Privy Council Appeal No. 42 of 1994

Director of Buildings and Lands *Appellant*

v.

Shun Fung Ironworks Limited *Respondent*

and Cross-appeal

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH FEBRUARY 1995

Present at the hearing:-

LORD KEITH OF KINKEL
LORD MUSTILL
LORD SLYNN OF HADLEY
LORD LLOYD OF BERWICK
LORD NICHOLLS OF BIRKENHEAD

*[Delivered by **Lord Nicholls of Birkenhead**]*

In the 1970s and for some years earlier Shun Fung Ironworks Limited carried on a mini-mill business at Junk Bay in Hong Kong. The company 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 Shun Fung 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 15th October 1985 the Governor made an order under section 3 of the Crown Lands Resumption Ordinance that Shun Fung's Junk Bay site was required for a public purpose, and fixed 30th July 1986 as the date of resumption. Shun Fung 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.

Shun Fung's claim for compensation came before the Lands Tribunal in October 1988. In 1987 the company 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 HK$1 billion. The Crown contended that Shun Fung was entitled to less than $100 million.

The hearing turned into an extraordinarily mammoth exercise. The Lands Tribunal (Rhind J. and Mr. M.W. Phillips) heard evidence and 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 Shun Fung $131 million. On appeal the Court of Appeal (Power V.-P., and Nazareth and Litton JJ.A.) increased the award to $519 million.

The business loss

The principal dispute concerns the basis on which compensation should be paid for the loss sustained by Shun Fung in respect of its business. On resumption Shun Fung lost its land and buildings at Junk Bay. Shun Fung also lost its plant and machinery. These items had to be left behind because Shun Fung had nowhere to move them, and they were later sold by the government. The land, buildings, plant and machinery were valued at $109.75 million.

In addition Shun Fung had to close down its business. Shun Fung 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, by applying appropriate discount rates to the expected profits over a period of years. The period used in this case was thirteen years, from 1st July 1986 to 30th 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 $79 million. However, to earn these profits Shun Fung 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 expected value in 1999 discounted back to 1986, namely about $2.5 million. These two amounts together fell far short of the present value, almost $110 million, 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 Shun Fung than a claim simply for the present value of the site.

Shun Fung disputed this valuation of its business as a going concern. 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, 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 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 $408 million, inclusive of the $109.75 million for the Junk Bay site. This is to be compared with the tribunal's award of $131 million. 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 $519 million.

The statutory provisions

The Crown submitted that as a matter of law Shun Fung 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 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, sections 5(2) and (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 (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 Resumption Ordinance 1900, was amended 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 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

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 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.

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 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 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 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, per Lord Bridge of Harwich at page 392.

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 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 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 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 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.

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 of his own might incur the expenditure. This is particularly so when, as in the case of Shun Fung, 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 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.

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: Shun Fung'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 re-opens 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 Shun Fung's site at Junk Bay reverted to the Crown on 30th July 1986. Shun Fung ceased operations in the following month, and finally vacated the land in January 1987. The company 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 before initial production could begin. A further four years would be needed for the plant to move to full production.

As events turned out, Shun Fung was unable to find a relocation site in Hong Kong. In December 1987 the company 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 Shun Fung ceased steel making at Junk Bay, before the company 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 29th June 1992 even more time had passed. By then Shun Fung could not have got back into the steel making business before early 1995. Shun Fung would have been out of the business for 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 Kong, and there would be continuity of management through the Leung family and some continuity of staff: although one would expect most of the workforce 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 Shun Fung for Shunde would not be the same business as the one carried on at Junk Bay. There would be no continuity between them. In 1986 the land resumption forced Shun Fung 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 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.

This conclusion disposes of this part of the case. On this ground alone Shun Fung'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.

(2) Shun Fung's intention

When Shun Fung left Junk Bay it had no better than an even chance of finding a relocation site. The company had solved that difficulty before the hearing by the Lands Tribunal began in October 1988. The tribunal was satisfied that, from the time Shun Fung was served with the notice of resumption on 30th 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: Shun Fung 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, Shun Fung 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 Shun Fung'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 Shun Fung 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 Company Limited as a partner. In August 1972 New World acquired a 51% stake in the company.

Over the next ten years Shun Fung had a troubled time. The company 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 $85 million. In 1982 loans from New World stood at over $71 million. 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 $187 million 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.

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 Shun Fung's expected profits represented a yield of 8.7% per annum on the cost ($397 million) of building the works at Shunde, and that was without any provision for working capital. In making this calculation the tribunal used its findings on the amount of profits Shun Fung 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. 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 Shun Fung, and it was providing the finance. Why was it prepared to move 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 Shun Fung's relocation as soon as the Shunde site had been found? The explanation lies in Shun Fung'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 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 relocation basis fails. Even if the steel making business carried on by Shun Fung 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 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 sustained attack on this part of the tribunal's decision. The tribunal found that, in the no scheme world, Shun Fung would have earned $324 million profits over the eleven year period from 1988 to 1999. The tribunal valued this stream of expected profits at less than $79 million. The tribunal's decision on this point, carried to its logical conclusion, meant that Shun Fung 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. Shun Fung 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 $324 million to $345 million, 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 annum.

At the Lands Tribunal hearing Mr. Best, Shun Fung's accountancy expert, contended for a real discount rate of 12% to 13% 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%. 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 six and a half years comprised in Shun Fung's relocation claim should be 2.5%. This represented the annual average of the historic Hong Kong best lending rates (about 9.7%) plus 1% less, so as to convert a nominal rate to a real rate, 7.1%.

The discount rate fixed by the tribunal was 25% real, equivalent to 33% nominal. This compared with a real discount rate of 20.1% for the Hang Seng index and 25.9% for New World itself. The tribunal did not consider Shun Fung 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% was the appropriate discount rate for valuing the profits lost by Shun Fung 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% presupposed that Shun Fung'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 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 Shun Fung would have made had there been no scheme. Instead, the Court was concerned with the valuation of the profits Shun Fung 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 Shun Fung's claim on a relocation basis was for a period of six and one half 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 Shun Fung's loss of profits on the relocation basis, the relevant period stretched until 1998. When calculating the value of Shun Fung's goodwill, the parties were agreed 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% 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 Shun Fung in running its business in those years. The tribunal was in a position to know there had been no untoward happenings which would have substantially deprived Shun Fung 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 1992/3 at Mr. Best's prime (real) lending rate of 2.5% per annum. In doing so the Court observed that, to an extent, some of the risk factors had 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%, making the discount rate 5%. 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 $239 million.

Before the Board Shun Fung submitted that the rates of 2.5% and 5%, 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. Shun Fung'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. Shun Fung'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. Shun Fung declined to accept that the profits should be discounted at the same rates. Shun Fung 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% 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% for which Shun Fung contended before the Lands Tribunal. That methodology included an examination of the market's perception of Shun Fung'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 Shun Fung. The parties led evidence and conducted their respective cases before the fact finding tribunal on one footing. It is not open to Shun Fung 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 Shun Fung's appeal on this point must fail for this reason, it is unnecessary for their Lordships to express their views on Shun Fung'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 Shun Fung, 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.

Shun Fung's fall-back position was that the discount rate should be 13% 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 Shun Fung's business was 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 Shun Fung 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 Junk Bay in January 1987 and in respect of costs incurred in looking for alternative accommodation for the business. There was nothing unreasonable in Shun Fung looking for another site or in keeping on its more important staff while doing so. The amount involved is about $12.5 million. Their Lordships are unable to accept this submission. Whether these expenses were incurred reasonably was a question of fact for the Lands Tribunal.

The third issue: loss of profits in the shadow period

The third issue is an issue of law of general importance. Shun Fung first became aware that its business was under threat when it received the letter from the government in November 1981. The news spread quickly. During the first half of 1982 the possibility that Shun Fung's site might be resumed at some indefinite date became generally known. This had a paralysing effect on Shun Fung's operations. The tribunal found that the removal of the business from the land was in the nature of a slow asphyxiation for Shun Fung. 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 Shun Fung's high tensile rebars, to stop entering into new long term contracts with Shun Fung because of the threat of resumption. For its part Shun Fung 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 million. This is the difference between the losses Shun Fung 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 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 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. 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.

Shun Fung'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 million, 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, 30th 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 Shun Fung in the shadow period which are attributable to its decision to refuse long term orders. This was a reasonable decision, because otherwise the company 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 Shun Fung'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 II of Part VI of the Town and Country Planning Act 1990 in England. The existence of this 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 Shun Fung's site was an integral part, started on 5th November 1981 with the Crown's announcement of its intention to resume the land. Accordingly all Shun Fung's pre-resumption losses, totalling $18.173 million, rank for compensation. It follows that their Lordships consider both *Sim's* case and *Prasad's* case were correctly decided. It also follows that

Stephenson L.J.'s observation in the latter case, at page 357, that loss of medical practice by Dr. Prasad and his wife due to the threat of impending compulsory 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 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:-

> "(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."

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 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 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 Lands Tribunal misdirected itself in fixing the rate of interest at prime lending rate plus one 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 7-day call rate plus two per cent, the Court of Appeal appears to have been motivated by a desire to be generous to Shun Fung 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 Shun Fung's solicitors two letters without prejudice save as to costs. The first of these Calderbank letters, as they are known colloquially, was an offer to pay Shun Fung $170 million 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 3rd November 1988. The second letter, written on 10th June 1989, was an offer to settle the plant and machinery claim for $61.5 million. That offer also was exclusive of the same two matters.

Since the tribunal's award fell short of the amount of $170 million offered in the first letter, the tribunal took this letter into account when making its costs order. Shun Fung received its costs up to 7th 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 Shun Fung had persevered unreasonably with an inflated relocation claim.

On appeal the total amount awarded exceeded $170 million, but the sum recovered in respect of the plant and machinery ($60 million) 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 Order 22 rule 14 and Order 62 rule 5 of the Rules of the Supreme Court 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. Order 22 rule 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 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 assisted in their attempts to do so. By accepting the first offer Shun Fung 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 Shun Fung. Had the Crown made a payment into court, assuming this is possible, Shun Fung'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 Shun Fung 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 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 HK$18.173 million 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. Shun Fung must pay four-fifths of the Crown's costs in the Court of Appeal and before their Lordships' Board.

Dissenting judgment on the Cross-appeal delivered by ***Lord Mustill*** *and* ***Lord Slynn of Hadley***

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 Majesty that the cross-appeal should be dismissed for reasons which we set out briefly.

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

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

At discussions which took place between SFI and Government officials over the years, the latter continued to say that it would be necessary to take the land for the purpose of the new town and SFI 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, SFI vacating the site on 19th January 1987.

There is no doubt that SFI 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 (Cap. 124).

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 15th 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 30th 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 30th 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 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 compensatior .

The Lands Tribunal, following a number of Scottish judgments (in particular *Aberdeen City District Council v. Sim* (1982) 264 E.G. 621) and two English decisions (*Prasad v. Wolverhampton Borough Council* [1983] Ch. 333 and *West Midland Baptist (Trust) Association 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 the business as a 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 SFI's business from that land was an on-going process" starting in late 1981 when it was known that SFI 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 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 claimant "due to the resumption of the land" is also referring to the reversion of the land to 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 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 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 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 15th October 1985, the date of the Governor's order that the land should be resumed, and not from 19th 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 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 (supra)*. 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 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 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 page 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 & Transport Company Limited 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.