

exceeding seventy-five, or at the outside ninety-nine years, with suitable provisions to meet the objection raised by the Land Commission of 1886-7, viz that the Crown should not at the expiration of the lease confiscate the whole value of tenant's improvements.

This change in land policy generated even more criticism than the complaints which, 50 years earlier, had resulted in a change from 75 years to 999 years. The critics this time were less successful. The Governor was only able to obtain a variation to his new instructions, allowing him to grant a right of renewal for 75 years, in addition to an original 75-year term. Some earlier leases had been granted without any right of renewal.<sup>12</sup>

When the first non-renewable 75-year leases began to expire, the Government adopted a policy of granting new leases of 75 years to the original owners, on payment of a premium, calculated on current land values. The sharp increase in land values substantially increased the premiums payable. A major problem arose when a large number of leases, due to expire in 1972, neared expiration. By 1972, increases in land values had soared to speculative heights. If premiums were assessed on current market values, the sums would have been substantial and well beyond the immediate resources of many lessees. To meet this problem, the Crown Leases Ordinance (Cap 40)<sup>13</sup> was enacted in 1973, under which all leases, except for some in the New Territories, were thereafter renewed at a new Government rent based on 3% of the rateable value.<sup>14</sup>

By 1970, problems had also arisen in relation to re-grants of land, occupied after the expiration of non-renewable leases which, since the original grant to a sole lessee, were held in multi-ownership. Negotiations for re-grants with a large number of occupiers were invariably both difficult and protracted. These problems were reduced in 1970 by the enactment of the Crown Rent and Premium (Apportionment) Ordinance (Cap 125). When collective agreement is not reached, the Government may now grant a new lease for the land to The Financial Secretary Incorporated, who may then exercise his statutory powers to deal with any outstanding matters. Where land is compulsorily acquired for public purposes, the wide powers under the Lands Resumption Ordinance (Cap 124) are invoked.

Later Government policy granted leases on Hong Kong Island and Kowloon for 75 years, with a right of renewal for 75 years. There continue to be some older leases in the longer settled areas for 999 and 99 years. In the New Territories, leases were never granted for periods longer than 99 years from 1 July 1898, less the last three days. For a period, some New Territories grants were for shorter durations of 75 years with a right of renewal for 24 years less three days but later leases were generally for the residue of 99 years less the last three days from 1 July 1898.<sup>15</sup> The New Territories (Renewable Crown Leases) Ordinance (Cap 152) applied to those leases in the New Territories granted for a term of 75 years, together with a right of renewal for a further 24 years less three days.<sup>16</sup> Rights to land in the New Territories are generally dealt with by the New Territories Ordinance (Cap 97).

12 J W Norton Kyshe, *The History of the Laws and Courts of Hong Kong*, Vol II, pp 543, 544.

13 Now known as the Government Leases Ordinance (Cap 40).

14 This was the first use of the 3% rateable value formula later adopted in the Joint Declaration and for those purposes enacted in 1988 in the New Territories Leases (Extension) Ordinance and in 1997 in the Government Rent (Assessment and Collection) Ordinance (Cap 515).

15 *Hong Kong 1963*, ch 10, pp 173-175.

16 Now known as the New Territories (Renewable Government Leases) Ordinance (Cap 152).

In 1984, Annex III of the Joint Declaration provided that all New Territories and other Government leases which expired before 30 June 1997 and did not contain a right of renewal, might be extended for 50 years up to 30 June 2047 without the payment of any additional premium. The annual rent for the period of extension was based on a formula similar to that which already existed under the Crown Leases Ordinance.<sup>17</sup> The new Government rent which is in effect a ground rent, is 3% of the rateable value of the property at the date of expiration, adjusted in accordance with any subsequent changes in rateable value. Other Government leases which did not expire by 30 June 1997, continue to enure beyond 1 July 1997 with the duration of their contractual expiration dates unaffected by the resumption of sovereignty by the People's Republic of China on 1 July 1997.

After the Joint Declaration was signed and in anticipation of the Basic Law incorporating the provisions of Annex III, the Hong Kong legislature in 1988 took the initiative of enacting the New Territories Leases (Extension) Ordinance (Cap 150). This Ordinance extended New Territories Government leases in terms of Annex III of the Joint Declaration. Section 6 provided that 'The term of a lease to which this Ordinance applies is extended from the date it would, apart from this Ordinance expire, until the expiry of 30 June 2047'. In 1997 the Government Rent (Assessment and Collection) Ordinance (Cap 515) was enacted, which provides valuation and other machinery necessary to calculate the new 3% ground rent payable to the Government on leases statutorily extended from 1 July 1997 or other relevant date.<sup>18</sup>

There are also a number of other ordinances dealing with the lease of Government land. These include the Government Lease (Pok Fu Lam) Ordinance (Cap 118) enacted to meet the special circumstances relating to a Government lease granted on 1 January 1893 following the loss of certain documents. In addition to the Government's contractual powers as lessor, it also enjoys various enforcement and other rights under the Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap 126). The Government Land Ordinance (Cap 28) principally deals with the occupation of Government land not subject to any Government lease. Grants of land under the Government Home Ownership Scheme are subject to special conditions and are governed by the Housing Ordinance (Cap 283). In 1993, this Ordinance was amended to provide owners, liable to payment of a premium on resale, with a means of appeal to the Lands Tribunal against its calculation by the Director of Housing.

17 Now known as the Government Leases Ordinance (Cap 40).

18 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and The Government of the People's Republic of China on The Question of Hong Kong (the draft agreement was initialled on 26 September 1984; the Joint Declaration was executed on 19 December 1984; thereafter, it was ratified by the legislatures of both Governments; the Joint Declaration came into force on 27 May 1985 when instruments of ratification were exchanged at Beijing by both Governments. See Chapter 24.

*Hosiery* case marked a temporary return to statutory criteria. The enactment of the General Rate Act 1967, which recognised a very limited statutory tone of the list concept, led to a revival of the same errors which ultimately developed into the so-called science of tonometry. This erroneous development was later rejected as unsound in a vigorous judgment of Lord Templeman in the landmark decision of the House of Lords in *K Shoe Shops Ltd v Hardy (Valuation Officer)* [1983] 3 All ER 609.

In addition to the statutory sources, a considerable body of case law exists in Hong Kong, dealing with the local statutory provisions. Many of the ordinances are based on similar legislation in England or other common law countries. The decisions of courts in those other common law jurisdictions are often helpful. Problems which may appear to be novel to Hong Kong will, on occasion, be found to have been faced and resolved by other common law courts.<sup>66</sup>

At times, the search for guidance will lead to common law jurisdictions of countries other than England. Historically, this is in part because, until the enactment of the Acquisition of Land (Assessment of Compensation) Act 1919, the assessment of compensation in England was largely left to the discretion of Boards of Arbitrators. In accordance with general arbitration principles, awards were reviewed relatively rarely by English courts. Until at least 1920, except in relation to railway resumptions and disturbance, the amount of English appellate authority on compensation and valuation principles was relatively small. Nearly the reverse situation existed in other Commonwealth countries. At an early stage, Canada, Australia and New Zealand land compensation legislation tended to provide for disputes to be resolved by litigation rather than arbitration. This resulted, during the early part of the last century, in a substantial body of compensation and valuation case law developing in those countries.

Many of those disputes reached the Privy Council, which delivered several of the leading appellate judgments on land compensation valuation law. The early seminal influence of the Privy Council has endured to the present. The fundamental common law presumption of 'no expropriation without compensation' was articulated in clear terms in *Commissioner of Public Works (Cape Colony) v Logan* [1903] AC 355. In *Cedar Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569, the Privy Council declared that hypothetical purchasers in the market might also include purchasers wanting the property for the same primary purpose which had led to the compulsory acquisition. The task of assessing market value also included, according to the Privy Council in *Fraser v City of Fraserville* [1917] AC 187, an assessment of the prospects and possibilities of future development. In other words, the market value of a

<sup>66</sup> English textbooks are referred to at page 14, fn 21; Australian textbooks include DH Brown, *Land Acquisition* (2nd Ed); GL Fricke, *Compulsory Acquisition of Land in Australia* (2nd Ed); JP Brennan, *Digest of Cases On Compensation For Resumption of Land* (which also includes some New Zealand and other cases); the main New Zealand textbook is JP McVeagh, *Law of Land Valuation* and N Khublall, *Law of Compulsory Purchase and Compensation — Singapore and Malaysia*. In addition to series of general law reports, see also 'Property and Compensation Reports' (P & CR) and the 'Estates Gazette' (EG). In 1985, the Estates Gazette, in addition to including reports of cases in its weekly publication, commenced publishing half yearly, the 'Estates Gazette Law Reports' (EGLR) which includes cases from the weekly publication and others not previously published. For rating reports, see Chapter 15, fn 6. Other publications dealing with Hong Kong land compensation are GM Erasmus (ed), *Compensation For Expropriation: A Comparative Study*; Roger Nissim, *Land Administration and Practice in Hong Kong* (2nd Ed); Tsuyoshi Kotaka and David L Callies (eds), *Taking Land: Compulsory Purchase and Regulation in Asia-Pacific Countries*; Robert V Anderson (ed), *Land-Value Taxation Around the World*.

property did not merely include the value of the property in its present condition but also its potential value.<sup>67</sup>

The difficult question of injurious affection, which will always be subject to the particular statutory provisions of any relevant legislation, was considered by the Privy Council in *Sisters of Charity of Rockingham v R* [1922] 2 AC 315. The injurious affection to property not taken was held to include the effect on property some distance from the property compulsorily acquired.

The problems of assessing the value of potentialities was again considered by the Privy Council in *Vizagapatam Raja Sri Vyricherla Narayana Gajapatiraja Bahadur Garu v Revenue Divisional Officer* [1939] AC 301, more commonly known as *Raja's Case*.<sup>68</sup> The Privy Council, after considering conflicting English appellate judgments, affirmed that the valuer must value not merely existing use but uses to which the land might reasonably be capable of being put in the future. Those potentials were to be included even though the only possible purchaser might be the body entitled to purchase under compulsory powers. All the valuer had to ensure, in that event, was that he did not allow for any enhancement in value due to the exercise of those compulsory powers.

In 1947, the Privy Council reaffirmed the well-settled principle that compensation must not include any sum for any increase in value of the land entirely due to the scheme underlying its compulsory acquisition: *Pointe Gourde Quarrying and Transport Co v Sub-Intendent of Crown Lands* [1947] AC 565. The clarity of that judgment and its delivery at a time when massive post-Second World War redevelopment plans were commencing, probably explains why its leading dictum, now known as the *Pointe Gourde* principle, quickly became an essential part of a valuer's liturgy. The effect of economic stabilisation legislation and land sales controls enacted to meet wartime conditions were considered in *Minister of Public Works v Thistlethwayt* [1954] AC 475. The issue was whether those restrictions were to be taken into account in assessing compensation. The Privy Council held that the market value of the land should include an element of value to the owner being deprived of his right to retain the property with a view to a sale in the future at a date which was reasonably expected to be not too far distant and at a price which almost certainly would exceed the controlled price.

The potential value of development land, long a fertile field for disagreement between valuers, was the primary issue in *Maori Trustee v Ministry of Works* [1959] AC 1. The Privy Council held that while the owner was entitled to receive compensation for the land's subdivisional potential, it must only be assessed on the basis of unrealised possibilities and not realised possibilities. In *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426, a statutory scheme had reduced the development value of unresumed land. The Privy Council held that the *Pointe Gourde* principle also applied in reverse. Accordingly, compensation was to be assessed without reference to any diminution in value, caused by the scheme, to the unresumed land.

The Privy Council in *Aik Hoe & Co Ltd v Superintendent of Lands and Surveys* [1969] 1 AC 1, was narrowly concerned with the accuracy of a valuer's statement that it was a fallacy that small lots were worth more per unit of area

<sup>67</sup> Privy Council and other authorities on development and potential value require to be construed subject to the restrictive provisions of section 12(c) of the Lands Resumption Ordinance (Cap 124). See further Chapter 4, pp 110–117 and *Director of Lands v Yin Shuen Enterprises Ltd* (2003) 6 HKCFAR 1.

<sup>68</sup> In several jurisdictions, including Canada, the authority is also called the "Indian" case: *Re Victoria & Grey Trust Co v Board of Governors of Trent University* (1970) 9 DLR 134 CA.

determination involves a matter of Government policy, the matter will be referred to the Executive Council. The Executive Council may call for written submissions from the parties before reviewing the determination. On the review, it may confirm or set aside the determination and give the Building Authority such directions as it may see fit. However, the Appeal Board does have an initial power of determination. This contrasts with the preparation powers of the Town Planning Board which acts merely in an advisory or consultative capacity.<sup>46</sup>

#### Determination of an appeal

Section 50 prescribes that every question on appeal is determined by the opinion of the majority of the members of the Appeal Tribunal and where there is an equality of votes the Chairman has a casting vote. The Appeal Tribunal may receive and consider any oral, documentary or other evidence. This includes any written statement whether on oath, affirmation or otherwise whether or not it would be admissible in evidence in proceedings in a court. In determining an appeal, the Appeal Tribunal may make an order confirming, varying or reversing the decision appealed against or substituting such other decision or make such other order as it thinks fit.

#### Costs

The Appeal Tribunal may make such order as to costs as it thinks fit. But it may not award any compensation or make an order for any other payment than costs.

#### Case stated

The Appeal Tribunal hearing an appeal may by way of a case stated refer to the Court of Appeal for its decision on any question of law relating to the appeal.<sup>47</sup>

#### F. URGENT WORK

Section 19 provides that in certain circumstances urgent work may be commenced without obtaining the Building Authority's consent. The circumstances are where: (a) any accident or emergency renders it necessary to shore up, underpin, demolish or otherwise make safe any existing building, or any natural, formed or man-made land or to carry out any street works immediately; and (b) notice is given to the Building Authority by the building owner or other person under an obligation to maintain the land or carry out the street works or for whom the street works are being carried out within 48 hours after it has been commenced, whichever is the earlier. Where the Building Authority considers the emergency no longer exists, the works may be required to cease until consent is obtained.

<sup>46</sup> The Board's plan preparation powers are only advisory except for its jurisdiction to determine planning permission applications. See *Ma Wan Farming Ltd v Chief Executive in Council* [1998] 1 HKLRD 514, [1998] 2 HKC 190 and Chapter 21.

<sup>47</sup> See section 53C where the case stated procedure is set out.

#### G. OCCUPATION OF A NEW BUILDING

Under section 21, no new building may be occupied except by not more than two caretakers unless (a) the Building Authority has issued an occupation permit; or (b) a temporary occupation permit has been issued. The Building Authority may on several specified grounds refuse to issue either an occupation permit or a temporary occupation permit.<sup>48</sup>

#### H. BUILDING AUTHORITY POWERS

The Building Authority or any public officer authorised in writing by him may under section 22 at any time enter and where necessary, in the presence of a police officer, break into any premises or enter upon any land (a) to ascertain whether any building, structure, street or natural, formed or man-made land is dangerous or liable to become dangerous; (b) to inspect or test any groundwater drainage works, drainage works or drainage system; (c) to ascertain compliance with the provisions of the Ordinance or of any notice order or regulation; (d) to carry out any work which he is authorised to carry out under the Ordinance.

#### Order to cease building works

The Building Authority may under section 23 by order in writing served on the registered general building contractor or registered specialist contractor or other person carrying on building or street works require that such works cease. This power may be exercised where in the opinion of the Building Authority (a) building works or street works are being carried out in contravention of the Ordinance or are connected with any building works that have been so carried out; (b) any building works that are being carried out which will (i) cause or be likely to cause a total or partial collapse of any adjoining or other building, street or natural, formed or man-made land; or (ii) render or be likely to render any adjoining or other building, street or natural, formed or man-made land so dangerous that it will collapse, or be likely to collapse, either totally or partially; or (iii) are in dangerous conditions within the site of the building works.

#### Order for demolition, removal, or alteration of building, building works or street works

Under section 24 the Building Authority may require for any building which has been erected, or where any building works or street works have been or are being carried out in contravention of the Ordinance (1) the demolition of the building, building works, or street works; or (2) such alteration of the building, building works or street works to comply with the provisions of the Ordinance or otherwise to put an end to the contraventions and in every case

<sup>48</sup> Any letter of toleration from a District Land officer does not restrict or usurp the powers of the Building Authority under the Building Ordinance – *Chong Ping v Hung Yuen Lawrence* [2000] 1 HKLRD 17.

*Director of Lands and Survey v Cheung Yun-keung* [1978] HKLTLR 45

Compensation was determined on the basis of development value of the property as a Class B site under regulation 19.

*Golden Hand Industrial Co Ltd v Director of Lands and Survey*  
[1980] HKDCLR 45

The Lands Tribunal referred to the power of the Building Authority under section 16(1)(d) to refuse the approval of plans which would contravene any approved or draft plan prepared under the Town Planning Ordinance (Cap 131). The Tribunal also considered concessions granted under regulation 22(2) of the Building (Planning) Regulations and the requirement of a second staircase under regulation 41(2).

*CG & L Investment Ltd v Director of Lands*  
[1982] HKC 610, [1980-82] CPR 496

The Lands Tribunal considered whether under regulation 2 of the Building (Planning) Regulations (Cap 123) the resumed land was a Class A site or a Class B site under regulation 19. If it were a Class A site, whether it acquired that status solely as a consequence of the public purpose for which it was resumed. It was common ground that if a Class A status was a result of the resumption, that change of status had to be ignored for compensation purposes. The Tribunal held that a decked nullah and two adjoining footpaths existed before the resumption and together constituted a street. The property was therefore not only a Class A site but had acquired that status before the resumption. Compensation was accordingly assessed on a Class A site basis.

*Redhill Properties Ltd v Director of Engineering Development*  
[1984] HKDCLR 1

In this resumption, the optimum value of the property resulted from refurbishing an existing structure. A residual valuation was carried out on the basis of a hypothetical refurbishing. This included converting the ground floor and two upper residential floors of an existing building comprising two flats into three residential floors comprising six flats. The existing ceiling height of the ground floor was only 2.39 metres which did not comply with the minimum height requirement of 2.5 metres under regulation 24(1)(b) of the Building (Planning) Regulations. The new plans provided for an increased height of 3.59 metres. The building was subject to the height restrictions of the Hong Kong Airport (Control of Obstructions) Ordinance (Cap 301) which prohibited the overall height of the building being increased. The selected alternative was to lower the building by excavating below ground level to enable the resultant increased ceiling height of the ground floor to be achieved. This required the ground floor slab level to be lowered by 1.2 metres. The lowering of the ground floor below ground level had a detrimental effect on the value. This is an interesting case where the hypothetical refurbishing had to be designed to take into account a complex number of Building (Planning) Regulations and other statutory provisions.

*Yeung Shing Land Investment Co Ltd v Collector of Stamp Revenue*  
VCJSA 37/82

The meaning of the Buildings Ordinance and its regulations may also have an effect upon valuations carried out for revenue law purposes. In this appeal, the valuation carried out for stamp duty purposes was in part on the interpretation of the Buildings Ordinance and its regulations.

#### M. OFFENCES

Under section 40, various offences are created for contraventions of the Ordinance, including of sections 4(3)(b), 6(b), 9(5)(b), 14(1), 17(1), 18(1), 18(6)(c), 21(1), 22(2)(a), 24A, 24B(14), 27(2)(c), 27(10)(a), 28(A), 30(1), 31(1), 32(3), or without reasonable excuse fails to comply with an order under section 19(2), 20(2), 22(3), 23, 24B(6), 25(1), (2), 26(1), 26A(1) or (3), 27A(1) or (2B), 27C(1) or (4), 28(2)(a) or (3) or (5), 29(2)(a), 29A(2), 30(3) or 31(2)(a), 39(b)(1) or 42.

Penalties range from fines of \$400,000 and to imprisonment for 2 years; fines of \$20,000 for each day during which it is proved to the satisfaction of the court that the offence has continued; fines of \$100,000 and to imprisonment for 2 years and a fine of \$5,000 for each day during which it is proved to the satisfaction of the court that the offence has continued; fines of \$5,000 and to imprisonment for 6 months and 1 year.

Where an offence committed by a body corporate is proven to have been committed with the consent or connivance of or to be attributable to any neglect or default on the part of, any director, manager, or other officer concerned in the management of the body corporate, or any person purporting to act in any such capacity that person as well as the body corporate is guilty of the offence — section 40(6).

Where an offence under this Ordinance committed by a partner in a partnership is proved to have been committed with the consent or connivance of, or to be attributable to any neglect or default on the part of, any other partner of the partnership, that other partner is also guilty of the offence — section 40(6A).<sup>78</sup>

Any prosecution under the provisions of this Ordinance may be commenced within 12 months of the commission of the offence or within 12 months of the same being discovered by or coming to the notice of the Building Authority — section 40(8).

<sup>78</sup> Section 40(7) provides that where anything is required to be done by the owner of a building and by virtue of section 2 there is more than one owner, it is a defence to any charge of failing to do that thing (a) that such thing was done by another owner of the building; or (b) that any notice or order in respect of such thing required under the Ordinance to be served on the owner was served on another owner of the building and not on the person charged. Similarly under section 40(7A) where anything is required to be done by an owner of land or by a person referred to in section 27A(1), it shall be a defence to any charge of failing to do that thing that any notice or order in respect of such thing required under the Ordinance to be served on the owner or on such person was served on another owner of the land or on another such person and not on the person charged.

The judgment also properly refers to the Government exercising its modification power in its private contractual capacity as landlord — *Hang Wah Chong Investment Co Ltd v Attorney General* [1981] HKLR 336. This important historical distinction has long excluded any doctrines of reasonableness or legitimate expectation or other grounds for judicial review. However, the Court did not consider the perhaps provocative observation of Lord Cooke in *Fok Lai Ying v Governor in Council* [1997] HKLRD 810 that the Government's leasehold contractual powers long held to be non-justiciable, may be accompanied by public duties. If so they would require it to be exercised reasonably and subject to judicial review.<sup>65</sup>

Lord Millett gave importance to sections 12(b) and 12(c) forming a consistent whole in derogation of section 12(d). In his view, it would be capricious to consider the former separately with differing consequences. Section 12(d) was subject to both sub-sections. The initial observation that neither sub-section is expressed with great felicity was of little significance for it was later found that their meaning was clear enough. This effectively closed the door to any more liberal construction of either sub-section (b) or (c).<sup>66</sup>

The Court of Final Appeal finally dealt with two points related to Article 105 of the Basic Law in language which suggested they were not fully argued or at all by Counsel. The first was that the 'real value' reference in Article 105 indicated that the Basic Law did not require compensation always to be assessed on the basis of open market value. This was essentially a negative finding invoked merely to reinforce the conclusion already reached as a matter of statutory and not constitutional construction. Until the true meaning of 'real value'<sup>67</sup> is expressly determined, it may remain arguable whether a construction of section 12(c), excluding compensation for development value complies with the Basic Law. The second point asserted by the Court was that under the Hong Kong system of Government leasehold title, the development potential of land remains the property of the Government. No doubt for short term leases that may be the position. Whether that is also the position for long term leases raises more complex issues. Government long term leases range from a large number of 999 year leases in Central to Kowloon leases for 75 years with similar 75 year rights of renewal and New Territories leases now statutorily renewable in terms of the Basic Law to 2047. It is improbable that Government in 2047 would refuse to grant similar long term leases for those expiring in that year. To do so at least without compensation might well amount to a breach of the Basic Law. The long settled valuation practice, reflecting actual market transactions, is to value long term leases on a quasi-freehold basis, without any reduction for their unexpired residues.<sup>68</sup> Although recognising that the statutorily described 'owners' are only lessees, that valuation practice proceeds on the basis that the interest of the Government as lessor is so minimal that it does not require any deduction for the lessor's interest. Since the enactment of the first resumption Ordinance in 1889 the Government on resuming a Government lease whose terms permit

65 See pp 84–87 (ante).

66 Pre-2003 awards of development compensation contrary to section 12(c) which must now be treated as overruled include *Cheung Lai-wan v Director of Lands and Survey* [1977] HKLTLR 14; *Director of Lands and Survey v Wong Chung-dom* [1997] HKLTLR 43 and *Suen Sun Yau v Director of Buildings and Lands* [1991] HKDCLR 33. See other cases in Cruden, *Land Compensation and Valuation Law in Hong Kong* (2nd Ed), pp 96–102.

67 See Chapter 24.

68 Chapter 11.

development, has never made any deduction purportedly based on its ownership of that lawful development potential.<sup>69</sup> This historical practice does not support a view that permitted development potential of long term leased land is exclusively owned by the Government.

The Court of Final Appeal promptly had to revisit section 12(c) issues in *Dragon House Investments Ltd and Nam Chun Investment Co Ltd v Secretary for Transport* (2005) 8 HKCFAR 668 when it heard together two appeals from the Court of Appeal which it separately described as the Dragon House and Nam Chun appeals. The appeals were dismissed and both cases remitted to the Lands Tribunal for rehearing.<sup>70</sup> The Court of Final Appeal made three main holdings. First, it rejected the new appellant submission that *Yin Shuen* had only excluded the speculative element of development value and not that forming part of the intrinsic or real value of the land. The Court affirmed that section 12(c) excluded the full amount of development value whether real or speculative. Secondly, existing favourable zoning had no independent value of its own and was only beneficial if the zoned land could lawfully be developed for that purpose. Thirdly, compensation had to be assessed on the best evidence which was likely to be prices of comparable land with no prospect of development. The Court of Final Appeal had little difficulty in rejecting the appeals which fell fully within *Yin Shuen* principles.

Although the exclusion of development value, whether under section 12(b) or (c) is now unarguable, the Court of Final Appeal judgment does not affect the validity of several prior judgments which on other grounds excluded section 12(c). These involve resumptions where other discretions relating to building covenants, combined development use of land under different user covenants, plot ratios and non-land related licences are concerned. They include *Niceboard*<sup>71</sup> which rejected the submission that section 12(c) prohibited compensation being assessed on a lawful permitted development value basis. The Government lease of 5.69 acres was restricted to agricultural user except for a small area of 0.1 acres which appeared in the 1930s to have changed to building use. The proposed concrete batching plant involved the use of the whole of the land. The Tribunal held that the plant building could be accommodated within the building land while the storage of raw materials, parking and access for vehicles could lawfully occupy the agricultural land as allowed by *Melhado*. The Tribunal further held that the requirement under the Government lease to obtain a discretionary Building Consent was not an expectancy under section 12(c).

69 This is a different issue to payment by Government lessees of modification premia for development not permitted under a Government lease.

70 The order made on 21 November 2005 resulted in *Nam Chun* being remitted back to the Lands Tribunal for a third hearing. The original Lands Tribunal *Yin Shuen* decision was delivered on 14 February 2001 and *Nam Chun* on 19 June 2001. The first re-hearings back were determined by the Tribunal on 21 October 2003; the second remission back order was made on 21 November 2005 and hearing for *Nam Chun* is pending. An appeal by *Nam Chun* against the costs taxation decision of the Registrar was dismissed by the Court of Final Appeal on 19 March 2007 — FACV No 11/2005.

71 *Niceboard Development Ltd v China Light & Power Co Ltd* [1994] HKDCLR 69, 21 October 2003.

The period between an owner becoming aware of the resumption scheme and its later formal notification, is now increasingly referred to as the “*shadow period*”. Any remaining doubts whether compensation is payable during the shadow period were removed by the Privy Council in *Shun Fung Ironworks Ltd v Director of Buildings and Lands* [1995] 2 AC 111.<sup>122</sup> The Tribunal<sup>123</sup> had found that from 5 November 1981, when the likelihood of resumption became known, until the statutory notice on 30 October 1985, loss of profits had been caused because of the anticipated resumption. On that issue the Court of Appeal<sup>124</sup> had reversed the Tribunal finding, upholding the Government submission that compensation for losses during the threat of resumption, before the giving of the statutory notice, was not payable.

The Privy Council in turn by a majority, reversed the Court of Appeal, holding that compensation was payable during the shadow period. Lord Nicholls, after declaring that the issue of law raised by the shadow period was of general importance, observed at page 135:

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.

After holding that resumption was a process and not merely the statutory event which occurs on the date when the land reverts to the Government, Lord Nicholls continued at page 136:

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 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 assertions 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 ...

Lord Nicholls went on and explained the proper principle in these terms:

122 The original claim, for over \$1b for which the Government initially admitted liability for less than \$100 million, was heard by the Lands Tribunal (Rhind J, President and MW Phillips Member) over 263 days; the transcript exceeded 17,000 pages and 38 volumes of written submissions were supported by 95 days of oral argument. The Tribunal then reserved judgment for just under 22 months when it awarded \$131m compensation but because of a rejected Calderbank offer ordered substantial costs to the Government. The Court of Appeal reversed the costs order and increased compensation to \$519m which was later reduced by the Privy Council to \$ 135,467,728.

123 The Lands Tribunal judgment is reported in [1995] HKLR 311.

124 [1994] 1 HKC 35.

So where can the boundary be drawn sensibly? ... 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 terms of the Resumption Ordinance, a pre-resumption loss which satisfies these criteria is as much ‘due’ to the resumption as a post-resumption loss.

Lord Nicholls dealt at page 138 with the Government submission that not all proposed schemes culminate in resumption. Some are abandoned or for other reasons do not proceed:

... 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 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 the answer to the ‘floodgates’ argument. Of course, many schemes involving resumption or compulsory acquisition do not come to fruition. Meanwhile the properties may be unsaleable and no compensation will ever be payable ... 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.

The Privy Council went on to hold that both *Sim's* case and *Prasad's* case, previously frequently followed by the Land Tribunal, were correctly decided.

### Types of businesses

Until section 10 was amended in 1984 to include disturbance expenses for non-business premises, the statutory right was limited to the amount of loss or damage to a business. The meaning of business was therefore a matter of importance. Although this is now of lesser importance, the narrower terminology of section 10(2)(d) dealing with businesses, when compared with the wider provisions of section 10(2)(e), may in some cases remain material. Many claims relate to manufacturing or retailing businesses or other commercial enterprises, which clearly fall within the definition of a business. However, in *Director of Lands and Survey v Chan Tai Land Investment Ltd* [1978] HKLTLR 115, land owned by a developer was resumed. At the date of resumption, the site had been cleared, building plans had been approved by the Building Authority and piling had been completed. The Government submitted that no compensation was payable for disturbance as the

- (b) Schedule 1 and Schedule 2 to Order 62 of the Rules of the District Court (Cap 336 sub-leg H).

Section 12 goes on to deal with taxation — subsection (6); rules made by the Chief Justice under section 10(3) of Order 62 of the Rules of the High Court — subsection (7); and definitions of various section 12 statutory terms including of ‘wasted costs’.<sup>160</sup>

The Tribunal’s general costs discretion is usually exercised on the basis of the amount of compensation awarded. If the award exceeds the District Court title and land jurisdiction of \$240,000, High Court costs are likely to be awarded.<sup>161</sup> If the award is for \$240,000 or less, District Court costs are the likely range.<sup>162</sup> On occasion despite the unlimited quantum jurisdiction of the Tribunal, where compensation exceeded the District Court land jurisdiction of \$240,000, only District Court scale costs were awarded.<sup>163</sup> The onus is on a successful party to apply for an order at the appropriate scale. In view of the available costs options in order to reduce potential difficulties including on taxation, it is desirable for parties to obtain a costs order in specific and detailed terms.<sup>164</sup> If counsel appears, it is also desirable, to apply for a certificate for counsel.

In *Chan Lok Tsun Tso v Secretary for the Environment, Transport and Works* (unreported LDMR 2/2004, 27 August 2004) the compensation claim was settled except as to costs. The parties declined to proceed to taxation and applied to the Tribunal to fix costs. The claimant sought costs on a common fund basis while the Director would only agree to lower party and party costs basis. The Tribunal held that:

... the role of this Tribunal in assessing the reasonable professional fees is not limited to that of a taxation Master. This Tribunal should not lose sight of the fact that “professional fees” is an item of loss which an landowner is entitled under the Ordinance.... Therefore the ordinary principles of loss should be applied. Taxation principles might be helpful but should not be the only principles applicable to the

- 160 A new section 12A also deals with costs for proceedings transferred to the Tribunal to the Court of First Instance or District Court or by the Tribunal to those courts.
- 161 Under sections 35 and 36 of the District Court Ordinance (Cap 336) the Court has jurisdiction for recovery of land or where title is in question where the annual rent or rateable value does not exceed \$240,000. The majority of compensation awards exceed \$240,000 and in those cases High Court costs are generally awarded.
- 162 In *Man Lin Tai v Secretary for the Environment, Transport and Works* (unreported LDRW 14/2004, 30 September 2008) the claim was settled for \$755,000 but disputed costs were later fixed at \$127,406. The Tribunal allowed High Court costs on the claim but only District Court costs on the disputed costs issue. The better view would appear to be where compensation awarded exceeds \$240,000 the costs for the whole claim, irrespective of any lesser costs quantum is inextricably related to the claim and should in the absence of special circumstances result in costs on the High Court scale being awarded. The Tribunal cited and was guided by *Ali Shoukat v Hang Seng Bank Ltd* (unreported HCPI 13/2003) but in that case the factual position was quite different and that judgment would appear of little, if any, relevance.
- 163 This confusion extends to the Hong Kong Civil Procedure 2009, Volume 1, p 963, para 62/2/3, which in the same terms as previous years limits recovery of costs in the Lands Tribunal to the District Court scale. The commentary overlooks the Tribunal’s express power, despite citing section 12 of the Lands Tribunal Ordinance (Cap 17) in appropriate cases, to award Court of First Instance costs. The Lands Tribunal’s power to impose High Court costs is expressly affirmed in the Chief Justice Reform measures. See section 41, Civil Justice (Miscellaneous Amendments) Ordinance 2008, amending section 12 of the Lands Tribunal Ordinance (Cap 17). See also fn 153 and fn 157 (above).
- 164 As to a court’s approach to an appeal against taxed costs, see *Nam Chun Investment Co Ltd v Director of Lands* (unreported FACV No 11/2005, 19 March 2007) and for a commentary under ‘Miscellaneous’ below.

assessment, particularly in the instant case where both parties are reluctant to have the bill submitted for taxation.... The professional fees for the solicitors are incurred as the direct result of the resumption exercise.

The Tribunal rejected the Director’s submission that the claimant should have instructed a less senior solicitor and that the hourly rate and the hours worked were excessive. It observed that compensation is not simple and the extent of the complexities only known after legal research. Nor was the amount of compensation recovered a major factor. The fact that the claimant was an unwilling vendor with a statutory right to recover fees was particularly relevant. The Tribunal clearly approached costs on the basis that unlike a civil action they were not at large and to that extent its discretion was restricted. The Tribunal after disallowing all the deductions sought by the Director granted costs in favour of the claimant on the High Court scale.

In *Leung Chuk Yau (t/a) Tin Cheung Ginseng Medicine Hong v Director of Lands* (unreported LDRD 4/2006, 16 October 2008) the parties had settled the claim for the value of the land at \$800,000. The hearing on 9 September 2008 was limited to a loss of goodwill claim for \$2,159,000, forced sale of stock of \$100,031.40, transportation fee of \$4,000, storeroom rental of \$20,000 and scale surveyors fees. The Tribunal awarded an agreed transportation fee of \$4,000 and adjourned fees, interest and costs for agreement while rejecting the other claims. The Tribunal accepted that in accordance with the costs orders for interlocutory matters in *Penny’s Bay Investment Co Ltd v Director of Lands* LDMR 23/1999 and LDMR 1/2005 the general principle for compensation applications, unlike general civil litigation, is that the resuming authority is liable for cost.<sup>165</sup> On these particular facts, the Tribunal ordered the Director to pay the applicant’s professional fees and costs to 31 December 2007; the applicant to pay the Director’s fees and costs after 31 December 2007; no costs for the 9 September 2008 hearing; with costs on the District Court scale.<sup>166</sup>

### Miscellaneous

In *Dragon House Investment Ltd v Secretary of Transport* (unreported FACV No 13/2004, 12 January 2006) the Court of Final Appeal’s substantive judgment was silent on costs.<sup>167</sup> The unsuccessful appellant, despite intervening costs correspondence with the respondent, without notice to the respondent, obtained sealed orders which were similarly silent on costs. When the respondent then applied for costs, the appellant submitted that on costs the court was functus officio. The Court of Final Appeal held that it was not functus for it had made no order as to costs. As the orders were sealed without notice, that could not shut out the right of the respondent to be heard. Costs orders were then made in favour of the respondent.

The Court of Final Appeal in *Nam Chun Investment Co Ltd v Director of Lands* (unreported FACV No 11/2005, 19 March 2007) concerned an appeal from the taxation of costs by the Registrar. The Court held that while Rule 60 of

- 165 The Tribunal also referred to *Emslie & Simpson Ltd v Aberdeen District Council (No 2)* [1995] RVR 159 and *Wong Yik Po v Director of Lands* [1996] 1 HKC 586.
- 166 The award of District Court costs was no doubt because the amount recovered was less than \$240,000 — see sections 35, and 36, District Court Ordinance (Cap 336).
- 167 For the substantive judgment, see *Dragon House Investment Ltd v Secretary for Transport* (2005) 8 HKCFAR 668.

**Age and state of repair**

The issue whether a proposed redevelopment is justified is a commonly disputed issue. The areas of dispute are generally related to the age and state of repair of a building. In *Gilmerton v Polywin Holdings Ltd* the Lands Tribunal heard substantial expert evidence, much of it conflicting, on the options of either upgrading the existing buildings or demolishing them for a new development. The Tribunal held that the existing buildings poor state of repair justified redevelopment.

Later in *Good Trader Ltd v Hinking Investments Ltd* [2007] 3 HKC 219 the applicant was the sole owner of a six storey building at No126 Tung Choi Street, Kowloon and the majority owner of the shares held as a tenant-in-common of the adjoining six storey building at No127 Tung Choi Street.<sup>21</sup> Those shares entitled it to the exclusive occupation of the whole of the building except the ground floor. The other tenant-in-common was the respondent whose shares entitled it to the exclusive occupation of the ground floor. The respondent opposed the application for sale on the ground that the applicant had failed to establish that the age and state of repair justified the proposed redevelopment.

The applicant submitted that the statutory words 'age' and 'state of repair' were two separate grounds of justification and the burden on an applicant was to establish only one of the those grounds. The respondent submitted that in any event the applicant had failed to establish either ground. The Tribunal recognised that the grounds were cumulative and the two words will normally be factually related. In many cases the age of a building will contribute to its state of repair. But there may be cases where redevelopment of a relatively new building may be justified. This could occur where damage by fire or landslides would on financial or structural repair render it not viable to repair the existing building. Although on occasion "or" may be construed as "and" the Tribunal was satisfied that 'age' and 'state of repair' were separate alternative grounds.

It was further submitted that age meant more than a number of years and included facilities. The building lacked an elevator, gas supply, fire extinguishers and other modern facilities. The Tribunal rejected the submission. It pointed out that an old building with those facilities was still an old building while a new building without those facilities was still a new building. The Tribunal found that each building will have its own lifespan and that there is both an economic and physical limit to that lifespan. The Tribunal held that the applicant's evidence had failed to prove that either the economic life or physical lifespan of the building had ended.

The building in *Fully HK Investments Ltd v Poon Vai Ching* was 40 years old. The applicants uncontested evidence accepted by the Lands Tribunal was that the structure and related facilities had deteriorated to the extent that it had become unfit for habitation unless essential repairs were carried out. The cost of repairs was held to be unjustifiably high. The Tribunal made an order for sale and fixed the reserve price at \$508.89 million.

**Age**

In *Intelligent House Ltd v Chan Tung Shing* [2008] 4 HKC 421 the parties accepted that the *Good Trader* economic lifespan test is a permissible test

<sup>21</sup> The application for review is reported in [2007] 4 HKC 579 and the later review decision in [2007] 4 HKC 479.

under section 4(2)(a)(i). The Tribunal held that on the state of repair ground it may apply the economic lifespan test to determine if the building had reached the end of its lifespan. This could be so determined if the cost of repairs outweighs the increase in value from completion of the repairs. Intelligent House accepted that test but submitted it was not an exclusive test and other relevant tests could be considered. The respondent China Superior submitted it was the sole test and matters such as obsolescence could not be taken into account for that would allow comparison with a modern building. The Tribunal held it was entitled to look at anything directly or indirectly relevant to age and state of repair. As to the age of the existing building a relevant issue was whether it had reached the end of its physical life. On that issue the type of building, materials, deterioration and whether they were no longer capable of performing the building's function were relevant.

**State of repair**

Disputes over a building's state of repair include whether defects are capable of repair. A common issue is whether the cost of repair is so expensive as to be uneconomic compared with the cost of redevelopment. The state of repair may extend to public health and safety issues.

In *Good Trader* there were factual disputes over the state of repair. The Tribunal was not supplied with a detailed cost survey. The applicant had merely lodged a general condition survey report recording defects found on an inspection. The surveyor advised that while the defects were very serious they were not structural in nature. In his opinion necessary repairs would not be cost effective. Redevelopment would increase the value of the property and improve the environment of Tung Choi Street. If redevelopment did not proceed he recommended that an illegal metal projection and canopy on the external façade be removed; the concrete spalling on the external wall be repaired; and corroded water piping along part of the external wall be replaced where it causes water seepage. His estimate for repair costs was \$366,000. Although he initially described the defects as creating an "immediate danger" he later qualified that danger as limited to a potential health hazard if the section of corroding piping were not repaired. The estimate of repair costs was 0.55% of the \$66,667,000 agreed estimated existing use value of the building. The estimate of replacing one-half of the corroded piping was \$40,000. The applicant's other surveyor after two site inspections considered the interior of the units in fair condition. He allowed a downward adjustment of 5% to 10% for the overall state of repair. The applicant's sole shareholder stated that the building was in a very dilapidated condition. Although no detailed survey had been carried out he estimated that costs of structural and other tests necessary for repair purposes would be in the region of \$1 million.

The respondent contended that as all the illegal structures and broken glazing belonged to the applicant's units it was reasonable it should bear those costs of repair. It also submitted that any improvement to the environment of Tung Choi that might result from redevelopment was irrelevant. Finally, if the only immediate hazard was caused by the corroded piping, the applicant had failed to establish that the state of repair justified redevelopment.

The Lands Tribunal agreed that any improvement to the immediate environment that might result from a redevelopment was irrelevant. There were no structural defects. It would be reasonable for the owner of a building to

committed; (c) enter a place to serve a notice under the Ordinance; (d) enter a place to measure, inspect, take samples and test as he reasonably believes is necessary to determine if an offence against the Ordinance has been or is being committed. However, an authorised officer may not except with the consent of the occupier or person in charge of the premises, enter domestic premises without a warrant issued by a magistrate.

An authorised officer who lawfully enters a place may require any person present at that place (a) to give details of his identity, name and address and produce his Hong Kong Identity Card for inspection by the authorised officer; or (b) who appears at the time to be responsible for or in charge of that place, to give such information or render such assistance as may be necessary to enable the authorised officer to carry out his functions. An authorised officer who enters any place if entry is by warrant must produce the warrant.

### Cessation orders

The Director may, with the consent of the Secretary, issue an order requiring persons working on a designated project to cease working on the project until the order is withdrawn. An order may be issued if (a) an environmental permit has not been issued for the project being undertaken; (b) an environmental permit has been withdrawn from the project being undertaken; or (c) there has been a breach of the conditions of an environmental permit issued for the project being undertaken, resulting in environmental damage.

The Director may, with the consent of the Secretary, issue an order requiring persons working on a designated project to carry out work on the project to remedy environmental damage identified by the Director. The Director may also, with the consent of the Secretary, after issuing an order to cease working on a designated project, take direct action to remedy environmental damage identified by the Director and may recover the costs of the remedial work from the owner of, or the operator or the contractor on, the site of the designated project.

### Recovery of costs of works

The Director may certify the costs due and names of the persons liable for the costs, apportioning the costs if appropriate where authorised to recover the costs of works carried out. The costs may include supervision charges and the costs of materials supplied by the Director for the purpose of carrying out the works. Annual interest at the rate of 10% commencing one month after the date of service of the certificate is recoverable as part of the costs.<sup>104</sup>

### Costs

The Lands Tribunal has a discretion to award either High Court or District Court costs. The general practice of the Tribunal is to award High Court costs where the compensation recovered or the value of the land in dispute exceeds the jurisdiction of the District Court. Where the award as to quantum

<sup>104</sup> Payment of costs by any person is without prejudice to the right to recover the payment from any other person who is liable to pay for the costs. Costs certified by the Director are recoverable as a civil debt due to the Government.

would fall within the jurisdiction of the latter court the District Court scale is instead generally applied.<sup>105</sup>

### Offences

#### *Offences relating to environmental permits*

A person who contravenes section 9 commits an offence and is liable on a first conviction on indictment to a fine of \$2,000,000 and to imprisonment for six months. On a second or subsequent conviction on indictment the fine increases to \$5,000,000 and imprisonment for two years. On a first summary conviction the penalties are a fine at level 6 and imprisonment for six months. On a second or subsequent summary conviction the fine is increased to \$1,000,000 and imprisonment to one year. In the case of a continuing offence the fine is \$10,000 for each day the offence is continued.

Statutory defences are where a person carries out an action in response to an emergency and in the interests of public safety or public health. It is also a defence that the offence was committed without his consent, connivance or he exercised due diligence to prevent the commission of the offence.

A person for whom a project is constructed, operated or decommissioned and who permits the carrying out of the project contrary to section 9 commits an offence and is liable for similar penalties. A person who either alone or with an associated person, separates contiguous projects, which, if taken individually, do not meet the specified scheduled levels<sup>106</sup> to qualify as a designated project but which collectively qualify as a designated project, to avoid the purposes of the Ordinance is taken to have contravened section 9(4) if he permits the carrying out of any part of any of the contiguous projects without first applying to the Director under section 4(5).<sup>107</sup>

#### *Offences relating to enforcement*

A person who (a) wilfully resists, obstructs or delays any public officer in the exercise of powers he is authorised to exercise;<sup>108</sup> (b) fails without reasonable excuse to comply with a requirement duly made by a public officer; (c) in compliance or purported compliance with a requirement of a public officer under Part VII produces a drawing, record or document which he knows to be incorrect or inaccurate in a material respect or does not believe to be correct or accurate; or (d) wilfully or recklessly gives information which is incorrect in a material respect or wrongly withholds information commits an offence and is liable on conviction to a fine at level 5.<sup>109</sup>

<sup>105</sup> See fn 25 (ante) for costs and other changes on practice and procedure under the civil justice reform measures enacted by the Civil Justice (Miscellaneous Amendments) Ordinance 2008.

<sup>106</sup> Schedules 2 and 3.

<sup>107</sup> Section 26.

<sup>108</sup> Under section 23.

<sup>109</sup> Section 27.

alternative powers was upheld by the Court of Final Appeal in *Ying Ho Co Ltd v Secretary of Justice* (2004) 7 HKCFAR 333.<sup>5</sup>

The Chief Executive is empowered under the Ordinance to make a wide variety of orders. For example, under section 3 he may prescribe areas where buildings are prohibited, impose height restrictions and order buildings to be demolished. The original height and other restrictions in the vicinity of Kai Tak International Airport and its flight paths were progressively relaxed.<sup>6</sup> Section 6 authorises markings or lights to be provided on private property. Marks, lights and beacons may also be authorised under section 7. Any type of lighting may be prohibited under section 9. Other lights may be prohibited by notice under section 10.

In 1996, the Director of Lands issued a Practice Note providing details of the procedure to be followed, pending the closure of Kai Tak airport and the relaxation or removal of existing height restrictions. Applications for exemption would be considered where new buildings were designed to accord with expected changes in height restrictions, provided they did not breach existing limits prior to the decommissioning of Kai Tak.<sup>7</sup>

### C. COMPENSATION

Section 21 creates a right to compensation in favour of any person who, as a consequence of orders or notices having been made under sections 3, 6, 7, 9 or 10:

- (1) has an interest in land the value of which is diminished; or
- (2) sustains damage by loss of rent or is disturbed in the enjoyment of any right in or over land; or
- (3) incurs reasonable expenses for the purpose of carrying out required building works.

The relevant date for assessing compensation for diminution of an interest in land is the date of the order or notice. Where a claim includes loss of rent, disturbance or expenses for carrying out required building works, then the amount to be claimed is the actual damage or loss suffered or expenses, reasonably incurred.

<sup>5</sup> This case concerned a dispute over building rights in respect of a Tsuen Wan new grant containing extensive positive building conditions. The appellant developers were the holders of a grant issued in 1992. The new development required to be completed by 1996 with penalties for non-completion. The development included a proposal to construct the tallest building in the world. The building some 18 kilometres from the airport was after grant found to be located in the new flight path. The height of the building was likely to jeopardise the operation of the yet to be installed instrument landing system. Unsuccessful prolonged negotiations resulted in completion time, even for a lower building, not being met. To avoid re-entry the appellant paid Government \$1/2 billion in waiver premia and damages and sued for reimbursement and damages. Government invoked the design, disposition and height clause and other provisions of the new grant to refuse consent for the construction of a building to the proposed height. The Court of Final Appeal in dismissing the appeal upheld the Government's refusal.

<sup>6</sup> See Hong Kong Airport (Control of Obstructions) (Consolidation) (Amendment) Order 1988 (to permit operation of new Kwai Chung container loading cranes). Major changes, including detailed disapplication provisions, were contained in the Hong Kong Airport (Control of Obstructions) Order 1997.

<sup>7</sup> See fn 5 (ante).

An important exception, where no compensation is payable, is where building works are necessary for the demolition or reduction in height of any building because it was erected in contravention of section 4.

Where property, the value of which is diminished, is held in multiple ownership, certain minor interests are prohibited from applying for compensation. The proviso to section 21 declares that a person may not claim compensation:

...where the diminution in value of his interest in land is less than one-tenth of the diminished value of such interest...

However, that exclusionary proviso is itself subject to the exception that it shall not operate:

... to prevent any person from recovering compensation in respect of a diminution in value resulting from the carrying out of building works in order to comply with the provisions of this Ordinance.

Section 22 declares that the right to compensation passes with the land, unless the instrument under which an interest in the land passes specifically excludes that right.

### Procedure

- (1) A claim for compensation must be made in writing to the Director of Lands within the time limits specified in section 23. In the case of a diminution in value of an interest in land, the time limit is one year from the date of the order. In other cases the time limits are not later than three months from the completion of the building works. There is provision for the Chief Executive in Council to extend the period for making claims to the Director. This specific provision makes any such application for extension of time to the Lands Tribunal under section 10(2)(d) of the Lands Tribunal Ordinance so far as the initial claim to the Director is concerned, unnecessary.
- (2) The Director must assess the claim in accordance with the rules in section 24 and notify the claimant of the amount of compensation which, in his opinion, is recoverable.
- (3) If any dispute arises as to whether any compensation is payable, or the amount or to whom it should be paid, the dispute must be referred to the Lands Tribunal.
- (4) Where a dispute arises, either the claimant or the Director may apply to the Lands Tribunal to determine the dispute. A dispute is deemed to have arisen where either party serves upon all the other parties a notice of intention to refer the dispute to the Lands Tribunal. Such party must, within two months, refer the dispute to the Lands Tribunal. In that application he must give particulars of the dispute and serve a copy of the application on all other parties.
- (5) The procedure is set out in the Lands Tribunal Rules (Cap 17) whose Schedule contains the prescribed form.

The Ordinance has now largely been superseded by the Railways Ordinance. However, the close similarity of the compensation provisions will render the case law and principles established under the older Ordinance, relevant to the new Ordinance and other later compensation ordinances. Under the 2007 merger of the Mass Transit Corporation and the Kowloon-Canton Railway Corporation their businesses carry on business under the former name. The merger does not affect the exercise of the resumption and other powers under the Railways Ordinance.<sup>8</sup>

### C. RAILWAYS ORDINANCE

The Ordinance is divided into five parts. Part I includes interpretation provisions where section 2 defines 'railway' as:

"railway" except in section 45, means any railway or proposed railway which is the subject of a scheme and includes all railway premises, depots, tracks, cuttings, embankments, tunnels, stations, goods and rail yards, car parks and other areas of ancillary uses but excludes non-railway developments above stations or other railway property.

Part II deals with matters falling within 'The scheme'. It provides for the preparation of scheme plans, objections and authorisations by the Chief Executive in Council. After the scheme steps are completed, the Chief Executive may order the resumption of land whereupon compensation rights arise under Part III and are assessed in terms of Part IV. The distinction between the Chief Executive in Council's powers in relation to the scheme and the later separate power of the Chief Executive to order resumption is important. The objection procedure culminates when, under section 11(4), the Chief Executive in Council either authorises or declines to authorise the scheme. There are no continuing or other rights of objection to any later resumption ordered under section 16. While the Scheme objections are determined by the Chief Executive in Council, it is only the Chief Executive, acting alone, who makes any later resumption order.

The two-stage scheme and resumption procedure closely follows similar provisions in the Roads (Works, Use and Compensation) Ordinance (Cap 370). The Court of Appeal recently emphasised the significantly different legal consequences of this dichotomy in *Ma Wan Farming Ltd v Chief Executive in Council* [1998] 2 HKC 190, [1998] 1 HKLRD 514.<sup>9</sup> The Court of Appeal held that the objection rights did not extend to the making of the resumption order nor were the policy decisions of the Chief Executive in Council or the Chief Executive judicially reviewable. Further, the facts failed to activate, in favour of the objector, the fair hearing and incidental rights under Article 10 of the Bill of Rights. The claim of the objector was found only to be pecuniary. At the later

<sup>8</sup> On 2 December 2007 the Mass Transit Corporation and the Kowloon-Canton Railway Corporation merged pursuant to the Rail Merger Ordinance (No 11 of 2007) enacted on 8 June 2007 which came into force on 2 December 2007. The merger Ordinance empowered the MTR Corporation Ltd to construct and operate certain railways in addition to the Mass Transit Railway; vested certain rights and liabilities of the Kowloon-Canton Railway Corporation in the MTR Corporation; and various other railway and bus services; enabled the Kowloon-Canton Railway Corporation to grant rights to the MTR Corporation Limited to operate the Kowloon-Canton railway including its more recent branches.

<sup>9</sup> See Chapter 19.

compensation stage he would be entitled to a fair hearing before the Lands Tribunal, when his pecuniary interest would be met.<sup>10</sup>

### D. THE SCHEME

#### Plans and public notice

Section 4 provides that where the Secretary for Transport proposes that a railway be constructed or modified, improved or extended, a scheme is to be prepared setting out the general nature and effects of the railway. The scheme must also indicate land that may be resumed; easements which may be created; and roads, foreshores or sea-beds over which power may be exercised.<sup>11</sup> A scheme does not have to be prepared where the proposals are only of a minor nature.

Once the scheme is prepared notice requirements of section 6 must be satisfied. These include lodging a copy of the scheme in the Land Registry. Public notice of the scheme must also be given in the *Gazette* and in Chinese and English newspapers. The scheme has to be open for public inspection and copies made available to the public at a reasonable cost.

#### Objections

Section 10 provides that a person, not later than 60 days after first publication of the scheme, may object to the scheme by delivering an objection in writing to the Secretary. The objection must describe the interest of the objector and the manner in which he alleges he is affected by the scheme.

If no objections are received the Secretary has power to authorise the scheme: section 11. Where objections have been made the Secretary must submit the scheme and objections to the Chief Executive in Council. After consideration the Chief Executive in Council may authorise or decline to authorise the scheme<sup>12</sup> or require the scheme to be reconsidered.<sup>13</sup>

In *Incorporated Owners of Wah Kai Industrial Centre & Others v Secretary for Justice* [2000] 2 HKLRD 458 judicial review proceedings were commenced after the issue of a resumption order to implement a scheme authorised by the Chief Executive-in-Council under section 11, to provide a new arterial railway link, including a tunnel, to the border. The applicants claimed that a ground for the resumption to permit buildings being demolished to allow the tunnel to be built was a mistake of fact. The resumption order was also based on irrelevant considerations. Further, the applicants should have been given an opportunity to be heard when the original scheme was modified. In dismissing the application the Court held that while a material mistake of fact was a recognised ground for judicial intervention, the supporting report did not suggest that any material mistake of fact had occurred. The Court was further satisfied that the decision to resume would have been made whether or not redevelopment potential was taken into account.

<sup>10</sup> Bill of Rights cases have generally been restricted by the facts: see also *Fok Lai Ying v Governor in Council & Ors* [1997] HKLRD 810, (1997) 7 HKPLR 327.

<sup>11</sup> The Secretary of Transport also has power to enter property for inspection.

<sup>12</sup> Section 11(4).

<sup>13</sup> Section 12.

in the valuation of that tenement for rating purposes.<sup>25</sup> When illegal structures are rateable, their illegal nature may affect the valuation. A valuation of an illegal structure is carried out on the assumption that the hypothetical parties have full knowledge of the risks involved in renting an illegal structure. For example, an inherent risk in renting an illegal structure is the relative uncertainty of continued occupation. There is also the risk of being liable to penal prosecution. All these factors will tend to reduce the market value of an illegal structure in comparison with a legal structure.

In *Cheung Man Yee v Commissioner of Rating and Valuation* RA 41/84, the tenement comprised both legal and illegal structures. One of the comparables also included an illegal structure. It was possible to analyse the unit rate per square metre of the rent for the illegal structure of the comparable and compare it with the unit rate for the remaining legal structures. This analysis revealed that the rent for the illegal structure was about half of the rent for the legal structure. The Lands Tribunal referred to *Re a Compensation Board* [1971] HKLR 338 and to *Lai Kit Lai Mutual Aid Committee v Commissioner of Rating and Valuation* [1986] HKLR 93 in support of rating illegal structures. In that latter judgment, Kempster JA observed:

In carrying out this exercise statutory restrictions which affect the occupation of the premises must be taken into account as must possibilities of waiver by the Crown or willingness of potential occupiers to incur the risk of breaking the law.<sup>26</sup>

## E. EXEMPTIONS

Section 36 is the principal provision exempting certain tenements from liability for rates. Other statutory provisions exemptions are the Rating (Miscellaneous Exemptions) Order 1981 and the Consular Relations Ordinance (Cap 259).

Section 36 exempts the following types of tenement:

(1) Agricultural land — section 36(1)(a):

agricultural land and any building,<sup>27</sup> other than a dwelling house, thereon used wholly or mainly in connection with such land but not land which is

25 Under the Roads (Works, Use and Construction) Ordinance (Cap 370), Schedule, Part I, Clause 5 the Lands Tribunal, exceptionally for a non-revenue statute, has a just and equitable discretion whether to reduce compensation for unlawful building works. The provision was later repeated in the similar Clause 5 of the scheduled Part I of the Railways Ordinance (Cap 519). Under the Lands Compensation Ordinance (Cap 124) section 11(2), (3).

26 In *Leung Wai Kee v Commissioner of Rating and Valuation* RA 165/84, an assessed monthly rent of \$1,500 was increased by \$800 for illegal structures making a total rent of \$2,500 per month to produce a rateable value of \$30,000. See also *Hong Kong Telephone Co Ltd v The Hong Kong Land Co Ltd* LT5/82, and *Man Kam Hung v Commissioner of Estate Duty* [1985] HKLR 407.

27 As to whether a building is used in connection with agricultural land see *Moore v Williamson (Valuation Officer)* [1973] RA 172; *United Counties Agricultural Society v Knight (Valuation Officer)* [1973] RA 13; *Fitter (Valuation Officer) v Fraser-Smith* [1988] RA 231; *Courtman (Valuation Officer) v West Devon and North Cornwall Farmers Ltd* [1990] RA 17; *Hambleton DC v Buxton Poultry Ltd* [1992] 1 WLR 330, [1991] RA 267 (CA); *Wright (Valuation Officer) v Sovereign Food Group Ltd* [1997] RA 105; *Farmer (Valuation Officer) v Hambleton DC and Buxted Chicken Ltd* [1997] RA 361. Cf *Wojick (VO) v WR Suckling & Sons* [1994] RA 97.

- part of an ornamental park, garden or pleasure ground or which is used wholly or mainly for the purpose of sport or recreation.<sup>28</sup>
- (2) New Territories dwelling houses used in connection with agricultural land — section 36(1)(b):
- any dwelling house in the New Territories (except New Kowloon) which—
- (i) is occupied in connection with agricultural land; and
  - (ii) is used as the dwelling house of any person engaged wholly or mainly in carrying on or directing agricultural operation on that land or employed as an agricultural worker thereon.

The area of the New Territories referred to as “New Kowloon” is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) and described in the Fifth Schedule of the Ordinance.

(3) New Territories village houses — section 36(1)(c):

any village house within such areas of the New Territories as may be designated by the Chief Executive for the purposes of this paragraph being—

- (i) a building to which paragraph (a) or (b) of regulation 3(2) of the Building Ordinance (Application to the New Territories) Regulations or any regulations replaced thereby, applies or applied; or
- (ii) a dwelling house, built before 16 August 1945, of a type which was normally built for New Territories residents.

This is a wide exemption which exempts the two particularised types of village houses, provided they are within the boundaries of areas designated by the Chief Executive. The policy of the Government in the New Territories is to so designate long-established villages.<sup>29</sup> Village houses within a designated area are exempt if they are of either of the two particularised types. No connection with agriculture is required. However, if a village house or other dwelling house is outside a designated area, it is only exempt if it is occupied in connection with agriculture in terms of section 36(1)(b).

The necessity for a village house to be within a designated area if it is to be eligible for exemption was emphasised in *Leung Siu-tip v Commissioner of Rating and Valuation* [1983] HKDCLR 32. In that case, the designated area included a large part of the long-established Pak Ngan Heung Village on Lantau Island. However, a small portion of the old village had been excluded from the designation. On an old lot, within the excluded portion, the appellant had built residential premises which were assessed with rates. The Lands Tribunal held that the exclusion of the tenements from the designated area was fatal to the appeal for exemption. It further held that as the designation of the boundaries was an administrative act, it was not judicially reviewable. The decision was later upheld by the Court of Appeal: *Leung Siu-tip v Commissioner of Rating and Valuation* MP 952/84.

28 The definition in section 36(4) is: “agricultural land” means land used as farm land, a fish pond, a market garden, an orchard or for animal husbandry. That definition came before the Lands Tribunal in *Sham Ka Kei v Commissioner of Rating and Valuation* [1983–85] CPR 362 where a pond for breeding gold fish was rated. The fish bred in the pond were later sold for display in aquaria. The owner appealed claiming the pond was on agricultural land. The Tribunal dismissed the appeal holding that the ordinary meaning of fish in an agricultural context did not extend to fish not bred for human consumption.

29 For village houses see also *Wah Yick Enterprises Co Ltd v Building Authority* (1998) 2 HKCFAR 170, [1998] 1 HKLRD 840, [1999] 1 HKC 880.

Appeal's approach may also be explained as a practical approach of telescoping rating liability and refunding rights when rating was to an extent a peripheral issue.

#### Refunds by the Chief Executive

The Chief Executive has a discretion to order a refund to be made for any amount paid in rates.<sup>120</sup> The statutory discretion is unfettered. In 1998 during a period of economic recession the Chief Executive exercised this power to order that rates be refunded for the quarter from 1 April 1998 to 30 June 1998.<sup>121</sup>

### L. PROPOSALS AND OBJECTIONS

After a new valuation list is prepared under section 12 following, a general revaluation is usually declared by the Commissioner in March and comes into force shortly thereafter on the first day of April next following. Thereafter except where annual revaluations are held, the same list subject to any deletions, additions or corrections, would be declared annually each March, coming into force on the following first day of April. The additions will include interim valuations under section 25 which have arisen when, during the rating year, new tenements have come into existence. However, current practice is to carry out annual revaluations. Before 1999, general revaluations were at three yearly or longer intervals.<sup>122</sup>

Part IX contains provisions enabling owners, occupiers and other persons aggrieved by a rateable valuation or the inclusion or omission of a tenement from the valuation list, to take steps to have their grievances considered.<sup>123</sup> These extensive rights may be exercised annually and not merely after any longer intervals of general revaluations.<sup>124</sup> They were a useful means of having rateable values corrected when, before section 11(1)(b) was enacted, the Commissioner

<sup>120</sup> Section 35.

<sup>121</sup> *Gazette*, 4 September 1998, No 36, Vol 2, GN 4284. The power of the Chief Executive to order a refund of rates may be contrasted with his power to order exemption from rates under section 36(3). In 1999, as part of further Government measures to deal with the economic recession, there was sufficient time for the Chief Executive to grant exemptions instead of later exercising the refunding power. This exemption was from the payment of half of the rates in respect of the period from 1 July 1999 to 30 September 1999: *Gazette*, 25 June 1997, No 25 Vol 3 GN 3442. Further exemption orders for domestic and non-domestic tenements up to certain amounts were made in 2003 and for periods from 2007 to 2009 during periods of economic buoyancy and more recently recession: Rating (Exemption) Order 2003 (LN 132 of 2003) for the period from 1 July 2003 to 30 September 2003; Rating (Exemption) Order 2007 (LN 33 of 2007) for the period from 1 April 2007 to 30 September 2007; Rating (Exemption) (No 2) Order 2007 (LN 221 of 2007) for the period from 1 January 2008 to 31 March 2008; and Rating (Exemption) Order 2008 (LN 34 of 2008) for the period from 1 April 2008 to 31 March 2009. The 2009/10 Budget included further rates exemptions for the first two quarters from 1 April 2009 to 30 September 2009. See also see fn 36 (ante).

<sup>122</sup> See Kenneth TW Pang, *Property Rates in Hong Kong* (2006), Chapter 5, pp 53–54.

<sup>123</sup> For the meaning of "aggrieved person", see *Attorney General of Gambia v Pierre Sarr N'Jie* [1961] AC 617.

<sup>124</sup> In 1998 it was announced that annual revaluations would replace triennial revaluations. This will eliminate any advantage of non-revaluation year appeals on the changed 'state' of a tenement. The triennial designated date of 1 July 1999 was replaced by an annual date of 1 October 1998.

was obliged to project market rental valuations forward to the next 1 April. However, they remain important and are particularly useful where the state of the tenement has altered between 1 April and the next following 1 April. Although the designated market rent valuation date between any longer general revaluations remains annually unaltered, the state of the tenement may always be reviewed at annual intervals. Where a building is demolished and the bare land is retained undeveloped, Part IX enables the owner to apply for a lower rateable value. In the less common circumstances, where the rateable value includes the consideration not only of the physical state of the tenement but of intangible factors such as profit; a material drop in profit may enable a successful proposal or appeal to be pursued, without having to wait until any more distant general revaluation. Other wider annual changes in economic market forces affecting rents, may also be relevant intangible factors.<sup>125</sup>

### Proposals

Where a ratepayer considers that the rateable value of his tenement is valued above or below its rateable value or that a tenement ought to be included or omitted from the Valuation List, he may in March of each year serve a proposal on the Commissioner setting out the proposed alteration to the valuation list: section 37.<sup>126</sup> If the Commissioner accepts the proposal the parties sign an agreement in terms of section 38 and the valuation list is altered to reflect the agreement.<sup>127</sup> If no agreement is executed then the Commissioner is required to serve on the proposer a Notice of Decision: section 39.<sup>128</sup> The Notice of Decision must specify either that no alteration will be made or the alterations the Commissioner is prepared to make even though not agreed.<sup>129</sup> The current practice of general valuations to be carried out more often on an annual basis will tend to reduce the circumstances where it may be necessary to lodge a proposal.

<sup>125</sup> The relevance in Hong Kong of changes in economic and other intangible non-physical factors represents a significant difference to English law, which only takes into account physical changes — see p 370 (ante). However, cases dealing with more limited annual physical changes to the state of an English hereditament, remain useful by way of analogy — see *Shearson Lehman Bros Ltd v Humphrys (Valuation Officer)* [1991] RA 125; *Walker (Valuation Officer) v Raillex Systems Ltd* [1993] RA 55; *Jafian Properties Ltd v Prisk (Valuation Officer)* [1997] RA 137.

<sup>126</sup> Until the expiration of Part II of the Landlord and Tenant (Consolidation) Ordinance (Cap 7) on 31 December 1998, rateable value was one of the criteria dividing the restricted rent provisions of Part II domestic premises from the market rents of higher rateable value Part IV domestic premises. A number of proposals some culminating in appeals were brought to increase a rateable value so as to move into Part IV and consequently achieve higher Part IV market rents — *Mauriello v Comr of Rating and Valuation* [1980–82] CPR 414 (LT) and *Fook Hong Enterprises Ltd v Commissioner of Rating and Valuation* [1983–84] CPR 380 (LT). As Parts I and II expired on 31 December 1998 and Part IV was repealed in 2004, it may be anticipated that appeals will now generally be to reduce a rateable value. The right to appeal to increase a rateable value will, of course, continue unaffected by the legislative changes to the Landlord and Tenant (Consolidation) Ordinance (Cap 7) see also fn 36 and 120 (ante).

<sup>127</sup> Agreements are recorded on Forms R20B and R21.

<sup>128</sup> Notices of Decision are recorded in Form R22A in response to a proposal for alteration; Form 22B where there is an alteration in the rateable value and Form 22C for other decisions. Form R23C is for notices of objection to proposed corrections; Form R23B is for notices of objection to proposed deletions; and Form R23A is for notices of objection to proposed interim valuations.

<sup>129</sup> Generally, for jurisdiction, see *Courtney Plc v Murphy (Valuation Officer)* [1998] RA 77.

contended that none of these vitiating elements occurred. The Court of First Instance had referred to cases which have emphasised the undesirability of attempting to define the circumstances in which indemnity costs have been awarded.<sup>63</sup> None of those authorities have held that the attributes of the parties or the character of the proceedings were irrelevant factors. The Court of Final Appeal held that the fact that the proceedings were brought to vindicate the public interest and protect a public asset central to Hong Kong's heritage were plainly relevant as to indemnity costs. Further, it was relevant if the proceedings had not been brought in the public interest in securing compliance with the law, would not have prevailed. The public importance of the proceedings and that the Society was financially dependent on public donations were also relevant. On these grounds the Court of Final Appeal held that the costs discretion of the lower Court had been correctly exercised. The award of indemnity costs and a certificate for three counsel was upheld. The Court went on to make similar orders for the appellate proceedings.

#### Costs — Court of First Instance — second judicial review

The Court of First Instance in *Society for Protection of Harbour Ltd v Secretary of Justice* [2008] 4 HKLRD 417 ordered costs in favour of the Society. No express order was made for indemnity costs or a certificate for 3 counsel.

#### General party and party costs

The Lands Tribunal has a discretion to award either High Court or District Court costs. The practice of the Tribunal is to award High Court costs where the compensation recovered or the value of the land in dispute exceeds the jurisdiction of the District Court. Where the award as to quantum would fall within the jurisdiction of the latter court District Court costs are generally awarded.<sup>64</sup>

<sup>63</sup> See fn 60 (ante).

<sup>64</sup> See section 12 Lands Tribunal Ordinance (Cap 17) as amended by section 41 of the Civil Justice (Miscellaneous Amendments) Ordinance 2008. See also Chapter 1, pp 28–29 and Chapter 4, pp 177–180 summarising the practice and procedure changes including costs enacted under the Civil Justice (Miscellaneous Amendments) Ordinance 2008.

## CHAPTER 19

### Revenue Law

#### A. GENERAL

Stamp duty is payable under the Stamp Duty Ordinance (Cap 117) and property tax under the Inland Revenue Ordinance (Cap 112). The assessment of stamp duty may involve the valuation of the open market value of estates and interests in land. The assessment of property tax until 1983 similarly included open market valuations of land but has since then been based on actual rents of individual properties. Estate duty was abolished under the Revenue (Abolition of Estate Duty) Ordinance No 21 of 2005.<sup>1</sup>

#### B. STAMP DUTY ORDINANCE

##### General

The Stamp Duty Ordinance provides for the charging and stamping of instruments.<sup>2</sup> The Collector of Stamp Revenue is responsible for the adjudication and assessment of stamp duty.<sup>3</sup> Stamp duty for land and buildings is payable either on conveyances or on agreements for sale and purchase. Duty on the consideration is calculated on an increasing sliding scale.<sup>4</sup> Where on the conveyance or sale of a property the consideration expressed in the instrument is below the market value of the property the Collector may assess duty on a voluntary disposition basis at the actual higher market value.<sup>5</sup> The assessment will usually require an open market valuation

<sup>1</sup> The Revenue (Abolition of Estate Duty) Ordinance No 21 of 2005 came into effect on 11 February 2006. For the position before abolition see Cruden, *Land Compensation and Valuation Law in Hong Kong* (2nd Ed) Chapter 17, pp 399–403. The last judgment of the Court of First Instance on estate duty before its abolition was *Graceful Mark Ltd v Commissioner of Estate Duty* [2005] 4 HKLRD 527.

<sup>2</sup> Section 4.

<sup>3</sup> Section 13.

<sup>4</sup> Section 13. Duty increases from \$100 where the value of the consideration does not exceed \$2 million; \$100 plus 10% of the amount by which the consideration exceeds \$2 million but does not exceed \$2,351,760 and thereafter in progressive steps to \$180,000 plus 10% by which the consideration exceeds \$6 million.

<sup>5</sup> Section 27(4). This power is not limited to gifts or related parties transactions but includes any under value instrument even if the parties are at arm's length — *Chan Li Chai Medical Factory (HK) Ltd v Collector of Stamp Revenue* (2001) 5 HKTC 785. For a judicial analysis of section 27 see the Privy Council judgment in *Lap Shun Textiles Industrial Ltd v Collector of Stamp Revenue* [1976] AC 530.

- (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;

'open market value' means the amount which the land if sold in the open market by a willing seller, might reasonably be expected to realize.

#### Fluctuations in value of land

- 3 Subject to paragraphs 8 and 10, where the open market value of any land is relevant for the purposes of assessing compensation under this Ordinance, no account shall be taken of any increase or decrease in that value which is attributable to anything done or proposed to be done under this Ordinance or to the use.

#### Disturbance payments

- 4 (1) For the purposes of assessing the amount to be awarded to a claimant in respect of a disturbance payment, the Lands Tribunal shall, in respect of any expenditure or loss to be incurred and in respect of which the claimant is entitled under this Ordinance to be compensated, assess the value of that expenditure or loss at the time of the award as if that expenditure or loss formed part of a claim for damages in tort.
- (2) No disturbance payment shall be payable in respect of any interference with a trade or business in any case in which such interference does not subsist for a period exceeding 14 days.

#### Unlawful building works

- 5 Compensation may be reduced so far as may be just and equitable in respect of any building or part thereof which has been constructed or modified, or on which building works have been carried out, so as to amount to a contravention of the Buildings Ordinance being a contravention within the meaning of that Ordinance or to a contravention of a Government lease or other instrument under which land built upon is held.<sup>50</sup>

#### Compensation where damage results only partly from the works

- 6 The compensation assessed under item 6 or 7 of Part II of this Schedule shall be reduced to such extent as may be just and equitable having regard to the share in the responsibility for the loss or damage not reasonably attributable to or connected with the works.

<sup>50</sup> A similar provision exists in the Railways Ordinance (Cap 16) – see Chapter 18. On illegality generally see Chapter 4 including p 104.

#### No compensation under item 8 for loss of advertising

- 7 Where a sign advertising any business, product, service or activity is removed under section 21, nothing in item 8 of Part II of this Schedule shall be construed as conferring upon any person a right to compensation for the loss of any benefit which might have accrued to him from the advertising of that business, product, service or activity if the sign had not been removed.

#### Set off where compensation paid for loss of value and land later resumed

- 8 Where compensation under item 2, 3, 4, 5, 8 or 9 of Part II of this Schedule has been paid in respect of the diminution in value of any land and such land or part thereof is subsequently resumed by the Government under this Ordinance or any other enabling power, then notwithstanding paragraph 3 of this Part of this Schedule or any other provision of law to the same or similar effect, that diminution in value shall be taken into account to reduce the compensation for the resumption of that land in so far as it was taken into account in the assessment of compensation for the diminution in value thereof.

#### Claim by a mortgagee in possession

- 9 Where under this Ordinance a claim for compensation may be made by a mortgagee in possession—
- (a) such claim may include compensation in respect of the whole interest which comprises the mortgage security; and
- (b) compensation received by a mortgagee in possession shall be applied by him firstly, to the settlement or reduction of the debt due under the mortgage and then to the payment of any excess to the mortgagor.

#### Limitation on compensation payable under item 9

- 10 Compensation shall be payable under item 9 of Part II of this Schedule only to the extent that the carrying out of building works in accordance with an amendment required, or condition imposed, under section 22(1)(c) or (d) does not increase the open market value of the land on which the building works are carried out.

#### Apportionment of compensation

- 11 Where there is a dispute between persons owning compensatable interests in any land or building as to the apportionment of the compensation payable or paid, the Lands Tribunal shall, on the application of any such person, apportion that compensation amongst such persons in such manner as may be just and equitable having regard to their respective rights and interests in the land or building.

#### Date of valuation and interest

- 12 Where, under the second column of Part II of this Schedule, compensation is to be assessed on the basis of the value of land, or the value of a claimant's interest in land, or of a rent, that value or that rent shall be assessed as at the date of the happening of the relevant event mentioned in the first column of Part II of this Schedule; and the person entitled to claim shall be the person fitting the description mentioned in the third column of Part II of this Schedule on that date.

A person who contravenes these provisions commits an offence and is liable on a first conviction, to a fine of \$500,000. In the case of a second or subsequent conviction the maximum fine is increased to \$1,000,000.

Section 2 defines "existing use" in a Development Permission Area as meaning the use of a building or land that was in existence immediately before the publication in the *Gazette* of notice of the draft plan of the Development Permission Area.

#### Section 21

While a plan or a development permission area is effective no person may undertake or continue development in the development permission area unless:

- (a) the development is an existing use;
- (b) the development is permitted under the plan of the development permission area;
- (c) permission to do so has been granted under section 16.

A person who contravenes these provisions commits an offence and is liable on a first conviction, to a fine of \$500,000. In the case of a second or subsequent conviction the maximum fine is increased to \$1,000,000.

#### H. POWER TO INSPECT AND REQUIRE INFORMATION

The Authority may at any reasonable time without warrant or notice enter land and any premises for the purposes of access to other land and any premises if needed for the purposes of:

- (1) ascertaining whether there is or was unauthorised development or any matters that in the opinion of the Authority constitute or constituted an unauthorised development;
- (2) posting a notice under section 23;
- (3) verifying that an unauthorised development or any matters that in the opinion of the Authority constitute or constituted an unauthorised development have been discontinued or any steps taken or land has been reinstated as required under section 23.

The Authority must not exercise any of these powers unless there are reasonable grounds to suspect that there is or was unauthorised development and it is necessary to enter the land or premises in question, or to have access through the land or premises in question, to enable the Authority to ascertain the position.<sup>111</sup>

Domestic premises have more stringent requirements.<sup>112</sup> The Authority must not enter domestic premises (1) save with the consent of the occupier or person in charge of the premises or (2) without a warrant issued by a magistrate.

A magistrate also has the power if satisfied on oath that there are reasonable grounds to believe that there is or was unauthorised development and it is necessary to enter any land or premises, or to have access through any land or premises to enable the Authority to ascertain whether there is or was unauthorised development or any matters that constitute or constituted an

<sup>111</sup> Section 22.

<sup>112</sup> Section 22(2)(b).

unauthorised development, to issue a warrant authorising the Authority or any person authorised in writing by the Authority to enter the land or premises. Where any place is entered under the warrant it must be produced. The Authority may require any person present (a) to give details of his identity, name and address and produce his Hong Kong Identity Card for inspection; or (b) who appears at the time to be reasonably responsible for or in charge of that place to give information or render other assistance as may be necessary to enable the Authority to carry out its the two statutory functions.

A warrant continues in force until the purpose for which the entry is necessary has been satisfied. For the purposes of exercising any power or performing any statutory duty<sup>113</sup> or determining if there is or was any contravention of any of the provisions of section 20, 21 or 23, where the Authority has reasonable grounds to believe that any person has any relevant information, the Authority may by notice in writing served on the person require him to provide the relevant information to the Authority, within the period specified in the notice.

#### Offence

Section 22(8) provides:

A person who—

- (a) fails without reasonable excuse to comply with the requirements of a notice served on him under subsection (7); or
- (b) in compliance or purported compliance with such a notice—
  - (i) provides to the Authority any information which he knows to be false in a material particular;
  - (ii) recklessly provides to the Authority any information which is false in a material particular; or
  - (iii) knowingly omits any material particular commits an offence and is liable to a fine at level 6.

"Relevant information" means information reasonably required by the Authority for the purposes of (a) ascertaining whether there is or was unauthorised development or any matters that in the opinion of the Authority constitute or constituted an unauthorised development; (b) identifying any person:

- (i) who undertakes or continues, or undertook or continued, any development; or
- (ii) on whom a notice may be served under section 23(1).

#### I. OFFENCE FOR APPEAL PROCEDURE NON-COMPLIANCE

The creation of the Appeal Board in 1991 with important regulatory powers resulted in the enactment of section 17C to provide for their enforcement. The section provides:

Where any person served with a summons under section 17B(6)(d) and who—

- (i) refuses or neglects without sufficient cause to appear or to produce any document, record or other thing required to be produced; or

<sup>113</sup> For the purposes of sections 20, 21 or 23.