[PRIVY COUNCIL]

DIRECTOR OF BUILDINGS AND LANDS . . . APPELLANT

AND

SHUN FUNG IRONWORKS LTD. . . . . RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

1994 Nov. 14, 15, 21, 22, 23, 24, 28, 29, 30;
1995 Feb. 20

Lord Keith of Kinkel, Lord Mustill, Lord Slynn of Hadley, Lord Lloyd of Berwick and Lord Nicholls of Birkenhead

Hong Kong—Land—Resumption—Claimant's land resumed by Crown—Claimant suffering loss and damage to business—Whether compensation to be assessed on basis of extinguishment or relocation of business—Whether compensation payable for injury to goodwill—Whether loss sustained prior to resumption order "due to" resumption—Proper interest rate—Crown Lands Resumption Ordinance (Laws of Hong Kong, 1991 rev., c. 124), ss. 10(1)(2)(a)(d), 17(3)(3A)

Hong Kong—Costs—Lands Tribunal—Claim for compensation for resumption—Settlement offer "without prejudice save as to costs"—Non-acceptance by claimant—No payment into court—Whether Lands Tribunal entitled to take offer into consideration in awarding costs—R.S.C. (Hong Kong), Ord. 22, rr. 1(1), 14; Ord. 62, r. 5

The claimant operated a mini-mill business on land in Hong Kong. In November 1981 the claimant was notified by the government that it intended to develop the area as a new town and that the claimant would have to relinquish its site. Thereafter the claimant's business was adversely affected by the threat of its land being resumed by the Crown under the Crown Lands Resumption Ordinance.[1] On 15 October 1985 a resumption order was made under section 3. The claimant was unable to find an alternative site by 30 July 1986, when the land reverted to the Crown and its business was closed down, and the land was finally vacated in January 1987. The claimant, having found a suitable site in China, submitted a claim for compensation to the Director of Buildings and Lands based on the relocation of its business to that site, and the matter was referred to the Lands Tribunal for determination under section 10. In November 1988 on behalf of the Crown the director made an offer "without prejudice" to settle the claim for $170m. exclusive of interest and costs, and subsequently a similar offer to settle part of the claim. Neither offer was accepted by the claimant. The tribunal held that the claimant's business had been effectually extinguished in 1986, that the business which the claimant intended to establish in China would not be the same, and that compensation for the claimant's business loss had to be determined on an extinguishment basis by valuing the business at the date of resumption. The tribunal

[1] Crown Lands Resumption Ordinance, s. 10: see post, p. 124B–D.

S. 17: "(3) . . . any sum of money payable as compensation by virtue of a determination of the Lands Tribunal . . . shall bear interest . . . (3A) The rate of interest for the purposes of subsection (3) shall be such rate as the Lands Tribunal may fix having regard to the lowest rate payable from time to time by members of The Hong Kong Association of Banks on time deposits."

awarded the claimant $131m., which included a sum for the claimant's loss of profits from November 1981 until January 1987, holding that during that period the business had declined owing to the shadow of resumption hanging over the claimant. The tribunal made no award in respect of injury to the goodwill of the business because the discount rate which it applied in capitalising the future profits which the claimant would have made if its land had not been resumed resulted in a sum considerably less than the value of the land, buildings, plant and machinery. By section 17(3) interest was payable on compensation and the tribunal, disregarding the rate specified in section 17(3A), fixed interest at the prime lending rate plus 1 per cent. The tribunal took the Crown's first settlement offer into account under R.S.C. (Hong Kong), Ord. 22 and Ord. 62[2] and ordered that the claimant was to receive its costs up to the date of that offer but was to pay the director's costs thereafter on a common fund basis. On appeal by both parties the Court of Appeal of Hong Kong increased the award to $519m., holding that relocation was the proper basis of assessment, but held that compensation was only payable in respect of losses arising after the resumption order had been made. The court also held that the tribunal had misdirected itself as to interest and fixed the rate at the seven-day call rate plus 2 per cent. and that the settlement offers could not be taken into account, and ordered the director to pay the claimant's costs of the proceedings before the tribunal.

On the director's appeal to the Judicial Committee and the claimant's cross-appeal:—

Held, allowing the appeal, (1) that under section 10 of the Crown Lands Resumption Ordinance a claimant was entitled to fair and adequate compensation for loss or damage suffered due to resumption of his land, including loss or damage to his business; but that, although the compensation related to the value of the land to the claimant, in respect of any particular loss it was necessary to show a causal connection between the resumption and that loss, that it was not too remote and that it was one which a reasonable person in the position of the claimant would have incurred; that provided those conditions were satisfied a claimant might recover compensation on a relocation basis for the cost of moving the claimant's business to another site even though that would exceed the amount payable on an extinguishment basis in respect of the value of the business at the date of resumption; that in order for a claim to be assessed on a relocation basis the claimant had to establish that the business was capable of being relocated, that he intended to relocate, and that a reasonable businessman would do so; and that, since there was no ground entitling the Court of Appeal to reverse the

[2] R.S.C. (Hong Kong), Ord. 22, r. 1(1): "In any action for a debt or damages any defendant may at any time pay into court a sum or sums of money . . ."

R. 14: "(1) A party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be 'without prejudice save as to costs' . . . (2) Where an offer is made under paragraph (1) . . . the court shall take into account any offer which has been brought to its attention: Provided that the court shall not take such offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into court under Order 22."

Ord. 62, r. 5: "The court in exercising its discretion as to costs shall . . . take into account . . . (*d*) any written offer made under Ord. 22, r. 14, provided that the court shall not take such an offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into court under Order 22."

A tribunal's conclusion based on its findings of fact, the claimant's business had been effectually extinguished at the date of resumption and since, despite the claimant's genuine intention to relocate its business, a reasonable businessman would not take that course, compensation had properly been determined by the tribunal on an extinguishment basis (post, pp. 125C–E, 126A, E–127A, 128B–D, 129E–F, 130C–D, 131F).

B (2) That R.S.C. (Hong Kong), Ord. 22, r. 14 and Ord. 62, r. 5 enabled offers made "without prejudice save as to costs" to be taken into consideration by the court in exercising its discretion with regard to costs unless the party making the offer could have made a payment into court under Order 22, and since Order 22 did not apply to a claim for compensation, because it was not an action for a debt or damages, the tribunal had been entitled to take into account the Crown's first settlement offer and had been C justified in ordering the claimant to pay the director's costs after 7 November 1988 on the common fund basis (post, pp. 140G–141A).

(3) Dismissing the cross-appeal in part, that the claimant was not entitled on appeal to present an entirely different case from that advanced before the tribunal with regard to the discount rate to be applied in calculating the value of the future profits which the claimant would have been expected to make if its business had not been extinguished; and that since the issues in relation D thereto were essentially issues of fact for the tribunal the Judicial Committee would not be justified in interfering with the tribunal's decision that no compensation was payable for injury to the goodwill of the business (post, pp. 134D–E, G–135A).

(4) That although section 17(3A) of the Ordinance gave the Lands Tribunal a discretion as to the rate of interest on the compensation awarded, the rate should be the lowest time deposit E rate as specified in that subsection unless there were good reasons for fixing a different rate; that the fact that a claimant financed his business with borrowed money would not of itself be a good reason for fixing a higher rate; and that, therefore, the Court of Appeal had correctly decided that the tribunal had misdirected itself in fixing the rate of interest at prime lending rate plus 1 per cent. and, in all the circumstances, the court had properly F exercised its discretion in fixing the rate at the seven-day call rate plus 2 per cent. (post, pp. 139E–F, G–140A).

(5) Allowing the cross-appeal in relation to the claim for loss of profits before resumption (Lord Mustill and Lord Slynn of Hadley dissenting), that resumption in section 10(1) of the Ordinance was not a process but a specific event which took place when the land reverted to the Crown, but losses sustained after the inception of the scheme and before resumption were "due to" G the resumption of the land within section 10(1) and qualified for compensation if the same conditions as those applicable to post-resumption losses were fulfilled; that the concept of causal connection would be given an extended meaning so that losses incurred in anticipation of resumption and because of the threat presented by resumption constituted losses caused by the resumption, and so the claimant was entitled to compensation for H all the pre-resumption losses claimed; and that, accordingly, $18·173m. would be awarded in respect of that claim and, except in relation to that matter and the rate of interest payable on the compensation, the tribunal's order would be restored (post, pp. 136F–G, 137G–138B, 141C–D).

Aberdeen City District Council v. Sim (1982) 264 E.G. 621 and *Prasad v. Wolverhampton Borough Council* [1983] Ch. 333, C.A. applied.

Per curiam. When a tribunal is determining the amount of the loss sustained by a claimant such as the claimant company, the market perception of the risks attached to the type of business is likely to be of assistance in arriving at an appropriate discount rate, but that must not lead the tribunal into the error of equating the amount of a claimant's loss with the price he could obtain if he sought to sell the future profit stream to an outside commercial investor (post, p. 134E–F).

Decision of the Court of Appeal of Hong Kong [1994] 1 H.K.C. 35 varied.

The following cases are referred to in the judgment of their Lordships:

Aberdeen City District Council v. Sim (1982) 264 E.G. 621

Calderbank v. Calderbank [1976] Fam. 93; [1975] 3 W.L.R. 586; [1975] 3 All E.R. 333, C.A.

Commissioner of Highways v. Shipp Bros. Pty. Ltd. (1978) 19 S.A.S.R. 215

Harvey v. Crawley Development Corporation [1957] 1 Q.B. 485; [1957] 2 W.L.R. 332; [1957] 1 All E.R. 504, C.A.

Horn v. Sunderland Corporation [1941] 2 K.B. 26; [1941] 1 All E.R. 480, C.A.

Hughes v. Doncaster Metropolitan Borough Council (1987) 55 P. & C.R. 383; [1991] 1 A.C. 382; [1991] 2 W.L.R. 16; [1991] 1 All E.R. 295, H.L.(E.)

Melwood Units Pty. Ltd. v. Commissioner of Main Roads [1979] A.C. 426; [1978] 3 W.L.R. 520; [1979] 1 All E.R. 161, P.C.

Pastoral Finance Association Ltd. v. The Minister [1914] A.C. 1083, P.C.

Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands [1947] A.C. 565, P.C.

Prasad v. Wolverhampton Borough Council [1983] Ch. 333; [1983] 2 W.L.R. 946; [1983] 2 All E.R. 140, C.A.

Smith v. Strathclyde Regional Council (1980) 42 P. & C.R. 397

West Midland Baptist (Trust) Association (Inc.) v. Birmingham Corporation [1970] A.C. 874; [1969] 3 W.L.R. 389; [1969] 3 All E.R. 172, H.L.(E.)

The following additional cases were cited in argument:

Baker Britt & Co. Ltd. v. Hampsher [1976] R.A. 69, H.L.(E.)

Bailey v. Derby Corporation [1965] 1 W.L.R. 213; [1965] 1 All E.R. 443, C.A.

Bede Distributors Ltd. v. Newcastle-upon-Tyne Corporation (1973) 26 P. & C.R. 298

Bibby (J.) & Sons Ltd. v. Merseyside County Council (1979) 39 P. & C.R. 53, C.A.

British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd. [1912] A.C. 673, H.L.(E.)

Callwin International Electric Co. Ltd. v. Director of Engineering Development (unreported), 17 December 1984; Lands Tribunal of Hong Kong, Mass Transit Reference No. 3 of 1984

Chrulew v. Borm-Reid & Co. [1992] 1 W.L.R. 176; [1992] 1 All E.R. 953

Clibbett (W.) Ltd. v. Avon County Council [1976] R.V.R. 131

Commissioner of Highways v. George Eblen Pty. Ltd. (1975) 10 S.A.S.R. 384

Cutts v. Head [1984] Ch. 290; [1984] 2 W.L.R. 349; [1984] 1 All E.R. 597, C.A.

Dodd Properties (Kent) Ltd. v. Canterbury City Council [1980] 1 W.L.R. 433; [1979] 2 All E.R. 118; [1980] 1 All E.R. 928, Cantley J. and C.A.

Dominion Mosaics and Tile Co. Ltd. v. Trafalgar Trucking Co. Ltd. [1990] 2 All E.R. 246, C.A.

Edwards v. Bairstow [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.(E.)

Festiniog Railway Co. v. Central Electricity Generating Board (1962) 13 P. & C.R. 248, C.A.

Komala Deccof & Co. S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) [1984] H.K.L.R. 219

Lai Hing-tong v. Attorney-General [1990] 1 H.K.L.R. 56

Liesbosch Dredger (Owners of) v. S.S. Edison (Owners of) [1933] A.C. 449, H.L.(E.)

London and South of England Building Society v. Stone [1983] 1 W.L.R. 1242; [1983] 3 All E.R. 105, C.A.

Metropolitan Railway Co. v. Burrow (1883–1884) *Cripps on Compensation,* 8th ed. (1938), p. 906, D.C., C.A. and H.L.(E.)

Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound (No. 2)) [1967] 1 A.C. 617; [1966] 3 W.L.R. 498; [1966] 2 All E.R. 709, P.C.

Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound) [1961] A.C. 388; [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404, P.C.

Remnant v. London County Council (1952) 3 P. & C.R. 185

Ricket v. Metropolitan Railway Co. (1864) 5 B. & S. 149

Rought (W.) Ltd. v. West Suffolk County Council [1955] 2 Q.B. 338; [1955] 2 W.L.R. 1080; [1955] 2 All E.R. 337, C.A.

Roy v. Westminster City Council (1975) 31 P. & C.R. 458

Service Welding Ltd. v. Tyne and Wear County Council (1979) 38 P. & C.R. 352, C.A.

Sotiros Shipping Inc. v. Sameiet Solholt [1983] 1 Lloyd's Rep. 605, C.A.

Suen Sun-yau v. Director of Buildings and Lands [1991] H.K.D.C.L.R. 33

Tang Yue-chung v. Director of Lands [1986] H.K.L.T.L.R. 27

Tasmania (Owners of the) v. City of Corinth (Owners of the) (1890) 15 App.Cas. 223, H.L.(E.)

Tramountana Armadora S.A. v. Atlantic Shipping Co. S.A. [1978] 2 All E.R. 870

Venables v. Department of Agriculture for Scotland, 1932 S.C. 573

Wright v. British Railways Board [1983] 2 A.C. 773; [1983] 3 W.L.R. 211; [1983] 2 All E.R. 698, H.L.(E.)

Wright v. Municipal Council of Sydney (1916) 16 S.R.(N.S.W.) 348

APPEAL (No. 42 of 1994) with leave of the Court of Appeal of Hong Kong by the Director of Buildings and Lands from the judgment of the Court of Appeal of Hong Kong (Power V.-P., Nazareth and Litton JJ.A.) given on 8 December 1993, with an addendum given on 17 December relating to costs, allowing appeals by the director and the claimant, Shun Fung Ironworks Ltd., against the award by the Lands Tribunal (Rhind J. and Mr. M. W. Phillips) on 29 June 1992 of a total of $131,030,728 compensation to the claimant in respect of the resumption of its land at Junk Bay, Sai Kung, New Territories, of which sum $13,736,000 related to past loss of profits; against the tribunal's order dated 21 January 1993 that the rate of interest payable on the compensation was to be the prime lending rate from time to time plus 1 per cent.; and against its order dated 5 May 1993 that the director had to pay the claimant's costs up to and including 7 November 1988 on a party and party basis and the claimant

had to pay the director's costs thereafter on the common fund basis. The Court of Appeal had set aside those decisions of the tribunal and ordered that an award of compensation of $519,120,350 be substituted, which included $6,875,000 in respect of loss of profits for the period 15 October 1985 to 19 January 1987; that the rate of interest be fixed at 2 per cent. above The Hong Kong Association of Banks' seven-day call rate which had prevailed from time to time; and that the director had to pay the claimant's costs of the reference to the tribunal and of all hearings before the tribunal subsequent to its determination on 29 June 1992.

The facts are stated in the judgment of their Lordships.

Michael Barnes Q.C. and *Robert Bailey-King* for the director. The tribunal was correct in law in awarding compensation on the basis of extinguishment rather than relocation of the claimant's business. For the purpose of assessing compensation any increase or decrease in the value of the land as a result of its resumption by the Crown had to be ignored.

Compensation for resumption of land in Hong Kong is governed by the Crown Lands Resumption Ordinance. The tribunal had to determine the compensation payable to the claimant under section 10(2)(*a*) of the Ordinance on the basis of the value of the land resumed at the date of resumption, and under subsection (2)(*d*) on the basis of the loss or damage to the claimant's business due to its removal from the land as a result of the resumption.

Compensation under subsection (2)(*d*) may be either on an extinguishment or on a relocation basis. In the former case the landowner receives compensation based on the value of his land and buildings thereon, and the value of the goodwill of his business. On a relocation basis he is compensated for the value of the land and buildings, and the loss or damage caused to him in ceasing to carry on his business at that site and relocating it to a different site, including the cost of transferring plant and machinery and any temporary loss of profit while the business is moved from the original site to another, but generally not including the cost of acquiring the new site. Section 10(2)(*d*) of the Ordinance may be compared to section 63 of the Land Clauses Consolidation Act 1845. [Reference was also made to section 2 of the Acquisition of Land (Assessment of Compensation) Act 1919; section 5 of the Land Compensation Act 1961; section 7 of the Compulsory Purchase Act 1965; *Horn v. Sunderland Corporation* [1941] 2 K.B. 26 and *Harvey v. Crawley Development Corporation* [1957] 1 Q.B. 485.] In English and Hong Kong law, loss or damage may be recovered in a compensation claim in addition to the value of the land itself and the consequences of severance provided that (i) the loss or damage is consequential upon the acquisition, (ii) it is not too remote and (iii) the expenditure claimed has been reasonably incurred.

The fundamental question of whether the additional costs claimed for relocation can be recovered should be decided by applying these three criteria. The tribunal and the Court of Appeal approached the matter by applying four tests. (1) Was there a bona fide intention to relocate? (2) Had a specific site been identified for relocation? (3) Was the business the same or a new one? (4) Was relocation in all the circumstances

A reasonable? The Court of Appeal radically changed the fourth test by regarding it as being whether the relocation was caused by the resumption, i.e., whether the relocation was the natural and reasonable consequence of the resumption. The Court of Appeal thus erred in reversing the tribunal's decision. [Reference was made to *Metropolitan Railway Co. v. Burrow* (1883–1884) *Cripps on Compensation,* 8th ed. (1938), p. 906; *Horn v. Sunderland Corporation* [1941] 2 K.B. 26; *Wright v. Municipal Council of* B *Sydney* (1916) 16 S.R.(N.S.W.) 348; *Service Welding Ltd. v. Tyne and Wear County Council* (1979) 38 P. & C.R. 352 and *Callwin International Electric Co. Ltd. v. Director of Engineering Development* (unreported), 17 December 1984, Lands Tribunal of Hong Kong, Mass Transit Reference No. 3 of 1984.] Compensation under section 10(2)(*d*) on a relocation basis cannot exceed the maximum amount payable on an C extinguishment basis.

Compensation for loss or damage will be recoverable under section 10(2)(*d*) if (1) it is proved that the loss or damage has occurred or will occur, (2) the loss or damage is caused by the resumption of the claimant's land, (3) the loss or damage is of a kind which is reasonably foreseeable at the date of resumption, and (4) the items of expenditure constituting the loss or damage are reasonably incurred by the claimant. The Court of D Appeal erred in applying the second principle and ignoring the third and fourth. Factual causation alone is not sufficient. [Reference was made to *Owners of Liesbosch Dredger v. Owners of S.S. Edison* [1933] A.C. 449; *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388; *Harvey v. Crawley Development Corporation* [1957] 1 Q.B. 485; *Metropolitan Railway Co. v. Burrow, Cripps* E *on Compensation,* 8th ed., p. 906; *Wright v. Municipal Council of Sydney,* 16 S.R.(N.S.W.) 348; *Festiniog Railway Co. v. Central Electricity Generating Board* (1962) 13 P. & C.R. 248; *West Midland Baptist (Trust) Association (Inc.) v. Birmingham Corporation* [1970] A.C. 874; *Commissioner of Highways v. George Eblen Pty. Ltd.* (1975) 10 S.A.S.R. 384; *Commissioner of Highways v. Shipp Bros. Pty. Ltd.* (1978) 19 S.A.S.R. 215; *Prasad v. Wolverhampton Borough Council* [1983] Ch. 333; *Dodd* F *Properties (Kent) Ltd. v. Canterbury City Council* [1980] 1 W.L.R. 433; *Dominion Mosaics and Tile Co. Ltd. v. Trafalgar Trucking Co. Ltd.* [1990] 2 All E.R. 246 and *Bailey v. Derby Corporation* [1965] 1 W.L.R. 213.]

In determining whether a business to be carried on at another site is the same as that which existed at the resumed site the tribunal usually has to consider (i) whether a new location is readily available for the business, G (ii) whether the activities to be carried on will be the same or substantially the same as those at the old location, and (iii) whether the distance between the two sites and the different conditions at the new site are such as to suggest that the business at the new site will be different from that at the old site. It was for the tribunal to ascertain the relevant facts. It was justified in concluding that the new business would not be the same as the claimant's former business. There were no grounds on which the H Court of Appeal could interfere with the tribunal's decision. [Reference was made to sections 11 and 11A of the Lands Tribunal Ordinance; *Edwards v. Bairstow* [1956] A.C. 14 and *Baker Britt & Co. Ltd. v. Hampsher* [1976] R.A. 69.]

The Chief Justice had no power under section 10 of the Lands Tribunal Ordinance to direct that payments be made into court in respect of matters before the tribunal, and the wording of the Lands Tribunal Direction No. 3 shows that it was contemplated that before it came into force there would be some other provision permitting or authorising payments-in, whereas no such provision has been made.

Further, a claim for compensation for resumption is not an action for a debt or damages to which R.S.C. (Hong Kong), Ord. 22, r. 14 and Ord. 62, r. 5(*d*) applies. Accordingly, the Lands Tribunal was entitled to have regard to *Calderbank* offers (see *Calderbank v. Calderbank* [1976] Fam. 93) when considering the question of costs. [Reference was made to *Cutts v. Head* [1984] Ch. 290.]

Lionel Read Q.C. and *Simon Pickles* for the claimant. The primary question raised by the claim under section 10(2)(*d*) of the Crown Lands Resumption Ordinance was what compensation was payable for the loss or damage the claimant's business had suffered as a result of the resumption. The Ordinance is a self-sufficient statutory code which falls to be construed and applied according to its own language. Principles derived from the English statutory code of compulsory acquisition apply if, and only to the extent that, they are clearly consistent with the Hong Kong code. [Reference was made to the title to and sections 3 and 8 of the Crown Lands Resumption Ordinance 1889; sections 8, 9 and 10 of the Crown Lands Resumption Ordinance 1900; the title to and section 2 of the Crown Lands Resumption Ordinance 1921; section 2 of the United Kingdom Acquisition of Land (Assessment of Compensation) Act 1919; section 10 of the Crown Lands Resumption Ordinance (Laws of Hong Kong, 1964 rev., c. 124); section 10 of the Crown Lands Resumption (Amendment) Ordinance 1974 and sections 5 and 6 of the Crown Lands Resumption (Amendment) Ordinance 1984.]

In Hong Kong there is a statutory right to compensation for damage to a business. Three basic principles apply to the determination of the primary question. (i) Compensation is payable for all loss or damage caused by removal of the business from the land resumed. (ii) The loss or damage to be assessed is loss or damage to the claimant. (iii) The loss or damage must be the natural and reasonable consequence of the removal of the business as a result of resumption. [Reference was made to *Hughes v. Doncaster Metropolitan Borough Council* [1991] 1 A.C. 382; *Ricket v. Metropolitan Railway Co.* (1864) 5 B. & S. 149; *Horn v. Sunderland Corporation* [1941] 2 K.B. 26; *W. Rought Ltd. v. West Suffolk County Council* [1955] 2 Q.B. 338; *Prasad v. Wolverhampton Borough Council* [1983] Ch. 333; *Venables v. Department of Agriculture for Scotland*, 1932 S.C. 573; *West Midland Baptist (Trust) Association (Inc.) v. Birmingham Corporation* [1970] A.C. 874 and *J. Bibby & Sons Ltd. v. Merseyside County Council* (1979) 39 P. & C.R. 53.] There is no requirement that the loss or damage must not be too remote, nor is compensation limited by statute to that which would have been payable if the business had been extinguished. [Reference was made to *Service Welding Ltd. v. Tyne and Wear County Council*, 38 P. & C.R. 352.]

The questions whether there was an intention to relocate and whether there was an identified site for relocation are questions of fact. So are

A questions relating to the nature of the business relocated or to be relocated, and when it was or may be relocated. The Court of Appeal was entitled to interfere with the tribunal's conclusions of fact if they could not reasonably have been entertained or were otherwise founded on error of law.

The Court of Appeal correctly held that the tribunal erred in law in rejecting the relocation-based claim. The tribunal had to decide the claim B by determining whether the loss or damage was the natural and reasonable consequence of the removal of the business from the site as a result of resumption, but did not do so. [Reference was made to *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673; *Sotiros Shipping Inc. v. Sameiet Solholt* [1983] 1 Lloyd's Rep. 605; *London and South of England* C *Building Society v. Stone* [1983] 1 W.L.R. 1242; *Bede Distributors Ltd. v. Newcastle-upon-Tyne Corporation* (1973) 26 P. & C.R. 298 and *Owners of the Tasmania v. Owners of the City of Corinth* (1890) 15 App.Cas. 223.]

The scheme underlying compulsory acquisition of land can neither increase nor decrease the value of the land for the purpose of assessing compensation. The value of land embraces all the loss suffered from acquisition, including disturbance. The principle enunciated in *Pointe* D *Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands* [1947] A.C. 565 applies to the assessment of loss or damage to a business under section 10(2)(*d*) of the Ordinance as it does to the value of the land under section 10(2)(*a*).

The sums referred to in the Crown's two settlement offers could have been paid into court, and so the tribunal was not entitled to have regard E to them. Section 3 of the Lands Tribunal Ordinance provides that the Lands Tribunal is a court of record. The Lands Tribunal Direction No. 3 was validly made and covered the position. What should happen to money which a litigant wishes to pay into court is a matter of procedure and practice within section 10(4)(*b*) as to which the President of the Lands Tribunal may make directions. Primary or subordinate legislation is not required to enable him to do so. [Reference was made to *Chrulew v. Borm-* F *Reid & Co.* [1992] 1 W.L.R. 176; *Lai Hing-tong v. Attorney-General* [1990] 1 H.K.L.R. 56 and *Tramountana Armadora S.A. v. Atlantic Shipping Co. S.A.* [1978] 2 All E.R. 870.] The offers by the Crown were not as good as payments into court. If, however, the tribunal was entitled to take into account the Crown's first settlement offer, the fact that interest and costs were excluded from the offer was to be taken into consideration in G accessing its weight.

Barnes Q.C. in reply. A claimant can only recover compensation under section 10(2)(*d*) if the relevant loss or expense was a factual consequence of the resumption and was reasonably incurred. The concept of direct consequence has been rejected as part of the law in England, Scotland and certain Commonwealth countries, and it would be unsatisfactory for it to be applied to compensation for business loss occasioned by resumption. H [Reference was made to *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388; *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound (No. 2))* [1967] 1 A.C. 617; *Harvey v. Crawley Development Corporation*

[1957] 1 Q.B. 485; *West Midland Baptist (Trust) Association (Inc.) v. Birmingham Corporation* [1970] A.C. 874; *Prasad v. Wolverhampton Borough Council* [1983] Ch. 333 and *Venables v. Department of Agriculture for Scotland*, 1932 S.C. 573.] The question is whether the action of the person who incurs the expenditure is reasonable and not whether the consequence is reasonable.

It would be wrong to approach section 10 on the basis that the Ordinance is a self-contained code. Although the historical development of this area of the law was different in Hong Kong from that in England, the broad thrust of the legislation is the same in both countries. The tribunal made no error of law and was not bound to set out its full and precise findings or reasons: see *J. Bibby & Sons Ltd. v. Merseyside County Council*, 39 P. & C.R. 53, 63.

Calderbank offers can be made to settle an issue, although other issues remain to be determined. Interest and costs can be excluded from such offers: see *Tramountana Armadora S.A. v. Atlantic Shipping Co. S.A.* [1978] 2 All E.R. 870. The purpose of a *Calderbank* offer is to assist and encourage the parties to settle their disputes.

Lionel Read Q.C. and *Simon Pickles* on the cross-appeal. The reason given by the tribunal for dismissing the claim for loss of goodwill was that the value of the net assets exceeded the value of the business as a going concern so that there was no goodwill. The tribunal wrongly applied a market approach in determining the capitalisation rate of the future profits which the claimant could have been expected to make, and failed properly to assess the damage to the claimant due to the loss of its business as a result of the resumption. The value of the business as a going concern could not have been less than the value of the fixed assets of the business. Although the tribunal was entitled to have regard to what a market investor might have given for the business, the tribunal failed to ask itself whether that was a fair assessment of the damage to the claimant. The tribunal should also have considered whether the claimant might have been prepared to pay more to keep its land and business than an outside investor would pay for the business. [Reference was made to *Wright v. Municipal Council of Sydney*, 16 S.R.(N.S.W.) 348; *Remnant v. London County Council* (1952) 3 P. & C.R. 185 and *W. Clibbett Ltd. v. Avon County Council* [1976] R.V.R. 131.]

By section 10(2)(*d*) a causative link is required between loss or damage to the claimant's business on the one hand and the removal of that business as a result of resumption on the other. The section does not predicate a time when the loss or damage must be suffered, or begin to be suffered. There is no reason in the Ordinance, or in principle, why a removal before the date of resumption but after the Governor has ordered resumption may be the result of resumption, but a removal before the resumption is ordered cannot be the result of resumption. The tribunal properly decided that the resumption and removal of the business commenced with the scheme for the new town, and that there was a sufficient causative link between the loss, the removal and the resumption. [Reference was made to *Prasad v. Wolverhampton Borough Council* [1983] Ch. 333 and *Melwood Units Pty. Ltd. v. Commissioner of Main Roads* [1979] A.C. 426.]

A By section 17(3) of the Ordinance interest is payable on compensation, and section 17(3A) gives the tribunal a discretion to fix some other rate than that specified. The Court of Appeal was not entitled to interfere with the tribunal's exercise of its discretion since the tribunal had made no error of law or principle. In commercial cases it has been the practice for many years to award interest at 1 per cent. over the bank or minimum lending rate and base rate: see *Komala Deccof & Co. S.A. v. Perusahaan* B *Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* [1984] H.K.L.R. 219. [Reference was also made to *Tang Yue-chung v. Director of Lands* [1986] H.K.L.T.L.R. 27.]

Michael Barnes Q.C. and *Robert Bailey-King* for the director. In calculating the value of the goodwill the tribunal had to find the capital value of the claimant's loss of opportunity to earn profits indefinitely in C the future, and had to determine the anticipated future income stream, the period over which that was expected and the appropriate discount rate to be applied to each year's stream. Discount rates are related to interest rates. [Reference was made to *Wright v. British Railways Board* [1983] 2 A.C. 773 and *Roy v. Westminster City Council* (1975) 31 P. & C.R. 458.] The tribunal heard evidence as to the discount rate and various methods of calculation were suggested. The tribunal understood that under D section 10(2)(*d*) it had to assess the loss to the claimant of the opportunity to earn the future profits. The tribunal took into account the factors which showed that the business had a special value to the claimant above its market value. There was no error of law or principle in the tribunal's determination of the appropriate discount rate.

"Resumption" as used in section 10 means the reversion of the land to E the Crown under section 5. Loss or damage can only be due to resumption if it follows resumption. The Court of Appeal erred in equating resumption with the process of resumption. Section 4(1) and (3) indicates that resumption is to take place at the date specified in section 5. Section 17(3) indicates that the right to compensation accrues at the date of resumption.

English authorities on compulsory acquisition are of little assistance because the procedure in Hong Kong is completely different. A loss which F occurs before resumption cannot be caused by the resumption. *Aberdeen City District Council v. Sim* (1982) 264 E.G. 621 and *Prasad v. Wolverhampton Borough Council* [1983] Ch. 333, in so far as they hold the contrary, were wrongly decided but, in any event, in Hong Kong compensation is only payable for losses which occur after the land has reverted to the Crown. Losses occurring before that date are compensatable G only if they occur after resumption has become inevitable, i.e., after notice of resumption has been given under section 4. Section 10(2)(*d*) does not provide that compensation is payable for loss to a business as a result of the anticipation of resumption. The *Pointe Gourde* principle is irrelevant to the question whether compensation can be awarded for a loss which occurs prior to resumption.

When a statute provides a specific figure or rate as a numerical H guideline it must be followed unless some special feature justifies departure from it. The tribunal wrongly rejected the guidance given by section 17(3A). [Reference was made to *Wright v. British Railways Board* [1983] 2 A.C. 773 and *Suen Sun-yau v. Director of Buildings and Lands* [1991]

H.K.D.C.L.R. 33.] However, the rate which the Court of Appeal awarded was too generous to the claimant.

Read Q.C. in reply. The claimant could have expected a substantial return on its capital. The figure arrived at by the tribunal did not properly reflect the value to the claimant. [Reference was made to *Roy v. Westminster City Council*, 31 P. & C.R. 458 and *Hughes v. Doncaster Metropolitan Borough Council* (1987) 55 P. & C.R. 383.]

The discount rate adopted by the tribunal grossly overstated the risk to the claimant of staying in business and earning the profits which it reasonably expected to make.

The principle underlying *Prasad v. Wolverhampton Borough Council* [1983] Ch. 333 should be applied in Hong Kong. To the claimant resumption was inevitable once the new town scheme had been decided, announced and embarked upon, and so the claimant should be paid compensation for the losses it suffered from November 1981 to January 1987.

Cur. adv. vult.

20 February 1995. The judgment on the appeal, and of the majority of their Lordships on the cross-appeal, was delivered by LORD NICHOLLS OF BIRKENHEAD.

In the 1970s and for some years earlier the claimant company, Shun Fung Ironworks Ltd., carried on a mini-mill business at Junk Bay in Hong Kong. The claimant acquired scrap metal, partly from its own shipbreaking operations. The scrap was melted and cast into ingots or billets, which were then cut and rolled into steel reinforcement bars of different sizes. The reinforcement bars, or rebars, were sold to the construction industry and used in making reinforced concrete. The main components of the mill were electric arc furnaces for melting the metal, a continuing casting machine, and rolling mills.

In November 1981 the claimant received a letter from a government official notifying the company that the government intended to develop Junk Bay as a new town and that it would be necessary for the company to give up its site. The formal steps were taken, but only after a protracted period of years. On 15 October 1985 the Governor made an order under section 3 of the Crown Lands Resumption Ordinance that the claimant's Junk Bay site was required for a public purpose, and fixed 30 July 1986 as the date of resumption. The claimant was unable to obtain another suitable site before that day arrived, and so it had to close down its business. It finally quit Junk Bay in January 1987.

The claimant's claim for compensation came before the Lands Tribunal in October 1988. In 1987 the claimant had found a green field site, with a suitable river frontage, at Shunde in China. It lodged a claim for losses and expenses including the cost of setting up a new plant at Shunde and continuing its mini-mill business there. With ongoing items the total amount of this "relocation" claim was more than H.K.$1 billion. The Crown contended that the claimant was entitled to less than £100m.

The hearing turned into an extraordinarily mammoth exercise. The Lands Tribunal (Rhind J. and Mr. M. W. Phillips) heard evidence and

A submissions over 263 days, the transcript exceeded 17,000 pages, and the 38 volumes of written submissions were amplified by oral argument lasting 95 days. The judgment of the tribunal covered 900 pages. In round figures the tribunal awarded the claimant £131m. On appeal the Court of Appeal (Power V.-P., Nazareth and Litton JJ.A.) increased the award to £519m.

B *The business loss*

The principal dispute concerns the basis on which compensation should be paid for the loss sustained by the claimant in respect of its business. On resumption the claimant lost its land and buildings at Junk Bay. The claimant also lost its plant and machinery. These items had to be left behind because the claimant had nowhere to move them, and they were later sold by the government. The land, buildings, plant and machinery C were valued at $109·75m.

In addition the claimant had to close down its business. The claimant lost the profits which the business could have been expected to produce. The Lands Tribunal awarded nothing in respect of this head of claim, for this reason.

The lost future profits had to be valued, as at the date of resumption, D by applying appropriate discount rates to the expected profits over a period of years. The period used in this case was 13 years, from 1 July 1986 to 30 June 1999. Capitalising the profit figures as found by the Lands Tribunal at the discount rates fixed by the tribunal produced a value of a little under $79m. However, to earn these profits the claimant would have had to retain and use its land and plant at Junk Bay. So, on this footing, the value of these items at the date of resumption in 1986 was their E expected value in 1999 discounted back to 1986, namely about $2·5m. These two amounts together fell far short of the present value, almost $110m., of the site with its buildings and equipment. Hence a claim assessed in this way, which carried with it the consequence that the Junk Bay site had to be valued on a discounted basis, was much less valuable to the claimant than a claim simply for the present value of the site.

The claimant disputed this valuation of its business as a going concern. F But its primary claim at all stages of the proceedings has been that its business loss is not to be measured simply by valuing the business as at the date of resumption in 1986, the so-called "extinguishment" basis for assessing compensation. That is not the fair or true measure of the damage it sustained by the resumption. The proper measure is the costs it would incur in moving to Shunde and resuming its interrupted business there, G the so-called "relocation" basis. These costs would include the cost of adapting the new site, loss of profits while the new site was equipped and production started, together with the amount of unproductive overheads and professional fees. All these items would have to be adjusted for inflation.

The Lands Tribunal held that the extinguishment basis was the correct H basis. It also made findings regarding the ingredients comprised in the relocation claim. Had compensation fallen to be assessed on the relocation basis, the tribunal's award would have been of the order of $408m., inclusive of the $109·75m. for the Junk Bay site. This is to be compared with the tribunal's award of $131m. The Court of Appeal, reversing this

decision, held that compensation ought to be assessed on the relocation basis and, as already mentioned, increased the award to $519m.

The statutory provisions

The Crown submitted that as a matter of law the claimant could not be awarded a larger sum on a relocation basis than its maximum entitlement on an extinguishment basis. This submission makes it necessary to turn to the statutory provisions regulating the payment of compensation on the resumption of land. Section 10 of the Crown Lands Resumption Ordinance provides for the amount of compensation to be determined by the Lands Tribunal if the claimant and the acquiring authority are unable to agree, in these terms:

> "(1) The tribunal shall determine the amount of compensation (if any) payable in respect of a claim submitted to it . . . on the basis of the loss or damage suffered by the claimant due to the resumption of the land specified in the claim. (2) The tribunal shall determine the compensation (if any) payable under subsection (1) on the basis of— (*a*) the value of the land resumed and any buildings erected thereon at the date of resumption; . . . (*d*) the amount of loss or damage to a business conducted by a claimant at the date of resumption on the land resumed or in any building erected thereon, due to the removal of the business from that land or building as a result of the resumption; . . ."

In general, the value of the land resumed is taken to be the amount which the land if sold by a willing seller in the open market might be expected to realise: section 12(*d*).

The legislative code in England relating to compensation for compulsory acquisition contains no express provision corresponding to section 10(2)(*d*). Despite this difference, in all respects relevant in the present case the principles applicable under the two codes are the same. The Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) provided that regard should be had to the value of the land taken and to the damage sustained by severance: section 63. The Act contained no express provision for disturbance losses, either regarding businesses or generally. However, by judicial interpretation the value of the land was taken to mean the value of the land to the claimant and, hence, to embrace such personal losses: see the classic exposition of Scott L.J. in *Horn v. Sunderland Corporation* [1941] 2 K.B. 26, 43–49. The Acquisition of Land (Assessment of Compensation) Act 1919 set out rules for the assessment of compensation. In section 2, rule (2) provided, in short, that the value of the land should be its market value, but rule (6) stated that this should "not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land." These provisions are now reproduced in the Land Compensation Act 1961, section 5(2)(6), and the Compulsory Purchase Act 1965, section 7.

In Hong Kong the legislative history is slightly different but the end result is the same. Section 8 of the Crown Lands Resumption Ordinance 1889 (No. 23 of 1889) corresponded to section 63 of the Act of 1845. In 1921 this section, reproduced in section 10 of the Crown Lands

A Resumption Ordinance 1900 (No. 10 of 1900), was amended by the Crown Lands Resumption Ordinance 1921 (No. 14 of 1921) by adding a provision that the value of land resumed should be taken to be the price it would fetch in the open market. The entitlement to compensation for damage to a business was preserved not, as in the United Kingdom, by a saving proviso to that effect, but by adding into section 10 an express provision for the payment of such compensation. In 1974 the task of determining B the amount of compensation was transferred from the compensation board to the Lands Tribunal, and section 10 was redrafted in its present form.

Fair compensation

C The purpose of these provisions, in Hong Kong and England, is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. No allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated D fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail.

E Land may, of course, have a special value to a claimant over and above the price it would fetch if sold in the open market. Fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority. As already noted, this is well established. If he is using the land to carry on a business, the value of the land to him will include the value of his being F able to conduct his business there without disturbance. Compensation should cover this disturbance loss as well as the market value of the land itself. The authority which takes the land on resumption or compulsory acquisition does not acquire the business, but the resumption or acquisition prevents the claimant from continuing his business on the land. So the claimant loses the land and, with it, the special value it had for him as the G site of his business. The expenses and any losses he incurs in moving his business to a new site will ordinarily be the measure of the special loss he sustains by being deprived of the land and disturbed in his enjoyment of it. If, exceptionally, the business cannot be moved elsewhere, so it simply has to close down, prima facie his loss will be measured by the value of the business as a going concern. In practice it is customary and convenient to assess the value of the land and the disturbance loss separately, but H strictly in law these are no more than two inseparable elements of a single whole in that together they make up the value of the land to the owner: see *Hughes v. Doncaster Metropolitan Borough Council* [1991] 1 A.C. 382, 392, *per* Lord Bridge of Harwich.

Three conditions

The application of the general principle of fair and adequate compensation bristles with problems. As useful guidelines there are three conditions which must be satisfied. First, it goes without saying that a prerequisite to an award of compensation is that there must be a causal connection between the resumption or acquisition and the loss in question. It will be necessary to return to this prerequisite when considering the third issue arising on this appeal.

The adverse consequences to a claimant whose land is taken may extend outwards and onwards a very long way, but fairness does not require that the acquiring authority shall be responsible ad infinitum. There is a need to distinguish between adverse consequences which trigger a claim for compensation and those which do not. A similar problem exists with claims for damages in other fields. The law describes losses which are irrecoverable for this reason as too remote. In *Harvey v. Crawley Development Corporation* [1957] 1 Q.B. 485, 493, Denning L.J. gave the example of the acquisition of a house which is owner-occupied. The owner could recover the cost of buying another house as his home, but not the cost of buying a replacement house as an investment. The latter would be too remote.

The familiar and perennial difficulty lies in attempting to formulate clear practical guidance on the criteria by which remoteness is to be judged in the infinitely different sets of circumstances which arise. The overriding principle of fairness is comprehensive, but it suffers from the drawback of being imprecise, even vague, in practical terms. The tools used by lawyers are concepts of chains of causation and intervening events and the like. Reasonably foreseeable, not unlikely, probable, natural are among the descriptions which are or have been used in particular contexts. Even the much maligned epithet "direct" may still have its uses as a limiting factor in some situations.

In the present case it is not necessary to pursue these problems in relation to claims for compensation on resumption. No dispute arises over remoteness in the instant case. Suffice to say as a matter of general principle, to qualify for compensation the loss must not be too remote. That is the second condition.

Fairness requires that claims for compensation should satisfy a further, third condition in all cases. The law expects those who claim recompense to behave reasonably. If a reasonable person in the position of the claimant would have taken steps to eliminate or reduce the loss, and the claimant failed to do so, he cannot fairly expect to be compensated for the loss or the unreasonable part of it. Likewise if a reasonable person in the position of the claimant would not have incurred, or would not incur, the expenditure being claimed, fairness does not require that the authority should be responsible for such expenditure. Expressed in other words, losses or expenditure incurred unreasonably cannot sensibly be said to be caused by, or be the consequence of, or be due to the resumption.

No rigid limitations

It is against this background that their Lordships are unable to accept the Crown's submission that a claimant can never be entitled to

A compensation on a relocation basis if this would exceed the amount of compensation payable on an extinguishment basis. In the ordinary way, the expenses and losses incurred when a business is moved to a new site will be less than the value of the entire business as a going concern. Compensation payable on a relocation basis will normally be less than compensation payable on an extinguishment basis. But this will not always be so, and a rigid limitation as contended by the Crown could lead to B injustice. Such a limitation finds no support in the statutory provisions, and it would be inconsistent with the purpose for which these provisions exist. A businessman may spend large sums of money in setting up a new business. Before the business has time to prove itself, his premises are acquired compulsorily. Having no profit record, the business may be worth little. The compensation payable on an extinguishment basis would C be paltry. But a reasonable businessman, spending his own money might consider it worthwhile incurring expenditure in fitting out new premises nearby and continuing his business there. Fairness requires that in such a case the claimant should be entitled, in respect of the disturbance of his business, to his reasonable costs incurred in the removal of his business and in setting it up again at the new property. Otherwise he would not be properly compensated for his loss; he would not be placed in a financially D equivalent position.

It would be different if no reasonable businessman, forced to quit, would incur the cost of moving the business and setting it up in the new property. In the latter case a claimant would not be entitled to compensation calculated on a relocation basis. He would not be entitled to reimbursement of expenses unreasonably incurred.

E The conclusion to be drawn, in a case where the cost of moving the business to another site would exceed the present value of the business, is that this is not of itself an absolute bar to the assessment of compensation on the relocation basis. It all depends on how a reasonable businessman, using his own money, would behave in the circumstances. In such a case, however, the tribunal or court will need to scrutinise the relocation claim with care, to see whether a reasonable businessman having adequate funds F of his own might incur the expenditure. This is particularly so when, as in the case of the claimant company, compensation assessed on a relocation basis would greatly exceed the amount of compensation payable on an extinguishment basis. The greater the disparity, the more closely the claim should be examined, because the less likely would it be that a reasonable businessman would behave in this way. Compensation is not intended to G provide a means whereby a dispossessed owner can finance a business venture which, were he using his own money, he would not countenance. However, when considering these matters the tribunal or court might allow itself a moderate degree of latitude in approving as reasonable the relocation of a family business, for the reasons set out by Wells J. in *Commissioner of Highways v. Shipp Bros. Pty. Ltd.* (1978) 19 S.A.S.R. 215, 222.

H The same result can be arrived at by reasoning expressed in other language which accords more directly with the basic principle that compensation is payable for the value to the claimant of the land in question. When determining that value the tribunal is in effect assessing

how much a prudent person in the position of the claimant would himself have been prepared to give for the land sooner than lose it: see *Pastoral Finance Association Ltd. v. The Minister* [1914] A.C. 1083. He would be willing to pay more than others, because retention of the site would save him the expense of moving, and the inconvenience of temporary disturbance and also the possible loss of customers. In some circumstances, such as those already mentioned, the extra value of the land to a prudent businessman might even exceed the present value of the business. In such a case that extra value is part of the value of the land to the claimant.

The first issue: the claimant company's relocation claim

Three principal questions arise on relocation claims. (1) Can the business be relocated, or has it effectually been extinguished? Most businesses are capable of being relocated, but exceptionally this may not be practicable: for example, another suitable site may not exist. If the business is not capable of being relocated, then perforce compensation will have to be assessed on the extinguishment basis. (2) Does the claimant intend to relocate? The claimant must have reached a firm decision to relocate his business, and he must be reasonably assured that he will be able to do so. (3) Would a reasonable businessman relocate the business?

(1) *Was the business extinguished?*

A business has several attributes. These include the goods or services it supplies, its management and staff, its suppliers, its customers, its location, its reputation, its name. When a business closes down at one site and reopens elsewhere, there is usually no difficulty in knowing whether, in practical terms, it is the same business or not. Take a simple example. A restaurant in Soho is forced to close when its premises are taken over. On the following day the same management opens a new restaurant of the same style nearby, under the same name and employing the same staff. That would be a case of the same business operating from a new location. That would be so even if there were an interval of a few days or weeks before the restaurant opened at the new site. The matter would stand differently if, four or five years after the Soho restaurant was shut, the same management opened a new restaurant outside London. That could not be regarded as the same business. It would rather be a case of one business having closed down and, some years later, the same management having set itself up in the same line of business again. In between these two extremes would be examples which would not be so clear cut. In each case it is a question of fact and degree whether the new business has retained sufficient attributes of the old business for the new business sensibly to be regarded as the old business at a new site or, which comes to the same, as a continuation of the old business at a new site.

In the present case the claimant's site at Junk Bay reverted to the Crown on 30 July 1986. The claimant ceased operations in the following month, and finally vacated the land in January 1987. The claimant was then without land and without plant or machinery. Nor had it found a relocation site. If it were able to find a suitable new site, two to three years would be needed for ordering and installing plant and machinery

A before initial production could begin. A further four years would be needed for the plant to move to full production.

As events turned out, the claimant was unable to find a relocation site in Hong Kong. In December 1987 the claimant signed an agreement giving it an option over the site at Shunde. Even without the delays of litigation there would have been almost a four year gap from August 1986, when the claimant ceased steel making at Junk Bay, before the B claimant could have gone into production again with its new plant and machinery at Shunde in about July 1990. On top of that there would have been the four year build-up to full production. By the time the Lands Tribunal gave judgment on 29 June 1992 even more time had passed. By then the claimant could not have got back into the steel making business before early 1995. The claimant would have been out of the business for C more than eight years.

The Lands Tribunal was impressed by the many years' discontinuity between the business at Junk Bay and the business planned for Shunde. The tribunal noted the areas of similarity: the operations at Shunde would be the same, the raw materials would be the same, the plant and machinery would be the same type and producing the same output, and the customers would be the same. Further, the headquarters would remain in Hong D Kong, and there would be continuity of management through the Leung family and some continuity of staff: although one would expect most of the work force to be different, because Shunde is 70 or so miles from Junk Bay.

The conclusion of the Lands Tribunal was that the business planned by the claimant for Shunde would not be the same business as the one E carried on at Junk Bay. There would be no continuity between them. In 1986 the land resumption forced the claimant to close its steel making business and liquidate most of its operating assets. Its then business was effectually extinguished at that time.

The Court of Appeal took a different view. It held that the tribunal was wrong to give so much weight to the lapse of time. Their Lordships are unable to agree with the Court of Appeal. As already noted, this issue F is essentially one of fact and degree, and their Lordships can see no ground entitling the Court of Appeal to depart from the conclusions reached by the tribunal on the basis of its primary findings of fact. The Court of Appeal rightly criticised the reliance which the tribunal seems to have placed on the different political system in China, but this criticism goes no distance towards undermining the principal thrust of the tribunal's reasoning.

G This conclusion disposes of this part of the case. On this ground alone the claimant's claim for compensation to cover the cost of moving to Shunde and re-establishing its steel making business there must fail. However, it is right that their Lordships should deal briefly with the other points argued on this first issue.

H (2) *The claimant company's intention*

When the claimant left Junk Bay it had no better than an even chance of finding a relocation site. The claimant had solved that difficulty before the hearing by the Lands Tribunal began in October 1988. The tribunal

was satisfied that, from the time the claimant was served with the notice of resumption on 30 October 1985, it had a genuine intention to relocate its mini-mill business subject only to receiving sufficient compensation from the government to finance this. The tribunal was satisfied this was still the position in June 1992: the claimant would relocate in Shunde if it were compensated on a relocation basis.

The qualification concerning receipt of sufficient compensation is to be noted. This does not negative the intention to relocate. Compensation cannot be assessed on a relocation basis unless the claimant has moved his business or intends to do so. If he has already moved his business by the time of the hearing, this particular point does not arise. If he has not done so, the tribunal needs to satisfy itself that the claimant will do so. But many a person who has to close down his business because his land is taken compulsorily does not have sufficient other means of his own to move and set up again at another place. He may be desperately anxious to resume his business at another site he has found, but unless he receives enough compensation, he is not financially able to do so. Such a claimant does not lack the necessary intention to relocate. If he receives adequate compensation for his loss, it will be duly applied in meeting the expenses for which it was awarded to him. The Court of Appeal was therefore correct in holding that, on the tribunal's findings, the claimant company had the necessary intention to relocate.

This is not to say that the qualification concerning receipt of sufficient compensation is irrelevant in the present case. It furnishes an explanation on a point arising on the third of the relocation claim questions.

(3) *Would a reasonable businessman relocate?*

The tribunal held that the claimant's business was not reasonably viable because, even had there been no scheme, there would have been no profits from which shareholders could receive dividends before 1996–97. The latter part of this finding may be strictly correct, but the overall conclusion is questionable. The founder of the claimant was Mr. L. Y. Leung. In 1972 the company decided to buy another electric arc furnace, another rolling mill and a new concasting machine. To assist with the financing necessary for these purchases Mr. Leung took in New World Development Co. Ltd. as a partner. In August 1972 New World acquired a 51 per cent. stake in the company.

Over the next 10 years the claimant had a troubled time. The claimant had difficulty in mastering the concasting machine and the intricate chemistry of high tensile steel making. From 1976 to 1982 it incurred net losses of approximately $85m. In 1982 loans from New World stood at over $71m. Had there been no scheme, so that the business would have carried on at Junk Bay, the New World loans including capitalised interest would have stood at $187m. by 1990. However, the problems were gradually being overcome. Had there been no scheme, full production would have been achieved by 1985. Further, as the tribunal found, in this "no scheme world" all the New World loans would have been repaid by 1996–97. There is force in Mr. Read's submission that a business which would repay in full loan capital of these amounts over such a period could hardly be regarded as not commercially viable.

A The tribunal also concluded that, by ordinary commercial standards, relocation at Shunde was not economically feasible as the return on the investment to set up the Shunde works was too poor relative to the risks of investing in China. Here the tribunal was on firmer ground. The tribunal's basis for this conclusion was that the claimant's expected profits represented a yield of 8·7 per cent. per annum on the cost ($397m.) of building the works at Shunde, and that was without any provision for B working capital. In making this calculation the tribunal used its findings on the amount of profits the claimant would have made had there been no scheme. The tribunal ought to have used its findings on the expected profits if the business were re-established at Shunde. The latter figures show a higher yield. Even so the yield would still be far short of the return an investor would expect for a China project with its attendant risks. C Inflation had substantially increased the costs since resumption, but this does not furnish a reason for ignoring the actual costs.

This being so, one asks why New World was interested in relocating in Shunde. Mr. Leung and his two sons wished to stay in the mini-mill industry by relocating if they had to leave Junk Bay. This is understandable. But by now New World owned all the shares in the claimant, and it was providing the finance. Why was it prepared to move D and start afresh in Shunde? Further, since New World with its financial resources had no difficulty in funding worthwhile projects, why had it not simply gone ahead and financed the claimant's relocation as soon as the Shunde site had been found? The explanation lies in the claimant's intention to relocate its business at Shunde, but only if it received sufficient compensation. New World was willing to run a new mill at Shunde, but it E was not willing to put up its own money to meet the heavy costs of initially establishing the mill there. The likely returns did not make this worthwhile. This was so, even though New World had no qualms about accepting a lower return than commercial considerations would normally dictate because of the good relations the chairman had with his old home town.

On this further ground, therefore, the claim for compensation on a F relocation basis fails. Even if the steel making business carried on by the claimant at Junk Bay is not to be regarded as having been extinguished by the events which took place at and around the time of resumption, this would still not be a case in which the dispossessed owner would be entitled to be paid the cost of moving his business to Shunde and setting it up there. He would not be so entitled because a reasonable businessman G would not take this course. The acquiring authority cannot be expected to be responsible for expenses which no reasonable businessman would incur.

The second issue: value of the goodwill

For the reason already explained, the tribunal made no award in respect of injury to goodwill (loss of profits) when fixing the amount of compensation payable on an extinguishment basis. Mr. Read mounted a H sustained attack on this part of the tribunal's decision. The tribunal found that, in the no scheme world, the claimant would have earned $324m. profits over the 11-year period from 1988 to 1999. The tribunal valued this stream of expected profits at less than $79m. The tribunal's decision

on this point, carried to its logical conclusion, meant that the claimant would have been better off had it closed down the business at Junk Bay, sold the site and the plant and machinery, and invested the proceeds. The claimant ought not to have been carrying on this business at all, despite the prospect of these profits. The thrust of Mr. Read's submission was that the tribunal's conclusion was self-evidently wrong.

The present value of a stream of profits expected over a period of years depends essentially on three factors: the amount of the profits, the dates when they are expected to materialise, and the discount rate applied. There was no issue before the Board on the first two of these items. The Court of Appeal amended the tribunal's conclusion on the first item upwards, from $324m. to $345m., but nothing turns on this increase in the amount of the expected profits. The dispute concerned the third item: the discount rate.

In this calculation the discount rate, or capitalisation rate, comprises the rate at which an amount of money payable at a future date should be reduced to arrive at its present value. Its present value is the price a person would pay now for the right or prospect of receiving the amount of money in question at the future date. Three ingredients can be identified in the discount rate. One is the rate of return the potential purchaser would expect on his money, assuming that the payment to him at the future date is free of risk. A second ingredient is the allowance the potential purchaser would make because of the likely impact of inflation. He is buying today, in today's currency, the right to be paid at a future date an amount of money which, when paid, will be paid in tomorrow's depreciated currency. The third ingredient is the risk factor. The greater the risk that the purchaser may not receive in due course the future payments he is buying, the higher the rate of return he will require. It is around this third factor that the dispute before the Board centred.

In the instant case the rate of return an investor would actually expect on an investment, including an allowance for inflation, was referred to as the "nominal" rate of return. This is to be contrasted with the "real" rate of return, which is the rate of return exclusive of any allowance for inflation. The parties were agreed on the conversion of nominal rates to real rates by a geometrical deduction based on an agreed historic average inflation rate in Hong Kong of 7·1 per cent. per annum.

At the Lands Tribunal hearing Mr. Best, the claimant's accountancy expert, contended for a real discount rate of 12 per cent. to 13 per cent. when calculating the value of the future profits lost on an extinguishment basis. Mr. Li, the Crown's expert, contended for a real discount rate of 28 per cent. The parties worked on real and not nominal rates because, with the exception of the two earliest years, inflation was stripped out of all the figures used in the calculations. Mr. Best also contended that if compensation were calculated on a relocation basis, the real discount rate in respect of the profits lost in the limited period of $6\frac{1}{2}$ years comprised in the claimant's relocation claim should be 2·5 per cent. This represented the annual average of the historic Hong Kong best lending rates (about 9·7 per cent.) plus 1 per cent. less, so as to convert a nominal rate to a real rate, 7·1 per cent.

A The discount rate fixed by the tribunal was 25 per cent. real, equivalent to 33 per cent. nominal. This compared with a real discount rate of 20·1 per cent. for the Hang Seng index and 25·9 per cent. for New World itself. The tribunal did not consider the claimant was well managed, nor would it have been perceived by the market as one of the brighter jewels in New World's crown. The tribunal also rejected Mr. Best's view that 2·5 per cent. was the appropriate discount rate for valuing the profits lost by the B claimant between 1987 and 1993 had compensation fallen to be assessed on the relocation basis. There was no difference between the risks involved in the two situations; and the rate of 2·5 per cent. presupposed that the claimant's forecast profits were as good as money in the bank.

Having decided that, contrary to the view of the Lands Tribunal, compensation should be assessed on the relocation basis and not on the C extinguishment basis, the Court of Appeal was not concerned to value the goodwill of the business, that is, to value the entirety of the stream of future profits the claimant would have made had there been no scheme. Instead, the court was concerned with the valuation of the profits the claimant would lose for the period needed to re-establish its business at Shunde. As events turned out, this came to be a claim for much the same period. Under this head the claimant's claim on a relocation basis was for D a period of $6\frac{1}{2}$ years, from January 1987 to June 1993, while it was establishing the mill at Shunde and building production up to full capacity. But the tribunal found that the new mill would not reach full production capacity until 1999. So, when calculating the claimant's loss of profits on the relocation basis, the relevant period stretched until 1998. When calculating the value of the claimant's goodwill, the parties were agreed E on valuing the profits lost over a period ending in 1999, barely a year later.

The Court of Appeal regarded the tribunal's rejection of Mr. Best's 2·5 per cent. rate as fundamentally flawed. By the time the tribunal gave judgment in June 1992, five of the claim years had passed and, hence, it was no longer necessary to speculate on what risks might have assailed the claimant in running its business in those years. The tribunal was in a F position to know there had been no untoward happenings which would have substantially deprived the claimant of its profits. Indeed, the building boom in Hong Kong and South China had continued unabated. The court fixed the real discount rate for the four years from 1989–90 to 1992–93 at Mr. Best's prime (real) lending rate of 2·5 per cent. per annum. In doing so the court observed that, to an extent, some of the risk factors had G already been taken into account in the computation of profits. As to the years from 1992–93 onwards, the court considered the expected profits for these years should be discounted by an additional factor of 2·5 per cent., making the discount rate 5 per cent. The court recognised that there was an element of arbitrariness in this calculation. On this approach the amount due as compensation for lost profits was about $239m.

Before the Board the claimant submitted that the rates of 2·5 per cent. H and 5 per cent., held by the Court of Appeal to be applicable when valuing lost profits for the purposes of a relocation claim, were equally applicable when valuing lost profits for the purposes of an extinguishment claim, and that these were the correct rates. The claimant's loss was not

to be measured by the price obtainable had it sought to sell the stream of expected profits in the open market.

Herein lies a curious feature of this appeal. The claimant's case has undergone a volte-face. As already noted, in his evidence to the tribunal Mr. Best drew a distinction between the approach applicable when valuing the lost profits comprised in the relocation claim and the approach applicable when valuing the goodwill of the business on the extinguishment claim. He said there was no relation between the two discount rates. The claimant declined to accept that the profits should be discounted at the same rates. The claimant now seeks to reverse its case entirely. It seeks to submit that the same approach is applicable to both claims and, further, that the proper discount rate applicable to the extinguishment claim is the low rate of 2·5 per cent. Mr. Best contended was applicable to the relocation claim but *not* to the extinguishment claim. It also seeks to repudiate the methodology introduced and used by Mr. Best when calculating the rate of 13 per cent. for which the claimant contended before the Lands Tribunal. That methodology included an examination of the market's perception of the claimant's business as an investment.

There is force in the submission that the same discount rate is applicable to both claims. Their Lordships are unable to accept the Court of Appeal's view that conceptually these are different exercises. In each case one is quantifying the damage sustained by loss of a stream of expected future profits. But, as will be readily apparent, an insuperable difficulty confronts the claimant. The parties led evidence and conducted their respective cases before the fact finding tribunal on one footing. It is not open to the claimant on appeal to advance a radically different case which, had it been raised before the tribunal, would have been the subject of evidence and cross-examination.

Since the claimant's appeal on this point must fail for this reason, it is unnecessary for their Lordships to express their views on the claimant's contentions regarding the correct manner of valuing lost profits in this type of case. They will make only one general observation. When a tribunal is determining the amount of the loss sustained by a claimant such as the claimant company, the market perception of the risks attached to the type of business is likely to be of assistance in arriving at an appropriate discount rate. However, this must not lead the tribunal into the error of equating the amount of a claimant's loss with the price he could obtain if he sought to sell the future profit stream to an outside commercial investor. Even on the willing seller basis, a prudent landowner running his own business might be prepared to pay more to keep his land and business and the expected profits than would an outside investor to acquire them. He might be prepared to accept a lower rate of return than an outsider who has no personal links with the business. In appropriate circumstances a tribunal may properly recognise this and make a modest allowance accordingly.

The claimant's fall-back position was that the discount rate should be 13 per cent. as contended before the tribunal. This claim also must fail. The issues upon which Mr. Best and Mr. Li locked horns were essentially issues of fact for the tribunal. Among these issues was the degree of importance to be attached to the fact that the claimant's business was

A buttressed by the advantage of having, through New World, ready access to cheap finance and assured customers for much of its output. Their Lordships have seen nothing which would entitle them to disturb the tribunal's conclusions on these issues.

As a separate matter the claimant also sought to challenge the tribunal's rejection of almost the whole of its claim for compensation in respect of unproductive or duplicated overheads incurred after leaving B Junk Bay in January 1987 and in respect of costs incurred in looking for alternative accommodation for the business. There was nothing unreasonable in the claimant looking for another site or in keeping on its more important staff while doing so. The amount involved is about $12·5m. Their Lordships are unable to accept this submission. Whether these expenses were incurred reasonably was a question of fact for the C Lands Tribunal.

The third issue: loss of profits in the shadow period

The third issue is an issue of law of general importance. The claimant first became aware that its business was under threat when it received the letter from the government in November 1981. The news spread quickly. D During the first half of 1982 the possibility that the claimant's site might be resumed at some indefinite date became generally known. This had a paralysing effect on the claimant's operations. The tribunal found that the removal of the business from the land was in the nature of a slow asphyxiation for the claimant. Customers became unwilling to enter into long term forward contracts. Even New World told Hip Hing Ltd., its building subsidiary which took half of all the claimant's high tensile E rebars, to stop entering into new long term contracts with the claimant because of the threat of resumption. For its part the claimant reasonably and properly decided in June 1982 not to enter into contracts of more than six months' duration.

In the result, in the long drawn out period from November 1981 to January 1987, while operating as best it could under the threat of resumption, the company suffered financially to the extent of $18,173,000. F This is the difference between the losses the claimant made in fact and the profits or reduced losses it would have made in this period had there been no threat of resumption. (Strictly this claim for loss of profits prior to resumption should terminate on 30 July 1986, but the Crown expressly took no point on this.)

This claim raises the question whether a loss occurring *before* G resumption can be regarded, for compensation purposes, as a loss *caused* by the resumption. At first sight the question seems to admit of only one answer. Cause must precede effect. That is a truism. A loss which precedes resumption cannot be caused by it. Hence, it is said with seemingly ineluctable logic, a pre-resumption loss cannot be the subject of compensation.

The difficulty with this approach is that it leads to practical results H from which one instinctively recoils. Pursued to its logical conclusion it would mean that the businessman who moves out the week before resumption cannot recover his removal expenses; he should have waited until after resumption. It would also run counter to the reasoning

underlying the *Pointe Gourde* principle: *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands* [1947] A.C. 565. A landowner cannot claim compensation to the extent that the value of his land is increased by the very scheme of which the resumption forms an integral part. That principle applies also in reverse. A loss in value attributable to the scheme is not to enure to the detriment of a claimant: see *Melwood Units Pty. Ltd. v. Commissioner of Main Roads* [1979] A.C. 426. The underlying reasoning is that if the landowner is to be fairly compensated, scheme losses should attract compensation but scheme gains should not. Had there been no scheme those losses and gains would not have arisen. But if business losses arising in the period post-inception of the scheme and pre-resumption are to be left out of account, a claimant will not receive compensation for those losses although they are attributable to the scheme. If the threat of resumption drives away customers who need long term assurance of supply, on resumption no compensation would be payable for this loss of profits. Future losses of profits would be recoverable, but not the losses already incurred. This would be so even in respect of losses arising after the Governor had made a formal order for the resumption of the land. Any losses arising before the date on which the land was resumed and title reverted to the Crown would be outside the pale so far as compensation is concerned.

The Crown did not shrink from these conclusions. In *Aberdeen City District Council v. Sim* (1982) 264 E.G. 621 the Inner House of the Court of Session in Scotland held that legal expenses incurred before the date of the deemed notice to treat were compensatable. In *Prasad v. Wolverhampton Borough Council* [1983] Ch. 333 the Court of Appeal in England reached a similar conclusion regarding removal expenses. The Crown submitted those decisions were wrong.

The claimant's claim to compensation under this head succeeded before the Lands Tribunal. The tribunal's way around the difficulties was to construe "removal" in section 10(2)(*d*) as including threat of removal. The tribunal also held that resumption is a process, starting in the present case with the onset of the scheme for the new town at Junk Bay. The Court of Appeal disagreed on the "threat" point, but adopted a similar approach on the "process" point save that the court held that the process of resumption did not begin until the order was made by the Governor in October 1985. Accordingly the court made an award of $6,875,000, part only of the amount claimed.

Their Lordships are unable to accept the latter approach. Under section 10(1) of the Resumption Ordinance compensation is payable in respect of loss or damage suffered by the claimant due to "the resumption of the land." Resumption in that subsection is a reference to the reverter of the land to the Crown. This is an event, not a process. The event occurs on the date specified in section 5: here, 30 July 1986.

The starting point for a consideration of this conundrum must be to remind oneself that, far from furthering the legislative purpose of providing fair compensation, the Crown's contention would have the opposite effect. It would stultify fulfilment of that purpose. Coming events may cast their shadows before them, and resumption is such an event. A compensation line drawn at the place submitted by the Crown would

be highly artificial, for it would have no relation to what actually happens. That cannot be a proper basis for assessing compensation for loss which is in fact sustained. Take the person who sensibly and reasonably moves out a few days before resumption. On the Crown's argument he would have to be told that he cannot recover his removal expenses. Such a person would listen with bewilderment on having the niceties of causation patiently explained to him. He would listen with wide-eyed incredulity on being told that logic led to the inescapable conclusion that his claim failed and that he ought not to have taken the sensible course he did. That would rightly bring the law into disrepute. That, frankly, would be to indulge in legal pedantry of a most unattractive kind.

Indignant asseverations are not a substitute for reason and principle, for the law is nothing if it is not principled. So the search is for a coherent principle which will, in the first place, provide compensation for the removal expenses of a landowner who reasonably moves out before resumption.

At first sight a claim for such expenses might seem to be capable of being rationalised on the unexceptional ground that the landowner has done no more than take reasonable steps to contain his loss and that his expenses are recoverable by an application of conventional mitigation principles. The weakness in this analysis is that, at any rate as conventionally applied, the mitigation principle is directed at the mitigation of loss arising from a wrong which has already occurred. To apply this principle in cases where the wrong (or, here, the resumption) has not yet occurred might be a sensible development, but it would have to be recognised that this would be a development of the established principle.

A development along these lines would embrace the losses incurred by the claimant in the shadow period which are attributable to its decision to refuse long term orders. This was a reasonable decision, because otherwise the claimant could have faced substantial claims for breach of contract. This analysis would not embrace losses attributable to decisions made by customers themselves to look elsewhere. They knew of the claimant's plight and turned to a more secure supplier. Again, and this is the next step in the reasoning, to draw a distinction between these two types of losses would not be defensible or practicable. It could not be right to compensate for a loss caused by a landowner refusing to accept a long term order, but refuse compensation if the loss were caused by a customer who, being aware of the landowner's difficulties, sought another supplier without first offering his order to the landowner. That could not be right, because the root cause of the loss was the same in the two instances.

The principle

So where can the boundary be drawn sensibly? If the line contended by the Crown is rejected, as it must be for the reasons already spelled out, there is no sensible stopping place short of recognising that losses incurred in anticipation of resumption and because of the threat which resumption presented are to be regarded as losses caused by the resumption as much as losses arising after resumption. This involves giving the concept of causal connection an extended meaning, wide enough to embrace all such losses. To qualify for compensation a loss suffered post-resumption must

satisfy the three conditions of being causally connected, not too remote, and not a loss which a reasonable person would have avoided. A loss sustained post-scheme and pre-resumption will not fail for lack of causal connection by reason only that the loss arose before resumption, provided it arose in anticipation of resumption and because of the threat which resumption presented. In the terms of the Resumption Ordinance, a pre-resumption loss which satisfies these criteria is as much "due to" the resumption of the land as a post-resumption loss.

This conclusion should give no cause for surprise. A narrow justification for giving causal connection an extended meaning in this context can be found in the reasoning underlying the *Pointe Gourde* principle, applied to losses attributable to the scheme but which arise before resumption. But the rationale is more broad-based. This is not the occasion to examine whether a comparable approach is applicable also in other legal contexts, such as claims for damages for wrongful expulsion from land. Suffice to say, everyone seeks to plan ahead, and the law would be defective if it did not recognise this. In the law causation is a tool, but no more than a tool, used by lawyers when attributing legal responsibility for a happening to a particular source. In everyday terms, loss caused by the threat of an act which later eventuates would normally be regarded as loss caused by the act just as much as loss incurred after the act has happened.

If the line is drawn in this way the result is fair and sensible. Had there been no scheme, the losses in question would not have arisen. The result is coherent because it accords with the established *Pointe Gourde* principle. It also means that compensation is not dependent on whether the acquiring authority acts speedily or tardily in carrying through the process culminating in resumption. Losses arising after the inception of the scheme will attract compensation, however short or long the shadow period, provided they satisfy the criteria mentioned above.

Their Lordships have in mind that, at the outset of a shadow period, there may be no certainty that resumption will take place. As time passes, and the scheme proceeds, the likelihood of resumption increases, until the Governor makes a resumption order. At that stage, but not before, there is a legal commitment. Their Lordships can see no sound reason for attempting to draw a spurious line somewhere along this penumbra of gradually darkening shadow. One of the conditions for compensation is that the loss must have been incurred reasonably. If a reasonable person would have continued to trade normally the landowner cannot claim compensation for losses incurred by his refusal to accept any more orders. He cannot simply let his business run down, and then seek to recover compensation for his losses. The less certain the prospect of resumption, the greater will be the burden of showing that he acted reasonably in running down his business and that the losses were caused by the prospect of resumption. This provides also the answer to the "floodgates" argument.

Of course, many schemes involving resumption or compulsory acquisition do not come to fruition. Meanwhile properties may be unsaleable, and no compensation will ever be payable unless special "blight" provisions apply, such as those in Chapter 11 of Part VI of the Town and Country Planning Act 1990 in England. The existence of this

A type of loss, for which the landowner may be without remedy if resumption does not take place, is not a sound reason, when resumption does take place, for drawing the compensation boundary in such a way as to exclude all pre-resumption loss.

In the present case it was common ground that the scheme, of which the resumption of the claimant's site was an integral part, started on 5 November 1981 with the Crown's announcement of its intention to B resume the land. Accordingly all the claimant's pre-resumption losses, totalling $18,173,000, rank for compensation. It follows that their Lordships consider both *Sim's* case, 264 E.G. 621 and *Prasad's* case [1983] Ch. 333 were correctly decided. It also follows that Stephenson L.J.'s observation in the latter case, at p. 357, that loss of medical practice by Dr. Prasad and his wife due to the threat of impending compulsory C purchase was not compensatable, will need reconsideration if this is to be read as an observation of general application.

The fourth issue: interest

The fourth issue concerns the rate of interest payable on the compensation. Under section 17(3) of the Resumption Ordinance money D payable as compensation automatically carries interest ("shall bear interest") from the date of resumption of the land. Section 17(3A) makes provision concerning the rate of interest, in these terms:

> "The rate of interest for the purposes of subsection (3) shall be such rate as the Lands Tribunal may fix having regard to the lowest rate payable from time to time by members of The Hong Kong Association of Banks on time deposits."

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Under this subsection the Lands Tribunal has a discretion regarding the rate, but it is required to have regard to the lowest time deposit rate. The question before the Board concerns the extent of the fetter thus imposed on the tribunal when exercising its discretion.

In their Lordships' view, in requiring the tribunal to have regard to F the lowest time deposit rate the legislative purpose must be that this should be the rate fixed by the tribunal unless in the particular case there is good reason for departing from it. The rate specified is a low one, but the legislature must be taken to have intended that ordinarily this should be adequate recompense to a claimant for being kept out of his money. This would not cover a case where one of the parties has behaved unreasonably, and by his conduct protracted the time taken in determining G the claim. In a suitable case that could furnish good reason for the tribunal fixing a higher or lower rate, depending on who was at fault. However, there is nothing exceptional or unusual in a claimant financing his business with borrowed money. That by itself would not be a good reason for departing from the rate specified in section 17(3A).

Their Lordships therefore agree with the Court of Appeal that the H Lands Tribunal misdirected itself in fixing the rate of interest at prime lending rate plus 1 per cent. Accordingly it was for the Court of Appeal to fix the interest rate in the proper exercise of its discretion. In fixing the rate at the seven-day call rate plus 2 per cent., the Court of Appeal appears to have been motivated by a desire to be generous to the claimant

having regard to all the circumstances of the case. The court did not elaborate, and so one is left in the dark about the reasons for this wish to be generous. This is a little unsatisfactory, but this complex case has several unusual features and their Lordships do not consider they would be justified in inferring that the Court of Appeal, in turn, misdirected itself. The rate fixed by the Court of Appeal will stand.

The fifth issue: the Calderbank letters

The Crown's solicitors sent the claimant's solicitors two letters without prejudice save as to costs. The first of these *Calderbank* letters, as they are known colloquially (*Calderbank v. Calderbank* [1976] Fam. 93), was an offer to pay the claimant $170m. in respect of all its claims exclusive of interest and costs. Those two matters would remain for resolution by the tribunal. That letter was written on 3 November 1988. The second letter, written on 10 June 1989, was an offer to settle the plant and machinery claim for $61·5m. That offer also was exclusive of the same two matters.

Since the tribunal's award fell short of the amount of $170m. offered in the first letter, the tribunal took this letter into account when making its costs order. The claimant received its costs up to 7 November 1988, but it was ordered to pay the Crown's costs thereafter on the common fund basis. The tribunal awarded costs on the common fund basis because it considered the claimant had persevered unreasonably with an inflated relocation claim.

On appeal the total amount awarded exceeded $170m., but the sum recovered in respect of the plant and machinery ($60m.) was less than the offer in the second letter. Nevertheless the Court of Appeal declined to take this letter into account on the question of costs, primarily on the ground that the Crown ought to have made a payment into court if it wished to protect its position regarding costs.

Before the Board the Crown advanced two arguments in support of its appeal against this decision. The first was that there is no procedure for making payments into court in respect of claims for compensation in the Lands Tribunal. The Lands Tribunal Direction No. 3 issued by the president of the tribunal in 1986 was not effective to create a payments-in procedure, because the president has no power under the Lands Tribunal Ordinance to create such a procedure.

The Court of Appeal held that such a procedure undoubtedly exists, and that if the Crown had made a payment into court accompanied by a suitable notice, this would have been accepted by the Registrar of the Supreme Court. For their part their Lordships do not consider they are sufficiently apprised of all the background facts to enable them to decide this point. It is not necessary, however, to seek further assistance because the Crown's second argument succeeds.

The effect of R.S.C. (Hong Kong), Ord. 22, r. 14 and Ord. 62, r. 5 is that *Calderbank* offers shall be taken into account by the court when exercising its discretion as to costs, but not if the party making the offer could have protected his position as to costs by means of a payment into court under Order 22. Ord. 22, r. 1 provides for a defendant making a payment into court "In any action for a debt or damages." A claim for compensation is not such an action. Thus on a strict reading of the rules

A this is not a case to which the bar on taking into account a *Calderbank* offer applies. Accordingly the Court of Appeal erred in holding that the *Calderbank* letters could carry no weight on questions of costs in this case.

Their Lordships recognise this is a strict, even a literal, interpretation of the rules. However, viewing the matter more broadly, it is difficult to see why the *Calderbank* letters should not have consequences as to costs in this case. Parties are to be encouraged to settle their disputes and B assisted in their attempts to do so. By accepting the first offer the claimant would have received a significantly larger sum than it was awarded by the tribunal at the end of an enormously protracted and expensive hearing. Interest would have followed automatically, and there is no reason to doubt the tribunal would have made a costs order in favour of the claimant. Had the Crown made a payment into court, assuming this is C possible, the claimant's position would have been much the same, neither better nor worse. It is not as though a payment of money into court would have given the claimant some advantage over and above an offer by the Crown to settle for a like amount.

For these reasons their Lordships will humbly advise Her Majesty as follows: the appeal should be allowed and the judgment of the Court of Appeal set aside save as to the rate of interest payable on the D compensation; the cross-appeal should be allowed in respect of the claim for loss of profits in the shadow period so that the sum of H.K.$18,173,000 should be substituted for the sums awarded by the Lands Tribunal and the Court of Appeal; save in those two respects the order of the Lands Tribunal should be restored. The tribunal's costs order will stand. The claimant must pay four-fifths of the Crown's costs in the Court of Appeal E and before their Lordships' Board.

LORD MUSTILL and LORD SLYNN OF HADLEY delivered the following dissenting judgment on the cross-appeal. Although we are in entire agreement with the advice humbly tendered to Her Majesty that the appeal be allowed in respect of the matters raised in the appeal and for the reasons given, we regret that we feel constrained humbly to advise Her F Majesty that the cross-appeal should be dismissed for reasons which we set out briefly.

From the receipt of the government's letter of 5 November 1981 the claimant knew that the government had concluded that, for the development of the new town at Junk Bay, the claimant's site would have to be cleared and this opinion quickly became public knowledge.

G Customers in the circumstances were unwilling to place new long term contracts; the claimant was itself unwilling to undertake commitments for delivery more than six months ahead. As the Lands Tribunal found, "the claimant's net losses and indebtedness continued to mount." Inquiries were made as to possible relocation.

At discussions which took place between the claimant and government officials over the years, the latter continued to say that it would be H necessary to take the land for the purpose of the new town and the claimant stressed its anxiety as to whether resumption would go ahead at all, but without any decision being taken by the government. It was only in October 1985 that the government committed itself to resume the land.

Operations finally ceased in August 1986, the claimant vacating the site on 19 January 1987.

There is no doubt that the claimant suffered considerable loss before resumption as a result of the anticipated or "threatened" resumption of its site and during the long period which intervened while plans were made and before a decision was announced. Its sense of grievance is not only intelligible but natural. The question is, however, whether it has any legal right to be compensated for its losses during what has been called "the shadow period," i.e. between the initial notification and actual resumption.

It is accepted that there is no general remedy to be compensated for blight or disturbance. Everything depends on a proper construction of the Crown Lands Resumption Ordinance.

The Ordinance provides three stages for the resumption of land. The first is a decision by the Governor in Council that resumption of the land is required for a public purpose, whereupon he may order resumption of the land under the Ordinance. In this case his order was made on 15 October 1985. The second stage is the publishing in the Gazette and the serving on the owner and fixing on the land of a notice that the land is so required; the notice to fix on the land must state the date on which the land will be resumed. In this case the notice was posted on 30 October 1985. The third stage is that the land reverts to the Crown on the date given in the notice unless it has in the meantime been purchased by agreement. The land reverted to the Crown in the present case on 30 July 1986.

If compensation cannot be agreed the owners' claim is referred to the Lands Tribunal under sections 6(3) or 8(2) of the Ordinance. The basis of the compensation payable is set out in section 10(2) and, so far as relevant to this cross-appeal, is to be on the basis of:

> "(*d*) the amount of loss or damage to a business conducted by a the claimant at the date of resumption on the land resumed or in any building erected thereon, due to the removal of the business from that land or building as a result of the resumption; . . . "

The principles of assessment and additional rules for determining compensation are set out in sections 11 and 12 of the Ordinance and by section 17(3) the sum of money payable as compensation shall bear interest from the date of resumption of the land until the date notified for collection of the compensation.

The Lands Tribunal, following a number of Scottish judgments (in particular *Aberdeen City District Council v. Sim*, 264 E.G. 621) and two English decisions (*Prasad v. Wolverhampton Borough Council* [1983] Ch. 333 and *West Midland Baptist (Trust) Association (Inc.) v. Birmingham Corporation* [1970] A.C. 874), directed itself that the words "loss or damage" meant "all loss or damage" and that compensation should be "full compensation."

They concluded: "So long as there has been resumption and the removal of a business as the result of it, we see no difficulty in interpreting 'removal,' so as to include 'the threat' of a removal." Moreover "the resumption in the present case was an on-going process, commencing with the scheme for the new town at Junk Bay" and "the removal of [the

A claimant's] business from that land was an on-going process" starting in late 1981 when it was known that the claimant was under "the shadow" of resumption. They accordingly awarded compensation in the sum of $13,736,000.

Attractive as the Lands Tribunal's decision is from the point of view of achieving fair compensation we are unable to accept that "resumption" in section 10(2)(*d*) includes "threat of resumption" or that removal B includes "threat of removal."

Resumption in sections 3 and 4 and 4A of the Ordinance is clearly referring to the reversion of the land to the Crown as provided for in section 5. The compensation to be determined under section 10(1) on the basis of the loss or damage suffered by the the claimant "due to the resumption of the land" is also referring to the reversion of the land to C the Crown and cannot be read as including a "threat of resumption." In section 10(2)(*d*) the loss or damage must be "to a business conducted by a the claimant at the date of resumption on the land resumed." This is clearly referring to the final date of vesting in the Crown as provided in section 5. It cannot in our view mean a business conducted at the date when resumption is threatened on land threatened to be resumed. The loss due to removal of the business from the land "as a result of the D resumption" is again referring to the actual vesting of the land in the Crown: it does not mean as a result of the threatened resumption.

The relevant loss or damage is that which "results from the resumption." In our view that loss and damage can only flow from a resumption after it has occurred. It cannot begin to flow five years before the resumption occurs. Moreover we think that it would be very E unsatisfactory in a case where two landowners were told that their land was to be required, where both suffered identifical blight, but where five years on the land of one was resumed, but the land of the other was not, that only the former should receive compensation for the blight during the "shadow period."

The Court of Appeal ordered that the loss of future profits should run from 15 October 1985, the date of the Governor's order that the land F should be resumed, and not from 19 January 1987 (the date when the land was vacated). This meant an increase of $6,875,000. They did so by construing the word resumption in section 10(2)(*d*) as "process of resumption" for this purpose. They set aside, however, the claim for damages preceding the actual resumption of the land.

For the reasons given above we do not think that this is the right G construction. In our view both in section 10 and in section 17(3) resumption means the vesting in the Crown and does not mean either the threat of resumption or the process of resumption.

Much emphasis has been laid on the decision of the Court of Appeal in *Prasad v. Wolverhampton Borough Council* [1983] Ch. 333. There the appellants bought a house which was subject to a compulsory purchase order made under section 43 of the Housing Act 1957. They vacated the H house shortly before the council served a notice to treat and then claimed compensation for disturbance under section 37(1)(*a*) of the Land Compensation Act 1973. The question was under the latter section whether they had been "displaced from ... land in consequence of ... the

acquisition of the land" by the council. The Court of Appeal considered that loss of trade or business resulting from the threat of compulsory purchase was not the subject matter of compensation but that losses reasonably incurred by reason of the acquisition including losses incurred in anticipation of, and prior to, the land actually being acquired were compensatable. The words "in consequence of," it was said, had a causal rather than a temporal meaning in the Land Compensation Act 1973.

We do not consider the reasons in that case determinative of the present issue. The scheme of the Act of 1973 and its antecedents are very different from the present Ordinance. The Court of Appeal clearly regarded the process of compulsory acquisition as a continuing one and the expenses of moving were incurred after that process began by the making of a compulsory purchase order. Stephenson L.J., at p. 345, also recognised that to move before the notice to treat is served may be justified as a way of mitigating damage:

> "and it cannot be disputed that it is often wise, and not always risky, for a person threatened with the compulsory acquisition of his property to find alternative accommodation which may put him to expense and which may cause disturbance and loss of trade or business. Such prudent anticipation may mitigate the loss resulting from losing the property, whereas waiting to move till the last moment may increase the dispossessed person's loss."

It is to be noted that in *Smith v. Strathclyde Regional Council* (1980) 42 P. & C.R. 397 the Lands Tribunal in Scotland also considered that expenditure incurred before the notice to treat as a way of mitigating damage could be recovered. It seems to us that these cases are all dealing with language and a scheme which is different from the present one.

Nor do we consider that the principle in *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands* [1947] A.C. 565 can affect the clear meaning of the words used in the Ordinance.

The facts and arguments in this case may militate strongly in favour of an ex gratia payment in view of the length of time under which the property was "in shadow" and in favour of the Ordinance being changed to include blight occurring prior to actual resumption. These however are matters for the government and the legislature and we would humbly advise Her Majesty that the cross-appeal should be dismissed.

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