LAND COURT OF QUEENSLAND

CITATION:	*Pfeiffer Nominees Pty Ltd v Department of Transport and Main Roads* [2017] QLC 43
PARTIES:	**Pfeiffer Nominees Pty Ltd ACN 005 073 549** (applicant) v **Chief Executive, Department of Transport and Main Roads** (respondent)
FILE NO/s:	AQL113-14
DIVISION:	General Division
PROCEEDING:	Determination of compensation under the *Acquisition of Land Act 1967*
DELIVERED ON:	21 August 2017
DELIVERED AT:	Brisbane
HEARD ON:	18, 19, 20 August 2015
HEARD AT:	Cairns
MEMBER:	WL Cochrane
ORDER/S:	**Compensation is determined in the amount of Two Million One Hundred and Seventy Thousand Dollars ($2,170,000).**
CATCHWORDS:	REAL PROPERTY – COMPULSORY ACQUISITION OF LAND – COMPENSATION – ASSESSMENT – resumption – *Acquisition of Land Act 1967* – valuation methodology – *Pointe Gourde* principle – existence of scheme – time of the scheme's existence – highest and best use – town planning as evidence of scheme *Acquisition of Land Act 1967* s7(3), s20, s20(2) *Black v Commissioners for Railways* (1890) 11 LR (NSW) 160 *Bowers and Crane v Pine Rivers Shire Council* (2007) 28

QLCR 196

Crown v Murphy (1990) 64 ALJR 593

Haig v Minister Administering the National Parks and Wildlife Act 1974 (1994) 85 LGERA 143

Hope v Brisbane City Council (2012) 33 QLCR 322

Housing Commission of New South Wales v San Sebastian Pty Ltd (1978) 140 CLR 196

Hutchins and Cunnington v Council of the Shire of Woongarra (1992) 14 QLCR 286

Lasseter v Blacktown City Council (1994) NSWLEC 24

Marshall v Commissioner of Irrigation and Water Supply (1973) 40 CLLR 71

Melwood Units Pty Ltd v Commissioner of Main Roads [1979] AC 426

Mount Lawley Pty Ltd v Western Australian Planning Commission [2007] WASCA 226

Pointe Gourde Quarrying and Transport Company Limited v Sub-Intendent of Crown Lands [1947] AC 565

Redland Shire Council v Edgarange Pty Ltd (2008) 29 QLCR 91

Roads and Traffic Authority of New South Wales v Perry (2001) 52 NSWLR 222.

Spencer v Commonwealth (1907) 5 CLR 418

Steven v The Commissioner of Water Resources (1990) 13 QLCR 75

Union Fidelity Trustee of Australia v Co-ordinator General (1988) 12 QLCR 82

Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority (2008) 233 CLR 259

Wilson & Anor v Liverpool Corporation City Council [1971] 1 All ER 628

APPEARANCES: CL Hughes QC with Dr M Jonsson of Counsel (instructed by All About Law) for the applicant

JM Horton QC (instructed by Clayton Utz Lawyers) for the respondent

[1] This decision relates to an application for determination of the amount of compensation payable in respect of resumption of part of a lot of land on the Captain Cook Highway north of Cairns.

[2] This is a somewhat unusual case insofar as the experts engaged by the parties, including civil engineers, town planners, traffic engineers and valuers, have met and

discussed the various parameters that surround this case and have already reached agreement in relation to those parameters.

[3] Importantly, the valuers have met and agreed as to what the appropriate compensation should be in either of two possible scenarios. I accept their expert opinions in that regard.

[4] Those alternative scenarios depend upon the view that the Court takes as to whether, in assessing compensation, it is necessary to apply the principle generally referred to as the *Pointe Gourde* principle (which can also be applied in reverse).[1]

[5] It is agreed between the parties that, should the Court be persuaded that the resumption is part of a long standing scheme to protect and enhance the Captain Cook Highway, the appropriate measure of compensation for the resumed land would be $2,170,000 plus allowances for disturbance and interest.

[6] If, on the other hand, the Court finds that access to the Captain Cook Highway would have been prohibited regardless of the effects of any scheme to which the resumption is related, then the amount of compensation due to the applicant would be $580,000 plus an allowance for disturbance and interest.

The subject land

[7] The parent parcel of land has the following characteristics:

1. An area of 4.679 hectares.
2. Is located at the Smithfield, a Northern Suburb in the Cairns local government area.
3. Has a frontage of 442 meters to the Captain Cook Highway, and varies in depth from 31 meters in the south to about 138 meters at its widest point.
4. Is bounded by Avondale Creek to the rear.
5. Is described as Lot 4 on RP 748657, County of Nares, Parish of Smithfield, Title Reference 21445042.[2]

[8] The parent parcel is joined by Lot 5 on SP 196223 which has an area of 47.4954 hectares.

[9] The properties are in ownership of associated entities and were being developed as a residential estate development called "Canopy's Edge". There was no dispute

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1 See *Pointe Gourde Quarrying and Transport Company Limited v Sub-Intendent of Crown Lands* (Trinidad) [1947] AC 565.

2 Ex 16, page 16 and Ex 8, page 2.

between the parties that the two lots could be regarded as being in common ownership.

The taking of the land

[10] On 3 July 2007, the respondent Department of Transport and Main Roads issued a notice of intention to resume for the taking of about 1.048 hectares from the land for the purpose of transport, in particular for road purposes for the Captain Cook Highway (Cairns-Mossman).[3]

[11] Within the notice of intention to resume, the background information which was required to be provided pursuant to section 7(3) of the *Acquisition of Land Act 1967* ("the Act") advised the land owner as follows:

> "Project background
>
> The department has been undertaking planning for the Captain Cook and Kennedy Highways for many years to ensure they can be upgraded to accommodate the future transport demands generated by continuing economic and urban development in the region.
>
> The department's future planning for the Captain Cook Highway requires road overpasses of the roundabouts at the intersections of:
>
> - The Captain Cook Highway and the Cairns Western Arterial Road; and
> - The Captain Cook Highway and the Kennedy Highway.
>
> Additional traffic lanes and merge and diverge lanes are required to accommodate these overpasses. These cannot be accommodated within the existing highway reserve.
>
> Additional land is needed from your property to accommodate these works. The dimensions of the additional land are shown on Resumption Plan No. R11-673, and these dimensions are based on the need to:
>
> - Accommodate the actual footprint of the proposed works;
> - Accommodate relocated bikepaths, road drainage, and public utilities; and
> - Provide a clearzone for errant vehicles."

[12] The taking of the land occurred by Taking of Land Notice (No. 1313) published in the Queensland Government Gazette No. 37 on 12 October 2007, taking an area of 1.048 hectares. That area was later varied by Amending Taking of Land Notice (No. 1637) published in the Queensland Government Gazette No. 62 on 31 October 2008, to comprise an area of about 1.049 hectares being designated as Lot 902 on SP 219917.[4]

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3 Ex 1, vol 3, tab 43.

4 Ex 1, vol 3, tab 44.

Background

[13] The resumed land is constituted by a strip of land along the full length of the frontage to the Captain Cook Highway, which is a four-lane sealed bitumen road and is a declared limited access highway, being part of the State controlled road network.

[14] With respect to the town planning context of the subject land and of the taken land, the totality of it was zoned "commercial" under the Cairns City Council Planning Scheme, but was subject to access restrictions which limited the highest and best use of the land.

[15] There was, however, no agreement between the parties as to the manner in which the access restrictions constrained the highest and best use of the land. [5]

[16] In its statement of facts, issues and contentions the applicant contends as follows:

> "As at the date of the resumption:
>
> a. The Captain Cook Highway (Cairns-Mossman) was part of the state-controlled road network.
>
> b. The land was zoned '*Commercial*' under the Cairns City Council Planning Scheme, but was subject to access restrictions which limited the highest and best use of the land to residential use comprising multi-unit residential development.
>
> c. The access restrictions which so constrained the potential usage of the land had been imposed or retained by or in consultation with the Department in order to facilitate a scheme of continuing improvement and development of the Captain Cook Highway (Cairns-Mossman).
>
> d. More particularly:
>
> (i) The Department's long-term planning for the relevant section of the Captain Cook Highway was reflected in at least the Cairns Mulgrave Regional Transport Study (1993), the Integrated Study for the Kuranda Range, and the Brinsmeand-Kamerunga Road, Barron River to Smithfield, Long Term Planning Report (the latter prepared by Maunsell McIntyre, December 2000 revision).
>
> (ii) The Department's proposed method of access between the Captain Cook Highway and adjacent developable land on the Marlin Coast, including the land, was limited to long-term access points, including a point opposite Cumberland Avenue on the Kennedy

[5] Ex 2, para 11 and Ex 3, para 4.

Highway, so as to avoid unacceptable safety, efficiency or planning impacts on the State-controlled road network.

e. But for the Department's concern to facilitate the scheme of continuing improvement and development of the Captain Cook Highway (Cairns-Mossman), a higher order use of the land reflective of the full commercial potential of the land was realisable by the owner of the land for the time being."[6]

[17] Those contentions were disputed by the respondent, who said in its statement of facts, issues and contentions in response as follows:

"As to paragraph 11 of the statement:

a. The Respondent admits the allegation in sub-paragraph 11(a);

b. As regards sub-paragraph 11(b), the Respondent:

(i) admits that Lot 4 on RP748657 (**Lot 4**) was zoned 'Commercial' under the Cairns City Council Planning Scheme at the date of resumption;

(ii) admits that Lot 4 was subject to access restrictions which limited the highest and best use of the land;

(iii) says that:

A. prior to the resumption, access to and egress from Lot 4 to the Captain Cook Highway was not consistent with the preferred traffic and transport arrangements for Precinct 4 set out in the Smithfield Town Centre Development Control Plan that was in force from 29 November 1996 to 1 March 2005 upon the commencement of the Planning Scheme for the City of Cairns – Cairns Plan 2005);

B. at the date of resumption:

1) access to and egress from Lot 4 to the Captain Cook Highway was not consistent with the Respondent's planning for the Captain Cook Highway;

2) the Captain Cook Highway frontage of Lot 4 was a 'limited access road';

3) additional access to such a road type would not ordinarily be permitted;

C. access to and egress from Lot 4 to the Captain Cook Highway was not compatible with the existing at-grade or proposed grade-separated road infrastructure along the critical major road link as it would create exit, entry and weaving manoeuvres that would compromise the safety

6 Ex 2, para 11.

and efficiency of the Captain Cook Highway as the major arterial roads to the south and two major arterial roads to the north and west;

D. in or about September 2002, Lot 4 enjoyed the benefit of approved access to the highway for its then current use;

(iv) denies that the access restrictions limited the highest and best use of Lot 4 to residential use comprising multi-use residential development and believes that allegation to be untrue on the basis that:

A. a director of the Applicant was also a director of K&V Enterprise Pty Ltd ACN 097 191 752);

B. K&V Enterprises Pty Ltd was registered owner of Lot 5 on SP160333 (**Lot 5**) (which adjoins Lot 4, being the land the subject of this proceeding);

C. The permitted point of access between the Kennedy Highway and Lot 5 was via a single access point located on the northern boundary of Lot 5 opposite Cumberland Avenue and generally in accordance with Plan of Development 5010-47 dated 3 April 2001;

D. Mr Peter Burke of C & B Group representing K&V Enterprises Pty Ltd met with representatives of the Respondent on 17 January 2002, before the Applicant's purchase of Lot 4;

E. At that meeting, one or more of Messrs Peter McNamara, Malcolm Hardy and John Breen informed Mr Burke that;

1) the Respondent would not allow direct access from Lot 4 once internal roads on Lot 5 were constructed between the main access location opposite Cumberland Avenue and the boundary of Lot 4;

2) the Respondent would support any approach Mr Burke might make to Council for the possible relocation of any commercial land closer to the main Cumberland Avenue access, which would result in commercial traffic not having access through residential land;

3) there was a land requirement for Lot 4 of about 0.47 hectares but the land requirement would likely increase;

F. the Applicant was aware before purchasing the land (by reason of having a director in common with K&V Enterprises Pty Ltd) that Mr Burke has been told by the Respondent the matters stated in sub-paragraph 4(b)(iv)(E) above;

G. the Applicant and K&V Enterprises Pty Ltd could have jointly developed Lot 4 and Lot 5 realise the commercial designation of Lot 4;

H. instead, at the date of the resumption, K&V Enterprises Pty Ltd has applied for a material change of use and preliminary reconfiguration of a lot over Lot 5 and including Lot 4 for Canopy's Edge Estate that proposed to eliminate the commercial zoning to Residential 2, in line with the remainder of the estate.

c. As regards sub-paragraphs 11(c) and (d) of the statement, the Respondent:

(i) denies that the access restrictions constrained the potential usage of Lot 4 and believes that allegation to be untrue for the reasons stated in sub-paragraph 4(b)(iv) above;

(ii) denies that the cause of the access restrictions with respect to Lot 4 is properly to be attributed to the scheme of continuing improvement and development of the Captain Cook Highway (Cairns-Mossman) undertaken by the Respondent;

(iii) says that the proposed continuing improvement and development of the Captain Cook Highway (Cairns-Mossman) was known to the Applicant prior to its purchase of Lot 4 for the reasons stated in sub-paragraph 4(b)(iv) above.

d. As regards paragraph 11(e) of the statement, the Respondent denies that a higher order use of Lot 4 reflective of the full commercial potential of the land was realisable by the owner of the land but for the Respondent's continuing improvement and development of the Captain Cook Highway and believes that allegation to be untrue for the reasons stated in paragraphs 4(b)(iv) and (c) above."[7]

Compensation principles

[18] As at the date of resumption, section 20 of the Act relevantly provided:

> (1) In assessing the compensation to be paid, regard shall in every case be had not only to the value of land taken but also—
>
> (a) to the damage, if any, caused by any of the following—
>
> (i) the severing of the land taken from other land of the claimant;
>
> (ii) the exercise of any statutory powers by the constructing authority otherwise injuriously affecting the claimant's other land mentioned in subparagraph (i); and
>
> (b) to the claimant's costs attributable to disturbance.
> …
>
> (2) Compensation shall be assessed according to the value of the estate or interest of the claimant in the land taken on the date when it was taken.

[7] Ex 3, para 4.

(2A) However, in assessing the compensation, a contract, licence, agreement or other arrangement (a relevant instrument) entered into in relation to the land after the notice of intention to resume was served on the claimant must not be taken into consideration if the relevant instrument was entered into for the sole or dominant purpose of enabling the claimant or another person to obtain compensation for an interest in the land created under the instrument.

…

(4) But in no case shall subsection (3) operate so as to require any payment to be made by the claimant in consideration of such enhancement of value.

(5) In this section—

costs attributable to disturbance, in relation to the taking of land, means all or any of the following—

(a) legal costs and valuation or other professional fees reasonably incurred by the claimant in relation to the preparation and filing of the claimant's claim for compensation;

(b) the following costs relating to the purchase of land by a claimant to replace the land taken—

(i) stamp duty reasonably incurred or that might reasonably be incurred by the claimant, but not more than the amount of stamp duty that would be incurred for the purchase of land of equivalent value to the land taken;

(ii) financial costs reasonably incurred or that might reasonably be incurred by the claimant in relation to the discharge of a mortgage and the execution of a new mortgage, but not more than the amount that would be incurred if the new mortgage secured the repayment of the balance owing in relation to the discharged mortgage;

(iii) legal costs reasonably incurred by the claimant;

(iv) other financial costs, other than any taxation liability, reasonably incurred by the claimant;

(c) removal and storage costs reasonably incurred by the claimant in relocating from the land taken;

(d) costs reasonably incurred by the claimant to connect to any services or utilities on relocating from the land taken;

(e) other financial costs that are reasonably incurred or that might reasonably be incurred by the claimant, relating to the use of the land taken, as a direct and natural consequence of the taking of the land;

(f) an amount reasonably attributed to the loss of profits resulting from interruption to the claimant's business that is a direct and natural consequence of the taking of the land;

> (g) other economic losses and costs reasonably incurred by the claimant that are a direct and natural consequence of the taking of the land.

[19] With respect to the concept of "value" referred to in section 20(2) of the Act, while that term is not defined in the Act, its meaning has been accepted to be determined in accordance with the decision of the High Court in *Spencer v Commonwealth*.[8]

[20] The relevant passages from that case, most generally cited, appear in the judgments of Griffiths CJ and Isaacs J.

[21] The learned Chief Justice said:

> "In my judgment the test of value of land is to be determined, not by enquiring what price a man desiring to sell could actually have obtained for it on a given day, *ie*, whether there was in fact on that day a willing buyer, but by enquiring "What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?" It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in a position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together."[9]

[22] Isaacs J observed:

> "In the first place the ultimate question is, what was the value of the land on 1st January 1905?
> All circumstances subsequently arising are to be ignored. Whether the land becomes more valuable or less valuable afterwards is immaterial. Its value is fixed by Statute as on that day. Prosperity unexpected, or depression which no man would ever have anticipated, if happening after the date named, must be alike disregarded. The facts existing on 1st January 1905 are the only relevant facts, and the all important fact on that day is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which it was adapted. The plaintiff is to be compensated; therefore he is to receive the money equivalent to the loss he sustained by depravation of his land, and that loss, apart from special damage not here claimed, cannot exceed what such a prudent purchaser would be prepared to give him. To arrive at the value of the land of that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would over look any ordinary business considerations. We must further suppose both to be perfectly acquainted with the land and cognizant of all the circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present

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8 (1907) 5 CLR 418.
9 Ibid [432].

> demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of arousal for what reasons so ever in the amount which one would otherwise be willing to fix as the value of the property."[10]

The *Pointe Gourde* principle

[23] The *Pointe Gourde* principle takes its name from the well know case of the *Pointe Gourde Quarrying and Transport Company Limited v Sub-Intendent of Crown Lands* (Trinidad), [11] a decision of the Privy Council.

[24] In a frequently cited observation from that decision, Lord MacDermott said "it is well settled that compensation for compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying that acquisition".[12]

[25] That observation was not really novel in Australian legal history because it had been applied in other cases earlier than that time. For example, in *Black v Commissioners for Railways*[13] the New South Wales Supreme Court observed:

> "the land is to be assessed at the value it would have had if the railway for which it is resumed had never been contemplated. Any and every other circumstance may be taken into consideration in estimating the worth of the land, except the effect upon it of the railway for which it is taken."

[26] The practical effect of the *Pointe Gourde* decision is exemplified by the facts in that case, which involved the English government compulsorily acquiring land owned by the appellants at Pointe Gourde in Trinidad.

[27] The land was required by the United States of America in connection with the construction of a naval base in Trinidad.

[28] Present on the land was a large deposit of limestone which, prior to acquisition, the appellants had quarried and sold.

[29] The purchase price was $101,000, of which $86,000 was paid as compensation for the value of the quarry as a going concern, and the balance of $15,000 was paid having regard to the "special adaptability" of the land, namely the increase in the value of the land that would have occurred as a result of the presence of the US

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10 Ibid [440] – [441].
11 [1947] AC 565.
12 Ibid [572].
13 (1890) 11 LR (NSW) 160.

naval base, which would have created a larger market for the limestone being mined.

[30] The Privy Council decided that the $15,000 payment should not have been made, because the presence of the US naval base was a consequence of the scheme for which the land had been resumed and therefore should have been ignored.

[31] The *Pointe Gourde* principle was adopted by the High Court of Australia in *Housing Commission of New South Wales v San Sebastian Pty Ltd,*[14] with the consequence that the *Pointe Gourde* principle is now sometimes referred to as the *San Sebastian* principle.[15]

[32] In the *San Sebastian* case there was evidence before the Court that, by reason of planning restrictions including adoption of a strategic plan, an agreement reached between three levels of government as to the future direction of development in an area of Sydney, and the acquisition of the land by the Housing Commission of New South Wales, the market value of the land in that immediate area for redevelopment purposes had been very considerably depressed.

[33] Kirby P (as he then was) in *Haig v Minister Administering the National Parks and Wildlife Act 1974*[16]said as follows

> "According to the principle, which is one devised by the judges, in valuing land for resumption purposes, any increase in the land's value which is entirely due to the scheme underlying the acquisition is to be disregarded. The converse of the principle is also accepted. Any diminution in the value of the land which is entirely due to the resumption scheme, or to any blight caused by a step in the resumption process, is to be disregarded in determining the value of the land: see *Housing Commission of New South Wales v San Sebastian Pty Ltd* ... Behind this principle lies a search for fair valuation and an insistence upon just procedures. If it were not upheld in the determination of the value of resumed land, it would be possible for a resuming authority to use its power or influence, in respect of such matters as zoning, to diminish the value of the land to be resumed, to its own advantage and to the disadvantage of the owner at valuation."

[34] The *Pointe Gourde* principle also operates in reverse, as was demonstrated in the decision in *Melwood Units Pty Ltd v Commissioner of Main Roads,*[17] a decision of

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14 (1978) 140 CLR 196.

15 See for example Bignold J in *Lasseter v Blacktown City Council* (1994) NSWLEC 24 and Kirby P *Haig v Minister Administering the National Parks and Wildlife Act 1974* (1994) 85 LGERA 143 [149].

16 Ibid 143 [149]-[150].

17 [1979] AC 426.

the Privy Council on appeal from the Supreme Court of Queensland, where it was held that a resuming authority could not, by its project, destroy the potential of land and then resume it on the basis that the potential which was destroyed had never existed.

[35] The *Melwood Units* decision involved 37 acres of land near Brisbane which had been purchased with the intention of using it as a shopping centre.

[36] The purchasers sought planning permission to use the land as a shopping centre but were given approval only for the northern portion of the land, which was later sold to a shopping centre developer for $40,000 per acre. That same purchaser would have purchased the southern portion as well, had it been permitted to be used as a shopping centre. The resuming authority contended that the land should be valued simply as rural land whereas the dispossessed land owner contended for a value of $40,000 per hectare.

[37] In that case the Privy Council observed:

> "A resuming authority cannot by its project of resumption destroy the potential of the whole 37 acres for development as a drive-in shopping centre and then resume and sever on the basis that the destroyed potential has never existed. Moreover, in their Lordships' opinion, the principle remains applicable in a case such as the present, notwithstanding that planning permission had not been given for the whole 37 acres and would not have been given, when the lack of such permission was manifestly due to the expressway project, and it is established that, without the expressway project, such planning permission would have been given for the whole 37 acres. To hold otherwise in this case would enable the acquiring authority to inflict by its project the same injustice at one remove" [18] (i.e. the Pointe Gourde Principle).

[38] In order to engage the *Pointe Gourde/San Sebastian* principle, it is necessary to identify the "scheme" which underlies the acquisition.[19]

[39] The Land Appeal Court had to grapple with the notion of the "scheme" in *Redland Shire Council v Edgarange Pty Ltd*.[20]

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18 Ibid [434].

19 See Per Kirby P in *Haig v Minister Administering the National Parks and Wildlife Act 1974* (1994) 85 LGERA 143 [149]-[150].

20 (2008) 29 QLCR 91.

[40] There, the Land Appeal Court referred to *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*[21] and the concern expressed by the High Court about the reference in *Pointe Gourde* to the underlying "scheme".[22]

[41] The High Court said:

> "What was meant in *Pointe Gourde* and other cases by references to "the scheme" does not readily appear… In the context of statutory compulsory acquisition of land, a "scheme" may be taken to be a broad expression derived from the promotion in 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 promotors 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 construct of an air force base under Lend Lease as part of a "scheme", may readily be understood."[23]

[42] The Land Appeal Court also referred to the observations of Lord Widgery in *Wilson & Anor v Liverpool Corporation City Council*.[24]

[43] Lord Widgery observed:

> "Whenever land is to be compulsory acquired, this must be in consequence of some scheme or undertaking or project. Unless there is some scheme or undertaking or project compulsory powers of acquisition will not arise at all, and it would I think be a great mistake if we tendered to focus attention on the word 'scheme' as though it had some magic of its own. It is merely synonymous with the other words to which I have referred, and the purpose of the so-called *Pointe Gourde* rule is to prevent the acquisition of land being at a price which is inflated by the very project or scheme which gives rise to the acquisition." [25]

[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 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.

[45] In the decision of *Hope v Brisbane City Council*[26] his Honour Member Isdale referred to *Bowers and Crane v Pine Rivers Shire Council*[27] where the Land Appeal

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21 (2008) 233 CLR 259.
22 Ibid [275].
23 Ibid [46].
24 (1971) 1 All ER 628.
25 Ibid [635].
26 (2012) 33 QLCR 322.
27 (2007) 28 QLCR 196 [22].

Court observed that the effect of *San Sebastian* was refined in the *Crown v Murphy*:[28]

> "The principle applies in cases where there is a direct relationship between the planning restriction and the scheme of which resumption is a feature and extends to cases where there is merely an indirect relationship, provided that the planning restriction can properly be regarded as a step in the process of resumption…
>
> Of course a characteristic or attribute of the land which affects its value must be taken into account in the assessment of compensation even if the planning restriction which is a step in the process of resumption is dependent upon or directed to that characteristic or attribute."

[46] Usefully for this case, his Honour Member Isdale in *Hope v Brisbane City Council*[29] referred to the decision in *Mount Lawley Pty Ltd v West Australian Planning Commission*.[30] His Honour Member Isdale said as follows:

> "In *Mount Lawley Pty Ltd v Western Australian Planning Commission* the Court of Appeal of Western Australia considered an Act the particulars of which do not intrude upon the principle being discussed. Noting that whether the effect on value is attributable to "the Scheme" can be a difficult question to answer the Court turned to an example given by Jacobs J, with whom the other Justices agreed in the High Court's decision in *Housing Commission of New South Wales v San Sebastian Pty Ltd*. Jacobs J said:
>
> > "Assume an area of land on the outskirts of existing settlement, and assume a planning authority concerned to designate land uses in a planning scheme. The land is designated open space. Thereafter it is resumed for the purpose of a public reserve. The fact that the land was zoned as open space may have depreciated its value. Does the resuming authority pay compensation at the depreciated value of open space or at some other value? The question cannot be correctly answered without knowing whether there was any connexion between the zoning as open space and the subsequent resumption. If the zoning was done with the intent or in anticipation that the land should be resumed for a purpose such as a public reserve or if the zoning was proposed or dictated by the resuming authority then s 124 requires that the zoning be ignored. It is only a step in the process of subsequent resumption. But in other circumstances the resumption may be unconnected with the act of zoning. It may be that the resuming authority selects the land for resumption as a public reserve because it is zoned open space; if it does so it is doing no more than ensuring that it, as well as others, conforms to the planning scheme. In those circumstances there is no relevant relationship between the zoning and the public purpose. No public purpose, existing or anticipated, intended, or urged by the zoning authority, leads to the zoning; rather, the zoning leads to the public purpose and consequent resumption."

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28 (1990) 64 ALJR 593 [595].
29 (2012) 33 QLCR 322.
30 [2007] WASCA 226.

The Court of Appeal of Western Australia then said:

> "The question of what is a 'step in the process' in this kind of context has since been discussed in a number of cases. Relatively recently, in ***Sydney Harbour Foreshore Authority v Walker Corporation Pty Ltd*** [2005] NSWCA 251; (2005) 63 NSWLR 407 (**Walker No 1**) Basten JA (with whom Beazley JA and Stein AJA agreed), said that the 'lesson of … **San Sebastian** … is that no narrow view should be taken of steps which may affect the value of land'. However, he added that 'it is necessary to distinguish between conduct which constitutes a proper exercise of planning powers irrespective of the ultimate resumption and a use of planning powers in pursuit of a proposed resumption'"."

The conduct of the Department of Transport and Main Roads and the Cairns City Council - the applicant's opening

[47] In order to understand the nature of the scheme contended for by the applicant, it is necessary to contemplate the manner in which the subject land has been dealt with in a number of Cairns City Council planning scheme documents, and in a number of documents generated by the respondent Department of Transport and Main Roads.

[48] In the Cairns Plan of 2005, the subject land was located in the commercial zone, as were a number of surrounding lots.[31]

[49] Within that zone the following uses were code assessable:

1. Care takers residence
2. Retail use, display facilities, business facilities, child care centre
3. Industry class A retail use-display facilities
4. Retail use-restricted premises
5. Detached bottle shop
6. Business and commercial uses-business facilities
7. Tavern
8. Service station
9. Child care centre
10. Place of assembly
11. Indoor sport and recreation[32]

[50] That Cairns Plan of 2005 also contained a general code 4.8.1 ("the Code") in respect of "development near major transport corridors and facilities."[33]

[51] As Mr Hughes of Queens Counsel pointed out in opening the case for the applicant there was no dispute that the subject site was near a major transport corridor and in

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31 T 1-10, line 1 to T 1-11, line 9 and Ex 4B, pages 49-52.
32 T 1-12, line 1 to T 1-14, line 47 and Ex 4B.
33 Ex 4B, page 129, para 4.8.1.

that regard then the contents of the planning scheme with respect to applicability become relevant.

[52] The Code provides:[34]

> **Applicability**
>
> This code applies to development that is:
>
> - Assessable;
> - On land within 200 meters of an existing or future major transport corridor (as identified on the Road Hierarchy Overlay contained in chapter 3) or an identified major transport facility (as identified n Road Hierarchy Overlay contained in chapter 3);
> - Identified in the table below.

APPLICABLE DEVELOPMENT
Material Change of Use except for house, Illuminated Tennis Court, Home Activity, Home Based Business, Dual Occupancy, Restricted Premises, Detached Bottle Shop, Primary Industry, Aquaculture Minor, Aquaculture Major, Intensive Animal Husbandry, Cemetery and Crematorium, Park, Local Utility, Public Utility, Telecommunication Facility, Indoor Sport and Recreation or Outdoor Sport and Recreation.
Reconfiguring a Lot resulting in one or more additional lots.

[53] Clearly that part of the Code is applicable to the subject land.

[54] Within the Code, the following performance criteria are identified:

> "P1- the form and density of development on sites adjacent to a major transport corridor or facility must be compatible with the intended role of the corridor or facility and must not prejudice traffic safety or efficiency."[35]

[55] One of the acceptable measures in respect of assessable development was:

> "A1.1 direct access is not provided to a major road corridor where legal and practical access from another road is possible."[36]

[56] Performance criteria P2 in that same section of Cairns Plan of 2005 provides

> "P2 the form and density of development on sites in the vicinity of major road corridors must not create or exacerbate the need for local traffic to use major roads for local trips."[37]

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34 Ibid.
35 Ibid.
36 Ibid.
37 Ex 4B, pages 129 and 130.

[57] In contemplating those performance criteria, Mr Hughes was keen to point out that Lot 4 of the parent parcel (constituted by Lot 4 and Lot 5) had no other lawful access than the existing access onto the highway.[38]

[58] Mr Hughes also directed the Court's attention to the town planning provisions which existed under the planning schemes for the balance of Cairns, and in particular in this Development Control Plan ("DCP") which had been in place, he told the court, since 1996.[39]

[59] Pursuant to that scheme, the subject land lay within the Smithfield DCP and in particular was in precinct 4 of that DCP.

[60] It is important to Mr Hughes's case that the precinct 4 concept plan[40] shows that the land along the Kennedy Highway and the Captain Cook Highway had a preferred planned use for commercial with a mixed residential area, and a possible tourist development tucked in behind that preferred land use to the south and west.

[61] In the planning scheme, properly describing the land use that was envisioned, the following appears:

> "Council may consider commercial uses where they are designed and developed in a discrete sub-precinct adjacent to the Kennedy Highway near Cumberland Avenue and as depicted on Sheet 6. Access to this area is only to be via an internal service road from the Kennedy Highway. Commercial uses which are considered appropriate include, but are not limited to showrooms, hardware stores and the like."[41]

[62] That statement in the town planning scheme had been preceded by the following:

> "There is no major access point into the precinct at present. It is envisioned that an internal circulation road be provided from the Kennedy Highway at Cumberland Avenue threading through the development to the Captain Cook Highway and Brinsmead-Kamerunga Road roundabout. The proposed road is not intended as a major through route but rather as a road which provides local access and bus connections."[42]

[63] Mr Hughes, for his case, took comfort from those observations and told the Court:

> "… Anyway, as I said, your Honour, this was the planning regime in place not at the time of the resumption, but historically. And one thing we do glean from it, though, your Honour, is of course as long ago as 1996, the subject land was being promoted for commercial use in a supportive role. Not to compete with the Smithfield Regional Centre - or Town Centre as it

38 T 1-16, line 18.
39 Ibid, line 25
40 Ex 4A, page 42.
41 Ibid, page 23.
42 Ibid, page 22.

was then called – but in a commercial role that supported that Town Centre."[43]

[64] The Court enquired of Mr Hughes the implication of the town planning provision by asking him:

> "So the land wasn't sterilised completely for so long as whoever owned it was content to keep living on it and running a landscape business. But, effectively, looking at the planning scheme, is there an argument that the land was otherwise sterilised because you couldn't get access onto the highway?"[44]

[65] Mr Hughes's response was to say:

> "Well that's our position, you Honour. A deliberate planning decision was made. This land ought to be used for commercial purposes. It could have been left in the rural zone. It could have been included in the residential 2 zone, as the land beside it was. But it wasn't. The deliberate planning decision was made to put it in the commercial planning area in support of the Town Centre or as it then became, a sub-regional centre at Smithfield. And you Honour can see the philosophy of surrounding the regional centre – the sub-regional centre at Smithfield – with other areas of warehouse-type commercial uses such as the Bunnings and pet shop and all of the other uses that surround the Smithfield sub-regional centre now.
>
> So your Honour now, really, sees where the thrust of the importance of the Pointe Gourde in reverse principle is, because if, as we submit, the access restriction declaration – or declarations that have been put on the land – are part of the scheme, then they – that scheme cannot be used to drive down the value of this commercial land and say it had no commercial value when it's resumed in part by the Department. That's the whole ethos behind Pointe Gourde and Pointe Gourde in reverse. You can neither inflate nor deflate the value of the land by taking steps in the scheme prior to the resumption. Your Honour, that – sorry, there is one other irony in the whole matter in terms of town planning. Your Honour was given extracts from the planning scheme for 2009." [45]

[66] Mr Hughes, while conceding that his observations were likely to be the subject of argument, then took the Court to the provisions in the Cairns Plan of 2009 to show that the subject land remained in the Brinsmead-Smithfield district planning areas within a commercial area. It was surrounded to the north and west by residential land and to the south by land proposed for sport and recreation.[46]

[67] Mr Hughes observed:

> "So, the consistent planning theme in our submission – and I'm aware it's likely to be the subject of argument – but the consistent planning theme

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43 T 1-18, line 44 to T 1-19, line 2.
44 T 1-19, line 40.
45 T 1-19, line 45 to T 1-20, line 18.
46 T 1-20, line 40.

> seems to be for the subject land it be used for commercial purposes in support of the sub-regional centre."[47]

[68] In terms of background documents, Mr Hughes then turned his attention, in the course of his opening, to what he described as decisions of the Cairns City Council which were either directed or influenced by the Department of Transport and Main Roads itself.[48]

[69] He began by going back to 2 October 1970, to a letter which was apparently addressed to a potential developer or its agent enquiring as to the Department of Transport and/or Main Roads ambitions with respect to the Captain Cook Highway between Buchan's Point and Cairns, which was then a limited access road.

[70] That correspondence, on its face, related to the intention of the relevant department to declare that part of the highway a limited access road and stated, inter alia:

> "The intentions of this limitation of access is to stop ribbon development which as you are fully aware, has choked up arterial roads in many places in this State, and it would indeed be unfortunate to see this sort of thing happen on a road such as the Captain Cook Highway.
>
> Your proposed subdivision would effectively turn a rural area into an urban area which would create problems of drainage access and reduce the capacity of the Highway system presently existing and in order to preserve the rights of the through motorist, limitation of access will be enforced.
>
> Even though this section of road has not as yet been declared a Limited Access Road, the Commissioner, under powers outlined in the Main Roads Acts, as controlled in certain requirements for any proposed and/or existing accesses of adjoining properties to Declared Roads."[49]

[71] He also drew the Court's attention to a memorandum from the Department of Main Roads Engineer to the then Mulgrave Shire Council (of which Council the Cairns City Council is the successor). That internal memo was dated 30 June 1971 and contained, at paragraphs 6, 7, 8 and 9 the following:

> "6. I enclose copies of plans of the first sub-division to be submitted to this office for approval of the access to the highway. The location of the access and its geometry are satisfactory to tie in with existing and future work.
> …
>
> 7. One more situation may arise which stresses even more urgently the difficulties which may arise in controlling even the major accesses. Consider the sketch shown in Appendix A. This sketch

47 T 1-20, lines 39 to 42.
48 T 1-21, line 10.
49 Ex 1, vol 1, tab 2, page 3.

represents in simplified diagrammatic form the type of layout the Shire Council is attempting to obtain. It can be open that if area "D" was the first area to be developed, there are no great problems regarding the major access.
…

8. It is obvious that some means of controlling access to the highway must be devised. The control of the major accesses with the possible exception of situations detailed in paragraph 7, should not be too difficult since the developers appear to be prepared to accept Mulgrave Shire's conditions limiting such accesses. However, control of accesses to the individual allotments can not be effected by the Shire Council.

9. It would appear that this Department must control such individual accesses, and that the only methods available are:

(a) Declaration of limitation of access. Besides requiring a fair amount of work preparing the necessary plans and hearing objections etc., it is understood that this could involve considerable compensation payments since there are no such limitations on the existing road.

(b) Effecting control by the construction of a physical barrier such as a fence. Presumably, agreement would have to be reached with current owners to provide accesses to the adjacent land, suitable for the present, it would appear that landowners would have the same rights to compensation as they would have of limitations were gazetted." [50]

[72] An inter-office memorandum of 19 December 1972 sought approval in principle for a declaration of limited access for Captain Cook Highway between Saltwater Creek and the Smithfield Post Office.[51]

[73] That inter-office memorandum generated a response from the District Commissioner on 5 January 1973, expressing agreement with the proposal regarding limited access and safe guarding of future lanes on the Captain Cook Highway (Cairns-Mossman Road).[52]

[74] There were other documents of a similar inclination[53]

[75] In October 1976, a study of the Cairns area transport, the 'Cairns Area Transport Study', was prepared by the Main Roads Department in association with the Cairns

50 Ex 1, vol 1, tab 3, page 4.
51 Ex 1, vol 1, tab 4, page 6.
52 Ex 1, vol 1, tab 5, page 11.
53 See Ex 1, vol 1, tabs 5, 6 and 7, pages 11 to 14.

City Council and the Mulgrave Shire Council.[54] That document identified anticipated traffic between the Barron River Bridge and the Kennedy Highway intersection with the Captain Cook Highway.

[76] I do not propose to deal individually with each of the many documents contained in the agreed bundle. Suffice it to say that there are number of other 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.[55]

[77] On 5 February 1983, by proclamation contained in Queensland Government Gazette of that date, the Captain Cook Highway between its intersection with Yorkey's Knob Road to Smithfield was declared a limited access highway. [56]

[78] An accompanying map depicting the area of the highway then declared to be a limited access road included that part of the Captain Cook Highway to which the subject land has a frontage.

[79] There was a minor discrepancy with respect to the date of the copy of the map lithograph, which seemed to show 1983 in relation to a proclamation of June 1981, but ultimately it appeared as though nothing turned upon that.[57]

Evidence of the traffic engineers

[80] Mr Robert Holland and Mr Colin Beard, two very experienced traffic engineers well known to this Court, were engaged by the applicant and the respondent respectively to provide advice in respect of traffic engineering matters.

Their joint report

[81] They met with a view to identifying areas of agreement and disagreement.

[82] They produced the joint report dated 3 December 2014.[58]

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54 Ex 1, vol 1, tab 7, page 15.
55 See for example Ex 1, vol 1, tabs 8 to 14.
56 Ex 1, vol 1, tabs 14 and 15.
57 T 1-25, line 40 to T 1-26, line 35.
58 Ex 6.

[83] Within that report, they were able to identify five particular areas of agreement between them with respect to the implications for access to and from the subject site. Those matters of agreement were as follows:

> "22. Neither Mr Beard nor Mr Holland are aware of any case where an applicant has successfully applied for an access to a state controlled road contrary to the declaration of limitation of access and the wishes of DTMR at the relevant time. They understand that any appeal rights in respect of the declaration under the Transport Infrastructure Act are limited in extent and can be exercised for only a short time after the declaration is made.
>
> 23. It was agreed that, at the date of resumption, Lot 4 was included in the commercial planning area, thereby suggesting commercial development potential. However, it appears that, at all material times, 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 either highway.
>
> 24. It was agreed that the authorities (Council and DTMR) have not effectively facilitated the planning and construction of the proposed internal circulation road. In fact, residential development of Lot 5 had effectively precluded reliance on such a link for access to significant commercial development on Lot 4 well before the date of resumption.
>
> 25. It was agreed that, at the date of resumption, because of the 1983 declaration of limitation of access, there was no reasonable prospect of commercial redevelopment of Lot 4 reliant on direct vehicular access to or from the Captain Cook Highway.
>
> 26. It was agreed that, while it might also 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 Lot 4 beyond that imposed by the much earlier declaration of limitation of access."[59]

[84] In addition, Mr Owen Dalton, a town planner engaged by the applicant, prepared what might be described as a supplementary report to a joint report prepared by himself and Mr Bruce Hedley, a town planner for the respondent.[60]

[85] In his report, Mr Dalton says that he took certain factors into account in response to a request as follows:

> "that I consider and provide my opinion as to what would have been the perception of the prospects of gaining approval for commercial development of the subject land at the time that the resumption the subject of these proceedings occurred, ignoring the DTMR steps over the years to

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59 Ex 6, page 4, paras 22 to 26.
60 Ex 11.

protect the traffic capacity and efficiency of the Captain Cook Highway in this locality."[61]

[86] The factors which Mr Dalton took into account were as follows:

1. Planning area designation (nee zoning) of the land;
2. Assessment table provisions;
3. Surrounding land uses; and
4. Provisions of the Code.

[87] In his report, Mr Dalton provides the following conclusion:

> "Taking the above Planning Scheme provisions into consideration, it is my opinion that a prospective purchaser of the subject land, and/or an appropriately qualified consultant advising a prospective purchaser, would have assumed the potential to gain access to the subject land direct from the Captain Cook Highway.
>
> Further, and in any event based upon my experience with a number of commercial projects involving properties with direct frontage to restricted access state-controlled roads, I would have advised a prospective purchaser (and the vendor) that the existence of a restricted access status of a highway frontage does not necessarily preclude the ability to gain access approval, as I am aware of several instances where approval for direct site access has been successfully negotiated." [62]

[88] It is important to recall that Mr Dalton is, of course, not a traffic engineer and the comments made by him are in his role as a town planner.

[89] Unfortunately, Mr Dalton does not in his report give details of those "several instances" where he says approval for direct access to land from restricted access state-controlled roads have been successfully negotiated.

[90] The respondent, unsurprisingly, is critical of Mr Dalton's conclusions.

[91] In the submissions for the respondent it is submitted as follows:

> "it is erroneous to read the Code, as Mr Dalton said he had, as somehow positively authorising direct access to the Captain Cook Highway. Mr Dalton made two errors in his reading of the Code. *First*, he gave no effect to its primary purpose, ie to ensure the development does not compromise the safety and efficiency of major transport corridors and facilities such as the Captain Cook Highway (Exhibit 4b, page 129, see 'Purpose' and Performance Criteria P1). *Secondly*, even acceptable measure A1.1 upon which Mr Dalton placed such great reliance is no support at all for what he asserted. He read it as providing that '*if legal and practical access from another road is not possible, then direct access would be provided to a major road corridor'*. That reading is wrong. It says: *'direct access is <u>not</u>*

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61 Ibid, page 2, para 1.
62 Ex 11, page 3, para 3.

provided to a major road corridor where legal and practical access from another road is possible'.[63]

[92] The respondent relies upon the evidence given by Mr Beard both orally and in response to the contentions by Mr Dalton with respect to what are properly traffic engineering matters. The respondent obtained a supplementary statement from Mr Beard.[64]

[93] Mr Beard in his report summarised the views articulated by Mr Dalton as follows:

> "A prudent purchaser and/or his appropriately qualified (traffic) consultants would assume:
>
> a. that vehicular access would be approved to and from the Captain Cook Highway for a commercial redevelopment of part of Lot 4; and
> b. access can be successfully negotiated to and from declared Limited Access Roads."[65]

[94] In his commentary on those conclusions, taking the second point first, Mr Beard points to his experience that there are some circumstances where access to a limited access road is feasible and can, therefore, be approved or successfully negotiated.

[95] He points out, however, that at the date of resumption DTMR had already formally advised that this was not seen as a site where such access would be acceptable.

[96] Mr Dalton, Mr Holland, and Mr Beard agreed that they are unaware of any case where such a decision by the DTMR had been overturned.

[97] Mr Beard stresses his view with respect to Mr Dalton's conclusions in the following terms:

> "Consequently, in the circumstances prevailing at the date of resumption, we concluded that "*there was no reasonable prospect of commercial redevelopment of Lot 4 reliant on direct vehicular access to or from the Captain Cook Highway*."
>
> In my opinion, no responsible, professional traffic engineer should conclude other than as Mr Holland and I formerly agreed."[66]

[98] With respect to his characterisation of the first point in Mr Dalton's analysis, Mr Beard points out that he and Mr Holland recognise that the planning scheme did provide support for commercial redevelopment of land along the frontage to the Captain Cook Highway and the Kennedy Highway, but that that commercial

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63 Respondent's closing submissions, para 17(c).
64 Ex 14.
65 Ibid, page 2, para 2.
66 Ibid, page 3, para 3.

development potential could only be realised through the provision of access via an appropriate internal road from the Kennedy Highway and Cumberland Avenue to Brinsmead-Kamerunga Road.

[99] Mr Beard's report included an aerial photograph which he said showed the current land ownership pattern which had made construction of such a traffic route difficult.

[100] Mr Beard was also asked to consider whether access to the subject site for a commercial development from the Captain Cook Highway would significantly prejudice traffic safety and efficiency on the highway, putting to one side the 1983 declaration of limited access. It is unnecessary to iterate in detail the analysis carried out by Mr Beard. He concludes having regard to all of the design considerations nominated by him as follows:

> "Taking all of these design considerations into account, a DTMR decision to refuse such development access in 2007 would have been entirely reasonable, and justified based on the inability of the development proposal to comply with its normal design standards. The reasons for refusal would have been based on traffic safety considerations. If service industry uses were proposed, the development would generate of the order of 1000 vehicles per day (100 vehicle movements per hour during peak periods). More traffic intensive with uses such as show rooms could be expected to generate up to 250 vehicle movements per hour during peak periods. These are not insignificant traffic volumes, in respect of the frequency of traffic safety issues which would arise.
>
> That is, even if the Captain Cook Highway was not a declared limited access road, access for the commercial development proposal would not have been consistent with the requirements of the Road Planning and Design Manual, and therefore, should have been refused."[67]

[101] I feel obliged to prefer the evidence given by Mr Holland and Mr Beard to that of Mr Dalton, having regard to their professional qualifications as traffic engineers as against Mr Dalton's foray into traffic engineering matters notwithstanding his town planning speciality.

[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.

The joint report of the town planning expert witnesses

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67 Ibid, page 4.

[103] Each party engaged a town planning witness who had wide experience both in the area, and as an expert witnesses before this Court and the Planning and Environment Court.

[104] The two town planners (Mr Owen Dalton for the applicant and Mr Bruce Hedley for the respondent) met to prepare a joint report identifying areas of agreement and disagreement between them.

[105] There was no disagreement between either of the town planning experts and they were able to produce a joint report which identified five points of agreement. Those points of agreement were:[68]

> "1. The Smithfield Town Centre DCP established the opportunity for commercial development to occur on Lot 4.
>
> 2. However, this opportunity was bounded or constrained by the provisions of the DCP relating to the transport network and, specifically, those provisions requiring access to commercial development to be via an internal service road from the Kennedy Highway and stating that no new access points to the Captain Cook Highway will be approved.
>
> 3. The inclusion of Lot 4 in the Commercial Planning Area under CairnsPlan is considered to reflect continuation of the intent established by the DCP for future land use, as evidenced by the fact that a range of commercial-type land uses were listed as "Code Assessable" land uses within the Commercial Planning Area.
>
> 4. CairnsPlan did not contain specific or prescriptive statements relating to access to any commercial development, in general, or to Lot 4, in particular.
>
> 5. The Town Planning Experts jointly acknowledge receipt of the Joint Report of Traffic Engineers, and note the agreement noted in Clause 25 of that report that, because of the 1983 declaration of limitation of access, there was no reasonable prospect of commercial development of Lot 4 that was reliant on direct vehicular access to or from the Captain Cook Highway."

The evidence of the civil engineering expert witnesses

[106] Each party to this application engaged the services of a civil engineering expert. Mr Paul Steele was engaged by the applicant and Mr Maurice McAnany was engaged by the respondent.

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68 Ex 7, pages 5 and 6.

[107] The two civil engineering experts met on two occasions and prepared joint reports.[69]

[108] In addition, each of those engineers produced an individual report.[70]

[109] In their first joint statement, the civil engineers identified a number of points of agreement about both Lot 4 and Lot 5 and in particular agreed "[i]f it is found that access to Lot 4 from the Captain Cook Highway is not possible, access to Lot 4 will have to be gained from Lot 5 by way of a crossing of Avondale Creek."[71]

[110] Mr Steele, in that regard, observed that that was the logical conclusion, however he noted that Lot 4 and Lot 5 were in separate titles and owned by separate legal entities.

[111] With respect to that separate ownership, as Counsel for the respondent points out in his closing submissions:

> "Even Mr Steele who initially sought to make something of the point (exhibit 13, para 4.1) accepted in cross-examination that there existed a relationship between the entities and the joint development that had been proposed by them before the date of resumption. It ought therefore be found that the Lots could and would have been developed jointly and cooperatively on the principles established by *Neray Holdings Pty Ltd and Blocksidge and Badgery v Brisbane Exposition and South Bank Redevelopment Authority* (Land Court, 13 May 1988, unreported)."[72]

[112] They also gave consideration to the costs of redirecting Avondale Creek and achieving access to the balance of the lot. In their second joint report, the civil engineers identified a number of points of agreement.

[113] Those points of agreement were:[73]

> "3.1 The following points have been agreed to by **PS and MM**.
>
> 3.2 The estimated cost of constructing a culvert crossing of Avondale Creek from Lot 5 to Lot 4, based on October, 2007 construction rates would have been $ 615 000 (exclusive of GST).
>
> 3.3. The estimated net cost of realigning Avondale Creek (as was supported out), based on October, 2007 construction rates would have been $ 1 057 000 (exclusive of GST).

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69 Ex 9 and Ex 10.
70 Ex 12 and Ex 13.
71 Ex 9, page 2, para 3.4.
72 Respondent's closing submissions, para 18.
73 Ex 10, page 2, paras 3.0 to 3.6.

3.4 The above stated net cost to realign Avondale Creek makes allowance for the following:

(i) All costs associated with the construction of Avondale Creek in its new location.

(ii) All costs associated with works that would have been required in relation to Avondale Creek, had it remained on its original alignment.

(iii) All costs associated with earthworks that would have been required within the new Avondale Creek area, had Avondale Creek remained on its original alignment.

3.5 The above costings show that in the post-resumption scenario, based solely on civil engineering considerations, it would have been substantially more cost effective to construct a culver crossing over Avondale Creek between Lots 4 and 5 than to realign Avondale Creek. It is, however, recognised that there may be town planning and valuation reasons that outweigh the saving in construction costs.

3.6 If it is accepted that in the pre-resumption scenario, a culvert crossing of Avondale Creek was required between Lots 4 and 5, the additional cost to the development of realigning Avondale Creek is the difference between the net creek, realignment costs and the culvert crossing costs. (i.e. $ 442 000). It should be noted that the necessity and/or cost to construct this pre-resumption creek crossing is further dealt with under "Points of Disagreement"."

[114] There were a number of points of disagreement with respect to the composition of costs, and disagreement about who would bear what portions of the costs.

[115] Because of the agreement which was subsequently reached between the valuers engaged by the parties in this case, it is unnecessary to explore in any detail those areas of disagreement.

The evidence of the valuers

[116] The valuers engaged by the parties were Mr Geoffrey Eales of Opteon Valuers for the applicant, and Mr Terry Gould of Knight Frank for the respondent.

[117] The valuers met in conclave on 15 January 2015 and produced a joint report setting out the matters which were agreed between them.[74]

[118] In explaining the points of disagreement between them, the valuers say:

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74 Ex 8.

> "Although the valuers fundamentally agree that the Pointe Gourde principle applies, we disagree on the extent to which the 'scheme of works' should be interpreted. We both agree that this is a matter of legal interpretation as to what constitutes the "scheme"."[75]

[119] Although it is agreed that the identification of the scheme is a matter for the Court, each of the valuers set out an explanation of the basis upon which they approach the *Pointe Gourde* issue. Ultimately the valuers were able to agree the following:[76]

> "33. Before resumption, the land had areas of 1.7724 hectares above the Q100 line and 2.925 hectares below the Q100 flood line. (Total Area 4.6974 Ha).
>
> 34. After resumption, the land has 1.233 hectares above the Q100 line and 2.415 hectares below the Q100 flood line. (Total Area 3.648 Ha).
>
> 35. If left-in left-out access direct to the Captain Cook highway is prohibited solely as a consequence of the "scheme of works", the valuers agree on a Before value of $4,120,000; an After value of $1,950,000; and Compensation of $2,170,000 plus reasonable disturbance and interest.
>
> 36. If left-in left out access direct to the Captain Cook Highway would have been prohibited regardless of the "scheme of works", the valuers agree on a Before value of $2,530,000; an After value of $1,950,000; and Compensation of $580,000 plus reasonable disturbance and interest.
>
> 37. This agreement is based on the understanding that the subject Lot 4 is capable of joint development with Lot 5, due to the close relationship between the entities that own these two parcels.
>
> 38. If this understanding is found to be wrong at law, both valuers will need to reconsider a number of aspects that would impact on their assessment of value, including the possibility of seeking further civil engineering input."

The submissions of the parties

[120] A submission that for the principle in *Pointe Gourde* to apply a scheme must be precisely and definitely identified and made known to all the world was disposed of by Lord Denning MR in the *Wilson* case.[77]

[121] In response to such a submission, the Master of the Rolls said:

> "I do not accept counsel's submission. A scheme is a progressive thing. It starts vague and known to few. It becomes more precise and better known as time goes on. Eventually it become precise and definite, and known to

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75 Ibid, page 3, para 5.
76 Ibid, page 6, paras 33-38.
77 *Wilson & Anor v Liverpool City Council* [1971] 1 All ER 628.

> 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 become 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 as at the time when the value is to be assessed."[78]

The applicant's submissions

[122] The applicant here adopts a similar line of reasoning referring to the initial ambitions to have the Captain Cook Highway declared a limited access road and upon that ambition being achieved then undertaking road works in reliance upon it.

[123] Mr Hughes for the applicant put it this way:

> "In this case, it is not appropriate that the scheme be limited to the future works that geographically coincide with the land actually taken. In circumstances such as these, where the resumed parcel lies somewhere along the length of a highway, the resumption can only properly be attributable to the broader scheme, or transport planning strategy as a whole, and not merely to that part of the highway to be constructed on the land taken."[79]

[124] In support of that proposition Mr Hughes calls in aid the decision in *Roads and Traffic Authority of New South Wales v Perry*.[80]

[125] In that decision the following appears:

> "The resumption of land in the middle of a substantial extension to an existing railway or highway will be for the public purpose of that scheme or project as a whole, and not just for whatever part of it is to be constructed on that land. Section 56 (1)(a) would fail to achieve its evident purpose if the Court could award compensation for an increase in value due to the construction on the new railway or highway up to the boundaries of that land resumed and only had to ignore the proposal as it directly related to that land."[81]

[126] In the submissions for the applicant, Mr Hughes pointed out that the records of the Department of Main Roads reveal what he described as:

> "…a continuum of the planning for, and the development of the Captain Cook Highway to accommodate the evolving transport demands of the broader communities, from Cairns to Mossman, extending from the 1970's through to the present. As the records themselves record, the Department recognises this highway as:
>
> (a) The sole transport link between Cairns and Port Douglas and Mossman to the north;
>
> (b) The sole artery accommodating the daily commuter of flow between Cairns city and the northern beach suburbs.

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78 Ibid [634].
79 Applicant's outline of submissions, para 74.
80 (2001) 52 NSWLR 222.
81 Ibid [66].

> This continuum of planning and development has involved acquiring land, widening roads, upgrading intersections, changing speed limits and restricting access and opposing development applications."[82]

The respondent's submissions

[127] Mr Horton of Queen's Counsel resists the proposition that the relevant "scheme" for the application of the *Pointe Gourde* principle began somewhere around about 1981 when the limited access declaration affecting Lot 4 was made.

[128] In his submissions, Mr Horton says "[t]here are several reasons why the Applicant's case must fail. His case is that there is a very long scheme of some 37 years … which started in 1970 … and that everything that has been done since … comprises part of it."[83]

[129] Mr Horton goes on in his submissions to identify four reasons why he submits the applicant's case should not succeed.

[130] The first point that Mr Horton makes is to assert that a limited access declaration is not of itself a scheme or capable in its own right of giving rise to one. He points out that a limited access declaration is a statutory act which recognises the character of a piece of public infrastructure (i.e. a road) as warranting control over access to and from it. He goes on to say that a limited access declaration is not in any sense a project for which there might be said to be a component or which involved the carrying out of works.

[131] He submits that the applicant's formulation of the scheme contradicts the observations of the High Court in the decision of *Walker Corporation*[84] which I have referred to above.[85]

[132] The submission must also be contemplated in the context of the observations made by the resuming authority in the background information provided pursuant to section 7 of the Act (quoted above) in which the resuming authority referred to its planning "for many years".

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82 Applicant's outline of submissions, paras 75-76.
83 Respondent's closing submissions, page 7, para 20.
84 *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259.
85 See [42].

[133] Mr Horton's submissions go on to distinguish the present case from a number of other cases.[86]

[134] I do not propose to refer in detail to each of those decisions save to observe that they demonstrate, to my satisfaction, that the identification of a "scheme" in each case necessarily depends on the surrounding facts and circumstances.

[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.

[136] Secondly, Mr Horton said that the fact that this case might be contemplated by starting with the 2007 resumption and looking back in time. Mr Horton submits that viewing the factual context in that way reveals the absence of the requisite nexus demonstrating a series of steps in the scheme.

[137] He refers to the case of *Steven v The Commissioner of Water Resources*[87] as establishing that the nexus to which he referred must exist by virtue of the resumption being something that could be said to be the "next step" in the scheme.[88]

[138] In the *Steven* decision, the Land Appeal Court observed:

> "But if we were to go further, it would appear to us on consideration of the legislative provisions which govern the establishment of schemes of this nature that one could reasonably hold that the scheme at the time of the enhancement (which we think was, at the latest, the completion of the Clare Weir) was not the same as the scheme at the time of the acquisition. At the former time the scheme embraced only existing works because it could not be said with any degree of confidence what would be the next step in relation to the storage of water. At the latter time the scheme embraced significant additional works, and was not the same scheme."[89]

[139] The *Steven* decision involved the resumption of land pursuant to the *Irrigation Act 1922-1986* for the purpose of subdividing existing large farms and forming them into smaller farms, which would be provided with reticulated water supply and

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86 See *Steven v The Commissioner of Water Resources* (1990) 13 QLCR 75; *Union Fidelity Trustee of Australia v Coordinator-General* (1988) 12 QLCR 82*, Hutchins and Cunnington v Council of the Shire of Woongarra* (1992) 14 QLCR 286.

87 (1990) 13 QLCR 75.

88 Ibid [2].

89 Ibid [82].

which the Water Resources Commission would dispose of by way of auction. That resumption occurred in 1987.

[140] The subject resumed land enjoyed a licence to pump water from the Burdekin River, an entitlement which was enhanced by the construction of the Clare Weir, which was approved in 1974 as part of a scheme referred to as the Burdekin extension (Urannah Dam) scheme.

[141] It is easy to see then, why in the *Steven* decision, the Court was able to identify two different schemes.

[142] The construction of the Clare Weir was part of a proposal entitled "the Burdekin River project irrigation undertaking" which was approved by the Government in March 1980 and which involved the construction of the dam at Burdekin Falls which:

> "would provide water supplies for irrigation and possible future urban and industrial development in the lower Burdekin in conjunction with the existing storages at Clare Weir, Gorge Weir and Blue Valley Weir on the Burdekin River and Eungella Dam on the Broken River and to the resumption of lands required for the scheme including the resumption of lands in the proposed extension of the new irrigation area currently used for cattle grazing for the creation of new irrigation farms." [90]

[143] In its decision in *Steven*, the Land Appeal Court reflected on the Land Appeal Court in *Marshall v Commissioner of Irrigation and Water Supply*.[91]

[144] In the *Marshall* decision the Land Appeal Court observed:

> "on our reading of the *Irrigation Acts* in particular sections 7, 9 and s 15(a) – and the facts before us in evidence, the scheme of the subject resumption embraces the Undertaking as approved by Parliament in the construction, redesign and development of the irrigation area in relation thereto. All works and structures in implementation of this Undertaking and Area are necessarily part of the scheme."[92]

[145] I have little difficulty in accepting that the development of dams for a combined scheme of other water supply and storage facilities for something like the extended Burdekin River irrigation area might be seen as one "scheme", and a proposal to resume and subdivide farms to create smaller farms might be seen as a separate and quite different scheme.

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90 Ibid [81].
91 (1973) 40 CLLR 71.
92 Ibid [75].

[146] I have greater difficulty however accepting that a "step" in a scheme must necessarily result in physical work or physical activities. The declaration of limited access did not involve any particular works, but did provide a legal framework within which access on the Captain Cook Highway might be restricted so as to facilitate the traffic carrying capacity of the highway.

[147] Thirdly, Mr Horton submits that the authorities show not only that the resumption must properly form part of some wider scheme, but it must be contemplated as a step in it.

[148] Mr Horton submits that if the scheme is said to have begun between 1970 and 1983 the Court must then look for some indications that the 2007 resumption was a step in the scheme.

[149] I do not understand any of the authorities to establish that a scheme must identify with a high degree of particularity all of the steps which might be taken to bring the scheme to fulfilment.

[150] Nor does any reported decision establish to my satisfaction that a scheme is of a limited period. It is clear from the authorities that schemes can continue over a long period of time. In that regard, the observations of Lord Denning quoted above are apposite and worthy of restatement. He said that "a scheme is a progressive thing. It starts vague and known to few. It becomes more precise and better known as time goes on. Eventually it becomes precise and definite and known to all."[93]

[151] Finally, Mr Horton submits that if there is a longstanding scheme (which he rejects) then the applicant cannot pick and choose which elements of it it seeks to rely upon.

[152] His submissions say:

> "if it began in 1970/1983, then it must continue (on the applicant's case) to at least 2007. But what the applicant does is to cherry pick by inviting the Court to ignore the Limited Access Declaration but to take into account the Council's planning scheme changes which gave the land some prospect in a planning sense at least, of commercial development."[94]

[153] I do not apprehend that the applicant has sought to "cherry pick" the support of elements in the way now contended for by the respondent. It is a well-known process that the State has responsibility for what are generally referred to as "state

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93 *Wilson & Anor v Liverpool City* Council [1971] 1 All ER 628 [634].

94 Respondent's closing submissions, page 9, para 32.

controlled roads" (in respect to which a limited access declaration can be made), whereas a local Government has the responsibility for controlling development in areas within its remit, including areas adjacent to state controlled roads including those to which access may be restricted.

Conclusion

[154] Having regard to the evidence outlined above, the submissions made by the applicant and by the respondent, and my observations with respect to those submissions, I have reached the following conclusions:

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.

2. It is arguable, but not necessary for me to decide, that that scheme had in fact been in place since the mid 1970s.

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.

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.

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.

6. Compensation for disturbance has been agreed between the parties at $17,500 but, as advised by counsel for the parties during the submissions I am not required to make any order for disturbance.[95]

7. Thus, there only remains for interest to be calculated. I will hear from the parties in that regard.

Orders:

Compensation is determined in the amount of Two Million One Hundred and Seventy Thousand Dollars ($2,170,000).

WL COCHRANE
MEMBER OF THE LAND COURT

[95] T 3-2, lines 16 to 26.