33/1902

IN THE PRIVY COUNCIL No. 14 of 1961

ON APPEAL FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE MATTER of KUALA LUMPUR HIGH COURT CIVIL APPLICATION No. 1 of 1959

- and -

IN THE MATTER of LAND ACQUISITION ENACTMENT CAP.140 SECTION 23

- and -

10 IN THE MATTER of LAND ACQUISITION OF LOT Nos.57 and 58 SECTION 58, TOWN OF KAULA LUMPUR

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
30 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.
68272

B E T W E E N :

LIM FOO YONG LIMITED (Applicant) Appellant

- and -

THE COLLECTOR OF LAND REVENUE (Respondent) Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an Appeal from the Order of the Court of Appeal of the Supreme Court of the Federation of Malaya dated the 12th December 1960 allowing in part the Appeal of the present Respondent (P.100) and dismissing the Cross-Appeal of the present Appellant against the Award of Ong, J. sitting with (P.58) two Assessors made on the 26th February 1960 in the High Court at Kuala Lumpur under the Land Acquisition Enactment of the former Federated Malay States (F.M.S. Cap.140) whereby the Appellant had been awarded compensation comprising the sum of (P.72 l.1) $202,280 in respect of the market value of its land compulsorily acquired under the said Enactment and the further sum of $276,240 in respect of the severance of the said land from the other land of the Appellant.

2. The said Order of the Court of Appeal set aside the award of the said sum of $276,240 made by Ong, J. in respect of compensation for severance and the main issue in the present appeal is whether any and if so what sum should have been awarded under this head.

3. The Land Acquisition Enactment authorises the appropriate Government authorities to acquire any land whenever it is needed for a public purpose. 10

4. The procedure which the Enactment requires to be observed down to the making of a reference to the High Court is not in issue in this appeal and is briefly as follows. Notifications are published in the Gazette declaring firstly that the land in question is likely to be needed for a public purpose and secondly that it is so needed. A land office official called the Collector is then directed to take proceedings for the acquisition of the land 20 and he causes statutory notices to be posted on or near the land publishing the intention of Government to acquire it and inviting claims for compensation to be made to him for all interests therein. Under sub-section (ii) of section 9 persons interested are required to state their interest in the acquired land and the amount and particulars of their claims. The Collector is given powers under sub-section (iii) of section 9 (which he exercised in this case) to require the 30 registered owner of land to furnish a written valuation thereof.

5. The next stage of the proceedings is an inquiry under section 11 by the Collector in the course of which he determines and makes a formal award of the compensation which in his opinion should be allowed for the acquired land in accordance with sections 29 and 30 the relevant provisions whereof are set out fully in paragraph 7 hereof. When the Collector has made 40 his award under section 11 he is authorised under section 16 to take possession of the land.

6. Any interested person who does not accept the Collector's award may require him, in a case like the present one, to refer the matter for the determination of the High Court in accordance with sections 22 and 23.

7. The provisions of the Enactment which are thereafter material are as follows:-

Sec.25 - "If the objection is in regard to the amount of compensation and the award of the Collector is not less than five thousand dollars the Court shall also appoint two assessors for the purpose of aiding the Judge in determining the objection . . . . ."

Sec.29(i) - "In determining the amount of compensation to be awarded for land acquired under this Enactment the Court shall take into consideration the following matters and no others, namely :

(a) the market value at the date of the publication of the notification under section 4(i), if such notification shall within six months from the date thereof be followed by a declaration under section 6 in respect of the same land or part thereof, or in other cases the market value at the date of the publication of the declaration made under section 6;

(b) any increase in the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put;

(c) the damage, if any, sustained by the person interested at the time of the Collector's taking possession of the land by reason of severing such land from his other land;

(d) the damage, if any, sustained by the person interested at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his other property whether movable or immovable in any other manner or his actual earnings; and

(e) if, in consequence of the acquisition, he is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change."

Sec.30 - "In determining the amount of compensation to be awarded for land acquired under this Enactment the Court shall not take into consideration:

(a) the degree of urgency which has led to the acquisition;

(b) any disinclination of the person interested to part with the land acquired;

(c) any damage sustained by the person interested which, if caused by a private person, would not be a good cause of action; 10

(d) . . . . "

Sec.34 - "In case of difference of opinion between the Judge and both of the assessors as to the amount of compensation or as to the amount of any item thereof the decision of the Judge shall prevail."

Sec.37(i)(c) - "If the claim of the applicant made under section 9(ii) exceeds by twenty per centum or more the amount awarded, he shall not be entitled to his costs." 20

Sec.38(i) - "Where the amount of compensation awarded exceeds five thousand dollars the Collector or the person interested (as the case may be) may appeal therefrom to the Court of Appeal."

Sec.39 - "If the sum which in the opinion of the Court the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per cent. per annum from the date on which he took possession of the land to the date of payment of such excess to the Court or the person interested." 30

Sec.54 - "From any judgment or order of the Court of Appeal made on appeal under sections 38 or 41 of this Enactment an 40

appeal shall lie to the Yang di - Pertuan Agong as provided for in the Federal Constitution."

8. On the 11th October 1957 when the acquisition proceedings were instituted the Appellant, a limited company, was the registered proprietor of seven pieces of town land namely Lots 134, 135, 136, 156 and 157 (section 57) and Lots 57 and 58 (section 58) in the Town and District of Kuala Lumpur. Only Lots 57 and 58 (hereinafter called "the swimming pool land") were compulsorily acquired in the said acquisition proceedings but the Appellant's claim for compensation for severance related to the remaining lots specified above and hereinafter called "the hotel land".

9. The situation of all the said land is shown on the Site Plan (Exhibit A1). On the said plan Lots 134, 135 and 136 are coloured pink, Lots 156 and 157 are coloured yellow and the swimming pool land is coloured blue. The shortest distance between the hotel land and the swimming pool land is 165 feet.

10. The aggregate area comprised by the hotel land and the swimming pool land is 6 acres 2 roods 5.7 poles of which the swimming pool land comprises 2 acres 1 rood 11.5 poles (101,140 square feet) and the hotel land 4 acres 34.2 poles (183,474 square feet).

P.2 l.10
P.116

11. The Appellant purchased Lots 134, 135 and 136 for $62,000 on the 23rd January 1956 and on the 7th March 1956 it purchased Lots 156 and 157 for $27,500. Having thus acquired the hotel land the Appellant intended to construct thereon what its managing director Lim Foo Yong (hereinafter called "the Managing Director") described in evidence during the reference before Ong, J. as . . . "a very high-class hotel of world standard with recreational and amusement amenities - e.g. swimming, tennis and playground for children". To this end one Lee Yoon Thim an architect (hereinafter called "the Architect") was consulted and instructed to prepare plans.

P.82 l.40
P.39 l.7
P.83 l.1
P.39 l.13

12. The Architect prepared two site plans for the Appellant. The first site plan (Exhibit A2) contemplated the construction of a seven storey hotel, a petrol kiosk, a swimming pool and

P.44 l.38

P.45 l.1 a car park. This plan was submitted on the 25th April 1956 to the Kuala Lumpur Municipality for planning permission which was granted subject to
P.45 l.5 the re-siting of the petrol kiosk. Subsequently an amended site plan (Exhibit A3) was produced by the Architect and approved on the 21st June 1956 by the Municipality. The said amended site plan re-sited the proposed hotel building on Lot 136 so as to provide a bigger car park. It also re-sited
P.39 l.33 the petrol kiosk at the rear of the proposed hotel building. The swimming pool therefore disappeared. 10

13. The Managing Director thereupon looked for further land hearby on which to construct the
P.41 l.9 swimming pool and in September 1956 he successfully concluded negotiations on behalf of the Appellant for the purchase of the swimming pool land. This purchase was negotiated as part of a larger transaction whereby the same Vendor namely the liquidator of Eu Tong Sen Limited agreed to sell the swimming
P.40 l.26 pool land and over 30 acres of land about a mile away in the Freeman Road area of Kuala Lumpur for 20
P.40 l.34 the sum of $660,000. The Appellant only acquired the swimming pool land and the Freeman Road land was resold for $600,000 by the Managing Director
P.41 l.32 to another company in which he held shares and of which he was also managing director. After allowing for the services of the Managing Director in conducting negotiations the purchase price of the swimming pool land was treated as $60,000 and,
P.63 l.33 in due course, on the 10th April 1957 that land was transferred to the Appellant. 30

14. By a letter dated the 24th September 1956
P.41 l.13 (Exhibit A4) addressed to the Managing Director by one Joe Eu on behalf of the Vendor of the swimming pool land the Appellant obtained an assurance that it would be able to procure access between Lots 157 and 58 over an existing
P.63 l.43 footpath which traversed Lot 56 which was also the
P.44 l.15 Vendor's land.

P.43 l.40 15. Between April and August 1957 the 40
P.45 l.30 Architect prepared a plan (Exhibit A1) for a swimming pool, two tennis courts, a badminton court and a car park on the swimming pool land.
P.42 l.7 The said plan was never submitted to the Kuala Lumpur Municipality for planning approval as
P.64 l.5 the Architect was busy with plans for the hotel building and the acquisition proceedings intervened.

16. In July 1957 the Appellant concluded arrangements with one Lim Joo Tan (hereinafter called "the prospective Tenant") for the leasing of the projected hotel and by a letter dated the 12th July 1957 (Exhibit A9) the Appellant confirmed that the prospective Tenant was to be granted a lease of the future Hotel Merlin for 5 years in the first instance with option of renewal. The rent arranged was $50,000 per month and it was stipulated *inter alia* that:- P.107

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> "1. The Hotel, which is situated on Lots 134, 135 136, 156 and 157 Sec.57, Town of Kuala Lumpur, will have adequate car parking facilities and comprises of 204 bedrooms all fully air-conditioned and with bathrooms attached.
>
> 2. There will be a swimming pool, tennis courts, badminton courts and grounds on Lots 57 and 58, sec.58, Town of Kuala Lumpur, which is just behind the hotel proper".

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The said letter contained an undertaking by the Appellant to have a lease drawn up when the building was ready for occupation which was stated to be expected to be eight to ten months later.

17. It will be contended on behalf of the Respondent that the said arrangements made between the Appellant and the prospective Tenant were too vague to be legally binding and were in any event dependent upon the drawing up of a lease in terms to be agreed between the said parties.

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18. In August 1957 the Managing Director approached one Mrs. Lucy Pereira who was the executrix of her husband the former owner of Lot 158 marked on the plan Exhibit A1 and made her an offer for the purchase of the Lot with the object of providing access between the hotel and the swimming pool land. In the event Mrs. Pereira decided not to sell at that time but orally gave the Managing Director first refusal in the event of her selling the land in question in the future. Mrs. Pereira also agreed to lease a small portion of her land at a rent of $150 per month to facilitate access between the hotel and the swimming pool land. P.42 l.12 P.46 l.18

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Pp.7-9 19. The acquisition proceedings were instituted on the 11th October 1957 when notification under Sections 4 and 6 of the Land Acquisition Enactment were published in the Selangor Government Gazette in relation *inter alia* to the swimming pool land.

P.11 1.10
P.57 1.8 20. The procedure under the Enactment was thereafter duly followed save that, owing to the urgency of the purpose for which the land was being acquired, possession of the swimming pool land was, with the written consent of the Appellant, taken on the 12th October 1957 and not in accordance with section 16 of the Enactment. 10

21. The salient events in the course of the acquisition proceedings leading up to the reference to the High Court were as follows:-

P.10 1.34
P.13 1.11
P.14 (1) On the 16th October 1957 the Collector served the Appellant with a notice (Annexure D3) under section 9(iii) of the Enactment requiring from it a statement in writing of its valuation of the swimming pool land and of the basis upon which such valuation was made. By a letter dated the 3rd December 1957 (Annexure D7) the Appellant's solicitors first made the following claim:- 20

"(a) Value of land 101,140 square feet @ $3 per square foot	$303,420
(b) Damage by reason of severance and injurious affection	$1,200,000
	1,503,420"

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P.20 1.13 (2) After further correspondence in the course of which the Collector pressed for the grounds of the said claim the Appellant's solicitors by a letter dated the 21st January 1958 (Annexure D15) stated that they had now had additional time to finalise their claim and amended it to the sum of $910,492 which sum they apportioned as to $325,357 for the swimming pool land and as to the balance of $585,135 "for injurious affection to the remainder of our client's hotel property, which now occupies Lots 134, 135, 136, 156 and 157". 40

In paragraph 3 of the said letter the Appellant's solicitors set out the following further and better particulars of their amended claim:

"(a) In the amended claim the land contained in Lots 57 and 58 is not valued at a rate of $3/- per square foot but as part of the hotel property belonging to our clients and now occupying Lots 134, 135, 136, 156 and 157;

(b) The claim is for injurious affection or for severance and injurious affection. As stated above, Lots 57 and 58 form part of the hotel property belonging to our clients and now occupying Lots 134, 135, 136, 156 and 157. The said Lots 57 and 58 were planned by our clients to contain the playground of their hotel, with a swimming pool, and other outdoor sporting and recreational amenities to be constructed and provided there for the residents and customers of their hotel. Permission had been obtained from the owner of Lot 56 to use the footpath which traverses Lot 56 and links Lots 57 and 58 to Lots 134, 135, 136, 156 and 157. The acquisition of Lots 57 and 58 deprives our clients' hotel of a distinctive attraction and a distinguishing amenity and effects injuriously the remaining property.

(c) The amended claim is based on the difference in the value of our clients' hotel property aforesaid before and after the acquisition, taking into account the difference in the rent and the return it is able to command. Allowance has been made for the fact that the hotel was not completed at the effective date of acquisition. The resultant difference in value has for the purpose of our clients' claim been apportioned in the figures shown above."

(3) The Collector concluded his enquiry

pursuant to section 11 of the Enactment on the 31st January 1958 when he awarded compensation of $60,000 under paragraph (a) of sub-section (i) of section 29 in respect of the market value of the swimming pool land on the 11th October 1957. In making this award the Collector was guided by a report (Annexure D25) from the Federal Treasury's Chief Valuer who considered the value of the said land to have been $60,000 at the material date but did not refer to the question of severance or injurious affection. The Collector rejected the Appellant's claim under the latter head and made no award in respect of any of the matters mentioned in paragraphs (b)(c)(d) or (e) of sub-section (i) of section 29 of the Enactment.

P.32 l.23
P.29 l.23
P.114

(4) The Appellant accepted the award (Annexure D.17) under protest and on the 11th March 1958 it applied (Annexure B) under sub-section (i) of section 22 of the Enactment that the matter be referred by the Collector for the determination of the Court. The grounds of objection stated in the said application were as follows:-

P.22 l.24
P.4 l.11
P.4 l.30

"(a) That the amount of compensation awarded is insufficient having regard to:-

(i) The market value of the lands;

(ii) The damage sustained by us at the time of your taking possession of the lands by reason of the acquisition injuriously affecting our other property on Lots 134, 135, 136, 156 and 157 of section 58 Town of Kuala Lumpur;

(b) That the amount of $910,492/- claimed by us, being apportioned as to $325,357/- for the lands contained in Lots 57 and 58 and as to the balance of $585,135/- for injurious affection to our other property on Lots 134, 135 136, 156 and 157, correctly represents the amount of compensation which should have been awarded."

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(5) On the 20th March 1959 the Collector made the necessary reference to the Court.

22. Soon after the acquisition proceedings had begun namely on the 5th November 1957 (Exhibit A10) the prospective tenant re-opened correspondence and had further discussions with the Appellant and sought a reduction in the rent to be paid for the hotel in view of the reduction in amenities which he claimed the acquisition of the swimming pool land occasioned to the hotel property. After further discussion the Appellant by a letter (Exhibit A12) dated the 2nd December 1957 confirmed that he would accept a rent of $35,000 per month under a lease of the projected Hotel Merlin to be drawn up by his solicitors. It will be contended on behalf of the Respondent that the aforesaid discussions and correspondence were too vague to create a legally binding agreement between the parties concerned and were in any event dependent upon the drawing up of a lease in terms to be agreed between the said parties.

P.108 1.25
P.110 1.13

23. It does not appear from the evidence in the record of proceedings at what date work was begun on the Merlin Hotel nor is there any evidence to show in accordance with what plan the hotel was eventually erected. However the evidence of the Managing Director in the course of the reference before Ong. J. was that the plan Exhibit A1 had not been submitted for the approval of the Municipality when the acquisition proceedings started and that until then "this matter was under discussion between me and my architect." In his evidence before Ong, J. the Architect referred to the plan Exhibit A1 having been prepared sometime in August 1957 and as being "only a preliminary lay out". He also said in the same context that he "was then busy over the hotel plans." In this connection Ong, J. apparently thought that the construction of the hotel had begun by August 1957 whereas Thomson C.J. came to the conclusion that on the 11th October 1957 no construction work had been begun on either the hotel land or the swimming pool land.

P.42 1.10
P.45 1.29
P.64 1.5
P.94 1.36

24. Such evidence as was given before Ong, J. regarding the construction of the hotel disclosed

that it had not been completed by the 14th May 1959 when the Appellant agreed by letter (Exhibit A15) to accept a monthly rent of ∅9,000 from the prospective Tenant pending the completion of the building. By the 26th February 1960 further progress had been made but the building was still not completed and the monthly rent then being paid by the prospective Tenant was ∅30,000. In his evidence given on the 26th February 1960 before Ong, J. the Managing Director said he expected the work to be finished by the end of April 1960.

P.112 P.57 P.57 1.23 10

25. The hearing of the reference before Ong, J. and two assessors took place in the High Court of Kuala Lumpur on the 20th and 21st October 1959, the 13th November 1959 and the 26th February 1960.

26. Before Ong, J. the Appellant relied on the evidence of a valuer Chin Kok Kiong who purported to apply the "before and after" method of valuation to "find the margin of compensation for injurious affection." On the footing that the rent of the hotel including the recreational facilities on the swimming pool land payable by the prospective Tenant would have been ∅50,000 per month and after making various deductions the Appellant's valuer capitalised the value of the entire property on the basis of ten years purchase at the figure of ∅4,064,880. Taking a monthly rent of ∅35,000 which the prospective Tenant had agreed to pay after the compulsory acquisition of the swimming pool land and applying the same method of calculation as before, but this time on the basis of eleven years purchase, he capitalised the value of the hotel at the figure of ∅3,006,168. Although matters were still, according to the evidence in the record, at the planning stage at the time of the acquisition the Appellant's valuer based the said capitalised values upon the monthly rent which the prospective Tenant had agreed to pay for the completed Hotel Merlin with or (as the case might be) without the additional amenities planned for the swimmong pool land. He stated that the estimated cost of "buildings, roads, swimming pools etc." was ∅3,000,000. In this connecting the Managing Director confirmed the estimate of ∅3,000,000 and said in evidence that the estimated cost of the swimming pool, tennis and badminton courts and

P.36 1.28 P.37 1.3 P.37 1.32 P.57 1.13 20 30 40

recreational facilities alone was $100,000.

27. Having arrived at the said capitalised values of $4,064,880 before acquisition and $3,006,168 after acquisition the Appellant's valuer gave the following evidence in support of his opinion that the Appellant was entitled to $325,357 as compensation for the swimming pool land and $585,135 as compensation for "injurious affection":- P.37 l.24

"The difference between the two capital values is $1,058,712. At the relevant time, the Hotel Merlin was two years short of completion - and allowing for same at 8 per cent. for two yware years, I obtained net figure of $910,492. This figure represents blanket form compensation for land and injurious affection. I broke down this figure to get value of land, and of building separately. The total cost of lands and building was $4,064,880. Less estimated cost of buildings, roads, swimming pools etc. at $3,000,000 - leaves balance of $1,064,880 for the lands. I valued lands at date of acquisition at $915,796 for a total of 6.533 acres covering 7 lots. Value of 2.321 acres (Lots 57-58) would be $325,357 i.e. $3.3.21 cts. per sq. ft.

Injurious affection would therefore be $910,492 less $325,357 - or $585,135."

It will be contended on behalf of the Respondent that, although he did allow for the difference in gross realisation value being deferred for two years, the Appellant's valuer failed to make any allowance for developer's profit or interest charges on the outlay of the developer while the building was being built.

28. In the course of his evidence the prospective Tenant referred to the Federal Hotel which he believed to pay a monthly rent of $19-20,000 with only ninety rooms compared with two-hundred and four rooms in the Merlin Hotel. P.48 l.24 P.48 l.24

29. The Respondent called Arthur Aubrey Wragg the Chief Valuer of the Ministry of Finance who supported his earlier report (Annexure D.25) which was exhibited in the reference proceedings (Exhibits R17 and R18). He gave no evidence on the questions of severance or injurious affection. P.51 P.29

P.58 30. In his award delivered on the 26th February 1960 Ong, J. assessed the market value of the swimming pool land under paragraph (a) of sub-section (i) of Section 29 of the Enactment on
P.72 l.1 the 11th October 1957 at $202,280 calculated on
P.62 l.1 the basis of 101,140 square feet at $2.00 per square foot. This part of the award was not varied by the Court of Appeal and is not in issue in the present appeal save that Neal J. would have awarded an additional sum of $25,000 either as damages for severance or as an addition to 10
P.99 l.43 the market value of the land acquired.

31. Before dealing with the Appellant's
P.62 claim for injurious affection Ong, J. set out the material facts of the case which have been mentioned above and then observed that he had come to certain conclusions of fact which he set
P.66 l.27 out in the following passage of his award:-

"I accordingly find as a fact that the agreed rent payable by the lessee to the owners of the 20 hotel, had lots 57 and 58 not been taken, would have been $50,000 per month, which rent I consider fair and reasonable. I find, also, that the lease at such rental would have been for 5 years, with an option to the lessee to renew.

Secondly, I find as a fact that the purchase of Lots 57 and 58 was made as a direct consequence of the resiting of the hotel, and was for the express purpose of providing a swimming pool together with other recreational amenities as part 30 and parcel of the attractions of the hotel and to be comprised in the lease of the hotel for the monthly rent for $50,000 inclusive.

Thirdly I find that, by reason of the acquisition, the owners are permanently disabled from providing for the hotel and swimming pool and recreational facilities which they could have done on Lots 57 and 58. The swimming pool and recreation ground cannot in my opinion be carved out of the existing car park area, because among 40 other things an adequate parking space for cars is essential to a hotel of this size in that locality.

Fourthly, I find as a fact that by reason of the acquisition the owners of the remaining lots have suffered substantial loss from the reduction of the rental value of their hotel."

It will be contended on behalf of the Respondents that the aforesaid conclusions of Ong, J. included inferences from the evidence before him rather than fact and that not all such inferences were accepted by the Court of Appeal.

32. The learned Judge then proceeded to give his reasons for considering the Collector was wrong in holding that there had been no severance and, after stating that counsel for the State Government had rightly conceded that this question was one of fact for determination by the Court he made the following observations:-

P.69 1.37

"In view of the findings of fact which have already been set out, it follows as a necessary corollary thereto that the owners have been damnified or injuriously affected by reason of the acquisition causing a severance of Lots 57 and 58 from the rest of the land with which those two lots were intended to and did in fact form a composite unit. The owners are therefore in my opinion entitled under paragraph (c) of Section 29(i) to compensation for the damage sustained by them. Such damage was the direct consequence of the severance and such severance has had the effect of permanently disabling the owners from putting the land retained by them to the most advantageous and profitable use. The nature and extent of such damage has been fully proved."

It will be contended on behalf of the Respondent that the majority of the Court of Appeal did not, and it will be submitted rightly, accept that any damage attributable to severance had been proved or that such severance had permanently disabled the Appellant from putting the hotel land retained by it to the most advantageous and profitable use.

P.70 1.4

33. After adverting to the fact that at the hearing of the reference the Appellant had only adduced evidence to prove damage by reason of severance in accordance with paragraph (c) of sub-section (i) of Section 29 of the Enactment Ong, J. assessed the quantum of damages which ought in his judgment to be awarded to the Appellant under paragraph (c).

P.70 1.45

34. The learned Judge based his calculation on a loss of monthly rent of $10,000. This

involved accepting that the hotel property could have been leased for $50,000 but finding with the concurrence of the two assessors, that the hotel property could have been let at a monthly rent of $40,000 after the acquisition and not $35,000 which was alleged by the Appellant to be the appropriate rental (In this connection it will be contended on the Respondent's behalf that the observation of Ong, J. to the effect that it was
P.70 1.43 not challenged that the severance had caused the rental value to drop by $15,000 was erroneous because (1) the Respondent made no admission on this question which was considered by Ong, J. and the Assessors who did not accept the aforesaid drop in rental value of $15,000 alleged by the Appellant and (2) the aforesaid question was the main issue in the Court of Appeal). On the said basis the annual loss in rent would be $120,000 which Ong, J. reduced by $31,200 on account of Municipal assessment at the rate of 26% so as to leave $88,800, from which he deducted $35,520
P.71 1.11 in respect of income tax leaving a net loss
P.71 1.31 of $53,280. Capitalised on the basis of 8 years purchase the loss was therefore $426,240. Allowing with the concurrence of the assessors, a sum of $150,000 for the capital outlay (in constructing the swimming pool and other recreational facilities) and interest charges he arrived at the final figure of $276,240. Accordingly no order was made as to
P.72 1.7 costs in accordance with Paragraph (c) of sub-section (i) of Section 37 of the Enactment. Interest on the said sum of $276,240 was ordered to be paid from the 1st May 1960.

Pp.72-3 35. The first assessor (Jones) would have valued the damage attributable to severance by capitalising a gross rental loss of $10,000 per month on the basis of seven years purchase. By calculations which he did not disclose he assessed the compensation under this head at the sum of $233,040.

P.74 36. The second assessor (Navaratnam) considered a monthly rent of $50,000 for the entire holding would have been reasonable but that after the acquisition a monthly rent of $40,000 (and not $35,000 as alleged by the Appellant) would be
P.74 1.14 expected. His reason for this opinion was "because the Federal Hotel with its 90 rooms is receiving $19,800/- rental per month and the Hotel Merlin having 204 rooms more than double the Federal should be able to command $40,000 in view of the

fact that its locality and parking facilities are far better than the Federal Hotel". He applied a before and after valuation on this basis and arrived at the figure of $768,057.45 which he considered to represent the total compensation payable for the land acquired, severance and injurious affection. Of this sum he considered that $253,768.53 represented the value of the swimming pool land actually acquired and the balance of $514,288.92 represented compensation for severance and injurious affection. P.75 l.31 P.77 l.1

37. The respondent duly appealed to the Court of Appeal against the whole of the said award of Ong, J. and the following grounds of appeal filed on his behalf are relevant to this appeal: P.78 P.80 l.5

"IV. The learned Judge misdirected himself on the law as to severance or injurious affection which properly considered and understood did not entitle the owners, in the face of the evidence to any compensation at all by reason thereof.

V. In evaluating the evidence and coming to his conclusions on his part of the case the learned Judge failed to appreciate that the injury complained of entitling the owners to any compensation must be an injury to land and not merely a personal injury or injury to trade; and that in any event according to the evidence before him, insofar as any injury was suffered by the owners by not being able to provide a swimming pool on the five lots on which the hotel was to be erected, such injury had been suffered even before the owners proceeded to negotiate for the purchase of lots 57 and 58.

VI. Further the learned Judge in valuing the potential user of the land failed to bear in mind that it is the possibilities of the land and not its realised possibilities that he had to take into consideration.

VIII. Assuming without admitting that there was a right to compensation by reason of severance, the learned Judge failed to appreciate that the capitalised value of the said two lots in the sum of $276,240/- at which figure he arrived on the basis of the "Before and After" method of valuation represented the compensation payable not only for the loss of the land taken

but also for severance and injurious affection for the remainder.

IX. The learned Judge's Award therefore has, in the final result, given the owners compensation for the loss of the land twice over."

P.81 1.16

38. The Appellant gave Notice of Cross-Appeal on the following grounds:-

"I. The learned Judge was wrong in the method of Valuation adopted by him whereby he proceeded to assess separately the compensation for the land and the compensation for injurious affection by reason of severance; the learned Judge should have followed the orthodox "Before and After" method of valuation adopted by the Respondents' Valuer, and should have awarded nearer the amount claimed by the Respondents.

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II. In any event the learned Judge was wrong in holding:

(a) that in assessment of compensation the appropriate yardstick to apply should be a monthly loss of $10,000/- in that according to the evidence he should have found that the monthly loss was $15,000/- and should have accepted this figure in assessment of compensation;

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(b) that an allowance should be made for income tax payable by the Respondents in his assessment of compensation, in that he was making an assessment of compensation for the loss in the capital value of the remainder of the Respondents' property by reason of the acquisition, and not for the loss of income or earnings, and should have ignored the question of income tax liability."

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39. The said appeal and cross-appeal were heard by the Court of Appeal (Thomson, C.J., Hill, J.A., and Neal, J.) at Kuala Lumpur on the 25th and 26th August 1960.

P.82 1.20

40. For the Respondents it was contended inter alia:-

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(a) That when using the before and after method of valuation Ong, J. had in effect

given the Appellant the value of the swimming pool land twice over.

(b) That severance was not merely a "form of injurious affection" but stood by itself and involved damage done to the land which remains by reason of the taking of the other land. P.84 l.36

(c) That in submitting the plan Exhibit A3 the Appellant had put out of mind the making of provision for a swimming pool on the hotel land and on the 21st June 1956 it had obtained planning permission for the maximum development the five lots would bear. P.85 l.10

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(d) That the acquisition merely deprived the Appellant of an additional advantage to the hotel land so that it was not injuriously affected thereby.

(e) That in the premises the only thing on which compensation should have been based was market value and that Ong, J. had wrongly valued potentiality as if it was actual business.

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41. For the Appellant it was contended *inter alia* that:- Pp.85-6

(a) Although it had not claimed anything for loss of earnings it had produced evidence of it as having a bearing on valuation of land.

(b) No difficult would have arisen if Ong,J. had followed the before and after method of valuation referred to in the evidence given on behalf of the Appellant.

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(c) Ong, J. should not have considered the incidence of income tax on lost earnings.

42. On the 12th December 1960 the Court of Appeal, by a majority of the Judges sitting (Thomson, C.J. and Hill, J.A.; Neal, J. dissenting) allowed the Respondent's appeal and dismissed the Appellant's cross-appeal to the extent of ordering that the total amount of the award of compensation made by Ong, J. be reduced to $202,280 and that the taxed costs of the appeal be paid by the Appellant to the Respondent. P.100 l.30

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43. After dealing with the question of market value Thomson, C.J. referred to the claim of the Appellant under Paragraph (c) of sub-section (i) of Section 29 of the Enactment and said:-

P.91 l.21

"Here there are two questions to be considered. The first is whether any damage at all has been sustained by the Company's remaining land (the hotel land) by reason of the acquired land being severed from it; and the second is if there has been such damage what is the amount of it? In other words, as a result of the taking away of the acquired land has there been any diminution in the value of the remaining land of the owner and if there has what is the value of that diminution?"

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He then went on to say that he agreed the case of Cowper Essex v. Local Board for Acton (1889) 14 A.C. 153 was authority for the proposition that physical contiguity was not essential to a claim in severance but he relied on the reasoning of Lord Watson at page 167 of the report of that case in the House of Lords for his view that ....." in the present case before there could be said to be any diminution in the value of the hotel land by reason of the swimming pool land being severed from that land it would first have to be shown that the possession of both pieces of land by the Company gave an enhanced value to the hotel land."

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P.92 l.1

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44. In the light of this Test Thomson, C.J. then examined the reasoning of Ong, J. in assessing the Appellant's compensation under Paragraph (c) of sub-section (i) of Section 29 of the Enactment at the figure of $276,240. In his judgment the latter figure, if calculated on the correct assumptions, clearly represented the Appellant's total loss as a result of the acquisition so that, as $202,280 had already been awarded as the market value (under paragraph (a) of the said provision) of the swimming pool land, the difference (about $74,000) between the former and the latter sum must, on the reasoning and calculations of Ong, J. represent the extent to which the value of the hotel land had been lessened by reason of the swimming pool land having been separated from it.

P.92

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45. After pointing out that both sides had

attacked the said figure of $276,240 and the assumptions upon which it was based, Thomson, C.J. expressed his doubts whether prospective tax liability of the Appellant had properly been taken into consideration by Ong, J. in assessing compensation for a capital asset and pointed out that if the probable effect of income tax were to be disregarded Ong, J's figure of $276,240 would be increased to about $560,000. This would mean that the severance had diminished the value of the hotel land by about $358,400 or about $2/- a square foot. The fact that this loss per square foot to the hotel land by reason of severance was the same as the value per square foot of the adjacent swimming pool land was, in the judgment of the Chief Justice sufficient to call for inquiry into the validity of Ong, J.'s reasoning.

P.93 l.22

P.93 l.4

P.94 l.6

46. Reverting to the issues before the Court Thomson, C.J. observed:-

P.94 l.16

"What was under consideration was the state of affairs as at 11th October, 1957, and what had to be determined was capital values at that date. At that date actual development of the land had not commenced. Everything was in the planning stage."

He accepted that the Appellant had spent money on plans which would no doubt have been worked out for the development of the hotel and swimming pool land as a single unit and that the contract for letting the resultant establishment to the prospective Tenant had been made but he went on to say:-

"What we are concerned with is whether there has been any actual lessening in the capital value of the hotel land. Was it worth any less on 11th October, 1957, than it was the previous day? No construction had been commenced on any of the land, either the hotel land or the swimming pool land. If the hotel had been completed and the swimming pool had been completed and the whole undertaking been in actual profit-making operation the position might well have been different. But that was not the case.

P.94 l.32

The whole case for the Company was based on potential development and it seems to me there was no evidence that the actual potential

development which the Company had in mind, that is the development of the hotel land in conjunction with the swimming pool land was the only possible, or even the most profitable, development of the hotel land. Indeed such evidence as there was was on the whole against this."

P.95

47. He accepted that the amenity of the swimming pool would have been likely to attract more custom to the hotel but commented that a swimming pool of some sort could have been provided on the hotel land and referred to the fact that plans had been prepared and accepted by the local authority for such provision to be made. The Chief Justice further adverted to the fact that there was no evidence as to the rent the prospective Tenant would have been prepared to pay if the Appellant had reverted to the original plans. He also observed that according to the plans before the Court there was undeveloped land between the hotel land and the swimming pool land which the owner was at some time prepared to sell when he got what he thought to be the right price but there was no evidence as to whether this land could have been acquired or was suitable for a swimming pool or as to the price at which it could have been obtained.

48. The Chief Justice concluded by saying:-

"The truth clearly is that the Company had a chance to buy the swimming pool land cheaply and they saw a perfectly legitimate opportunity to turn their bargain to profit by developing that land in connection with their scheme for a hotel on the hotel land. Of that possibility they have been deprived but it does not follow that by reason of their deprivation the hotel land has suffered any diminution of value at all."

P.95 l.33

49. Accordingly Thomson, C.J. held that the cross-appeal should be dismissed and the appeal allowed to the extent of reducing the total amount of the Judge's award to $202,280. He also held that the Respondent should have the costs of the appeal.

P.96

50. Hill, J.A. concurred with the judgment of the Chief Justice.

P.96 l.18

51. Neal, J. agreed with the assessment of the

facts of the case by the Chief Justice and also with his reasons for inquiring into the validity of Ong, J.'s course of reasoning but also queried the Judge's assessment of the rental values after referring to a text book on valuation upon which he relied for his own calculations which he did not fully disclose. P.96 l.35

52. However, he did not agree with the subsequent reasoning of the majority of the Court since in his judgment the Appellant had established in law a right to compensation for the severance of the swimming pool land from the hotel land because the severance of the expropriated land prejudiced the Appellant in its ability to use or dispose of the remaining land. Under this head he would have allowed "some compensation to the Respondent although not the amount assessed in the Court below." If he were wrong on this point and the Appellant had not established his right to compensation for severance Neal, J.was of the opinion that he was "entitled to compensation for the land taken which takes into account the loss in respect of prospective development." P.98 l.18 P.98 l.32 P.98 l.36

53. Having rejected the rental figures submitted by the Appellant he took as the basis of his calculations the figure of $100,000 which had been alleged by the Appellant to be the estimated cost of the amenities to be constructed on the swimming pool land and, after reference to the said text book on valuation he calculated what he referred to as the "probable latent rental" which would have been released by the construction of the "improvements" on the swimming pool land. He capitalised the said rental by his own calculations to produce a final figure of $25,000 which in his judgment represented "the quantum of compensation to which he (i.e. the Appellant) would be entitled by way of severance from the other land." He went on to say that in his opinion the same working "would establish the same figure which should be added to the value as compensation for the loss of the prospective improvement to the land." He concluded his judgment by saying that he would allow an additional sum of $25,000 either by way of damages for severance or as an addition to the market value of the land arising from the loss in respect of prospective improvement. P.99 l.3 P.99 l.16 P.99 l.30 P.99 l.33 P.99 l.43

P.102

54. On the 1st May 1961 the Appellant was by Order of the Court of Appeal granted final leave to appeal to His Majesty the Yang di-Pertuan Agong from the said judgment of the Court of Appeal and the said appeal to His Majesty the Yang di-Pertuan Agong is accordingly referred to the Judicial Committee of Her Majesty's Privy Council for hearing pursuant to Section 54 of the said Enactment, Article 131 of the Federal Constitution and Article 2(1) of the Federation of Malaya (Appeals to Privy Council) Order in Council, 1958 (S.I. 158 No.426). 10

55. On behalf of the Respondent it will be contended that the decision of the Court of Appeal is right and should be upheld for the following among other

R E A S O N S

(1) Because the reasons given by the majority of the Court of Appeal for refusing to accept a calculation of the Appellant's loss on account of severance based on the rents alleged to have been agreed between the Appellant and the prospective Tenant were right. 20

(2) Because on the true interpretation of paragraph (c) of sub-section (i) of Section 29 of the Land Acquisition Enactment the damage, if any, sustained by the Appellant at the time the Collector took possession of the swimming pool land by reason of severing such land from the hotel land was represented by the depreciation, if any, in the market value of the hotel land retained by the Appellant. 30

(3) Because while it is not contested that loss by severance can in a proper case be estimated by adopting a "before and after" method of valuation and deducting the assessed value of land taken, the normal method of making a before and after valuation of undeveloped land would be to compare the market value of the whole property in its undeveloped state with the market value of the land retained in the same state. No evidence was adduced by the Appellant as to the reduction, if any, in the market value of the hotel land in its undeveloped state by reason of severance. The market value of that land would properly be based on its most profitable use, which would not 40

necessarily be hotel development, it being accepted that the most profitable use of the swimming pool land by itself would be for residential development such as flats.

(4) Because the residual method of valuation put forward by the Appellant depends on a number of uncertain factors small differences in which can result in large differences in the ultimate result, and when this method is used for a before and after
10 valuation in the manner proposed by the Appellant, it is based on the assumption that the most profitable use of the hotel land by itself would be for hotel development.

(5) Because on the Appellant's valuer's figures the gross realisation value in the after valuation is $3,006,168 from which there falls to be deducted the capital cost of buildings $2,900,000, and interest charges for two years on the capital outlay which would certainly exceed the difference
20 between the two figures stated. Thus the developer would be receiving a gross realisation value less than his outlay on building and interest charges alone apart from the cost of the land, whereas a developer would in fact require a substantial developer's profit above his outlay and the profit would also be deferred until the development reached a productive stage. The result of the after valuation put forward is to give a minus value to the hotel land by itself, which is absurd.

30 (6) Because the Appellant's valuer's calculations are also open to criticism on the grounds that (a) he made no deduction from the gross monthly rental for landlord's repairs (the proposed letting being a furnished letting); and (b) he used a number of years' purchase of the annual return of eleven years, which Ong, J. rightly regarded as excessive.

(7) Because although in the light of the evidence adduced on behalf of the Appellant the erection of
40 the Hotel Merlin on the hotel land retained after the acquisition was an entirely uneconomic proposition, the Appellant, which deals in property and whose managing director has special knowledge of these matters, did erect the said Hotel and could not possibly have done so if all it expected to receive for its outlay was a monthly rent of $35,000.

(8) Because if a simplified residual valuation of the hotel land after acquisition is made substantially on the basis (except for allowance for income tax) adopted by Ong, J. in capitalising the rental differential (which he assessed as $10,000 per month), the hotel property would have a gross realisation value calculated as follows:-

Annual rental	$40,000 per month
Deduct for furniture	$ 4,166
	35,834
Deduct 26% for assessment	$ 9,316
	26,518
This equals per year	$26,518 x 12 =$318,218
At eight years purchase	
Gross realisation value	$2,546,428

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The building cost alone being $2,900,000, the residual valuation again gives a substantial minus value for the hotel land and shows either that the annual rental is wrong or that the proposition was entirely uneconomic.

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(9) Because once the suggested rent of the hotel without the swimming pool land was rejected as a fair commercial rent, there was no evidence upon which the fair commercial rent for the Merlin Hotel after the acquisition could be assessed, except the evidence mentioned in paragraph 28 of this Case as to the monthly rental of the Federal Hotel, and such evidence is in favour of the Respondent. A comparison of rooms would indicate a monthly rental for the Merlin Hotel on the retained hotel land of $44,880 without allowance for the better locality and parking facilities of the Merlin Hotel. This figure, if taken as $45,000 would give a gross rental difference of $5,000 and on the calculations of Ong, J. (but without deduction in respect of income tax) would give a capital sum of $335,200. After deducting the figure of $150,000 allowed by Ong, J. for capital outlay and interest charges together with the value of the land taken at $202,280 (which Ong, J. wrongly omitted to do in his calculations) there is a negligible loss attributable to severance which would in fact be offset by factors for which Ong, J. made no allowance.

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(10) Because the reasons of Neal, J. for allowing an additional sum of $25,000 as compensation to the Appellant were wrong in that:-

(a) The learned Judge, having rejected the rental figures relied upon by the Appellant made hypothetical calculations based not on evidence but on theories of valuation which do not necessarily apply to the circumstances of this case.

10 (b) In so far as the learned Judge would have allowed the Appellant $25,000 by way of damages for severance he envisaged it as compensation for loss of the development potential of the swimming pool land. Such loss does not constitute the damage contemplated under paragraph (c) of sub-section (i) of Section 29 of the Enactment.

(c) In so far as the learned Judge would have allowed the Appellant the said sum of $25,000 as an addition to the market value of the
20 swimming pool land he was purporting to approve an increase in the award under paragraph (a) of sub-section (i) of Section 29 aforesaid which had not been asked for by the Appellant in its Notice of Cross-Appeal and which was not justified by any evidence.

R. D. STEWART-BROWN

P. G. CLOUGH