land to assist the construction of an air force base under Lend Lease as part of a "scheme", may readily be understood."

[15] In *Waters v Welsh Development Agency*, Lord Nicholls discussed the difficulties in defining the scope of the "scheme":[13]

> "**43** Notoriously the practical difficulty with the *Pointe Gourde* principle lies in identifying the area of the "scheme" in question. This difficulty does not arise when the enhanced

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7 [1947] AC 565 at 572.
8 [1979] AC 426 at 434.
9 [1990] HCA 42; (1990) 95 ALR 493 at 496.
10 Ibid.
11 [1978] HCA 28; (1978) 140 CLR 196 at 206-7.
12 [2008] HCA 5 at [46]; (2007) 233 CLR 259 at 275 [46]. Footnotes omitted.
13 [2004] 1 WLR 1304 at 1315-1316.

value arises from the authority's proposed user of the subject land. Then, by definition, what is in issue is the proposed use of the subject land. But when regard is had to the authority's use or proposed use of other land the application of the principle is not self-defining. A major development project of a general character, covering a wide geographical area, may proceed in several phases, each phase taking years to implement, and the detailed content and geographical extent of each phase being subject to change and finalised only as the phase nears the time when the work will be carried out. Is that one scheme or several?

**44** This question arose in one of the earliest cases where the *Pointe Gourde* principle was applied to enhanced value arising from use of land other than the subject land: *Fraser v City of Fraserville* [1917] AC 187. One of the grounds on which the arbitrators' award was set aside was that, in valuing the falls of a river and adjacent land acquired for electricity generation purposes, the arbitrators had taken into account the enhanced value emanating from a reservoir built by the acquiring authority higher up the river. In a much quoted passage, at p 194, Lord Buckmaster said that, in ascertaining the value of the property to the owner with all its advantages and possibilities, there should be excluded "any advantage due to the carrying out of the scheme for which the property is compulsorily acquired", the question of what is the scheme being a question of fact.

**45** The Privy Council did not decide whether the reservoir works and the work proposed to be carried out at the river falls were two parts of one scheme. That was a question for the fact-finding tribunal. Nor did the Board vouchsafe guidance on the criteria to be applied by the fact finding tribunal when deciding this "question of fact".

**46** This is essentially a problem which has arisen since the Second World War. Sir Michael Rowe QC, sitting in the Lands Tribunal, draw on his experience when he said in *Kaye v Basingstoke Corpn* (1968) 20 P & CR 417, 455:

> "Before the 1939 war it is broadly, perhaps entirely, true to say that the application of the common law rule was comparatively simple in so far as discovering what "the scheme underlying the acquisition" was. There was usually an Act, public but more often private, or an Order which defined the scheme and the area wherein it was to operate. But in the post-war years a new conception of planning led to a series of measures which gave to local authorities, of one kind or another, planning powers of a much less detailed although more far-reaching character.""

[16] And in a passage previously applied in this Court,[14] Lord Nicholls continued:[15]

> "[63] In applying this general principle there is of course no magical detailed formula which will provide a ready answer in every case [to the question of what constitutes the scheme]. That is in the nature of things, circumstances varying so widely. But some pointers may be useful. The *Pointe Gourde* principle should not be pressed too far. The principle is soundly based but it should be applied in a manner which achieves a fair and reasonable result."

[17] The *Pointe Gourde* rule has received specific statutory recognition in other Australian jurisdictions, where essentially the same controversy has occurred in the application of the relevant legislation. An example is the judgment of the New South Wales Court of Appeal in *Roads and Traffic Authority of New South Wales v Perry*,[16] which involved the operation of s 56(1) of the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) which provided that, in the assessment of the "market value" of land which is to be compulsorily acquired, there is to be disregarded "any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired." In that case, like the present one, the respondent's land was required for particular works at a certain point on a highway. The question was the appropriate level of generality at which the "public purpose" should be identified. Hodgson JA said:[17]

> "In this case, at the most general level, the purpose could be identified as the upgrading of the Pacific Highway between Sydney and the Queensland border; and there are other possible identifications, including the Raleigh Deviation generally, or particular versions of the Raleigh Deviation, or the extension of the Raleigh Deviation to Perry's Hill.
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> I do not think there are any clear rules determining how the relevant purpose or the appropriate level of generality is to be determined. *Factors to be taken into account would, in my opinion, include the degree of continuity and consistency of various elements of what is proposed and done, and fairness to both the claimant and the acquiring authority*."[18]
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> (emphasis added)

**The "scheme" in the present case**

[18] In the decision at first instance, Member Cochrane succinctly described the issue as follows:

> "[44] In the context of the present case, an issue arises as to how far back in time the Court must venture in order to identify the genesis

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14 *Redlands City Council v Edgarange Pty Ltd* [2009] QCA 16 at [11]; [2009] 1 Qd R 546 at 549 [11] per McMurdo P.

15 [2004] 1 WLR 1319 at [63]. Footnote omitted.

16 [2001] NSWCA 251; (2001) 52 NSWLR 222.

17 [2001] NSWCA 251; (2001) 52 NSWLR 222 at 241.

18 See also *State of Queensland v Springfield Land Corporation (No 2) Pty Ltd* [2019] QSC 143 at [24].

> of the "scheme." The appellant contends that it goes back to the beginning of the period when the road was dedicated as a limited access highway, whereas the respondent contends that the road widening exercise itself is the genesis of the relevant scheme."

[19] Member Cochrane discussed the applicant's case, as pointing to the history of the development of this highway, including the history of planning schemes and other decisions made by the Cairns City Council about development in its vicinity. That history dated back to 1970. Member Cochrane said that it was unnecessary to discuss each of the documents which was in evidence in this respect, and that it was sufficient to say that there were "pieces of correspondence and reports and the like, all of which make reference to the desirability for and the ambition to achieve limitation of access on the Captain Cook Highway from the Holloway Beach Road junction to the junction of the Captain Cook Highway with the Kennedy Highway".[19] Member Cochrane then referred to the Declaration (which was made by proclamation on 5 February 1983), and observed that a map accompanying the Declaration included that part of the highway to which the subject land had a frontage.[20]

[20] Member Cochrane noted that the parties had each engaged a traffic engineer, who before giving evidence had conferred and produced a joint report in which they agreed on, amongst other things, the following:[21]

- They were unaware of any case where there had been a successful application for an access to a state controlled road contrary to a Declaration of Limitation of Access and the wishes of the Department of Main Roads at the time.
- At the date of resumption, the land was included in the commercial planning area under the relevant planning scheme, but that "any such commercial development potential was based on the premise that all access would be via an internal circulation road rather than direct access to or from (the) highway."
- The council and the department had not "effectively facilitated" the planning and construction of such an internal circulation road.
- As a result of the Declaration, at the date of resumption there was no "reasonable prospect of commercial development of [the subject land] reliant on direct vehicular access to or from [the highway]".
- "[W]hile it might be true that access to or from the Captain Cook Highway would be inconsistent with the currently planned upgrade of the Captain Cook Highway and/or its intersection with the Kennedy Highway, that inconsistency had no additional impact on the access potential of [the land] beyond that imposed by [the Declaration]."

[21] Member Cochrane accepted the evidence of the two traffic engineers, and to the extent that it was inconsistent with their evidence, he rejected the opinion of a town planner, Mr Dalton, that there was a substantial prospect of obtaining approval for

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19 [2017] QLC 43 at [76].
20 [2017] QLC 43 at [78].
21 [2017] QLC 43 at [83].

access to the highway, notwithstanding the Declaration.[22] Member Cochrane made this finding:

> "[102] Having regard to all of the evidence, I find it highly improbable that any approval for a commercial development reliant upon access to the limited access Captain Cook Highway would have been able to be obtained."

[22] After discussing many of the authorities on the *Pointe Gourde* rule, and the respective submissions of the parties, Member Cochrane said this:

> "[135] I am satisfied that the limited access declaration, while not a project in itself, can be seen to be an element of a scheme, in this case, a scheme for the ongoing upgrading of the Captain Cook Highway which, even 20 years ago, could be seen as an important, and the only, road connection north of Cairns."

[23] The conclusion of the Land Court Member was expressed at the conclusion of his judgment as follows:[23]

> "Having regard to the evidence outlined above, the submissions made by the applicant and by the respondent, and my observations with respect to the submissions, I have reached the following conclusions:
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> 1. There has been a "scheme" of the sort embraced by the *Pointe Gourde* principle since at least 5 February 1983 when the section of the Captain Cook Highway between Yorkey's Knob Road and the Kennedy Highway was declared to be a limited access road effective from that date.
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> 2. It is arguable, but not necessary for me to decide, that that scheme had in fact been in place since the mid 1970s.
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> 3. The consequence of the existence of that scheme was that it was highly improbable that any access for development of the subject land for commercial purposes to be achieved from the Captain Cook Highway because of the limited access declaration.
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> 4. That the "scheme" *created by the declaration* achieved by the Department of Transport and Main Roads was embraced by successive local governments (Mulgrave Shire Council and then Cairns City Council) and was reflected in the constraints imposed by provisions of the relevant town planning schemes.
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> 5. In the light of the agreement between the valuers Messrs Eales and Gould, and as agreed with by the respective parties that if the access restrictions to and from the Captain Cook Highway are, consistent with the principle in *Pointe Gourde*, to be disregarded in the assessment of compensation, the appropriate measure of compensation for the loss of the resumed land to the applicant is the amount of $2,170,000 plus interest."

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22 [2017] QLC 43 at [101].
23 [2017] QLC 43 at [154].

(emphasis added)

[24] In paragraphs 1, 2 and 3 in that passage, Member Cochrane appears to have concluded that the relevant scheme is one which may have been in existence before the making of the Declaration in 1983, but which existed at least from that date. In the fourth paragraph in that passage, Member Cochrane referred to this as "the "scheme" *created by* the declaration". In my respectful opinion, on no reasonable basis could it be thought that the "scheme" for which this land was resumed was one which was created by, the making of the Declaration. This land was not resumed to further a purpose for which the Declaration had been made. It was resumed to upgrade a highway, which had long been used. It is only by characterising "the scheme" in the general sense that the scheme was the ongoing improvement of the highway that it could be said that the scheme had existed as early as 1983. But if that was the case, the scheme existed even earlier than the Declaration.

[25] In the Land Appeal Court, the principal judgment given by Member Stilgoe, with whom the other members of the Court agreed. Member Stilgoe referred to a submission by the present applicant that "there was sufficient evidence to show that it had some prospect of obtaining direct access [to the highway]".[24] The submission was rejected because, as the Member observed, Member Cochrane preferred the evidence of the traffic engineers (which I have set out above at [19]) and had accepted that "in practical terms, direct access to and from [the resumed land] would not be possible."[25]

[26] Member Stilgoe then considered whether there was "a scheme of which the resumption was a part."[26] She was "not persuaded that the Court erred in finding that a scheme existed."[27] But she held that the resumption was not "truly part" of a scheme "as from 1983".[28] Member Stilgoe reasoned as follows:

> "[65] Counsel for Pfeiffer submitted that, whether there was one scheme or two, they were both part of a long term plan for the Captain Cook Highway and, therefore, comprised a scheme for the purposes of Point Gourde. He drew our attention to *Hitchins and Cunnington v Council of the Shire of Woongarra* to demonstrate that a long time between resumptions was irrelevant in deciding whether they were part of a scheme.
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> [66] As the Land Court has observed, the upgrade and maintenance of a major highway may be the subject of a number of schemes, each focussing on a different problem, and each having a separate funding regime or separate contract. These separate projects do not become a scheme simply because they relate to the same section of road, or because they fall within a broad commitment to provide adequate roads for the people of Queensland through a continuous assessment of needs and upgrades. That point was well made in *Hitchins and Cunnington*. To find otherwise would make any work on

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24 [2018] QLAC 2 at [45].
25 [2018] QLAC 2 at [47].
26 [2018] QLAC 2 at [60].
27 [2018] QLAC 2 at [64].
28 [2018] QLAC 2 at [68].

> major roads which required resumption prohibitive. The *Point*[*e*] *Gourde* principle necessarily incorporates the concept of proximity; the act which destroys the value of the land must have a relationship with the act of resumption.
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> [67] The evidence demonstrates that the '1970s scheme', to the extent that there was one, specifically contemplated resumptions for road improvements. The purpose of the 'limited access declaration scheme' was to restrict ribbon development and multiple access points onto the highway. The resumption was to facilitate road widening and the construction of roundabouts. The resumption could be part of the 1970s scheme but it could not be part of the limited access scheme."

[27] Henry J said that "the lack of prospect of highway access was unconnected with the scheme for which the land was acquired" for the reasons given by Member Stilgoe.[29] His Honour added that, had there been the requisite connection between those two matters, it was significant that the disadvantage by reason of the Declaration had "long pre-existed the respondent's purchase of the land in 2002 and there was no real realistic chance of access being regained."[30] Consequently, his Honour reasoned, that this was effectively a claim for compensation for a loss "which the owner never had."[31]

[28] The third member of the Court, Member Isdale, agreed with that alternative reason for allowing the appeal, namely that this was a loss which the owner had never had.[32] He added that, for the Declaration to be disregarded, it would have to been shown that the Declaration was "a step in the process of the resumption."[33]

[29] In my respectful opinion, those other reasons, advanced by Henry J and Member Isdale as alternative reasons for allowing the appeal, are not immediately persuasive. In my view, the question was whether the Land Court had been correct in identifying the scheme, for the application of the *Pointe Gourde* rule, as it did.

[30] Counsel for the applicant strongly challenged the reasoning of Henry J and Member Isdale upon those alternative grounds. Counsel also challenged the reasoning of each member of the Land Appeal Court, upon the basis that they exceeded the proper bounds of appellate intervention. Nothing more need be said about the first matter, but that second submission must now be considered.

[31] The argument was that the identification of the underlying scheme presented a question of *fact* for the Land Court and, as such, it was a question "potentially influenced by a variety of considerations, choices and conclusions upon which reasonable minds might readily differ."[34] It was submitted that it is not appropriate for an appellate court to substitute its own opinion or conclusion for that under appeal because it sees the matter differently; the appellate court must find some error. It was submitted, in particular, that "[t]he appellate court must first identify that the primary decision maker acted upon some wrong principle of law, or that the

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29 [2018] QLAC 2 at [5].
30 [2018] QLAC 2 at [6].
31 [2018] QLAC 2 at [7].
32 [2018] QLAC 2 at [21].
33 [2018] QLAC 2 at [24].
34 Applicant's outline of submissions at para 22.

valuation under challenge was entirely erroneous."[35] For that submission, counsel cited, amongst other cases, *Commissioner of Taxation (Cth) v St Helens Farm (ACT) Pty Ltd*.[36]

[32] It may be accepted that the question of what is the scheme, in the application of the *Pointe Gourde* rule, is a question of fact. But as Lord Nicholls said in *Waters v Welsh Development Agency*,[37] "[t]he extent of a scheme is often said to be a question of fact. … But selecting from these background facts those of key importance for determining the ambit of the scheme is not a process of fact-finding as ordinarily understood." Rather, it involves the exercise of judgment.[38] In this case, therefore, it was necessary for the Land Appeal Court to find an error in the exercise of that judgment. Member Stilgoe clearly identified that as the task for the Land Appeal Court.[39]

[33] Member Stilgoe found that the Land Court erred in a number of respects, most importantly in the identification of a scheme of which the resumption was a relevant part. As I have said, the other members of the Court agreed with that reasoning.

[34] This was not a valuation case in the ordinary sense. The valuers were agreed that the land had either one value or the other, depending upon whether the effect of the Declaration was to be disregarded. Contrary to what was suggested at one part of the applicant's submissions, this was not a case which was dependent upon the observation of witnesses and the making of factual opinions.

[35] It was further submitted for the applicant that the *Pointe Gourde* rule "required an enquiry directed to a counterfactual premised upon the decision of a hypothetical purchaser", and that it "required a determination as to whether or not there was an inevitable limitation upon access attributable to the objective characteristics of the land (involving such matters as the dimensions and configuration of the highway frontage, and proximity to the roundabout) which would have inevitably served to depreciate the value of the land taken (that is independently of the application of the *Pointe Gourde* principle) in the mind of a hypothetical purchaser".[40] It was also submitted by the applicant that "displacement of the *Pointe Gourde* principle required a conclusion to the effect that the probabilities against direct access to the highway were of such magnitude or order that the hypothetical purchaser would not add anything in recognition of the premium value otherwise attributable to the commercial zoning of the land."[41]

[36] Those submissions are at odds with the factual finding by Member Cochrane that it was "highly improbable that any approval for a commercial development reliant upon access [to the highway] would have been able to be obtained".[42] And they are at odds with the way in which the case was conducted in the Land Court, which was on the basis that the land was to be assessed as having one of two values, one without restriction of access and one with no practical prospect of access, with no intermediate possibility.

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35 Applicant's outline of submissions at para 25.
36 [1981] HCA 4; (1981) 146 CLR 336 at 381.
37 [2004] 1 WLR 1304 at 1319 [59].
38 [2004] 1 WLR 1304 at [60].
39 [2018] QLAC 2 at [39].
40 Applicant's outline of submissions at para 44. Emphasis omitted.
41 Applicant's outline of submissions at para 44.
42 [2017] QLC 43 at [8].

[37] Beyond those arguments for the applicant, counsel seemed to be content to adopt the reasoning of the Land Court as to what it was which constituted the scheme in this case.

[38] As I have said earlier, the relevant scheme could not have been the restriction imposed by the Declaration. The purpose of the Declaration was to facilitate a better use of the highway; it was not an end in itself. And it could not be said that the resumption of the applicant's land was an "integral part" of such a "scheme". As Member Stilgoe reasoned, the restriction posed by the Declaration, with or without this resumption, could and did apply, as it had for decades.

[39] On a high level of generality, it could be said that both the Declaration and this resumption were part of a scheme for the ongoing upgrading of the Captain Cook Highway. But that would not warrant the application of the *Pointe Gourde* rule in this case. There are at least two reasons why that is so.

[40] The first is that, in the language of Lord Russell in *Melwood Units*, the rule will operate only where the value of land is enhanced or diminished "by the very scheme of which the resumption forms an integral part". When the reasons for the existence of this rule are understood, it can be seen why that is so. In essence, it is because of the unfairness, either to the resuming authority or (in cases which are said to involve "*Pointe Gourde* in reverse") the landowner. There is no evident unfairness in compensating the applicant for this resumption according to the actual value of its land.

[41] The second reason is this: if the *Pointe Gourde* rule is to be applied in this case, it would only be by identifying the scheme at that very high level of generality, namely a scheme to continuously upgrade the highway. But upon that premise, what is the effect of *the scheme*, as distinct from only one component of that scheme (i.e. the Declaration) upon the value of the land? As I have said, the Land Court Member at first instance was wrong to identify the scheme only as the Declaration. If the scheme was the ongoing construction and upgrade of the highway, the impact overall of that scheme upon the subject land would have to be considered, which it was not in this proceeding.

**Conclusion and orders**

[42] For these reasons, the Land Appeal Court was correct in allowing the appeal and substituting the order for compensation as it did. I would order as follows:

1. Grant leave to appeal.
2. Dismiss the appeal with costs.

[43] **MULLINS J:** I agree with McMurdo JA.