Foll *Merivale Motel Investments v Brisbane Expo Authority* 64 LGRA 108
Cons *FCT v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336
Dist *Roads Corporation v Dacakis* [1995] 2 VR 508
Cons *Taxation, Federal Commissioner of v Murry* (1998) 72 ALJR 1065
Cons *FCT v Murry* (1998) 193 CLR 605
Refd to *Peter Croke Holdings v Roads & Traffic Authority of NSW* (1998) 101 LGERA 30
Appl *Bunney v State of South Australia* (2001) 112 LGERA 213

[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . . APPELLANT;
DEFENDANT,

AND

REEVE AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1949.

SYDNEY, *April* 29, *May* 2, *July* 1.

Latham C.J., Dixon, McTiernan, Williams and Webb JJ.

Resumption—Land—Acquisition by Commonwealth—Large office building—Leasehold interest in building—Coffee-lounge business—Tenants permitted to remain in possession for a period—Compensation—Principles—Goodwill—Local not personal—Plant—Lands Acquisition Act 1906-1936 (*No.* 13 *of* 1906—*No.* 60 *of* 1936), *ss.* 5, 17, 28, 29 (1) (*a*), 37.

The respondents were lessees of a room in a large office building in which, since 1937, they had carried on the business of a coffee lounge. The coffee lounge was conveniently situated in a busy area and was patronized by occupants of, and persons using, the building. On the expiration of the lease, a further lease was granted to the respondents for a period of three years from 1st November 1942, and it contained a provision that should the respondents remain in possession after its expiration they should do so as tenants from month to month at a stated monthly rental. On 8th November 1945, the Commonwealth resumed the whole of the land occupied by the building. The respondents remained in possession and by the payment of rent to and the receipt of it by the Commonwealth, became monthly tenants of the Commonwealth until October 1946 when they went out of possession. The respondents claimed compensation under the *Lands Acquisition Act* 1906-1936 for the interest of which the resumption had deprived them.

Held that compensation for the interest resumed should be based on the fact that the goodwill was local, not personal, and therefore attached to the land.

The principles of assessing compensation applicable where a tenant's interest in the land resumed is taken or extinguished, discussed.

Decision of the Supreme Court of New South Wales (Full Court): *Reeve and Another* v. *The Commonwealth of Australia*, (1948) 49 S.R. (N.S.W.) 242, affirming the decision of *Owen* J., (1948) 65 W.N. (N.S.W.) 262, affirmed.

APPEAL from the Supreme Court of New South Wales.

In May 1937, Mrs. Rose Reeve became a sub-tenant of one Priest of room No. 2 on the ground floor of a large building, referred to as the Grace Building, which was situate on a piece of land fronting King Street, York Street and Clarence Street, Sydney, and which contained many suites of offices. Mrs. Reeve conducted a coffee shop or lounge in room No. 2 which was patronized by persons employed in the Grace Building or in the vicinity, or who visited the building. In September 1939, her daughter, Dorothy Mavis Reeve, became her partner in the business. The sub-lease from Priest expired in October 1939 and Mrs. Reeve and her daughter then became the tenants of Grace Bros. Pty. Ltd., the owner of the building, under a lease for three years from 31st October 1939. On its expiration they obtained a further lease in respect of the room for three years from 1st November 1942, at a rental of £416 per annum payable at the rate of £34 13s. 4d. per month and with a provision that if they remained in possession after the expiration of the lease they should do so as tenants from month to month at a rental of £34 13s. 4d. per month.

Mrs. Reeve and her daughter did not go out of possession on the expiration of the lease on 1st November 1945.

On 8th November 1945, the Commonwealth, by virtue of ss. 13 and 15 of the *Lands Acquisition Act* 1906-1936, resumed the whole of the land occupied by the Grace Building and by the payment of rent to and the receipt of it by the Commonwealth, Mrs. Reeve and her daughter became monthly tenants of the Commonwealth. In July 1946, notice to quit was given and in October 1946 Mrs. Reeve and her daughter went out of possession. Throughout the whole of the period of their occupancy of room No. 2 Mrs. Reeve and her daughter carried on therein the business of a coffee shop or lounge, and for the years ended 30th June 1943, 1944 and 1945 the net profits earned by the partnership were £791, £737 and £655 respectively.

From the time when the notice to quit was received Mrs. Reeve and her daughter endeavoured to obtain other suitable premises but they were unsuccessful until November 1946 when they purchased a similar type of business, the Gainsborough Cafe, for £4,000, and took an assignment of the vendor's weekly tenancy. In May 1947, they sold the Gainsborough Cafe for £3,250, and in November 1947 bought the Domino Cafe for £1,900 and undertook to perform the vendor's obligation to carry out work costing over £300 which the City Council had required to be done. The Domino Cafe was held under a monthly tenancy.

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All the contracts for the sale of the businesses referred to above contained a clause or declaration by the vendor or vendors that he, she or they, as the case might be, " will not within a term of two years computed from the day of handing over possession directly or indirectly jointly with or for any person or persons or upon any account or pretence carry on or be employed in carrying on a business of the same nature within a radius of one-half mile from the premises aforesaid."

Mrs. Reeve and her daughter, pursuant to s. 37 of the *Lands Acquisition Act* 1906-1936, brought an action in the Supreme Court of New South Wales against the Commonwealth for compensation on the grounds that the business carried on by them on the leased premises had a substantial goodwill based entirely or almost entirely on locality and not on personality and therefore attached to the land and not to the individuals, and the value of that goodwill must therefore be reflected in the value of their interest in land of which the resumption deprived them.

The action was tried without a jury before *Owen* J. who awarded compensation in the sum of £1,250 on the basis that Mrs. Reeve and her daughter, prior to the resumption, had a tenancy which, though only a monthly tenancy, received protection from the *National Security* (*Landlord and Tenant*) *Regulations* to an extent which made it very much more substantial in fact than a monthly tenancy. His Honour accepted the opinion of an expert that on the footing that the net profits of the coffee-lounge business carried on on the premises were about £750 a year, the market value of that business with a monthly tenancy protected by those regulations was £1,500, of which sum, however, £350 represented the value of the plant, leaving £1,150 if the value of the plant be deducted. On that basis he treated the premises as being worth £1,100 to Mrs. Reeve and her daughter, and held that the presence in the room of cubicles, partitions, floor coverings, &c. which had been provided by Mrs. Reeve and her daughter made the lease of the premises worth another £150 to them, making up the total sum which he awarded (*Reeve* v. *The Commonwealth of Australia* (1)). The Commonwealth did not call any evidence.

The Full Court of the Supreme Court (*Jordan* C.J., *Street* and *Maxwell* JJ.) dismissed an appeal from that decision (*Reeve and Anor.* v. *The Commonwealth of Australia* (2)) whereupon the Commonwealth appealed to the High Court.

Other facts and relevant statutory provisions appear in the judgments hereunder.

(1) (1948) 65 W.N. (N.S.W.) 262.

(2) (1948) 49 S.R. (N.S.W.) 242.

A. R. Taylor K.C. (with him *E. J. Hooke*), for the appellant. The principle involved is a matter of real concern for the Commonwealth. It does not follow that owing to an inability to secure suitable premises the total value of the business, subject to a deduction for plant, represented the value of the land to the respondents. At the time of the acquisition in November 1945 the respondents were not required to find other premises and they did not attempt to do so until they received a notice to quit in July 1946. They remained in possession of the acquired premises for nearly twelve months and did not incur any removal expenses. Their interest in the land did not change. Although the interest in the land might be of some value in the hands of the owner, it was not an interest which it could realize or sell for a consideration. What was to be valued was the interest in the land taken. That was a monthly tenancy, which continued for almost a year after acquisition. Loss of business may be a factor to be taken into consideration in determining the value of land to the owner, but the goodwill of the business is not by any means the measure of the value of the owner's interest in a piece of land. The effect of the value of the interest taken from the respondents on the acquisition is completely irrelevant. As shown by documentary evidence they in fact paid ten shillings for an interest in the land. The restrictive covenant limiting the radius and time within which vendors may carry on another business has an important bearing on the matter. The whole of the evidence given by the valuer Emmett was directed to the value which the business would realize if it were sold on a free market without the restrictive covenant. That evidence was quite irrelevant and quite insufficient for the purpose of determining the compensation payable under s. 28 of the *Lands Acquisition Act* 1906-1936 which, in this case, is to be compensation for the value of the land acquired. There is not anything to indicate that any part of the value of the business should be taken into account. The measure of a tenant's interest in land, so far as money is concerned, can only be measured by what he pays for it. The fact that the land itself may be specially suitable for the carrying on of a particular business may be a factor in determining the value of the land for the owner. The special suitability of certain land for the carrying on thereon of a particular business, and also loss of profits may be factors in such a determination. One cannot take the value of the land and then add the goodwill of the business which is being carried on upon it, nor can one add the profits by reason of the expropriated owner going out of business (*Pastoral*

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Finance Association Ltd. v. *The Minister* (1)). The principles enunciated in that case should be applied in this case. The value of a tenant's business carried on upon the land is not by itself any guide as to the value of the tenant's interest in the land. In arriving at profits the reasonable wages of the working owner should be deducted. True profits, as and when ascertained, should not be added to the value of the land. *Inland Revenue Commissioners* v. *The Glasgow and South-Western Railway Co.* (2) is a stamp-duty case and is not an authority for the measure of compensation adopted by the judge of first instance. What the House of Lords dealt with in that case was simply an amount which had been included in the total sum having regard to the factor of loss of business, not the value of goodwill at all. The principle adopted by the judge of first instance is a complete departure from established principle. As in the case of the owner of the fee simple, regard must be had to a tenant's interest in the value of the land. The respondents' monthly tenancy was valueless. Nothing could be allowed in respect of the loss of the goodwill of their business because it was found as a fact that " practically the whole of the goodwill was local rather than personal." Assuming that anything could be allowed in respect of loss of goodwill, the amount was arrived at on the wrong basis. Properly assessed, the average yearly profits (on a two-years' basis on which the expert had made his assessment of value) were only about £126, not £750. Assuming the figure should be £126 instead of £750, one does not simply capitalize £126 and assert that it is a value. It is only a factor to be taken into consideration. If in effect the business was such that in all the circumstances the proprietors only made wages out of it, then it had no value. It was never an argument on behalf of the Commonwealth that a deduction should be made from any compensation otherwise assessable, by reason of the fact that the respondents had been allowed to remain in possession as monthly tenants for eleven months after the date of resumption. Even if in the result the respondents' business was destroyed, they are not entitled to compensation therefor but only to compensation for their interest in the land which has been acquired.

[DIXON J. referred to *Horn* v. *Sunderland Corporation* (3).]

It is not disputed that loss of goodwill and loss of business may be taken into consideration as factors but that is very different from saying that either can be taken as a measure. In this case

(1) (1914) A.C. 1083, at p. 1088.
(2) (1887) 12 App. Cas. 315.
(3) (1941) 2 K.B. 26, at pp. 51, 52.

the value of the business has been taken as a measure of compensation. The expropriated owners of the business have been awarded the total value of the business. If upon examination it appear that no real profits were being made, then the value of the interest in the land is nothing because it was not producing anything. In the circumstances of this case the respondents should be awarded merely a nominal sum.

Reimer, for the respondents. It is true that under the *Lands Acquisition Act* what the respondents are entitled to be compensated for is the value of the land, but that must be the value of the land to them. It is not disputed that they are entitled to some compensation for the true value of their leasehold or occupancy as tenants. The goodwill and the monthly tenancy cannot be severed, they are inseverable. The removal of the business from the premises results in an entirely different position. The respondents should not be criticized by the appellant because of the fact that the court has acted on evidence adduced by the respondents in a case where the appellant did not call any evidence at all. There was evidence before the court upon which the award of compensation was properly made. It was found as a fact that there were not any alternative places to which the respondents could transfer their business. It does not necessarily follow that because it was a monthly tenancy it must have very little or no value because the occupancy was precarious. The respondents had the protection of the *National Security* (*Landlord and Tenant*) *Regulations* under which, normally, they had, in effect, an occupancy for an indefinite period. The evidence shows that the owner of the premises had no intention whatever of interfering with that possession. The value of the respondents' business on the market to a purchaser depends on the value of the goodwill, not on what wages the respondents receive from it. As regards small businesses of this type, and also of other types, it is quite common for the tenancy to be on a weekly or monthly basis. The test of the worth of a business is not how much a given person makes by way of profit, but how much will a purchaser pay or will a vendor be prepared to sell it for. It was rightly held by the judge of first instance that the goodwill was a local goodwill, it was a goodwill which attached to the premises. The evidence is that the basis upon which practically all such small businesses are sold is that working owners work without wages. Whether it be regarded as profit or wages the average sum of £750 was produced by the business. Goodwill is property (*Inland*

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Revenue Commissioners v. *Muller & Co.'s Margarine Ltd.* (1)). The goodwill is inseverable from the premises. It is the respondents' interest in the land.

[WILLIAMS J. referred to *Horn* v. *Sunderland Corporation* (2).

[DIXON J. referred to *Hayes* v. *The Minister for Works* (3).]

Having regard to the facts that the respondents have on the subject premises carried on the business for many years, that they have established a local special goodwill attachable to the premises in their hands, and that there is a lack of suitable alternative accommodation, they are entitled to have that goodwill assessed as part of their value of the land. The fact that the respondents remained in possession for eleven months after the date of acquisition has no bearing on the matter. As from that date they ceased to be tenants.

A. R. Taylor K.C., in reply. The effect of the evidence is not that the respondents had an asset which was returning to them £750 a year. The submission that the appellant acquired the whole of the interests of the respondents in the land, together with the goodwill is completely at variance with *Pastoral Finance Association Ltd.* v. *The Minister* (4). An owner is not entitled to compensation for losses to or the destruction of his business consequent on the taking of his property (*Minister of State for the Army* v. *Dalziel* (5)). The value of the goodwill must have diminished subsequent to the date of acquisition.

Cur. adv. vult.

July 1. The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of the Full Court of the Supreme Court of New South Wales upholding an assessment of compensation by *Owen* J. On 8th November 1945 the Commonwealth acquired the land occupied by the Grace Building in Sydney. The Grace Building contained many rooms, one of which on the ground floor was let to the plaintiffs Rose Reeve and her daughter Dorothy Mavis Reeve. At the time of acquisition they were monthly tenants and the effect of the *National Security* (*Landlord and Tenant*) *Regulations* was that they were entitled to remain in possession indefinitely if they paid the rent and otherwise behaved in a proper manner. The claim for compensation was made by virtue of s. 17 of the *Lands Acquisition Act* 1906-1936, which

(1) (1901) A.C. 217, at pp. 223, 226, 231.
(2) (1941) 2 K.B., at p. 45.
(3) (1913) 15 W.A.L.R. 106.
(4) (1914) A.C. 1083.
(5) (1944) 68 C.L.R. 261, at p. 292.

provides that, upon publication of a notification in the *Gazette* that land has been acquired, the estate and interest of every person entitled to the land shall be taken to have been converted into a claim for compensation. " Land " is defined in s. 5 to include any estate or interest in land. The plaintiffs therefore claimed compensation under s. 28 of the Act, which provides that, in determining compensation under the Act, regard shall be had (subject to the Act) to the following matters :—" (*a*) The value of the land acquired ; (*b*) The damage caused by the severance of the land acquired from other land of the person entitled to compensation ; and (*c*) The enhancement or depreciation in value of other land adjoining the land taken or severed therefrom of the person entitled to compensation by reason of the carrying out of the public purpose for which the acquired land was acquired." No claim was made under heads (*b*) and (*c*). The plaintiffs' claim is for the value of their interest as tenants.

The room was a single room on the ground floor of a large office building. There is no evidence that it had any special qualities except that it was conveniently situated for business purposes. It was used by the plaintiffs for the purpose of a coffee room. The room might have been used for any one of many purposes. One person might have used it for a coffee room, making a profit of £100 a year, another person might have used it for the same or another business, making a profit of £500 a year, and another person might have used it for some business out of which a profit of a still larger amount might have been made. But the amount payable by the Commonwealth would not vary with the amount of profit which the person using the room actually happened to make and would not depend upon the amount of possible profit which any person could make, except in so far (if at all) as the possibility of making such a profit affected the value of the tenancy.

Owen J. approached the determination of the question before him by inquiring whether on the relevant date " the circumstances gave a special value to the premises in the hands of the plaintiffs." I entirely agree that it is proper to inquire whether any circumstances gave a special value to the premises. But in my opinion the introduction of the words " in the hands of the plaintiffs " suggests that the basis of compensation is the loss suffered by the plaintiffs by the compulsory acquisition. But when the Commonwealth resumed the land the Commonwealth did not acquire the business, whatever it was, that happened to be carried on in the room, and the Commonwealth did not come under any liability to pay compensation for

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the loss of the business by the tenants. The measure of compensation is the value of the land, that is, in this case, of the claimants' interest in the land. In this case it happens that the value of such a business as that carried on by the plaintiffs is an important circumstance to be taken into account in determining the value of the tenancy (*Raja Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (1)). This is so because the possibility of using the premises for such a business is one of the valuable features or incidents of tenancy and not because the acquiring authority is bound to pay damages for loss of business or to pay the value of the business. It is often said in compensation proceedings that that which is to be assessed is the value of the land to the owner, and this expression is sometimes understood and applied as if the proposition meant that the owner is entitled to recover whatever loss he may suffer from losing his land. But the point of the phrase " value to the owner " is not that the owner is entitled to damages for all his loss consequent upon acquisition of his land, but that the value to the acquiring authority is not the measure of compensation. The principle excludes any increase in value due to the necessities of the authority which acquires the land. Where, for example, a large enterprise is in contemplation on a block of land and a single allotment in the middle of the block is required and accordingly is acquired, it may well be that the value of that allotment to the acquiring authority is tremendously greater than the value which it would possess if it were not included within the area which the acquiring authority was about to use. Such a circumstance, however, is excluded in computation of value (*Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (2)).

The value of land to the owner is what he can get for it. He can never get for it more than other people will give for it. But what other people will give for it is not unaffected by what the owner is prepared to take for it, and if the sale of the land would involve him in costs and expenses that fact may be an element which would affect the amount which he is willing to take. In some cases, however, such a fact would have no significance at all in relation to value ; as, for example, when other suitable land was readily available which any person could buy. If there were many allotments all similar, none of them possessing any special advantages, and all readily purchaseable, the compensation payable to a person who carried on business on one of them would not be increased in amount by any consideration of the value of any business which he had been conducting upon the land. The theory

(1) (1939) A.C. 302. (2) (1914) A.C. 569.

of compensation is that a money equivalent can provide a full and adequate compensation in all cases—that if land is acquired and money is paid for it the owner of the land is in as good a position as ever he was, because with the money he can purchase similar land—that if chattels are compulsorily acquired the owner can, with the compensation money, replace the chattels which he has lost. These principles may, I venture to suggest, require reconsideration in a time when the community is suffering or enjoying a scarcity economy, when the sales of many things are controlled by law, when there is no free market, and when in some cases the payment of a sum of money simply will not enable the former owner of the property acquired to put himself in the same position as formerly because equivalent land or chattels are not purchaseable.

The value of land, it has often been said in compensation cases, is determined by what a willing though not anxious seller is prepared to take and a willing but not anxious buyer is prepared to give. Any buyer of land would consider, in determining what price he was prepared to pay, the actual state and condition of the land. If land were suitable for farming and in good order, one class of buyers would value it as farming land, paying attention to its actual condition. It might be, however, that the land was suitable for development for building purposes. In such a case the value as a general rule would be much higher than the value as farming land, and the fact that it was well cultivated and in good order for farming purposes would not add to its value in the eyes of a potential buyer for building purposes. But the possible as well as the actual uses of the land in the hands of any person would affect both the hypothetical seller and the hypothetical buyer. Thus a purchaser who proposed to use the land for farming might have to pay a high price because other persons who had in view using the land for building might outbid him (see *R.* v. *Brown* (1)).

In *Pastoral Finance Association Ltd.* v. *The Minister* (2), it was held that appellants for compensation were " clearly entitled to receive compensation based on the value of the land to them. This proposition could not be contested " (3). But their Lordships went on to explain in the following words that the value of the land to the appellants did not include the value of the business profits which they expected to make from the use of the land :—" That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them.

(1) (1867) L.R. 2 Q.B. 630.
(2) (1914) A.C. 1083.
(3) (1914) A.C., at p. 1087.

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No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it. Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value " (1).

Thus, if the land has some special value by reason of a potential use, that is a matter to be taken into account in assessing compensation, but the capitalized value of profits which can be obtained by such use is not the measure of compensation. Loss suffered by the owner by reason of disturbance of his business by compulsory acquisition is not itself (apart from special statutory provision) an element in compensation, but it would affect the price which an owner would be prepared to take if he were willing to sell and might, in a particular case, produce the result that a purchaser would pay more than would otherwise be the case. If so, the loss due to such disturbance, though not recoverable as such as part of compensation, would be " one of the elements going to build up the purchase price to which the owner was fairly entitled in all the circumstances of the case " : see per *Greene* M.R. in *Horn* v. *Sunderland Corporation* (2).

In this case the evidence showed that there was a great scarcity of accommodation for any kind of business in the city area of Sydney. The room which the plaintiffs occupied was suitable for a coffee room, being conveniently situated in a busy area. There was no evidence that it could be more profitably used. The

(1) (1914) A.C., at pp. 1088, 1089. (2) (1941) 2 K.B., at p. 33.

tenancy of the plaintiffs was, as already stated, in effect a tenancy of indefinite duration. Accordingly, in this case a potential purchaser would take into account the fact that the room could be used as a coffee room, and he would be prepared to pay for the tenancy upon the basis that the room could be so used by himself, or that he could dispose of it to another person for such use. Accordingly, in the particular circumstances of this case there would be a real market among persons who desired to undertake such an enterprise. Thus the tenancy had a special value because, by reason of its location, the land could be used in this particular manner. It is for this reason, and not because the Commonwealth is bound to pay for a business when it acquires land upon which a business is conducted, that evidence as to the value of the business of the claimants is relevant.

In the present case I would have regarded the evidence of the value of the claimants' business as most unsatisfactory in character. The witness upon whom the learned trial judge relied emphasized the locality element in the goodwill of the coffee-room business, though he also stated that the personality of the proprietor of the business was an important element. His evidence was that the business was worth two years' purchase. He took the returns for income tax of the two proprietors as representing the profits of the business. These returns averaged over three years about £750 and accordingly he valued the business, including the plant, at £1,500. He made no deduction for tax payable. Under cross-examination he said that he did not know what wages had been charged in arriving at the amount of £750 upon which he had based his estimate and, in particular, that he did not know whether anything had been allowed for the work of the proprietors. In fact the income-tax returns showed what the mother and daughter, who worked in the business, had earned for their services from the business in the three years in respect of which they had rendered income-tax returns. The witness, however, said that the value of the business would be £1,500, whether or not any remuneration for the mother and daughter were charged against the business as wages in making the calculation which was the basis of his estimate. This statement was plainly absurd. The witness declined to draw any distinction, which he apparently regarded as over-refined, between profits and takings. But the evidence, if accepted, did show that there were people who were prepared to pay sums of this magnitude for businesses of this type. The learned trial judge (making a deduction for plant which was saleable) accepted the evidence that the business was worth the sum stated by the witness and gave judgment

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in favour of the plaintiffs for £1,150. In spite of the several unsatisfactory features of the evidence of this witness, I am not prepared to dissent from the valuation (which has been approved in the Full Court), as any valuation is very much a matter of opinion, and therefore I agree that the appeal should be dismissed.

DIXON J. On 8th November 1945 the Commonwealth compulsorily acquired under the *Lands Acquisition Act* 1906-1936 the piece of land fronting King Street, York Street and Clarence Street, Sydney, upon which stands the large building called Grace Building. The premises contained many suites of offices. On the ground floor the plaintiffs, a mother and daughter, occupied a room in which they conducted a coffee lounge. The lounge was patronized by those whose work lay in the building or in the vicinity or who frequented the building. Its custom depended upon the place where the business was carried on. The mother had started the business in May 1937 and she and her daughter had carried it on as partners since September 1939. At first they occupied the coffee shop under a sub-lease, but afterwards they became lessees from the owners of the premises under successive leases, the last of which ran out on 31st October 1945. The rent was £416 per annum payable by monthly sums of £34 13s. 4d. in advance. After the expiration of the lease which, as will be seen, occurred a week before the acquisition, they continued in occupation, paying the same rent. At length, in July 1946, the Commonwealth gave them notice to quit. They resisted and did not actually leave the room they occupied as a coffee shop until 16th October 1946. They found it impossible to obtain in the neighbourhood premises to which to transfer the business. In the following month they bought the business of another coffee shop, one carried on in Pitt Street. Most of the plant they had employed in their former business they had no further use for and they ultimately disposed of it—but not at the value it possessed as installed in the coffee shop. They claimed compensation from the Commonwealth in respect of the acquisition of their interest in the premises in Grace Building they had occupied as a coffee lounge. The amount of their claim was disputed and on 18th July they issued the writ in the action against the Commonwealth pursuant to the *Lands Acquisition Act* as for a disputed claim for compensation. The Commonwealth did not deny the existence of the interest in the plaintiffs or that it was converted by the acquisition of the land and building into a claim for compensation. By its plea the Commonwealth put in issue the amount of the claim. At the trial the amount of compensation

was determined as £1,250 and the determination was affirmed on appeal.

In maintaining a further appeal the Commonwealth necessarily is faced with the fact that what is involved is but the assessment of a sum of money in respect of the claim and that the assessment complained of is already covered by concurrent findings or determinations of two courts.

In *Commissioners of Succession Duties (S.A.)* v. *Executor Trustee and Agency Co. of South Australia Ltd.* (1), the following passage occurs in the judgment of *Latham* C.J., *Rich* and *Williams* JJ.: "It would not be proper for this court on an appeal of this nature to substitute its own opinion for that of the court below unless it were satisfied that the court below acted on some wrong principle of law, or that the value was entirely erroneous." Their Honours then refer to the statement of Lord *Buckmaster* in *Charan Das* v. *Amir Khan* (2) that the "Board will not interfere with any question of valuation unless it can be shown that some item has improperly been made the subject of valuation or excluded therefrom, or that there is some fundamental principle affecting the valuation which renders it unsound."

The rule thus laid down is almost indispensable to the administration of justice in compensation cases. For the estimation of a money sum is usually so much a result of judgment and sound discretion and so little the product of analytical reasoning, that, were it otherwise, every appeal would mean an assessment of compensation *de novo*, without any assignment of error in the reasoning or conclusions of the court appealed from. In opening the appeal to this Court counsel for the Commonwealth was careful to explain that the reason for the appeal was that the decision of the Full Court involved principles that constituted a matter of real concern to the Commonwealth, which was anxious to obtain a decision as to the principle to be applied where interests such as that of the plaintiffs are taken or extinguished. He said that the amount would not have provoked the appeal and that the Commonwealth was quite prepared to assume the responsibility of the costs of the proceedings in any event. Yet for myself I should have thought the principles governing the assessment of compensation in such a case were well settled and open to no dispute. The plaintiffs' interest in the coffee shop has some features which perhaps call for a little examination but, when they are understood, it is not easy to see how the applicable principles can admit

(1) (1947) 74 C.L.R. 358, at p. 367.

(2) (1920) L.R. 47 Ind. App. 255, at p. 264.

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of doubt. As an overholding tenant the duration of the plaintiffs' interest would, if there had been no controls, have been governed by their payment of rent. Probably they held over as monthly tenants, though that is rather guess work. For it does not appear whether rent was paid in advance for the month beginning 1st November 1945.

But by reason of Part III. of the *National Security* (*Landlord and Tenant*) *Regulations* the plaintiffs were entitled to continue in occupation of the premises indefinitely unless an order were made for their eviction by a competent court which, having been invoked on a prescribed ground, had considered the question of hardship inflicted upon the plaintiffs if they were dispossessed.

In the circumstances, if the Commonwealth had not acquired the building, the plaintiffs' rights of occupation were so protected that they might reasonably have looked forward to an undisturbed possession so long as the regulations lasted. The trade the plaintiffs did in the coffee house depended upon the continuance of their occupation. Once they lost possession of the shop they lost their business. In that sense their business was localized. This gave their right to continue in possession of the coffee shop a special value to them. Under reg. 33, which forms part of Div. 5 of Part II. of the same regulations, the plaintiffs could not, except with the consent of the appropriate Commonwealth authority, take a money consideration for the assignment of their monthly or other tenancy or require an intending occupier to purchase the goodwill of their business as a condition of assigning their tenancy. But that did not diminish the real value to them of their interest in the premises as the place essential to their business. No doubt it controls realization and therefore may tend to lessen the amount obtainable by realization. But where deprival of a business site is in question that is not conclusive of value to the proprietor. Early cases in the law of compensation established that where premises were compulsorily acquired upon which the owner conducted a business, the consequent destruction or impairment of the goodwill of the business must be taken into account (see *Jubb* v. *The Dock Company at Kingston upon Hull* (1); *White* v. *Commissioners of Works & Public Buildings* (2)). But the statutes under which this was done admitted of compensation for consequential loss, perhaps in addition to the value of the land, and it was not until *Inland Revenue Commissioners* v. *Glasgow and South-Western Railway Co.* (3), that it was made clear that where the goodwill was localized

(1) (1846) 9 Q.B. 443 [115 E.R. 1342].
(2) (1870) 22 L.T. 591.
(3) (1887) 12 App. Cas. 315.

in the land taken the consequent destruction of the goodwill must be taken into account in assessing the value or purchase price of the interest acquired (*Horn* v. *Sunderland Corporation* (1), per *Scott* L.J.). The question which in *Inland Revenue Commissioners* v. *Glasgow and South-Western Railway Co.* (2) the House of Lords was called upon to decide was how, for the purpose of ascertaining stamp duty upon a conveyance pursuant to a compulsory acquisition by a railway company, the consideration consisting of compensation should be calculated. The land had been owned by a firm of timber merchants who occupied it for the purpose of carrying on their business. The compensation paid had been assessed by a jury which had awarded it under three heads, namely, first an amount for the value of the land, second an amount for the value of the buildings, machinery, plant and the like, and third an amount for compensation for the loss of business. It had been decided in the Court of Session, Lord *Shand* dissenting, that the third amount formed no part of the consideration for the sale of the property. But this decision the House of Lords reversed. Lord *Halsbury* pointed out that what the jury had to ascertain was the value of the land. He said: "In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as 'damages for loss of business' or 'compensation for the goodwill' taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation" (3). Lord *Watson* remarked that in assessing the value of the property, or, in other words, the consideration which the railway company ought to pay for the land, or interest in land, which they take, it had become the practice of claimants to state the various items into which the price or consideration is capable of being resolved and to ask a jury to consider these separately. He said that when a proprietor instead of letting his land to a tenant occupies it himself for the purposes of trade, that is a special type of occupancy which must be taken into account in estimating the value of the land. The third head of compensation his Lordship described as

(1) (1941) 2 K.B. 26, at p. 45.
(2) (1887) 12 App. Cas. 316.
(3) (1887) 12 App. Cas., at p. 321.

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obviously intended to cover the loss which the firm of timber merchants sustained by reason of their having to give up the occupancy of the saw mills taken by the railway company.

In dealing with the reasons given in the Court of Session Lord *Watson* referred to the very case of a tenant carrying on business on the site compulsorily acquired. Lord *Watson* said :—" The Lord President points out what is perfectly true, that occupancy may be severed from ownership. The owner may let to a tenant and in that case the proprietor's claim would cover only the first two items in the finding of the jury. Upon the third item the railway company would in that case have to deal with the tenant and to satisfy his claim for loss of occupancy, which would be greater or less according to the duration of his lease . . . Occupancy is a right incidental to property : it passes with a disposition of property unless it has been severed from it by a lease, in which case the tenant's right becomes a burden upon that of the proprietor " (1). In answer to the argument that the amount awarded under the third head was not consideration for any right taken by the railway company or conveyed to the company by the firm, Lord *Watson* said :—" If I am right in saying that it is a sum paid in respect of the company taking from them and becoming possessed of their exclusive right of occupancy, that is not so. The deed of conveyance, in which the consideration is inserted, gives the company the right of occupancy " (2).

A Western Australian case affords a very good example of the manner in which the principles so explained apply in valuing a leasehold interest (*Hayes* v. *Minister for Works* (3)). The statute governing the assessment in that case of compensation required the compensation tribunal to have regard, except for severance, solely to the probable and reasonable price at which such land with any improvements thereon or the estate or interest of the claimant therein might have been expected to sell. The claimant was entitled to a lease of the premises for a period of five years. At the rent reserved the lease was, in the opinion of the tribunal onerous and of no value, unless some compensation could be awarded in respect of goodwill attaching to a leasehold interest. The claimant carried on at the premises the business of a general caterer with a licence to sell wines, tea and coffee and provisions, and provided some accommodation for boarders. A question was reserved for the Supreme Court whether under the statute any compensation for loss of goodwill of this business attaching to the

(1) (1887) 12 App. Cas., at pp. 323, 324.
(2) (1887) 12 App. Cas., at p. 324.
(3) (1913) 15 W.A.L.R. 106.

leasehold interest might be awarded. *McMillan* C.J. said that the cases showed that "value" in compensation provisions means value to the owner and that the courts have held that if the land was of a particular value to the owner owing to the nature of the business which was being carried on by him on the land he was entitled to compensation. His Honour emphasized the distinction between personal goodwill and local goodwill, the latter of which would affect the price of a site and the former of which would not. *Burnside* J. elaborated the distinction. He concluded: "Where the business is retail, of a local nature, depending on neighbours and customers and so on, then if no suitable premises can be found in the locality, obviously some compensation must be paid." The decision was that compensation for loss of personal goodwill could not be awarded but that compensation for the loss of local goodwill if found either in the case of freehold or leasehold interests could be given. This Court has acted upon the principle that the value of goodwill attributable to the land acquired is recoverable as compensation forming part of the value of the land. In *The Minister for Home and Territories* v. *Lazarus* (1), the Court had before it a question reserved upon a proceeding for the determination of compensation payable by reason of the acquisition of the premises of a licensed victualler within the territory that had been acquired by the Commonwealth for the purposes of the Federal capital site. A particular difficulty existed. Although the *Lands Acquisition Act* was made applicable, the *Seat of Government Acceptance Act* 1909 had enacted by way of proviso to its application that the value should not exceed the unimproved value of the land or of the claimant's interest therein as at 8th October 1908 together with the value of his interest in the improvements as at the date of acquisition. The date of acquisition was 23rd March 1916. If the value of the goodwill of the licensed victualler's business attached to and formed part of his interest in the improvements it would be valued as at a date six and one-half years later than if it was attributed to the unimproved value of the land. The question reserved was whether in determining the compensation the value of the claimant's business as a licensed victualler and the goodwill attaching to that business should be assessed at the earlier or the later date. The Court decided that the earlier date, 8th October 1908, must be taken, that is to say that the value of the business and goodwill must be considered as going to the value of the land, although its unimproved value, and not to that of the improvements. In the course of a joint judgment *Isaacs* and *Rich* JJ.

(1) (1919) 26 C.L.R. 159.

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said :—" The value of an hotel considered as an improvement is its value as a structure. Its value does not include the value of the business and goodwill. A building is, of course, indispensable to the business actually carried on upon the land, but not *that* building. If destroyed, it can be replaced, and the same business can proceed, with the same goodwill. The land itself, however, is different. If the goodwill of a business is personal only, it adds nothing to the value of the land. If it is attributable wholly or partly to the land, it *pro tanto* enhances its value, and that value is recoverable, not as goodwill *eo nomine* but as part of the value of the land. *Cotton* L.J. makes that very clear in *Cooper* v. *Metropolitan Board of Works* (1). Lord *Lindley* again explains it in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine Ltd.* (2). Although the unimproved value of the land assumes the absence of the improvements, it does not obliterate the fact that the business has been carried on there, and can be carried on there as soon as a suitable building is erected, and that a licence exists permitting that business on that land " (3). Further statements of these principles will be found in *Horn* v. *Sunderland Corporation* (4), per *Scott* L.J., and (5), per *Goddard* L.J. (dissenting) and in *Parbury Henty & Co. Pty. Ltd.* v. *The Minister of State for the Army* (6).

The application of the principles can rarely be easy. That is characteristic of most questions of valuation. But perhaps a particular source of difficulty is the necessity of distinguishing between the ultimate measure of compensation and the factors, such as the value of the goodwill destroyed by an acquisition, which may be taken into consideration in making the determination. Ultimately what is to be found is the value to the owner of the interest taken. All the actual and potential advantages to the proprietor of the interest enter into that value to him. If the goodwill of his business is annexed inseparably to the interest, it may not be possible to disentangle the one from the other. But it is the money equivalent to him found to be contained in the interest expropriated that must be assessed. You cannot simply take the profits of the business and capitalize them at a rate of interest and directly add them to whatever is thought to be the value of the land or interest therein to one who purchases it for some other purpose. That is shown by *Pastoral Finance Association Ltd.* v. *The Minister* (7). But you may be guided in your assess-

(1) (1883) 25 Ch. D. 472, at pp. 479, 480.
(2) (1901) A.C., at p. 235.
(3) (1919) 26 C.L.R., at pp. 166, 167.
(4) (1941) 2 K.B., at pp. 45-47.
(5) (1941) 2 K.B., at pp. 51-52.
(6) (1944) 45 S.R. (N.S.W.) 275, at pp. 278, 279.
(7) (1914) A.C. 1083.

ment of the value to the owner of his proprietary interest by weighing the effect such a consideration would have upon a person anxious to step into the owner's shoes in making his estimate of what he would give in order to do so and what effect it would have upon the owner in fixing an amount for which he would be ready to part with his interest.

In the application of these principles to the facts as he found them *Owen* J. passed by a short step from the value of the goodwill of the business destroyed by the acquisition to the ultimate question of the value of the interest acquired. In this Court the point was made on behalf of the Commonwealth that the value of the plaintiffs' business had been taken as the measure of, or the guide to, the value of their interests as tenants and this, it was said, was the error in principle which the case involved.

The finding of *Owen* J., however, was expressed very specifically. He said : " I find that the fact that the plaintiffs were carrying on business in the premises of which they were lessees added a special value to an interest which, without the business, would have had a nominal value and I assess that special value at £1,100." He went on to find that the fact that certain cubicles, partitions and equipment had been installed added something further to the plaintiffs' interest and he assessed the additional value at £150.

Concerning the legal accuracy of the manner in which these findings are expressed there can be no valid complaint. They are expressed in a form that very accurately reflects the principle. It is true that they are preceded by a discussion of the value of the goodwill, including the plant, and of the amount represented by the plant. But the assumption that, because his Honour made the step to the conclusion a short one without further expatiation, he must have treated the value of the goodwill as the necessary measure of the value of the interest appears to me to be gratuitous.

It must be borne in mind that the learned judge had accepted the contention of the plaintiffs that, to state the contention in his Honour's words, " it was a goodwill based entirely or almost entirely on locality and not on personality and therefore attached to the land and not to the individual, and that the value of the goodwill must therefore be reflected in the value of their interest in land of which the resumption deprived them." The business had been entirely destroyed by the acquisition of the plaintiffs' interest. It was plain that to take over the premises forming the coffee lounge was to take over the business or goodwill. In these circumstances the valuation of the goodwill might well be considered in point of

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fact, though not in point of law, to be decisive in the valuation of the interest of the plaintiffs which had been taken.

In supporting the Commonwealth's appeal counsel appeared to fall back upon a criticism of the evidence. The facts proved showed clearly enough that the business had depended on the situation of the coffee lounge, that there had been no possibility of the plaintiffs obtaining other premises at hand to which the business might be removed and that the plaintiffs had perforce to buy an entirely new business elsewhere. They proved that in the three years ended 30th June 1945 their annual net profits from the business had been successively £791, £737 and £655, or an average of about £725 a year. In arriving at this profit they had made no deduction for the value of their own personal services in the business, that is for notional wages. They employed one full-time employee at £4 a week and three part-time employees at £2 a week each. Two expert witnesses were called to prove what was the value of the business. One of them was an accountant who had acted for the plaintiffs. He said that he had made a study of the way in which the goodwill of a business is valued and had valued businesses. His evidence amounted to little more than saying that the basis of valuation should be the average net profit aggregated over three years, on the assumption that there would be a sufficient assurance that the site would be available to the business for a similar period. The other expert had for ten years been carrying on as a business and estate agent and was experienced in the sale of restaurants and similar businesses. He took the profits as £750 per annum and valued the business at £1,500. In this he included the plant, of which he had a list. On the faith of the list he attributed £350 to the plant, leaving £1,150 for the goodwill. He said that at the present time (*scilicet* because of the *National Security* (*Landlord and Tenant*) *Regulations* and similar legislation) a weekly tenancy was accepted without any objection by purchasers of businesses. But a covenant not to set up in opposition within half a mile was taken on the sale of a business like that of the plaintiffs in the city. He based his estimate on four considerations besides the profits, viz. the rent, the turnover, the position and the plant. As to the rent he considered it to be £5 a week under the rental value of the premises. As to the net profits, he was not informed whether they had been arrived at with or without a deduction of notional wages for the working proprietors. On this subject he gave a series of answers in cross-examination which showed his attitude to be that the purchaser of such a business bought on the basis that he would by, so to speak, working for two

years without remuneration, recover the price he had paid for the business and that the witnesses' estimate of £1,500 would not be altered by the fact that no deduction for notional wages for the proprietors had been made in arriving at the average annual profit of £725 or £750 derived by the plaintiffs from the business.

In answer to the case made by the plaintiffs the Commonwealth called no evidence. In my opinion it was entirely a matter for the learned judge to say what weight he would give to the evidence called on the part of the plaintiffs. The impression he formed of the second expert or valuer as a witness and of the true effect of his answers in cross-examination would necessarily determine the extent of his reliance on his estimate. There is nothing at all surprising or improbable in the amount at which the witness valued the goodwill, as is illustrated by the transactions into which the plaintiffs afterwards entered in their endeavours to re-establish themselves in another business, transactions which, though not very relevant, were proved. I think that the assessment of *Owen* J. finds ample support in the evidence. An objection was urged that after the notice of acquisition the plaintiffs remained in occupation of the premises at the same rent for almost a year and that it is not correct that they were deprived of their occupancy. It is just as if they had found neighbouring premises precisely similar. The answer to this contention is, in my opinion, that the plaintiffs' continuance in possession operated only as a postponement of the actual accrual of the plaintiffs' loss and not as a reduction of the loss. The plaintiffs' right or expectation of remaining tenants of the premises was of indefinite duration. It is not like the case of a defined term, where an extension of the *de facto* possession of the expropriated owner might operate in substance as a reduction of the residual period of which he had been deprived.

In my opinion the appeal should be dismissed with costs.

McTiernan J. In my opinion the appeal should be dismissed. I agree that the compensation awarded was not calculated upon a wrong basis. The view which I take is that the compensation was calculated upon the basis of the value of the tenancy, not the business. Where land is compulsorily taken from a trader who is carrying on business on the land, the diminution in the value of his goodwill in the business caused by the taking is to be considered in calculating the compensation to which he is entitled for the taking of the land. In *Cripps* on *Compensation*, 7th ed. (1931), p. 125, it is stated that "there are cases in which the diminution in the value of a goodwill may practically equal the entire value

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of the goodwill. This is a case where a business is retail and local, depending on neighbouring customers, and no suitable premises can be found in the locality within which the business connection extends." The present is a similar case. The expert evidence adduced to guide the court in forming its opinion of the value of the goodwill is very unsatisfactory. But as the appeal is brought to test the basis of the calculation of the compensation it is sufficient to dispose of the appeal to say that the basis is right.

WILLIAMS J. This is an appeal by the Commonwealth of Australia from an order of the Full Supreme Court of New South Wales dismissing with costs an appeal from an award of compensation made by *Owen* J. exercising jurisdiction under s. 37 of the *Lands Acquisition Act* 1906-1936. The claim for compensation arose out of the compulsory acquisition by the appellant under the provisions of that Act of the Grace Building situated in King, York and Clarence Streets, Sydney. The notice of acquisition was published in the *Gazette* on 8th November 1945 and by s. 17 of the Act the estate and interest of every person entitled to the land was thereupon converted into a claim for compensation. The respondents, in the first instance the mother, and after September 1939, the mother and the daughter, had carried on the business of a coffee lounge in Room 2 of this building since May 1937. They had a sub-lease of the room until 31st October 1939. Then they had two successive leases from the owners, the first from that date until 31st October 1942 and the second from 1st November 1942 until 31st October 1945. Thereafter they became monthly tenants of the owner at the existing rental of £34 13s. 4d. per month. The lounge which seated forty persons was open from 9 a.m. to 4.30 p.m. Mondays to Fridays; the room was in an excellent position for such a business; both partners worked in the business with some additional help, and the business showed profits, the net profits without deducting any notional salaries for the work done by the partners being for the year ended 30th June 1943, £791, for that ended 30th June 1944, £737, and for that ended 30th June 1945, £655, so that the average net profits were about £725. Section 28 of the Act provides, so far as material, that in determining compensation regard shall be had to the value of the land acquired. Section 29 (1) (*a*) provides that this value in the case of land acquired for a public purpose not authorized by a special Act (as in the present case) shall be assessed on 1st January last preceding the date of acquisition. The validity of the last-mentioned provision is under appeal in the Privy Council but on the present appeal it is not

suggested that there was any difference in the value of the respondents' estate in Room 2 between 1st January 1945 and 8th November 1945. The learned trial judge assessed the compensation at £1,250 and the Full Supreme Court on appeal refused to disturb his award. The case is a trumpery one to bring on a further appeal to this Court but we were assured that the appellant had only done so because there were grievous errors in the legal approach of the learned trial judge and the Full Supreme Court to the assessment of compensation. I listened carefully to the argument of the appellant but I have not been able to perceive these errors. The compensation was as I understand the reasons of *Owen* J. assessed on the basis that the respondents were entitled to be compensated for the value to them of the leasehold interest in the land of which they were expropriated. They were not evicted from the room immediately upon the acquisition but were allowed to remain in possession thereof as the tenants of the appellant and to carry on their business until July 1946 when they were given notice to quit. They refused to quit and still remained in possession until they were evicted in October 1946. They were then unable to obtain other accommodation in the locality into which they could move and continue to carry on their business.

The effect of the acquisition of the Grace Building by the appellant was therefore that the respondents lost the whole value of the business which they were carrying on in Room 2. They only had a monthly tenancy but that tenancy was protected by the provisions of the *National Security* (*Landlord and Tenant*) *Regulations* which made the tenants' occupation of indefinite duration, and the evidence is clear and uncontradicted that there were many businesses similar to that of the respondents carried on in leasehold premises under monthly and weekly tenancies in the city of Sydney which were being bought and sold for large sums of money. The respondents called an expert witness, G. N. Emmett, who swore that the respondents' business carried on in Room 2 with a monthly tenancy (provided the respondents were willing to enter into a restrictive covenant not to carry on a rival business within half a mile) had a sale value of £1,500 of which £350 was the value of the furniture, equipment and fittings, so that the value of the goodwill of the business was £1,150. *Owen* J. accepted this evidence and on this evidence and other evidence as to sales of similar businesses, especially the purchase by the respondents of the Gainsborough and Domino coffee lounges and the sale by the respondents of the former business, found the fact that the respondents were carrying on business in Room 2 added a special value to the monthly tenancy

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which without the business would have had a nominal value only and assessed that special value at £1,100. He also found the fact that cubicles and partitions had been erected, floor coverings provided, and various gas and electrical cooking and coffee-making appliances had been installed in the premises added something further to the value of the respondents' interest. He said that making the best estimate that he could he assessed that additional value at £150. In this way he arrived at the £1,250 which he awarded to the respondents as compensation. This was in my opinion a perfectly correct approach to the problem.

Their Honours in the Full Supreme Court made a similar approach. *Jordan* C.J. in a judgment in which the other members of the Full Court concurred referred to the leading case of *Inland Revenue Commissioners* v. *Glasgow and South-Western Railway Co.* (1), where the owners were awarded compensation for the value of the land to them under three heads (1) a sum for the value of the land; (2) a sum for the value of the buildings and (3) a sum for compensation for loss of business. The House of Lords held that all these items were included in the value of the land to be purchased. Lord *Halsbury* L.C. said: "Now the language of the legislature is this—that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as 'damages for loss of business' or 'compensation for the goodwill' taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation" (2). Lord *Watson* said: "When a proprietor instead of letting his land to a tenant occupies it himself for the purposes of trade, that is a special kind of occupancy which must be taken into account in estimating the value of the land; and the claim made here, which was affirmed by the jury to the extent of £9,500, was obviously intended to cover the loss which Sommerville & Co. sustained by reason of their having to give up the occupancy of the saw mills which the railway company took for the purposes of their undertaking. Upon that footing it is an item of value which is rightly included in the price. . . . The owner may let to a

(1) (1887) 12 App. Cas. 315.

(2) (1887) 12 App. Cas., at p. 321.

tenant and in that case the proprietor's claim would cover only the first two items in the finding of the jury. Upon the third item the railway company would in that case have to deal with the tenant and to satisfy his claim for loss of occupancy, which would be greater or less according to the duration of his lease" (1).

This case and other cases where compensation for disturbance of business has been allowed were discussed in the judgments of the Court of Appeal in *Horn* v. *Sunderland Corporation* (2). *Scott* L.J. said that "a claim for disturbance connected with the land taken must be made as part and parcel of the claim for purchase money. It cannot come under the head of compensation for severance or for injurious affection to the other lands of the owner, and the statute knows no tertium quid in the way of compensation. None the less, the owner in a proper case—that is, in a case where he really does incur a loss of money by disturbance due to the taking over and beyond the loss for which he is to be reimbursed in respect of the land taken—is entitled, because it has to do with the land, to have that element of personal loss taken into the reckoning of the fair price of the land, as has been held by the Courts from a very early stage" (3). *Goddard* L.J. said:—"The Act nowhere in terms refers to compensation for loss by disturbance, but it has always been held that, in assessing the value of the land, it is the value to the owner that has to be ascertained, and elements in the value to him are that he was carrying on business on the land which he is forced to sell and that he would have to move out of the house where he was living. . . . Thus, it will be seen that, while disturbance, which includes loss of business, was not mentioned eo nomine in the Act, it was a very real element to be taken into account in determining what the owner was to receive by way of compensation" (4). In one of the cases cited by *Scott* L.J., *Duke of Buccleuch* v. *Metropolitan Board of Works* (5), *Blackburn* J. said: "I agree that the words of the Act should be construed liberally, so as to give full compensation for all that is taken from an unwilling purchaser. I quite agree that where a house has a particular value, as, for instance, from being a place where a trade is carried on, the goodwill of which would be injured by the removal, the compensation should include that" (6).

If the respondents had been able to move their business into other equally suitable premises in the immediate locality they could not have recovered more than the expenses of the removal. The

(1) (1887) 12 App. Cas., at p. 323.
(2) (1941) 2 K.B. 26.
(3) (1941) 2 K.B., at p. 45.
(4) (1941) 2 K.B., at pp. 51, 52.
(5) (1870) L.R. 5 Ex. 221.
(6) (1870) L.R. 5 Ex., at p. 241.

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only importance of the fact that the appellant left them in occupation of Room 2 for some months after the date of acquisition is that it gave the respondents a breathing space to find other premises. But they were unable to do so and they suffered the same total loss of their business as they would have suffered if they had been immediately evicted. Accordingly, no deduction should be made from the compensation on this account. The special value of Room 2 to the respondents can be measured by estimating the price which they could have reasonably expected a willing purchaser to pay for the monthly tenancy and goodwill of the business and the furniture, equipment and fittings used in connection with the business in November 1945. That was the value of the land to the respondents at the date of expropriation and included all the items which *Owen* J. took into account in assessing the compensation at £1,250.

The evidence of Emmett was attacked because he had valued the goodwill of the respondents' business on the basis of two years net profits without knowing whether any charge had been made against those profits for the respondents' own services. But he maintained firmly under cross-examination that his value would be the same whether the profits included or excluded such a charge. He said that he had taken also into consideration rental value, turnover, plant and position. He said that the rent was £5 a month less than the full rental value and as to position that there was no other lounge in the vicinity, " that there was an established clientele that went there which was worth a terrible lot of money to a business of that description especially in that position which was nearly one hundred per cent—although not as good as the Strand Arcade." It may seem strange that there are members of the community who are prepared to pay £1,000 and more for the goodwill of a business out of which they may not be able to make profits substantially in excess of the wages which they would earn if they worked for an employer, but there are evidently many members of the community who prefer to work for themselves even if they can only make such profits and to pay considerable sums to acquire businesses of their own. There is nothing fantastic, it seems to me, in Emmett maintaining his opinion that at the date of acquisition purchasers could have been found who would have been willing to pay £1,500 for the monthly tenancy, goodwill, and the furniture, equipment and fixtures of the respondents' business in Room 2. His evidence is supported by such facts as were brought out in evidence relating to the prices which the respondents paid for the Gainsborough and Domino coffee lounges and that which they received for the sale of the former lounge. The appellant called no evidence to rebut the

respondents' evidence. The learned trial judge had the opportunity of seeing Emmett in the witness box and determining the degree of credence which he could attach to his evidence as a whole. In *Commissioner of Succession Duties (S.A.)* v. *Executor Trustee and Agency Co. of South Australia Ltd.* (1), this Court pointed out, citing a passage from the judgment of the Privy Council in *Charan Das* v. *Amir Khan* (2), that it would not be proper for this Court on an appeal of this nature to substitute its own opinion for that of the court below unless it were satisfied that the court below acted on some wrong principle of law, or that the value was clearly erroneous. In the present case I am of opinion that the Courts below acted on right principles of law and I am certainly not satisfied that the value was clearly erroneous or even erroneous at all.

For these reasons I would dismiss the appeal with costs.

WEBB J. The principles of assessment of compensation for lands compulsorily acquired do not appear to have been misunderstood or misapplied in the Supreme Court of New South Wales unless their misapplication is indicated by the assessment of £1,250 compensation for this coffee-shop business in view of the nature of the evidence. The witness Emmett did make the incredible suggestion on cross-examination that the profit made would not influence the price that might be offered for such a business; but this did not make it unreasonable to accept his evidence that the goodwill of this business was worth £1,150 if the business was likely to continue indefinitely: on the uncontradicted evidence for the respondents it returned to them a taxable income averaging £725 per annum for the three years preceding the resumption. This, however, made no allowance for the value of the services of the respondents in the coffee shop. Further, there was evidence that the rent was £5 per month less than the room was worth. There was also evidence that the managerial services of the respondents were worth £5 6s. per week each. At all events £5 6s. was stated in evidence to be the weekly wage for the manageress of a cafe in Sydney. Deducting from the average profit of £725, £550 for the respondents' services and £60 for additional rental, there was still left a profit of £115 per annum, or nearly treble the interest on £1,150 invested in Commonwealth stock or bonds. A business capable of returning that profit should have been worth £1,150 if likely to continue indefinitely. Moreover the work of the owners amounted to nothing more than providing and serving light refreshments between 9 a.m. and 4.30

(1) (1947) 74 C.L.R. 358, at p. 367.

(2) (1920) L.R. 47 Ind. App. 255, at p. 264.

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p.m. on five days a week, to say nothing of the satisfaction of being owners and controlling their own time and movements. At the time of the resumption, the respondents had, at most, a monthly tenancy; but the *Landlord and Tenant Regulations* were then in force and gave additional security of tenure; although it might well have been anticipated that those regulations would cease to operate in the then not distant future. But it did not follow that when those regulations were no longer in force the tenancy would become so precarious as to render the goodwill valueless. The goodwill was local and not personal and there was evidence that no coffee room was available in the immediate neighbourhood; but it was reasonable to suppose that the landlord would have been satisfied to receive a fair rent for the room and have allowed the respondents to remain in occupation while a fair rent was paid. This is the case where premises are built for bona fide letting purposes and not for the exploitation of tenants who have worked up a good business. It was not suggested that in a large building like the Grace Building, in which rooms are let to many tenants, the landlord would want to take over the business of every successful tenant or subject him to a rack-rent.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitor for the appellant, *K. C. Waugh*, Acting Crown Solicitor for the Commonwealth.

Solicitors for the respondents, *K. D. Manion & Co.*

J. B.