FACV No. 13 of 2004

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 13 OF 2004 (CIVIL)
(ON APPEAL FROM CACV NO. 1284 OF 2001)

Between :

DRAGON HOUSE INVESTMENT LIMITED **Appellant**

- and -

THE SECRETARY FOR TRANSPORT **Respondent**

FACV No. 11 of 2005

FINAL APPEAL NO. 11 OF 2005 (CIVIL)
(ON APPEAL FROM CACV NO. 335 OF 2003)

Between :

NAM CHUN INVESTMENT COMPANY LIMITED **Appellant**

- and -

THE DIRECTOR OF LANDS **Respondent**

Court : Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Nazareth NPJ and Lord Millett NPJ

Dates of Hearing : 1 – 3 November 2005

Date of Judgment : 21 November 2005

J U D G M E N T

Mr Justice Bokhary PJ :

1. The judgment of the Court will be given by Lord Millett NPJ. It includes the contributions of other members of the Court.

Lord Millett NPJ :

2. These two appeals (which we shall refer to as "Dragon House" and "Nam Chun" respectively) raise the same issues and have been heard together. They each concern land which is suitable and has significant potential for residential development and is either in a Comprehensive Development Area or is zoned for residential use but is held under a Government lease on terms which do not permit building. The question is what principles should govern the assessment by the Lands Tribunal of the compensation payable on resumption in the light of the judgment of this Court in *Director of Lands v. Yin Shuen Enterprises Ltd and Nam Chun Investment Ltd* (2003) 6 HKCFAR 1 ("the *Yin Shuen* judgment"). Neither claimant contends that the *Yin Shuen* judgment was wrong in any respect. Instead each of them has subjected the judgment to close textual examination and has invited us to hold that the Court of Appeal misunderstood it.

3. The *Yin Shuen* judgment has been carefully considered by two differently constituted Courts of Appeal (comprising six judges in all) in four cases including the two under appeal to this Court. In each case the Court of Appeal unanimously rejected the claimant's submissions,

which have been repeated before us, and held that they misrepresented the true meaning and effect of the *Yin Shuen* judgment.

The history of the proceedings

(1) Dragon House

4. The land was in a Comprehensive Development Area but it is common ground that the Lands Tribunal was correct in equating this with zoning for residential development. It was held under a Government lease which did not permit building. It was resumed in January 1999 for the purposes of the West Rail development. The Tribunal determined the amount of compensation in May 2001. It did not have the benefit of the *Yin Shuen* judgment, which was not delivered until 17 January 2003.

5. On 24 December 2003 and in the light of the *Yin Shuen* judgment the Court of Appeal (Le Pichon, Yeung JJA and Reyes J), having immediately beforehand heard two similar cases *View Point Development Ltd v. Secretary for Transport* [2004] 2 HKC 52 ("*View Point*") and *Busy Firm Investment Ltd v. Secretary for Transport* **(**CACV64/2003, 24 December 2003) ("*Busy Firm*") set aside the assessment of compensation and remitted the case to the Lands Tribunal to make a fresh determination. The claimant now appeals to this Court and asks us to reverse the judgment of the Court of Appeal and restore the determination of the Tribunal.

(2) Nam Chun

6. The claimant was the second respondent in the *Yin Shuen* case. The land was unimproved agricultural land in the New Territories which had significant development potential and was zoned for residential use but was held under a Government lease which did not

permit building. While the zoning did not permit agricultural use it did not preclude more valuable uses (such as open storage) consistently with the terms of the lease. The land was resumed for public housing in March 1999. The Lands Tribunal assessed the amount of the compensation in June 2001, also without the benefit of the *Yin Shuen* judgment.

7. The claimant relied on comparables which reflected prices in excess of the value of the land subject to the restrictions in the lease. The evidence showed that purchasers were willing to pay such prices in the hope of obtaining a modification of the terms of the lease to permit development. The Director of Lands ("the Director") contended that s.12(c) of the Lands Resumption Ordinance, Cap. 124 ("the Ordinance") excluded this element of the open market value of the land from being taken into account in assessing the amount of compensation. The Tribunal rejected this submission.

8. The Director appealed to the Court of Appeal, which heard the appeal together with an appeal by the Director in relation to another and smaller piece of land owned by *Yin Shuen*, and dismissed both appeals in January 2002. The Director appealed to this Court. By the *Yin Shuen* judgment we unanimously allowed the appeals on 17 January 2003 and remitted both cases to the Lands Tribunal to make a fresh determination of the compensation in each case on a full evaluation of the evidence and in the light of our judgment.

9. *Yin Shuen* decided to await developments, but Nam Chun returned to a differently constituted Lands Tribunal, which held a fresh hearing with additional evidence. It gave its decision on 21 October

2003. While purporting to apply the *Yin Shuen* judgment it assessed the compensation in the same amount as before.

10. The Director appealed to the Court of Appeal (Woo VP, Yuen JA and Stone J), which gave judgment on 4 March 2005. By this time a differently constituted Court of Appeal had heard the appeals in *Dragon House*, *View Point* and *Busy Firm*. The Court of Appeal concluded that the Tribunal had misunderstood the *Yin Shuen* judgment and failed to apply it correctly. It allowed the appeal and remitted the case to the Tribunal for yet another hearing. The claimant appeals to this Court and asks us to reverse the judgment of the Court of Appeal and restore the later decision of the Lands Tribunal which, it contends, correctly understood and loyally applied the *Yin Shuen* judgment.

The relevant legislation

11. The rules governing the assessment of compensation for the resumption of land are contained in ss 10 and 12 of the Ordinance. The critical provisions for present purposes are contained in ss 12(c) and (d). They provide as follows:

> "(c) no compensation shall be given in respect of any expectancy or probability of the grant or renewal or continuance, by the Government or by any person, of any licence, permission, lease or permit whatsoever:
>
> Provided that this paragraph shall not apply to any case in which the grant or renewal or continuance of any licence, permission, lease or permit could have been enforced as of right if the land in question had not been resumed; and
>
> (d) subject to the provisions of section 11 and to the provisions of paragraphs (aa), (b) and (c) of this section, the value of the land resumed shall be taken to be the amount which the land if sold by a willing seller in the open market might be expected to realize."

Section 12(d) represents the open market value of the subject land, but it is expressly made subject to s.12(c).

12. Paragraph 17 of the *Yin Shuen* judgment sets out the principles of English law which govern the assessment of compensation for the compulsory acquisition of land when based on its open market value. Paragraph 17(3) states the general rule that the subject land must be valued not only by reference to its present use but also by reference to any potential use to which it may lawfully be put. Paragraph 17(4) explains that, where land is subject to restrictions which affect its value, the claimant is not entitled to be paid the unrestricted value of the land. While, however, the existence of the restrictions must be taken into account, so too must the possibility of obtaining a discharge or modification of the restrictions. In such a case the costs as well as the risks and delays involved in obtaining any necessary consents must also be taken into account.

13. Accordingly the compensation payable on the resumption of land held under a Government lease which restricts its use, if based on the open market value of the land, would take account of the value of the land subject to the restrictions together with the prospects and cost (including the payment of any premium) of obtaining a modification of the terms of the lease. The greater the likelihood of obtaining a modification to allow a more beneficial use, the greater the open market value of the land.

14. Section 12(d), however, is subject to s.12(c). It is self-evident, therefore, that resumed land is not to be valued under s.12(d) at its open market value but at a value which takes no account of "any expectancy or probability of the grant…by the Government…of any licence, permission…or permit whatsoever." In the *Yin Shuen* judgment we held that where the resumed land is held under a Government lease no

account may be taken of any element in the open market value which reflects the prospect of a modification of the terms of the lease. It does not matter whether the prospects of obtaining a modification are remote or a near certainty; unless the claimant has a legal right to the modification the land must be valued without regard to the prospects or cost of obtaining it.

15. The parties to the present appeals, however, are not agreed as to the meaning and effect of the *Yin Shuen* judgment or the extent of the statutory disregard.

The claimants' contentions

16. The claimants have advanced two contentions:

(i) that what they describe as "the development potential" of the land is part of its "intrinsic" or "real" value and must always be taken into account in the assessment of compensation on resumption. By the *Yin Shuen* judgment, they argue, we did not decide that s.12(c) directs the compensation to be assessed without regard to the development potential of the land but only that it excludes what they describe as any "speculative element" in the prices paid for comparables adduced in evidence. Whether such prices contained a speculative element is a matter of evidence for the Lands Tribunal; and

(ii) that favourable zoning or other planning benefits of the subject land are not prospective but existing features of the subject land which affect its value, are not excluded from consideration by s.12(c) or the *Yin Shuen* judgment, and must be taken into account in the assessment of compensation.

17. The expressions "development potential" and "speculative element" need explanation. By "the development potential" of the land the claimants mean the amount by which the open market value of the land (ascertained in the usual way by the use of comparables) exceeds its value subject to the restrictions. The so-called "speculative element" in the prices paid for the comparables is ill-defined but appears to include at the very least the amount if any by which such prices may reflect an element of speculation that, even after the costs of obtaining a modification of the terms of the lease including the payment of any premium have been taken into account, such modification will increase the value of the land.

The Yin Shuen judgment

18. The leading judgment was given by Lord Millett NPJ with whom the other members of the Court agreed. In para.5 he set out the question for decision. He said:

> "The question is whether the compensation payable on resumption should reflect a price *in excess of the value of the land subject to the restrictions* if the evidence shows that purchasers are willing to pay such a price in the hope or expectation of obtaining a modification of the terms of the lease" (emphasis added).

Although this is the critical passage in the judgment, since any judgment can be understood only in the light of the question it decides, the claimants have paid no attention to it.

19. In the course of answering this question we found it necessary to overrule the judgment of H H Judge Cruden in *Suen Sun Yau v. Director of Buildings and Lands* [1991] HKDCLR 33 ("*Suen Sun-yau*"). After acknowledging that an owner of land held under a Crown lease with restricted use had no legal right to a change of use, he had said at p.41:

> "The market reality is that purchasers are prepared to buy agricultural land with non-agricultural potential *and accept the risk of obtaining the necessary change of user*. Mr. MacNaughton agreed that this commonly, occurred in the market. It was for this very reason that he rejected Mr. Chan's six comparables of agricultural land, *because they included an element over and above their value for agricultural use, because of the purchaser's hope that he could obtain a change of user*. On the evidence I am satisfied that Lot 22, because of its size and location, was suitable for residential use. I appreciate any purchaser would require to obtain Crown approval for any change of use; probably have to pay a premium; and comply with other conditions. However, I am equally satisfied that a purchaser, fully aware of those risks, would be willing to pay above bare agricultural land market value for the land, with that potentiality. *Where land is compulsorily resumed, the owner is entitled to the present value of the land, including the advantage of those potentialities*"(emphasis added).

20. H H Judge Cruden, who was very experienced in land valuation cases, was satisfied that purchasers are willing to buy land with "non-agricultural" (i.e. development) potential and accept the risk of (i.e. speculate on) obtaining the necessary change of user, and that in such circumstances they are willing to pay more than the "bare agricultural land market value" (i.e. the value of the land subject to the restrictions in the lease). By overruling his decision we necessarily rejected his view that the compensation payable to the owner on resumption should reflect more than the value of the land subject to the restrictions in the lease because of the prospect of obtaining a modification or discharge of the restrictions.

21. Having overruled *Suen Sun-yau* we reversed the decision of the Court of Appeal which had followed it. It had held that the Director's argument failed to acknowledge the "intrinsic" value of the land "with all its potentialities"; and that it failed to have regard to what it called "the realities of the commercial world" to which s.12(d) required observance. Lord Millett NPJ pointed out (para.50) that *"insofar as the intrinsic value of the land includes its development potential"* (emphasis

added), it could not be realised without a modification of the terms of the lease, and that the prospect of obtaining such a modification fell squarely within the words of s.12(c). He added that, insofar as "the realities of the commercial world" reflect the willingness of purchasers to pay "a speculative price in the hope of obtaining a modification of the terms of the lease", s.12(d) was subject to s.12(c) which directed that no account should be taken of the prospect of obtaining a modification. In this context the expression "a speculative price" can only mean a price in excess of the value of the land subject to the restrictions in the lease and which reflects the purchaser's assessment of the chances of obtaining a modification of the terms of the lease.

22. Before the Lands Tribunal the Government's valuer had challenged the claimants' comparables on the ground that the prices contained a large element of what he called "hope value" (but which the claimants call "development value") that is to say the amount which a purchaser is prepared to pay in excess of the value of the land for the use permitted by the terms of the lease in the hope or expectation of obtaining a modification of those terms to permit development. The Lands Tribunal had neither accepted nor rejected his evidence but ruled it to be irrelevant. In the *Yin Shuen* judgment (para.54) Lord Millett NPJ said that this evidence was not irrelevant but highly material. If correct, then the claimants' comparables could not be taken at face value. It did not follow that they must be disregarded altogether, but they could not stand without adjustment. In this context the necessary "adjustment" can only mean the substitution of the value of the land for the restricted use permitted by the lease for the open market value obtained by the use of the comparables.

23. In disposing of an argument which the claimants had advanced in reliance on art.105 of the Basic Law, Lord Millett NPJ said (para.57) that:

> "The right to exploit *the development potential* of the land by using it as building land was not disposed of by the Crown and remains the property of the Government for which it ought not to be required to pay" (emphasis added).

24. These passages are sufficient to show that we answered the question posed in para.5 of the *Yin Shuen* judgment in the negative and upheld the Director's submission, which the Lands Tribunal and the Court of Appeal had rejected, that in determining the amount of compensation payable on resumption the value of the land must be taken to be its value subject to the restrictions in the lease. The right to exploit the development potential of the land belongs to the Government, not the lessee; and no account may be taken of the prospects of obtaining a modification of the terms of the lease. Insofar as the claimants relied on comparables which reflected a price in excess of the value of the land subject to the restrictions, the excess must be disregarded. In the light of these observations, the interpretation which the claimants have placed on the *Yin Shuen* judgment is unsustainable.

25. In support of their argument that in the *Yin Shuen* judgment we excluded, not the full "development value" of the land but only that part of it which they call "the speculative element", the claimants rely on a number of isolated passages in the *Yin Shuen* judgment taken out of context. They place particular reliance on paras 25 to 27, 49 to 50 and 53.

26. In paras 25 and 26 Lord Millett NPJ described the mischief at which s.12(c) was aimed. Speaking of the situation in 1922 in para.25

he said:

> "…the Government was concerned with the fact that purchasers, not intending or being able to develop the land themselves, were willing to pay speculative prices in the expectation that the Government would resume the land and develop it as building land free from any restrictions in the lease. The remedy was to exclude the speculative element from the assessment of compensation".

The claimants seize on the expression "speculative element". While not inapt in its context, however, it clearly referred to what the claimants have called the "development potential", that is to say the amount which purchasers were willing to pay in excess of the value of the land subject to the restrictions in the lease in the hope (i.e. speculating on the fact) that the Crown would resume the land and develop it free from such restrictions.

27. In para.26 he observed that the factual situation had changed since 1922. He said:

> "Urban development is nowadays usually left to private developers, who seek any necessary modification of the terms of their lease, rather than undertaken by the Government after resumption. Since the 1950's, the Government has charged premiums for granting modification of the terms of a Crown lease, and its policy for many years has been to charge the full value of the difference between the value of the land subject to the restricted use and the value of the land after modification. Whether it always succeeds is, of course, another matter; but the result is that purchasers no longer speculate on the likelihood that the Government will resume the land; instead they speculate on the Government charging a premium which does not fully reflect the value of the modification."

In other words, even though they know that the Government will charge a premium for modifying the terms of the lease, and that its policy is to charge an amount reflecting the full development potential released by the modification, purchasers are still prepared to pay more than the value of the land subject to the restrictions, speculating on the likelihood that the Government will grant the necessary modification to permit development and charge an acceptable premium.

28. In para.27 Lord Millett NPJ explained the philosophy which underlies the ownership of land in Hong Kong and informs the Government's policy of seeking to charge a premium which represents the full value of the modification. He explained that, while Hong Kong remained a Crown Colony:

> "land in Hong Kong was regarded as belonging to the Crown, which parted with its ownership only for the duration of the lease and for the user specified in the lease. Subject thereto, it remained the undisposed property of the Crown. In granting a modification of the user covenants in the lease, therefore, the Crown in effect made a further disposal of the land for which it was entitled to charge full value".

He contrasted this with the position in England, where one would expect the value released by a modification of the user covenants in a lease to be shared between the landlord and the tenant because:

> "…the right to make more beneficial use of the land during the currency of the term cannot be said to belong wholly to the landlord or wholly to the tenant, for the tenant cannot exercise the right without the consent of the landlord and the landlord cannot exercise it while the lease subsists."

29. The claimants rely on this passage as support for their contention that "the development potential" released by the modification of the terms of the lease should be shared between the Government and the claimant. Lord Millett NPJ could not, they argue, have been speaking only of the position in England, since what he said was equally true in Hong Kong. But Lord Millett NPJ was not describing the factual situation created by the grant of a lease. He was describing the philosophy of land tenure in Hong Kong which explains the enactment of s.12(c) (which finds no counterpart in England) and the Government's policy of charging a full premium for modification instead of sharing the benefits of modification with the lessee.

30. At the beginning of para.27 Lord Millett NPJ said that the Government's right to charge the full value of the modification had not

been and could not be challenged. Clause 6 of the Joint Declaration provides that land leases in Hong Kong and other related matters would be dealt with in accordance with the provisions of Annex III. Clause 5 of Annex III provides:

> "Modifications of the conditions specified in leases granted by the British Hong Kong Government may continue to be granted before 1 July 1997 *at a premium equivalent to the difference between the value of the land under the previous conditions and its value under the modified conditions*" (emphasis added).

31. This provides good evidence of the Crown's practice before 1997. As a transitional provision it did not have to be enacted as part of the Basic Law. However, by art.120 the Basic Law recognises such modifications, providing that:

> "All leases of land granted, decided upon or renewed before the establishment of the Hong Kong Special Administrative Region which extend beyond 30 June 1997, and all rights in relation to such leases, shall continue to be recognized and protected under the law of the Region."

32. The claimants also rely on Lord Millett NPJ's use of the expression "the speculative element" in paras 49 and 50 of the *Yin Shuen* judgment. We have already dealt with para.50. In para.49 he said that, with the sole exception of H H Judge Cruden's observations in *Suen Sun-yau*, s.12(c) of the Ordinance had been consistently understood and applied in Hong Kong to exclude from the compensation payable on the resumption of land held under a Crown lease:

> "any element which would reflect the speculative element in the value of the land referable to the prospect of obtaining a modification of the user covenant in the lease."

As Le Pichon JA and Reyes J observed in *View Point* at p.62, in this context "the speculative element" can only have been referable to the "non-agricultural potential", "an element over and above their value for agricultural use" and "the purchaser's hope that he could obtain a change of user" mentioned in the passage cited from *Suen Sun-yau*.

33. In para.53 Lord Millett NPJ explained that "in a perfect market" (i.e. theoretically):

> "purchasers would pay a price which precisely reflected the prospects of obtaining a modification of the terms of the lease and the costs of obtaining it, including the payment of any premium; and the Government would charge a premium which exactly reflected the additional value which would enure to the land as a result of the modification. In such a market there would be no room for speculation. The value of the land would be the same whether one took account of the prospects and costs of obtaining a modification or disregarded them, and s.12(c) would have no effect. But the market is not perfect. Purchasers are prepared to pay prices which do not reflect the intrinsic value of the land, but contain a speculative element for which the Government ought not to be required to pay on resumption".

34. The claimants also rely on this passage, but it is difficult to see what help they can derive from it. In a perfect market, the value of the land would be the same whether one took account of the prospects and cost of obtaining a modification or disregarded them. Since the market is not perfect, however, the value attributed to the land is likely to depend on which of the two bases of valuation is adopted; and while private purchasers are likely to have adopted the first when deciding how much to pay for land with development potential, s.12(c) requires the Lands Tribunal to adopt the second when determining the compensation payable on resumption. In this context the "speculative element which the Government ought not to be required to pay" is simply the difference between the values produced by the two approaches; and is the same as "the right to exploit the development potential of the land" for which the Government ought not to be required to pay (para.57).

35. Properly understood there is nothing in the *Yin Shuen* judgment which lends any support to the claimants' contention that what falls to be excluded by s.12(c) is anything less than the full amount of the "development potential" of the land, that is to say the difference between the value of the land subject to the restrictions and its open market value

which takes account of the prospects and cost of obtaining a modification of the terms of the lease. We reject the first of the claimants' contentions.

36. The second can be disposed of shortly. The claimants rightly observe that there is nothing conditional or prospective about the zoning of the subject land. It is a present, accrued feature of the land, like its physical features such as its infrastructure which make it suitable for development, and must be taken into account in any proper valuation.

37. The question, however, is not whether it should be taken into account but whether any value can properly be attributed to it. Zoning does not have an independent value of its own, and zoning for residential purposes is of value only if it can be realised by developing the land for such purposes. As the Government's valuer observed in Nam Chun:

> "planning permission in itself has no value, it is the right to develop the land that is valuable."

The syllogism is straightforward:

(i) zoning for a use which is not permitted by the lease has no value capable of being realised unless the terms of the lease are modified;

(ii) in assessing the compensation to be paid on resumption no account may be taken of the prospect of obtaining such a modification; and

(iii) therefore no value may be attributed to zoning which can only be realised by obtaining a modification.

Dragon House

38. Before the Lands Tribunal the claimant relied on private sales of comparable land with potential for development also held under Crown

leases and subject to similar restrictions. The claimant contended that they provided the best evidence of the open market value of the subject land by reference to which, it argued, the compensation should be determined. The Government valuer challenged the claimant's comparables on the ground that the Ordinance required the development potential of the land to be ignored.

39. In cross-examination the Government valuer readily accepted that purchasers of land with development potential would take account of the need to obtain a modification of the terms of the relevant lease of the premium which the Government would be likely to exact which, he said "involves a lot of risk". He also agreed that any assessment of the risk was highly subjective and would vary from one purchaser to another. In his opinion use as an open car park represented the best use of the subject land if the possibility of obtaining a modification of the terms of the lease allowing future development was left out of account as the Ordinance required; and he relied on appropriate comparables to ascertain the value of the land on this basis.

40. Following H H Judge Cruden's judgment in *Suen Sun-yau* the Tribunal held that the Ordinance did not require the Tribunal "unlike the market" to disregard any development potential of the land based on an intended use which would necessitate a modification of the terms of the lease. It accepted the claimant's comparables as providing the best evidence of the open market value of the land with the potential for residential development.

41. The whole basis of the Tribunal's decision has been overturned by the *Yin Shuen* judgment. It cannot possibly stand with the

overruling of *Suen Sun-yau*. The case must be remitted to the Lands Tribunal to determine the amount of compensation the light of the *Yin Shuen* judgment as we have explained it.

Nam Chun

42. When the case was reconsidered by the Lands Tribunal the key issue was whether the zoning or planning benefits of the subject land should be taken into account in assessing compensation. The parties' respective comparables and arguments were much the same.

43. The Tribunal rejected the Government's comparables because they were not zoned for residential development. It interpreted the *Yin Shuen* judgment as excluding compensation only for the "inflated price" attributable to speculation on the Government's removing the restrictions in the lease and charging a premium which did not fully reflect the value of the modification. It said that "the ultimate question is whether the price is inflated."

44. Not surprisingly the Government's valuer, unable to refer to his own comparables for this purpose, was unable to quantify the amount by which the prices paid for the claimant's comparables were "inflated"; and the Tribunal concluded that his evidence that they were was "bare assertion". But there was a good deal of evidence of the value of the land subject to the restrictions in the lease, which was, or at least ought to have been, the object of the inquiry. Such evidence was provided by the Government's comparables; for the value of land with no development potential is evidence, and will usually be the best evidence, of the value of comparable land whose development potential is to be disregarded.

45. In his first report for the resumed hearing the claimant's valuer attributed to the zoning virtually the whole of the value of the subject land in excess of its value subject to the restrictions in the lease. Without the zoning, he said, the land would probably be worth what it was in its existing state. But given the favourable zoning, there was little room for speculating on the prospect of obtaining a modification of the terms of the lease. He said that such modification was a near certainty, a fact which s.12(c) and its proviso require to be left out of account. By reference to the Government's comparables he was able to value the subject land subject to the restrictions in the lease as well as the higher value which the land would possess if the restrictions were modified to allow redevelopment. Ignoring the statutory requirement that no account is to be taken of the prospect of obtaining a modification of the terms of the lease and the statements in the *Yin Shuen* judgment that the right to exploit the development value of the land remains the property of the Government for which it ought not to be required to pay, he split the difference equally between the parties. He resiled from this position in his second report, but his recantation was based on a misunderstanding of the *Yin Shuen* judgment.

46. The Tribunal's decision was flawed by a misunderstanding of the *Yin Shuen* judgment. It wrongly assumed that favourable zoning and other planning benefits had a value which was independent of the use to which the land could lawfully be put; it wrongly rejected the Government's comparables on the ground that they were not zoned for residential development, a factor which in our opinion made them more rather than less useful for the purpose of determining the compensation payable on resumption; and it wrongly stated that there was no evidence that the claimant's comparables contained an element which the

Ordinance directed should be left out of account. It cannot stand with the *Yin Shuen* judgment as we have explained it.

The use of comparables

47. In *Watford Construction Co. Ltd v. Secretary for the New Territories* [1978] HKLTLR 253 the Lands Tribunal held that in order to apply s.12(c) it was not necessary to employ a two-stage approach by first ascertaining the open market value of the land and then quantifying and deducting the expectancy or probability factor. Giving the judgment of the Tribunal, Power P said at p.260:

> "This may, in certain cases, be a proper and useful approach but the Tribunal can see nothing in s.12 that would prevent it from approaching the valuation of land restricted to agricultural use by using the sales of comparable land which is similarly restricted. Indeed, in the present case, the Tribunal is satisfied not only that this is a proper and permitted approach under s.12 but also that it is the approach to the problem of valuation most likely to result in a correct valuation."

48. In the light of later experience we think that, unless there is no alternative, the two-stage approach should be discarded. The object of the inquiry is to ascertain the value of the subject land without taking into account the prospect of obtaining a modification of the terms of the lease to permit development. The best evidence of this is likely to be provided by prices paid for comparable lands which have no prospect of development. The two-stage approach is a curiously roundabout method of determining the amount of compensation payable on resumption. It involves taking the open market value of land obtained by the use of comparables with development potential and attempting to quantify the element which must be left out of account in order to arrive at the value of the land subject to restrictions. But the only objective way of quantifying the element to be left out of account is to ascertain the value of the land subject to restrictions and deduct it from the open market

value. And once the value of the land subject to restrictions has been ascertained, the job is done, making the two-stage approach unnecessary.

Legitimate expectation

49. Before us Nam Chun put forward an argument based on legitimate expectation, and Dragon House asked us to accord it the benefit of the argument if we were to accept it. The gist of the argument is as follows. In 1983 and 1986 the Government concluded that s.12(c) of the Ordinance (then the Crown Lands Resumption Ordinance) could lead to injustice and gave a promise or made a representation to the Heung Yee Kuk that steps would be taken to repeal it. This, it is said, gave rise to a legitimate understanding that the Government would not rely on s.12(c) in future.

50. This argument was not put forward in the Lands Tribunal. We were told on instructions that Nam Chun was not aware of the promise until after the Tribunal had given its decision. Shortly before the hearing in the Court of Appeal, Nam Chun unsuccessfully moved that court for leave to file a respondent's notice out of time in order to raise the point and to file evidence in support of it. Undaunted by its lack of success, Nam Chun now says that the facts which it needs to make good its argument can be gleaned from the evidence already filed for other purposes. But it is not simply a matter whether the state of the evidence suits Nam Chun. The Director says that he would have adduced evidence on the point if it had been taken at the evidence-taking stage. This is fatal to the claimants' attempt to raise the issue before us. As we pointed out in *Flywin Co. Ltd v. Strong & Associates Ltd* (2002) 5 HKCFAR 356 at p.369 B-C:

> "Where a point is taken at the trial, the facts pertaining to it are open to full investigation at the evidence-taking stage of the litigation. That is as

> it should be. Therefore where a party has omitted to take a point at the trial and then seeks to raise that point on appeal, the position is as follows. He will be barred from doing so unless there is no reasonable possibility that the state of the evidence relevant to the point would have been materially more favourable to the other side if the point had been taken at the trial."

51. Nam Chun claims that the Lands Tribunal, not being a superior court, could not have given effect to the point even if it had considered the point a good one. They may or may not be so; there were several alternative ways in which the point could have been raised at the time, whether by way of judicial review or otherwise. But the point is now *Flywin* barred.

52. In any case, we are far from thinking that the case would have any prospect of success. It seems that the question of the repeal of s.12(c) arose in the context of the Heung Yee Kuk's opposition to the Government's proposal to abolish the prevailing scheme for making *ex gratia* payments upon the resumption of land in the New Territories. While the representation was clear, it was not free-standing. It was made for the purpose of persuading the Heung Yee Kuk to agree to the abolition of the scheme of *ex gratia* payments prevailing at the time and was part of a package offered by the Government which was never implemented. Nor was it unconditional: it was subject to the acceptance of the financial implications by the Financial Committee of the Legislative Council.

53. As it happened, no agreement was reached with the Heung Yee Kuk and the matter was held in abeyance. In these circumstances it is impossible to find that there was any representation or promise capable of giving rise to a legitimate expectation.

54. Whatever the effect of the representation or promise, it was clearly and unequivocally withdrawn in 1996 when representatives of the Heung Yee Kuk were told that after very careful consideration the Administration had come to the view that there was insufficient justification for repealing s.12(c). There is no evidence that it was relied on by anyone, let alone Nam Chun, before its retraction.

55. We would add that the proposition that a statutory provision is in effect to be treated as repealed because of an executive promise to repeal it is, to say the least, an extremely difficult proposition for which to argue. It ignores the fundamental constitutional doctrine of the separation of powers, for the repeal of primary legislation lies within the legislative and not the executive branch of government; and a promise to repeal existing legislation is not inconsistent with its enforcement pending repeal. The difficulty is increased when, as in the present case, the promise was qualified to begin with and later retracted.

Conclusion

56. We dismiss both appeals. The cases must be remitted to the Lands Tribunal to determine the amount of the compensation in the light of the *Yin Shuen* and this judgment.

(Kemal Bokhary)	(Patrick Chan)	(R A V Ribeiro)
Permanent Judge	Permanent Judge	Permanent Judge

(G P Nazareth)
Non-Permanent Judge

(Lord Millett)
Non-Permanent Judge

Mr Malcolm Spence QC and Mr Patrick Chong (instructed by Messrs K C Ho & Fong) for Dragon House Investment Ltd

Mr Benjamin Yu SC, Mr Patrick Chong and Mr Kan Fook Yee (instructed by Messrs K C Ho & Fong) for Nam Chun Investment Co. Ltd

Mr Edward Chan SC and Mr Nelson Miu (instructed by the Department of Justice) for the Secretary for Transport and the Director of Lands