

Brief Notes on Land Acquisition Practice - Part III

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Compensation for Disturbance and Other Losses

Under normal circumstances, when an owner sells property, no allowance is made for removal costs or other consequential losses. However, in view of the acquisition forcing upon the owner expenses which he could have avoided if not for the acquisition, the owner is allowed to claim certain losses.

The framework under which compensation for disturbance can be claimed is subject to the following principles:-

- (1) A right to disturbance compensation only arises where a claimant is expropriated or dispossessed.
 - disturbance can be claimed only when a claim for land is established
 - dispossession must also be established. "...disturbance must, in my judgement, refer to the fact of having to vacate the premises" (**Lee vs. Minister of Transport 1961**).
- (2) The compensation is limited to the actual loss suffered as proved by the owner or to an estimate of that loss if it has not been incurred at the time. The intention is to ensure that, as far as possible, the claimant finds himself in a similar financial position as before - no worse nor better. (See Ricket's, 1867)

(3) The loss must be capable of assessment; speculative and other losses that are too remote must be disregarded. A loss is compensatable as disturbance "provided, first, that it is not too remote and secondly, that it is the reasonable consequence of the dispossession of the owner" (**Romer L. J. Harvey vs. Crawley Development Corporation 1957**).

(4) Where an expropriated and dispossessed owner replaces lost property, no compensation will be payable for disturbance in respect of that expenditure.

According to Lord Dennings in **Harvey vs. Crawley Development Corporation**, if an owner pays a higher price for the new house, he would not get compensation on that account because he would be presumed to have got value for money. The principle of 'value for money' relates to extra cost involving:

- a new house or shop and also all items of claim related to it
- where it is apparent the claimant places himself in a better position after the acquisition.

This value for money concept leads on from the dictum of Scott LJ in **Horn vs. Sunderland Corporation** where the "claimant gains the right to receive a money payment not less than the loss imposed upon him in

the public interest, but on the other hand no greater”

- (5) There must be consistency in the claim. Compensation payable under various heads is to be treated as one amount of compensation and therefore, all items must be consistent with one another. This follows from **Horn vs. Sunderland Corp.** and **Mizzen Brothers vs. Mitchum Urban District Council** as quoted by Razak J in **Ng Chin Siu & Sons Rubber Estate Ltd. vs. CLR Hilir Perak.**

“That the claimants were not entitled to combine in the same claim a valuation of the claimants’ land upon the footing of an immediate sale for building purposes with vacant possession and a claim for disturbance and consequential damage upon the footing of interference with a continuing business.”

No disturbance compensation should be paid where the claim for land taken is based wholly on development value and the valuer should always consider the following two bases: -

- (i) existing use value and disturbance; or
 - (ii) development value, whichever the higher.
- (6) The claimant owes a duty to mitigate losses. It has been established that an owner must attempt to mitigate or reduce his losses and if alternative accommodation were available, he should avail himself of it.

Heads of Claim

The claims that are payable are:-

- (i) reasonable expenses incidental to such changes
- (ii) accommodation works
- (iii) loss of earnings

Under reasonable expenses incidental to such changes, the claims which are normally claimed and allowed are:

Removal Expenses

These are the most obvious items of disturbance for a person affected by acquisition because he must move to some other place:

- (1) cost of lorry or other transport must be paid
- (2) owner must mitigate loss by moving to the nearest available place.

Costs include:

- (i) cost of temporary storage
- (ii) damage to goods during transit.

Other costs, incidental and part of removal often claimed are as follows (however, much of these claims are subject to proof of actual loss by way of receipt):

- a. Adaptation of fixtures, fittings and chattels.
- b. Replanning and adaptation of new premises and in certain cases replacement of carpets and curtain.

- c. Publicity costs including letterheads, business cards and advertisement cards.
- d. Costs reasonably incurred in looking for alternative accommodation including surveyors' fees, as per **Harvey vs. Crawley**, loss compensatable provided it is the natural and reasonable consequences of the dispossession and it is not too remote, i.e. fees of lawyer, surveyors and valuer (but see "value for money").

choice to leave either the fixtures behind or to remove his fixtures. If left behind, then the extra value "reflected in the compensation for the interest in the property is the deemed value for the fixtures. Therefore no further value would be recommended for fixtures. If the renovations and additions had been put up recently, the first plaintiff could in my opinion successfully claim the cost under the law."

If taken by the tenant, then three possibilities occur in assessing compensation:

- (1) Owner can elect to sell it to the acquiring authority. Therefore, compensation is based upon the value to an incoming tenant. This provides the maximum compensation.
- (2) Cost of removal and reinstallation plus depreciation in value due to the removal. Actual estimates should be obtained.
- (3) The difference between value to incoming tenant and forced sale value. If this basis is adopted then the owner is assumed to have taken it with him and sold them in the market.

(ii) ***Depreciation of Stock***

This arises from delays and rough usage on removal. Measure of damage would depend upon the nature of the trade and stock, e.g. glass merchant and iron monger.

In the Malaysian case of **J.B. Ponnambalam**, the following costs were allowed:

- claim for drugs lost, damaged or destroyed

Damage for Loss of Earnings

Meaning of "earning" is 'money acquired by labour, service or performance'. Income from land is not earning in this context because it is rent, and market value would have covered that portion of income.

The loss of earnings refers to the loss of earnings from a business that at the time of the acquisition was a going concern. The claims arise when, because of the acquisition, the occupier is forced to close his business or is removed to another place. This is also any provable diminution in the value of the goodwill in his trade consequent on the taking of the premises in which such trade is carried on and the consequential loss of his earnings. It would not include prospective earnings.

Loss of earnings depends upon the nature of business. If the business can be successfully relocated without loss of income then there is no loss in earnings.

Measure of Damage or Loss

(i) ***Fixtures***

Fixtures by the tenant, if proven, are allowable claims. An owner has the

- cost of repairing a damaged refrigerator
- cost of replacing a German Steriliser.

customers will continue to resort to the same place of business.

There are two elements to goodwill:

- Personal goodwill
- Locational goodwill

Temporary Loss of Profits

In the course of removal to a new place, the business would have to be closed for a period of time until the new premises are ready. Even then business may not pick up to previous levels. In such cases temporary loss of profits can be claimed. In J.B.Ponnambalam three weeks' loss when practice was stopped to move to a new place was allowed.

It is generally argued that personal goodwill in which the goodwill is attached to the special skill of the proprietor and whose business is dependent upon the proper and effective execution of those skills will not attract any payment. Andrew Baum says that "the attractiveness of the personality of a proprietor is eventually translated into vocational goodwill".

Loss of Goodwill

Goodwill may be taken to mean the probability of the business being maintained at a certain level of profit when it is continued at the same place. The measure of loss in the value of the goodwill would be the diminution of this probability when the business is removed to a new place or when it is extinguished altogether.

Definition of goodwill: "The probability of continuance of a business connection".

- Such a probability will normally command a market value. Compulsory acquisition of such premises may result in the loss of the probability of a business connection. Therefore, compensation is required to place the claimant in the position as though his business is not taken away from him. Goodwill can be regarded as the probability that old

- What is important is the degree to which the profit-making potential of the business is affected by the compulsory acquisition of its premises. Where there is:-

- no damage at all, there is no claim
- total extinguishment of the business, duty of mitigation (maximum claim) of loss lies with the claimant.

- Disturbance compensation is payable as part of the purchase price of the land acquired. No claim for disturbance compensation arises where the expropriated business has no interest in the land.

Permanent Loss

There are two types of permanent loss:

- total loss
- partial loss.

The type of losses depends upon:

- (i) the facts of the case
- (ii) the nature of the business
- (iii) the location of the business
- (iv) the availability of alternative accommodation
- (v) the new location.

Therefore, even though there is removal, there could be total loss of profit as there have been cases where ninety per cent of loss have been allowed (**Massie vs. Liverpool Corp.**).

Basis of Claim

The basis of a claim for total extinguishment is the capitalised value to the claimant of the likely average future net profit to be made at the acquired premises in the absence of the compulsory acquisition and subject to certain adjustments.

- (1) The likely average future net profits should be calculated

To avoid exceptionally good and bad years, three-year average should be taken. Although future profits are required, extrapolation should only be made on the basis of previous profit and any expectation of increases or falls in the profit level should be reflected on the average figure.

- (2) Adjustment

- (i) Rent or Profit Rent

Any new owner must pay a full rent for taking over new premises and

therefore the profit for the business must be nett of rent. Therefore full market rent must be deducted especially in the cases of:

- Owner occupier
- Leaseholder sitting on a profit rent.

This is because market value is already paid for the premises, the value of rent is already compensated, and not deducting would be double counting.

Another approach for an owner occupied investment is capital invested that could earn an income. This has nothing to do with profit and if full rent is paid, the rents would be less. Therefore the rental value should be deducted.

- (ii) Interest on capital

The businessman has capital tied up in his business. Capital is in the form money, machinery, stock, raw materials, etc. If this capital is invested elsewhere or available to him, he could earn interest. Therefore, his amount should be deducted to show the true income from the business alone.

- (iii) Directors' remuneration

Accounts normally allow for deduction for salaries and wages. Directors and proprietors customarily derive an income from the business by salary or profit shares. If there is suspicion that the level shown is not the level normally allowed, then an adjustment must be allowed.

See **Shulman (Tailors) Ltd. vs. Greater London Council (1968)** :

I accept evidence that in the great majority of small family business, profitability is more reliably measure by ignoring the director's fees actually charged and substituting instead a reasonable figure being the value of the directors' services had they been employees.

Sometimes wife's and children's names are used for purposes of reducing income tax liability. If they do not do anything, then the amount should be added back to the income.

Generally, no allowance for wages is allowed for single proprietor's wife running her own business. See **Zarraga vs. New Castle Upon Type Corporation**.

Although it would be correct to deduct the wages of the operator to arrive at the nett operating project since **Perezic vs. Bristol Corporation**, it has been held that in one man operating business, there is no need to deduct wages.

(iv) Saving of head office expenses

When a branch office is acquired, the saving by the head office for operating the branch office should be deducted.

(v) Account to be scrutinised

Proper scrutiny of the accounts should be made to take into account allowable expenditure so that unduly inflated accounts are not submitted.

These include:

- proper amount allowed for repairs to and maintenance of the buildings
- stock is valued at a realistic price
- the amount kept is not too much or too little for the efficient running of the business
- bad debts are dealt with adequately.

(3) The adjusted profit figures from three or more years should be averaged, and then should be converted to a capital figure by capitalising the result.

Factors influencing the choice of capitalising rate are:

- whether the profits are rising or falling
- how long has the business been established
- how much of the goodwill is personal
- the nature of the business and the risks attached to it
- potentialities for expansion.

It is well to remember that it is not the market value of the goodwill that is to be ascertained but the value of the damage to the profit earning capacity of the business due to transference to other premises, i.e. the value of the goodwill to the owner.

Consistency in Claims

One of the most important considerations in any valuation is consistency in principles, methodology and approach. It is more so in the case of claims for severance and

injurious affection. It must always be borne in mind that all claims for severance and injurious affection are made to put back the owner in the same position as he was before the acquisition. The claims for severance and injurious affection and the value of land taken plus the value of the remaining land should equal the value of the whole before the acquisition. Therefore the basis of the claim for value for land taken would determine the basis for severance and injurious affection.

If the claim is on agricultural user, it should follow that all related claims should be for damages arising from the disturbance of such user.

On the other hand, if the claim is for potential user then the claims for damages should be on damages to the potentialities. It cannot include claims for agricultural damages.

In this context it is relevant to recount the rule laid out in **Horn vs. Sunderland Corporation**:

Where, by reason of the notice to treat, an owner is enabled to effect an immediate realisation of prospective building value, and thereby obtains a money compensation which exceeds both the value of the land as measured by its existing user and the whole of the owner's loss by disturbance, to give him any part of the loss by disturbance on top of the realisable building value is, in my opinion, contrary to the statutes" per Lord Scott LJ.

The Horn principle outlined above is actually an extension of an earlier principle established in the case of **Mizzen Bros vs. Mitchum**. Razak J. accepted this principle in the case of **Ng Chin Siu & Sons Rubber Estates Ltd. vs. CLR Hilir Perak**:

"But what he (Legal Adviser) contended was that if you claim, as in this case, that the agricultural land has building potential value as well then he says, quite rightly, the Mizzen case lays it down quite plainly that you cannot claim also the value of whatever there may be on the land which will have to be pulled down or destroyed when the building potential is finally exploited. I think that is only common sense."

It must be admitted however, Abdul Hamid J. referred to the principle in Mizzen Brothers in his judgement of **Hong Bee Realty Ltd. vs. CLR Kuala Lumpur** and expressed some doubts as to its applicability especially in cases where remote potential is present –

He submitted that in the present case, the land has agricultural value and development potential and the potential value should supersede the agricultural value. There is some validity in the argument although this may not be true in every case. It depends largely on the degree of the development potentiality and the extent to which it exceeds the existing use value.

Be it as it may, the practice is well established that with regards to compensation, consistency in approach and principles should always be uppermost in the minds of valuers.

The valuer should always consider the following two bases:

- existing use + disturbance + severance and injurious affection (relates to the existing use)

- development value + severance and injurious affection (relates to the development value).

Mitigation of Damages

It is not possible for the acquiring authority to compensate for every conceivable loss sustained by the owner. The owner on his part must try to minimise his losses. He must not obtain “value for money” by claiming something better than what he had before. It is a valuer’s task to see that fair and adequate compensation is paid to the owner whose land is partially affected by acquisition.

Ex-gratia Payments

In some jurisdictions it has been a practice to pay ex-gratia payments over and above what is normally payable under any law. This is sometimes to overcome any known or unforeseen hardships that the persons dispossessed of property may incur. It is suggested that such payments, if felt reasonable, should be included in legislations to avoid ambiguity or doubt.

Other Payments

There are jurisdictions that legally allow the payment for other losses that may result from the acquisition. Here again it is submitted these losses should be in legislation. This is so that the application of the law would be uniform and be seen to be fair.

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