

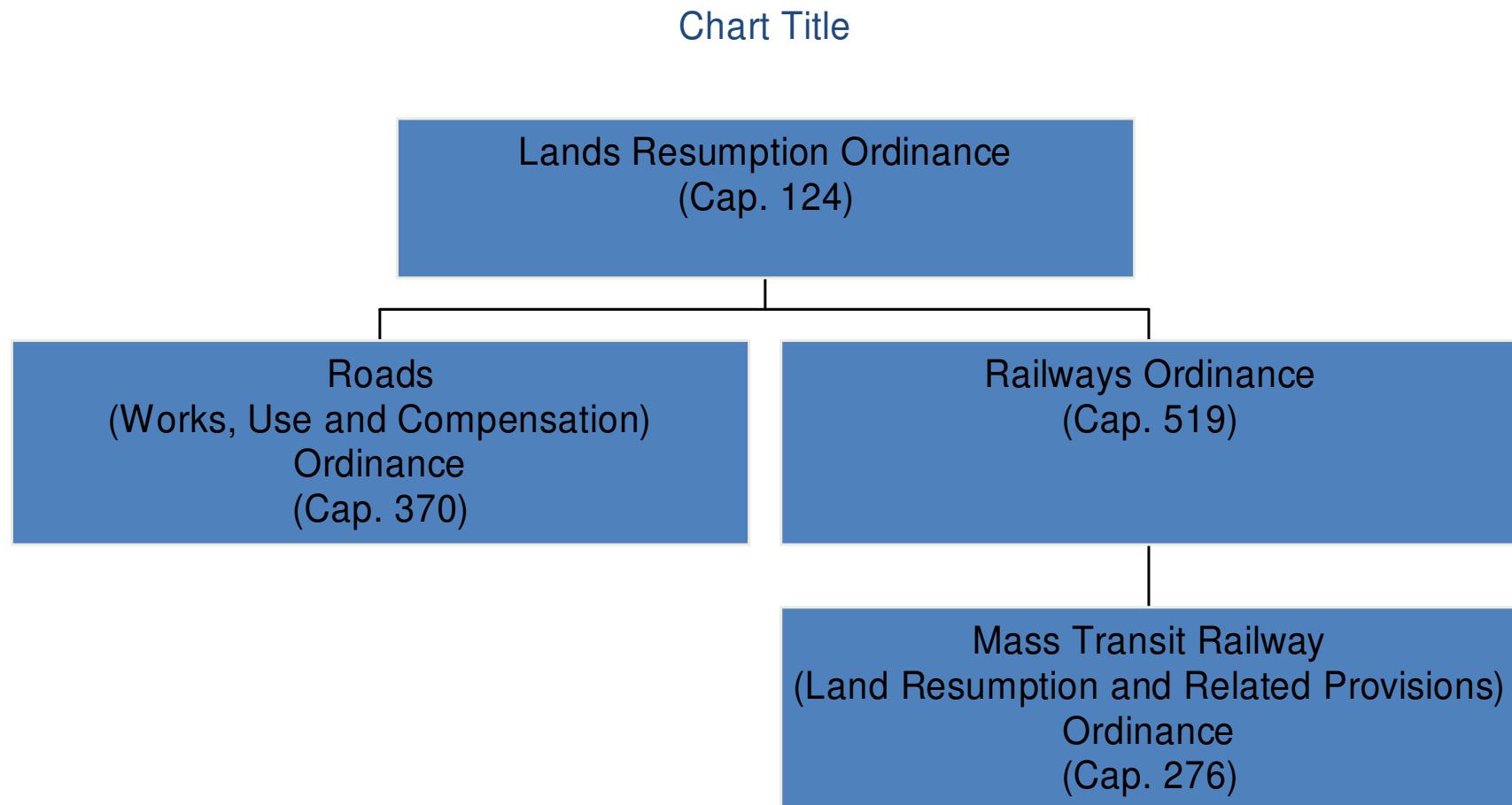
# **RESUMPTION & VALUATION IN HONG KONG**

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## Common Law Principle :

A government cannot take away its people's private property without statutory authority or compensation.

# Thus the power to resume must be a statutory creature



# Land Resumption Ordinance

- Resumption of any land can only be required for a public purpose;
- This Ordinance is relatively short so that its application relies very much on the common law principles which have evolved both in Hong Kong and particularly in other common law jurisdictions in relation to similar legislation.

# Interaction with Basic Law

## **Article 6 :**

The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.

## **Article 84:**

The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdiction.

## **Article 105:**

The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

# “real value of the property concerned”

- “In general, property is worth what it will fetch, and its open market value reflects its real value. But as the Courts of Hong Kong have repeatedly emphasised, this is not always the case. Sometimes the market is prepared to pay a speculative price which exceeds the true value of the property and reflects an element for which the resuming authority ought not be required to pay. There is nothing in art. 105 which requires it to do so.”
- “Secondly, compensation is only required to be paid for ‘the property concerned’, that is to say for the interest acquired. In the present case, that means for the land for the duration of the Crown lease and subject to the user restrictions in the lease. The right to exploit the development potential of the land by using it as building land was not disposed of by the Crown and remains the property of the Government for which it ought not to be required to pay. If the claimant’s argument is correct, then the Government’s practice in charging a full premium on modification of the terms of a Crown lease is also open to challenge under the Basic Law; and I do not consider that that is right.”<sup>1</sup>

1. *Director of Lands v. Yin Shuen Enterprises Ltd.* (2003) 6 HKCFA 1, [2003] 2 HKC 490

# Principle of Equivalence

Among the most important rules on compulsory purchase is the principle of equivalence, i.e. in the words of Scott LJ in *Horn v Sunderland Corporation* (1941) 2 KB 26, at p.42, “the right to be, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater.”

# Principle of Open Market Value

- In Hong Kong, open market value is the basis for valuing the land resumed<sup>2</sup>.
- It is built on the concept of fair compensation that a claimant is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount.
- “In general, property is worth what it will fetch, and its open market value reflects its real value.”<sup>3</sup>

2. Section 10(2) and 12(d) of Lands Resumption Ordinance

3. *Director of Lands v. Yin Shuen Enterprises Ltd and Another* (2003) 6 HKCFA 1, [2003] 2 HKC 490

# Special Value of Land

- Land may have a special value to a claimant, a dispossessed occupier in particular, over and above the price it would fetch if sold in the open market.
- In some jurisdiction, monetary payment over and above actual damage was usually awarded as a solatium for injured feelings.
- Arguably, this special economic advantage to the owner/occupier arising out of the claimant's occupation or use of the land is currently taken care of by "disturbance compensation" under section 10(2)(d) and 10(2)(e) of the Lands Resumption Ordinance.

# Special Adaptability

- On the other hand, “the special adaptability for some purpose or other is the basis of the market value of all land”. In *Re Lucas and Chesterfield Gas and Water Board* (1909) 1 KB 16, Fletcher Moulton LJ went on to state:

.....that where the special value exists only for the particular purchaser who has .... obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it. **But where the special value exists also for other possible purchasers**, so that there is, so to speak, a market, real though limited, in which the special value goes towards fixing the market price the owner is entitled to have this element of value taken into consideration.....

- Thus, possible purchasers include those interested not merely in the land in its existing state but also in its potentialities.
- *Kwok Lee Sau-sang v. Director of Lands and Survey* (1977) HKLTLR 105 is one of a number of cases, where the Lands Tribunal has held that an owner is entitled to recover higher compensation for loss of development value where, on the evidence, that potential has been established.

# Hope Value

- “If it is shown that a property has an added value on the open market because of the likelihood that it will be incorporated into a scheme of redevelopment then this added value must be taken into account when compensation is being assessed. However, before such a value can be attributed to the property the likelihood of redevelopment must be shown”. <sup>4</sup>
- Elementarily the price which the land in question might reasonably be expected to fetch on the open market at the valuation date would be expected to reflect whatever development potential the land has .<sup>5</sup>

4. *Cheung Lai-wan v Director of Lands and Survey* (1977) HKLTLR 14

5. *Mon Tresor & Mon Desert Ltd v Ministry of Housing and Lands* [2008] UKPC 31, [2008] 3 EGLR 13, [2008] 38 EG 140

# Balance of Probabilities

- In *Cheung Lai-wan and Others v Director of Lands and Survey* [1977] HKLTR 14, the Tribunal held that the existence of a joint development by 4 claimants in respect of 6 separate resumed properties had to be established on the **balance of probabilities** and since the Tribunal was not satisfied on the evidence that redevelopment had been established, the compensation of each property was valued separately.

## *“Probability” and “Realised Probability”*

- Citing *v Revenue Divisional Officer, Vizagapatam* [1939] AC 302, the House of Lords<sup>6</sup> distinguished “possibilities of the land and not its realized possibilities”, and emphasised that a deduction would have to be made to take account of the fact that the land might not be required for building or might not be required for a considerable time. **“This is a powerful confirmation of a principled approach to valuation.”**

6. *Transport for London v. Spirerose Limited (in Administration)*[2009] UKHL 44

# Additional Rules for Determining Compensation

- Under Section 11 of Lands Resumption Ordinance, when a property is resumed, there are certain principles of assessing compensation for **the value of the land resumed and of any buildings thereon**.
- Under Section 12, there are additional rules for determining compensation generally :-
  - (a) no allowance shall be made on account of the resumption being compulsory;
  - (aa) no account shall be taken of the fact that the land lies within or is affected by any area, zone or district reserved or set apart for the purposes specified in section 4(1)(a), (c), (d), (e), (f), (g), (h) or (i) of the Town Planning Ordinance (Cap. 131);
  - (b) no compensation shall be given in respect of any use of the land which is not in accordance with the terms of the Government lease under which the land is held;
  - (c) no compensation shall be given in respect of any expectancy or probability of the grant or renewal or continuance, by the Government or by any person, of any licence, permission, lease or permit whatsoever:

Provided that this paragraph shall not apply to any case in which the grant or renewal or continuance of any licence, permission, lease or permit could have been enforced as of right if the land in question had not been resumed; and

(d) subject to the provisions of section 11 and to the provisions of paragraphs (aa), (b) and (c) of this section, the value of the land resumed shall be taken to be the amount which the land if sold by a willing seller in the open market might be expected to realize.

- Apart from Section 12(c) , the above are in fact common law compulsory acquisition principles developed through time.

“Compensation is only required to be paid for "the property concerned" i.e. for the land for the duration of the Government lease and subject to the user restrictions in the lease.”

*Director of Lands v. Yin Shuen Enterprises Ltd and Nam Chun Investment Ltd* [2003] 2 HKC 490, [2003] 2 HKLRD 399, [2003] 6 HKCFAR 1

and

*Dragon House Investment Limited and Nam Chun Investment Company Limited v. Director of Lands* [2005] 4 HKLRD 480, (2005) 8 HKCFAR 668

# The Pointe Gourde Principle

- The hypothetical basis on which the open market value is ascertained, is on the assumption that the resumed land is available for sale in that market and is not being compulsorily resumed by the Government.
- It follows from that assumption that any increase in value or decrease in value, wholly due to the purpose for which the land is being resumed, should be disregarded.
- This principle, commonly referred to as the Pointe Gourde principle, is indeed a nomenclature from the Privy Council decision in *Pointe Gourde Quarrying and Transport Co. v Sub-Intendent of Crown Lands* (1947) AC 565. In this latter case, Lord MacDermott in fact used the wordings  
“that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.”

# Disturbance Compensation

- Disturbance is not expressly referred to in the Lands Resumption Ordinance, although it is referred to in other compensation ordinances.
- However, there are express provisions in section 10(2) for payment of what is commonly called disturbance:
  - (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;
  - (e)(i) the amount of any expenses reasonably incurred by him in moving from any premises owned or occupied by him on the land resumed to, or in connection with the acquisition of, alternative land or land and buildings, but excluding any amount to which paragraph (d) applies;
  - (e)(ii) the amount of any costs or remuneration mentioned in sections 6(2A) and 8(4).

# Application of Explicit Provisions

- In *Director of Public Works v Leung Sze* (1977) HKLTLR 158, the Lands Tribunal however did not consider “loss or damage to a business conducted by a claimant “ could be exactly equated to “disturbance” and but preferred to interpret directly from the words of section 10(2)(d) without any preconceptions, as to their extent , drawn from the approach of the English courts.
- In *Leung Kee Investment Co. Limited v. Secretary for Transport*, LDMR 26-28 of 1999, the Lands Tribunal refused to allow for any reinstatement or replacement in applying section 10(2)(e)(i) as they were items not being expenses incurred in moving from the premises resumed to the new house, or in connection with the acquisition of the new house.

Reasonable expenses “in removing”

*Glasgow Corporation v. Anderson*  
(1976) SLT 225

# Elements of Disturbance Compensation

Typical commercial or business disturbance damages are:

- Advertising, mailing costs concerning change of address and cost of new signs;
- Architects', planners' and surveyors' fees paid for frustrated projects;
- Executives' loss of time spent in looking for new premises, supervising and planning the move to new premises or dealing with business difficulties, negotiations or discussions arising out of the resumption;
- Cost of adaptation of new premises (doubtful after *Leung Kee* case);
- Double/unproductive overheads;
- Cost of bridging finance;
- Loss on forced sale of inventories/ stock;
- Loss of fixtures and fittings.

# Conditions of Compensation

A successful claimant must be able to meet 3 conditions<sup>7</sup> before his claim could be allowed. In brief, these three conditions are:

- (1) the causation could be established between the loss claimed and the resumption;
- (2) the loss claimed must not be too remote from the cause and
- (3) the claimant has discharged his duty to mitigate his loss.

*7. Director of Buildings v. Shun Fung Ironworks Ltd.* [1995] 2 A.C. 111, [1995] 1 HKC 417

# Removal or Extinguishment of Business

- ‘Removal of the business from the land’ covers not only the situation where the business is removed to another place but also the situation where the business is, because of the resumption, extinguished. In some cases a resumed owner may elect not to relocate for financial reasons.<sup>8</sup>
- Whether his decision is reasonable, and whether he is entitled to compensation for total extinguishment, will depend on the facts of each case.
- The onus of proving that relocation is not feasible falls on the claimant.

8. *Director of Lands & Survey v Chan Tai Land Investment Ltd.* (1978) HKLTLR 115

# Factors for Determining Move

- If a reasonable man in the position of the Applicant would have relocated his business elsewhere and would not have opted for total extinguishment of the same, the Applicant would only be allowed to claim compensation in relation of the cost of removing his business to a new location.
- Appropriate weight must be given to the aspects of whether in the circumstances it was practical to move, and whether one could reasonably anticipate a successful result if such a move had been made.
- Regard must be had not only to the nature of the business itself but also to the position of the individuals who made up the human element of the business.

*Yip Kui t/a Tai Wo Trading Co. v. Secretary for  
Transport,  
LDMR 52 of 2000*

The following factors were considered:

- Whether the business was inextricably tied to the land;
- Age of the Applicant;
- Availability of alternative premises;
- Applicant's effort in locating alternatives;
- Financial resources

*Yip Kui t/a Tai Wo Trading Co. v. Secretary for Transport, CACV 379 of 2002*

- Lands Tribunal rejected the applicant's claim that he had been forced to close the business and awarded compensation instead on the basis of relocation.
- “From that it is abundantly clear that the claim which can be made is a claim in respect of loss or damage which has been suffered or expenses incurred. It may be that quantification of that loss would depend upon an assessment of future loss or expenses which would be incurred but any claim for compensation must be founded upon actual loss and not upon some hypothetical basis of expenses that might be incurred if the applicant were to do something which he has not done and has no intention of doing.” (underline added)

# Potential Loss of Profit or Hypothetical Loss

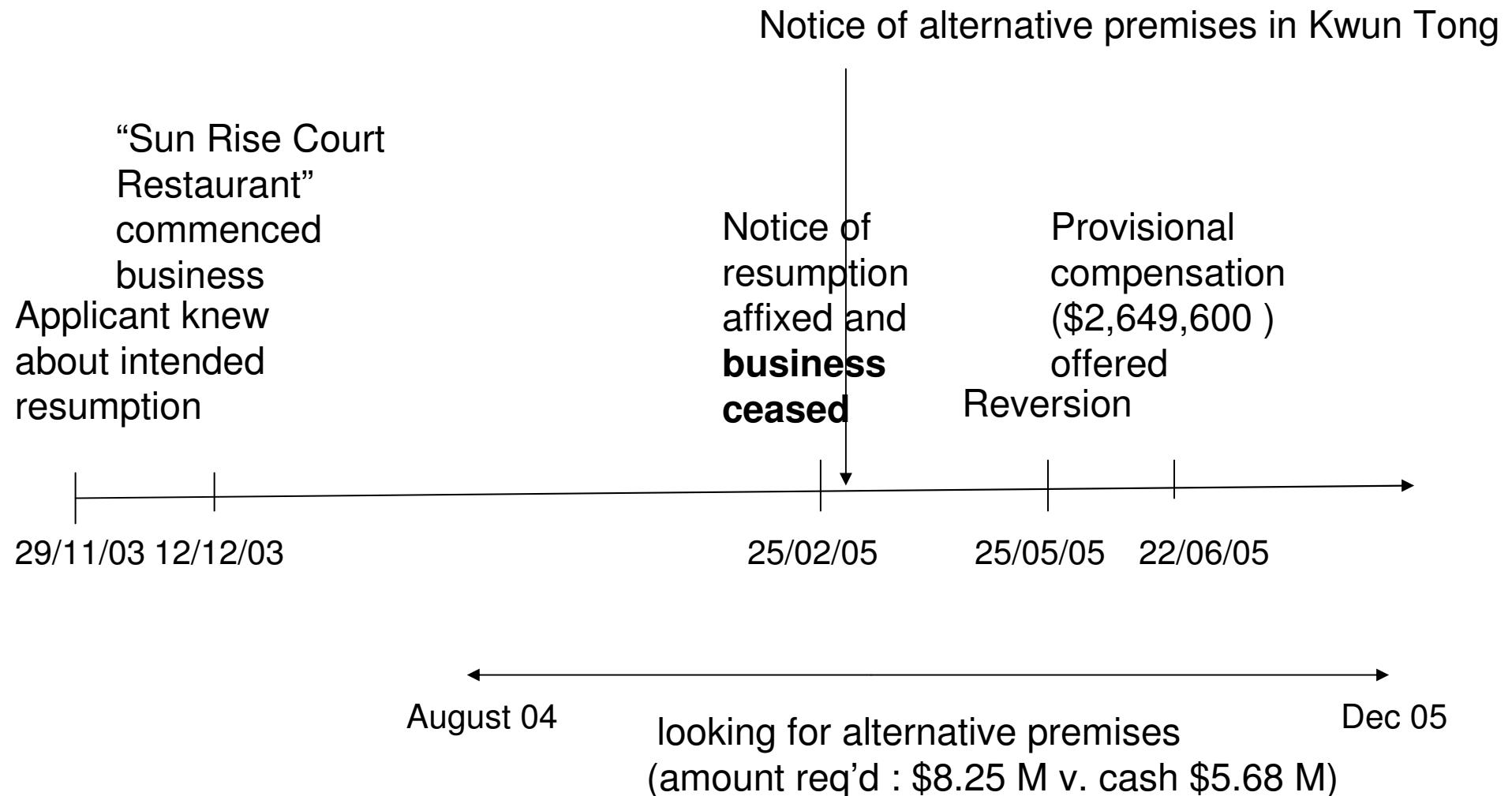
- The Applicant's business was carried on by another company where the *de facto* owners of the two were two brothers
- “In my view, it is clear that the applicant is not entitled to be compensated for potential loss of profit or hypothetical loss. I cannot see that the applicant can be entitled to any compensation after 31 July 1999 when it did in fact cease business because the threshold for compensation required by section 10(1) which is actual loss suffered and not loss computed on some hypothetical basis had not been met.”<sup>9</sup>

9. *Hongda Containers Limited v. The Secretary for Transport*, CACV 269 of 2003

*Happy Dragon Restaurant Limited v. Director of Lands*, [2010] 2 HKLRD 727

- Premises over 6,000 sq.ft. partly owned by affiliated company occupied as restaurant in Shau Kei Wan since December 2003.
- Business ceased almost immediately after notice of resumption was gazetted in February 2005.
- Alternative premises in Kwun Tong available in March 2005

*Time sequence for Happy Dragon Restaurant Limited v. Director of Lands, [2010] 2 HKLRD 727*



# Yip Kui Principle Distinguished

- The *Yip Kui* principle applies solely to claims for expenditure that had never been and never would be incurred.
- In the *Happy Dragon Restaurant* case, “expenditure had been incurred by the applicant for the fittings and fixtures which it used for its business and for the (general restaurant licence and liquor licence) in question required to operate the business. It is equally clear that those fittings and fixtures as well as the unexpired portion of the licences were lost when the land reverted to the Government. There is nothing prospective or hypothetical or spurious about such loss.”

# Characteristics of Goodwill

- An existing business entirely ceases or extinguished as a result of resumption.
- On the other hand, the business may be able to be continued at a new location. In the latter event it may, except for the temporary disruption of relocating, preserve its former profitability or it may continue with permanently reduced profit.
- **This permanent loss of profit is sometimes referred to as loss of goodwill.**
- Nevertheless the loss of goodwill is effect a misnomer in determining compensation.
- In *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.* (1995) 1 HKC 417, the Privy Council held “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.”
- The measure of loss to be determined under Section (10)(2)(d) is the value to the claimant of the business he carried on at the subject property at the relevant date of valuation.

# Calculation of Goodwill

From the accounting point of view, goodwill represents the excess earning power of the business over a reasonable return on the capital and results from the favourable location of a business, its reputation for service and other factors.

- Step 1            Examine the earnings record

In general, the allocations inherent in the application of generally accepted accounting principles can produce results that are not truly representative of the expected future profitability of a business. Adjustments may be required for

- inadequate or excessive depreciation charges,
- deferred expenses,
- abnormal or non-recurring items,
- inadequacy of working capital,
- redundant/surplus assets

- Step 2            Adjust past earnings to arrive at future maintainable profits  
(but beware of what happened in the past may not be indicative of the future)

- Step 3            Deduct interest on capital
- Step 4            Deduct profit rent
- Step 5            Deduct owner's remuneration
- Step 6            Multiple it by a YP

# Other Heads of Compensation

- The value of any easement or other right in the land resumed, owned, held or enjoyed by a claimant at the date of resumption; <sup>10</sup>
- The amount of loss or damage suffered by any claimant due to the severance of the land resumed or any building erected thereon from any other land of the claimant, or building erected thereon, contiguous or adjacent thereto; <sup>11</sup>
- For easement valuation, usually a before and after valuation should be carried out. <sup>12</sup>

10. Sec.10(2)(b) of Lands Resumption Ordinance

11. Sec.10(2)(c) of Lands Resumption Ordinance

12. *Lever son Limited v. Secretary for Transport*, LDMR 32 of 2000

# "disturbance payment" (騷擾補償金)<sup>13</sup>

A sum equal to-

(a) the expenditure and loss of money actually and reasonably incurred or to be reasonably incurred and arising from the dispossession of a person of land by reason of the matter for which the claimant is entitled to claim compensation under Part II of the Schedule; and

(b) in the case of disturbance of a trade or business on any land, the expenditure and loss of money actually and reasonably incurred or to be reasonably incurred and arising from the disturbance of that trade or business by reason of the matter for which the claimant is entitled to claim compensation under Part II of the Schedule:

Provided that a disturbance payment shall not include any expenditure or loss which would not be recoverable, on the grounds that the expenditure or loss was too remote or was not caused by the disturbance, if that disturbance were a tort

13. Roads (Works, Use and Compensation) Ordinance, Cap. 370 and Railways Ordinance, Cap. 519

# Injurious Affection

(under Roads (Works, Use and Compensation) Ordinance, Cap. 370 and Railways Ordinance, Cap. 519)

Item	Matters for which compensation may be claimed	Basis on which compensation is to be assessed	Notable Case
2	<p>(a) The creation of an easement or other permanent right or a right of temporary occupation.</p> <p>(b) Disturbance resulting from the creation of an easement or other permanent right or a right of temporary occupation</p>	<p>(a) (i) In the case of an easement or other permanent right, the amount by which the open market value of the claimant's interest in the land is diminished.</p> <p>(ii) In the case of the creation of a right of temporary occupation, the amount of an open market rent for claimant's interest in the land occupied during the period of the easement.</p> <p>(b) A disturbance payment.</p>	<i>Lever son Limited v. Secretary for Transport, LDMR 32 of 2000</i>
4	The closure of, or extinction, modification or restriction or a private right in respect of, a road or part of a road, <u>so that access to any land is adversely affected.</u>	<p>(a) The expense fairly and reasonably incurred in remedying or mitigating the effect of such closure, extinction, modification or restriction, as far as may be practicable, and any diminution in the open market value of the claimant's interest in the land after such expense has been incurred.</p> <p>(b) A disturbance payment.</p>	<i>Berwell Trading Ltd. v. Secretary for Transport, LDMR 6 of 2001;</i> <i>Santal Ltd. v. Secretary for Transport, LDMR 7 of 2001</i>

# Compensatable Interest

In *Wing Hing Oil Co. Ltd. v. Director of Buildings and Lands* [1988] HKDCLR 25, the Lands Tribunal held the claimant was a mere licence having no estate or interest in the land.

# Tenant Interest

- In *Bishopsgate Space Management Ltd and Teamworks Karting Ltd v London Underground Ltd* [2004] R.V.R. 89; [2004] 2 EGLR 175, it was decided land subject to a tenancy is to be valued on the basis that the tenancy could have been terminated on the earliest date possible under the tenancy and any prospect in the no-scheme world of the tenancy continuing is to be disregarded.
- The *Bishopsgate Space Management* case was followed by the Lands Tribunal in Hong Kong in 譚慶祥 v. 地政總署署長及環境運輸及工務局局長, LDLR 14 of 2006 & LDMR 6 of 2006 whereby **disturbance compensation is to be assessed on the same basis** so that the loss of profit will be limited to a period of 6 months after resumption.

# Non-statutory Compensation

Administered for public convenience  
and political consideration

# Home Purchase Allowance

- HPA is payable to owner-occupiers of domestic properties affected by resumption to enable them to purchase a replacement flat of about seven years age of a similar size in the locality of the resumed flat.
- The assessment of HPA is based on the value of a notional flat, which is defined as a 7-year-old flat in a comparable quality building, situated in a similar locality in terms of characteristics and accessibility, and located at the middle floor with average orientation.
- The HPA is the difference between the value of the notional replacement flat and the market value of the property being acquired.
- Owners of tenanted/vacant flat or tenanted area may be entitled to Supplementary Allowance which is a supplement to the open market value of the resumed flat. SA is a percentage of HPA.

## Ex-gratia Compensation Rates (per sq.ft.) for Resumed Land

Zone	Agricultural Land	Building Land
A	120% of Basic Rate	Valuation + 120% of Basic Rate
B	75% of Basic Rate	Valuation + 75% of Basic Rate
C	50% of Basic Rate	Valuation + 50% of Basic Rate
D	30% of Basic Rate	Valuation + 30% of Basic Rate

Owners eligible for Zone A compensation should be landowners of either:

1. New Town Development Areas (namely areas within the New Town boundaries as shown on gazettal outline zoning plans for new towns);
2. Areas that are affected by essential projects with territory-wide significance of the New Territories

With effect from 1 APR. 2011, the following revised ex-gratia basic rates may apply:

- a. Agricultural land - \$613
- b. Building land - \$1,212.5

## **Other EGAs Handled by Lands D (assisted by other departments)**

- EGAs for occupiers of legal/permitted domestic properties:
  - Legal occupiers of domestic properties;
  - Home purchase allowance/Supplementary allowance;
  - Domestic removal allowance; and
  - Permitted occupiers of licensed domestic structures & surveyed domestic squatter structures;
- EGAs for genuine farmers:
  - Rehabilitation allowance;
  - Crop compensation;
  - Disturbance allowance for cultivators;
  - Pig and poultry farmers;
  - Qualified farm structures on private land; and
  - Miscellaneous permanent improvement to farms;
- EGA for village house removals in N.T.;
- EGAs for legal commercial / industrial properties;
- EGA for fishery undertakings;
- EGA for removal of graves, Kam Taps and shrines;
- EGA for “Tun Fu” payment; and
- EGA for shops, workshops, godowns, slipways, schools and ornamental fish breeding undertakings.