INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D55/03

Profits tax – real property – whether profits were capital in nature and were not assessable to profits tax – sections 2, 14, 61, 61A and 68(4) of the Inland Revenue Ordinance ('IRO') – sections 26 and 28(3) of the Buildings Ordinance ('BO') – costs – appeal obviously unsustainable – section 68(9) of the IRO.

Panel: Kenneth Kwok Hing Wai SC (chairman), Patrick James Harvey and Anthony So Chun Kung.

Dates of hearing: 29 June, 2, 3, 10 and 11 July 2002.
Date of decision: 26 September 2003.

This appeal, heard together with that in D56/03, D57/03 and D58/03, was against the determination of the Commissioner whereby the profits tax assessment of each appellant was respectively confirmed.

The appellant company in this case ('A1') and that in D56/03 ('A2'), D57/03 ('A3') and D58/03 ('A4') were incorporated in Hong Kong. The issued share capital of each of the appellant companies has remained at $2 each since incorporation. Between July 1988 and April 1993, the appellant companies, either by themselves or through trustees, acquired a total of nine blocks of properties, six of which were with existing tenancies. The acquisitions of six of the nine blocks were respectively financed partly by a loan from the Bank and one block by interest-bearing loan from the Holding Company of A1 and A2. At least two blocks were purchased subject to orders imposed by the Building Authority under sections 26 and 28(3) of the BO. The appellant companies and their trustees sold all the nine blocks by agreement dated 11 August 1993 and the sale proceeds were divided among the four appellant companies.

The grounds of appeal of the four appellant companies were that 'the profits referred to in the determination were capital in nature and were not assessable to Profits Tax or alternatively that the assessment was excessive'. A3 and A4 also appealed against the assessments on the ground that they 'should have been granted rebuilding allowances'.

On the first day of hearing, the Board drew the parties' attention to D30/01 and D11/02.

Counsel for the appellant companies submitted that:

(a) the burden was on the respondent;

(b) the burden cast on the appellant companies by section 68(4) was no more than to provide sufficient evidence to show that the respondent's conclusion that the appellant companies were trading was wrong;

(c) there was no evidence that the appellant companies were trading; and

(d) there was no or no sufficient evidence that the appellant companies' activities were caught by section 14.

Held:

1. Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the appellant companies. In Mok Tsze Fung, Mills Owens J said: '*... It was for the appellant to adduce evidence before the Board of Review in order to discharge the onus resting upon him, and on his failure to do so the Board was entitled, indeed bound, to reject his appeal*'. The burden still rests on the taxpayer even in respect of the anti-avoidance provision, that is, sections 61 and 61A. The Board was bound to reject the submission of counsel for the appellant companies on burden of proof.

2. The stated intention in these four appeals is to redevelop for rental income. The stated intention, according to the oral evidence of the Surviving Shareholder of A1, was that they would lease it first and then they would buy all of them and then rebuild it and lease it. Whether the stated intention was in fact the intention is a question of fact. The Board decided against the appellant companies on this factual issue. If the stated intention was in fact the intention, there is no reason why the appellant companies should have put forward so many different stories in the past. As in D30/01 and D11/02, the significance of the evidence in these appeals lies in what the Board has **not** been told. There was **no** evidence on what was thought at the time the stated intention was said to have been formed to be the prospects of acquiring the last three blocks; the time it would take to evict all occupiers; and the time it would take to construct the proposed new building(s). There was **no** evidence on the financial worth or net worth as at July 1988 of any of the ultimate beneficial owners of the shares in the appellant companies; the appellant companies' financial ability to service the proposed new building(s) and to pay off the instalment loan; and what was thought to be the occupancy rate of the proposed new building(s) or the unit rental. The appellant companies have not proved that the 'stated intention' was in fact held, not to mention genuinely held, realistic or realisable.

3. The Board was of the opinion that all four appeals were obviously unsustainable. All four appellant companies should have realised that their appeals were hopeless after D30/01 and D11/02 had been drawn to their attention. Pursuant to section 68(9) of the IRO, each of the appellant companies was ordered to pay the sum of $5,000 as costs of the Board.

Appeal dismissed and a cost of $5,000 charged.

Cases referred to:

D56/03, IRBRD, vol 18, 617
D57/03, IRBRD, vol 18, 620
D58/03, IRBRD, vol 18, 623
Cunliffe v Goodman [1956] 1 All ER 720
Richfield International Land and Investment Co Ltd v CIR 2 HKTC 444
All Best Wishes v CIR 3 HKTC 750
D11/80, IRBRD, vol 1, 374
D16/91, IRBRD, vol 6, 24
D56/93, IRBRD, vol 9, 1
D64/99 (unreported)
D30/01, IRBRD, vol 16, 247
D11/02, IRBRD, vol 17, 443
CIR v Reinhold (1953) 34 TC 389
Kum Hing Land Investment Co Ltd v CIR 1 HKTC 301
CIR v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224
Mok Tsze Fung v CIR 1 HKTC 166
Cheung Wah Keung v CIR, IRBRD, vol 16, 746
Marson v Morton [1986] 1 WLR 1343
Simmons v IRC [1980] 1 WLR 1196
Pyrah v Amis (1957) 1 AER 196
CEC v Comptroller of Income Tax (1950-1985) MSTC 551

Anselmo Reyes SC instructed by Department of Justice for the Commissioner of Inland Revenue.
Benjamin Chain Counsel instructed by Messrs Tsang Chau & Shuen for the taxpayer.

Decision:

1. Four appeals, D55/03, IRBRD, vol 18, 591, D56/03, IRBRD, vol 18, 617, D57/03, IRBRD, vol 18, 620 and D58/03, IRBRD, vol 18, 623, were heard together.

Location sketch

2. The following is a sketch (not to scale) of the location of the subject properties. We have also included the dates of the acquisition agreements in the sketch. The Appellants and their trustees sold Blocks 1, 2a, 2b, 4, 5, 6, 7, 8 and 9 by agreement dated 11 August 1993. Blocks d, e and g were sold by two subsidiaries of an unrelated party by agreement dated 23 December 1994.

<table>
<tr><td colspan="8">Road 1</td></tr>
<tr><td colspan="4">Blocks a-c</td><td>Blocks d-e
20-5-1991</td><td>Block 1
12-7-1988</td><td>Block 7
7-12-1990</td><td>Block 2a
16-7-1988</td></tr>
<tr><td colspan="8">Service lane</td></tr>
<tr><td>Block f</td><td>Block 6
25-5-1989</td><td>Block g
28-6-1991</td><td>Block 5
23-11-1988</td><td>Block 8
9-10-1991</td><td>Block 9
1-2-1993
15-4-1993</td><td>Block 4
23-7-1988</td><td>Block 2b
16-7-1988</td></tr>
<tr><td colspan="8">Road 2</td></tr>
</table>

This appeal

3. This appeal is against the determination of the Commissioner of Inland Revenue dated 26 February 1999 whereby the profits tax assessment for the year of assessment 1994/95 under charge number 1-5036333-95-9, dated 24 April 1997, showing net assessable profits of $192,189,697 (after set-off of loss brought forward of $3,728,380) with tax payable thereon of $31,711,300 was confirmed.

The agreed facts

4. The facts in ‘Respondent’s statement of facts’ were agreed by the Appellants and the Respondent. We find them as facts and set them out below.

5. The Appellant in this case (‘A1’) and the Appellant in D56/03 (‘A2’) were incorporated in Hong Kong on 12 July 1988. The Holding Company is their immediate holding company.

6. The issued share capital of A1 and A2 has remained at $2 each since incorporation. The directors of A1 and A2 were as follows:

		Appointed on	**Resigned on**
A1	The Surviving Shareholder	23-7-1988	
	The Deceased Shareholder	23-7-1988	14-7-1990 (deceased)
	[named shareholder]	22-5-1990	
	The Holding Company	22-5-1990	

A2	[another named shareholder]	22-7-1988	
	The Nominee Shareholder	22-7-1988	10-7-1993
	[named shareholder]	22-5-1990	
	The Holding Company	22-5-1990	

7. On 12 July 1988, the Surviving Shareholder and the Deceased Shareholder entered into an agreement for sale and purchase to acquire Block 1 at a consideration of $5,500,000. On 29 July 1988, Block 1 was assigned to the Surviving Shareholder and the Deceased Shareholder who held the property in trust for A1.

8. The acquisition of Block 1 by A1 was financed partly by a one-year term loan in the amount of $4,675,000 from the Bank. The loan was to be repaid by 5 August 1989.

9. On 16 July 1988, the Nominee Shareholder entered into an agreement for sale and purchase to acquire Block 2a and Block 2b at a consideration of $12,000,000. On 23 September 1988, Block 2a and Block 2b were assigned to A2 through a deed of nomination executed by the Nominee Shareholder on the same date.

10. On 23 July 1988, A2 entered into an agreement for sale and purchase to acquire Block 4 at a consideration of $10,000,000. On 23 September 1988, the assignment of Block 4 to A2 was completed.

11. The acquisition of Blocks 2a, 2b and 4 by A2 was financed partly by a one-year term loan of $17,500,000 from the Bank. The loan was drawn down on 23 September 1988 and was repayable in full on 23 September 1989.

12. On 23 November 1988, A1 entered into an agreement for sale and purchase to acquire Block 5 at a consideration of $13,000,000. On 28 December 1988, the assignment of Block 5 to A1 was completed.

13. The acquisition of Block 5 by A1 was financed partly by a one-year term loan of $9,100,000 from the Bank. The loan was repayable on 28 December 1989.

14. Block 1 and at least one other block were purchased by A1 and A2 subject to orders imposed by the Building Authority under sections 26 and 28(3) of the BO.

15. On 25 May 1989, A1 entered into an agreement for sale and purchase to acquire Block 6 at a consideration of $15,280,000. On 6 March 1993, the assignment of Block 6 to A1 was completed.

16. Blocks 1, 2a, 2b, 4, 5 and 6 were all acquired by A1 and A2 with existing tenancies.

17. The Deceased Shareholder passed away on 14 July 1990.

18. On 7 December 1990, A1 entered into an agreement for sale and purchase to acquire Block 7 at a consideration of $7,800,000. On 6 June 1991, Block 7 was assigned to A2 through a deed of nomination executed by A1 on the same date. Block 7 was acquired by A2 with vacant possession and was financed entirely by interest-bearing loan from the Holding Company which loan was repayable on demand.

19. On 19 March 1991, A2 submitted building plans for a proposed new 24-storey composite building at Blocks 1, 7, 2a, 4 and 2b. This set of plans was rejected by the Building Authority. Revised building plans for a similar composite building were submitted on 9 July 1991 and the revised plans were approved by the Building Authority on 8 August 1991. No redevelopment was carried out after the granting of the approval. No other building plan had been submitted to the Building Authority in relation to Blocks 1, 2a, 2b, 4, 5, 6, 7, 8 and 9 before the properties were sold by A1, A2 and others to the Purchaser.

20. On 20 May 1991, a subsidiary of an unrelated company entered into an agreement to purchase Blocks d-e from the owner thereof at a consideration of $22,000,000. The assignment of Blocks d-e to the subsidiary of the unrelated company was completed on 19 August 1991.

21. On 28 June 1991, another subsidiary of the unrelated company entered into an agreement for sale and purchase to acquire Block g from the owner thereof at a consideration of $14,300,000. The assignment of Block g to the other subsidiary of the unrelated company was completed on 30 August 1991.

22. On 9 October 1991, A1 through various trustees entered into various agreements for sale and purchase to acquire Block 8 with details as follows:

Location	**Date of formal sale and purchase agreement**	**Date of assignment**	**Purchase price**
			$
G/F, Block 8	9-10-1991	11-11-1991	9,500,000
1/F, Block 8	9-10-1991	23-11-1991	2,700,000
2/F, Block 8	9-10-1991	23-11-1991	2,500,000
3/F, Block 8	9-10-1991	25-11-1991	2,500,000
Roof, Block 8	9-10-1991	25-11-1991	800,000

23. The acquisition of 3/F and Roof of Block 8 was financed partly by a demand loan of $2,000,000 from the Bank.

24. The Appellant in D58/03 ('A4') was incorporated in Hong Kong on 7 July 1992. There were two directors and shareholders, each holding one share of $1.

25. On 1 February 1993, A4 entered into an agreement for sale and purchase to acquire from a co-owner of Block 9 one half interest in Block 9 at a consideration of $11,000,000. On 5 April 1993, the assignment of the half interest in Block 9 to A4 was completed.

26. The Appellant in D57/03 (' A3') was incorporated in Hong Kong on 12 November 1992. On 13 April 1993, two named persons were appointed as the directors of A3. They were also the shareholders of A3 each holding one share of $1.

27. On 15 April 1993, A3 entered into an agreement for sale and purchase to acquire from the other co-owner of Block 9 the other half interest in Block 9 at a consideration of $23,800,000. On 14 May 1993, the assignment of the other half interest in Block 9 to A3 was completed.

28. On 11 August 1993, A1, A2, A3, A4 and the trustees who held the properties in trust for A1 entered into an agreement for sale and purchase to sell Blocks 1, 2a, 2b, 4, 5, 6, 7, 8 and 9 to the Purchaser at a total consideration of $570,000,000. The assignments of the properties to the Purchaser were completed on 15 January 1994. The sale proceeds were divided among the vendors in the following manner:

	$
A1	253,200,000
A2	253,200,000
A3	31,800,000
A4	31,800,000

29. On 23 December 1994, the two subsidiaries of the unrelated company entered into agreements for sale and purchase to sell Blocks d, e and g to the Purchaser at a total consideration of $238,000,000. The assignments of Blocks d, e and g to the Purchaser were completed on 30 May 1995.

Grounds of appeal

30. By letter dated 19 March 1999, all four Appellants gave notices of appeal against the assessments for the year of assessment 1994/95 on the grounds that:

> ' the profits referred to in the determination were capital in nature and were not assessable to Profits Tax or alternatively that the assessment was excessive' .

A3 and A4 also appealed against the assessments for the year of assessment 1993/94 on the ground that they:

' should have been granted rebuilding allowances' .

The appeal hearing

31. At the hearing of the appeals, the Appellants were represented by Mr Benjamin Chain and the Respondent was represented by Mr Anselmo Reyes, SC.

32. Mr Benjamin Chain did not lodge any authorities bundle before the hearing of the appeals. Mr Anselmo Reyes lodged a bundle of the following authorities:

(a) sections 14 and 68 of the IRO;

(b) Cunliffe v Goodman [1956] 1 All ER 720;

(c) Richfield International Land and Investment Co Ltd v CIR 2 HKTC 444;

(d) All Best Wishes v CIR 3 HKTC 750;

(e) D11/80, IRBRD, vol 1, 374;

(f) D16/91, IRBRD, vol 6, 24;

(g) D56/93, IRBRD, vol 9, 1; and

(h) D64/99 (unreported).

33. On the first day of hearing, we drew the parties' attention to:

(a) D30/01, IRBRD, vol 16, 247; and

(b) D11/02, then unreported (now reported IRBRD, vol 17, 443).

On the third day of hearing, Mr Anselmo Reyes supplied us and the Appellants with a copy of D30/01 and a redacted version of D11/02.

34. Mr Benjamin Chain called five witnesses who gave evidence along the lines of their witness statements or valuation report. Mr Anselmo Reyes did not call any.

35. We hope we will not be doing Mr Benjamin Chain an injustice to summarise his closing submission on the last day of hearing as follows:

(a) the burden was on the Respondent;

(b) the burden cast on the Appellants by section 68(4) was no more than to provide sufficient evidence to show that the Respondent's conclusion that the Appellants were trading was wrong;

(c) there was no evidence that the Appellants were trading; and

(d) there was no or no sufficient evidence that the Appellants' activities were caught by section 14.

Mr Benjamin Chain cited:

(a) Taxation of Property Transactions in Hong Kong by VanderWolk and Halkyard, 1995, pages 22 to 23;

(b) CIR v Reinhold (1953) 34 TC 389.

36. We drew the parties' attention to:

Kum Hing Land Investment Co Ltd v CIR 1 HKTC 301.

37. In his closing submission Mr Anselmo Reyes cited the following additional authorities:

(a) CIR v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224;

(b) Mok Tsze Fung v CIR 1 HKTC 166 {also reported in [1962] HKLR 258};

(c) Cheung Wah Keung v CIR, IRBRD, vol 16, 746 {also reported in [2002] 1 HKLRD 172}.

Our decision

Capital v trading

38. The law is well known.

39. Section 2 defines 'trade' as including '*every trade and manufacture, and every adventure and concern in the nature of trade*'. Section 14(1) excludes profits arising from the sale of capital assets.

40. We remind ourselves of what Sir Nicholas Browne-Wilkinson VC said in Marson v Morton [1986] 1 WLR 1343 at pages 1347 to 1349 and [1986] STC 463 at pages 470 to 471; what Lord Wilberforce authoritatively stated in Simmons v IRC [1980] 1 WLR 1196 at page 1199 and (1980) 53 Tax Cases 461 at pages 491 to 492; and the statement of the law by Orr LJ at pages 488 and 489 of the report in Tax Cases, which was approved by Lord Wilberforce as a generally correct statement (WLR at page 1202 and Tax Cases at page 495).

41. In All Best Wishes at page 770 and page 771, Mortimer J (as he then was) said:

> '*Reference to cases where analogous facts are decided, is of limited value unless the principle behind those analogous facts can be clearly identified.*' (at page 770)
>
> '*The Taxpayer submits that this intention, once established, is determinative of the issue. That there has been no finding of a change of intention, so a finding that the intention at the time of the acquisition of the land that it was for development is conclusive.*
>
> *I am unable to accept that submission quite in its entirety. I am, of course, bound by the Decision in the Simmons case, but it does not go quite as far as is submitted. This is a decision of fact and the fact to be decided is defined by the Statute – was this an adventure and concern in the nature of trade? The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person's intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words. Having said that, I do not intend in any way to minimize the difficulties which sometimes arise in drawing the line in cases such as this, between trading and investment.*' (at page 771)

Onus of proof

42. Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the Appellants.

43. We are bound by authorities to, and do, reject Mr Benjamin Chain' s submission on burden of proof.

44. To start with, in the leading authority of All Best Wishes, Mortimer J said (at page 772):

> '*It must be remembered that the burden of disturbing the assessment, rests upon the taxpayer.*'

45. In Mok Tsze Fung, Mills Owens J said (at page 183 of the HKTC report and page 281 of the HKLR report):

> '*The circumstances afforded every justification for raising additional assessments in very substantial amounts and the appellant, I consider, may count himself fortunate that the Commissioner took the course of requiring the assessor to maintain his assessments – a wrong course, in my view, as I have already indicated. It was for the appellant to adduce evidence before the Board of Review in order to discharge the onus resting upon him, and on his failure to do so the Board was entitled, indeed bound, to reject his appeal (vide Pyrah v. Amis (1957) 1 A.E.R. 196).*'

46. In Herald International Ltd, Blair-Kerr J said:

> '*According to section 68(3) the assessor attends the hearing before the Board "**in support of the assessment**", but the onus of proving that "**the assessment as determined by the Commissioner ... is excessive**" is placed fairly and squarely on the appellant by section 68(4).*' (at page 229)

> '*The question for the Board of Review is not whether the Commissioner erred in some way, but whether the assessment is excessive. As Mr Sneath so aptly put it: —*
>
> *" The question is: '**Did the Commissioner get the correct answer**'; not '**did the Commissioner get the correct answer by the wrong method**'."*
>
> *And the onus of proving that the assessment is excessive lies on the taxpayer-appellant. If the facts are agreed, and only points of law are involved, no difficulty should arise. If certain facts are not agreed, the onus of introducing evidence before the Board in the first instance lies upon the*

taxpayer. If he gives no evidence, the Board should deal with the case on the material before it. The assessor is entitled to have his assessment confirmed unless it is satisfactorily challenged by the taxpayer and shewn to be excessive. If the taxpayer has given ***prima facie*** *evidence of disputed facts, the assessor will be entitled to introduce evidence in rebuttal; and the Board will then resolve any conflict of evidence in the ordinary way on the basis of the evidence before them – not on the basis of evidence called by the Commissioner. It is the Board of Review which states the case for purposes of any subsequent appeal to a judge on a point of law. No tribunal can resolve disputed questions of fact except by evidence called before itself.*' (at page 237)

47. The burden still rests on the taxpayer, even in respect of the anti-avoidance provisions, that is, sections 61 and 61A. In Kum Hing Land Investment Co Ltd, one of the questions for the consideration of Scholes J was:

'*whether, the said payment and receipt having been established, the onus of satisfying the Board that the Commissioner was wrong was discharged by the Company*' (at page 311).

At page 316, Scholes J said:

'*On the hearing of the appeal Mr. Litton, who appeared for the appellant, said that the court was concerned with whether or not the transaction was artificial or fictitious, and that, although under the provisions of section 68(4) of the Inland Revenue Ordinance the burden of proof was on the taxpayer when appealing against an assessment to show that the assessment was excessive or incorrect, yet section 61 could only be relied on by the Crown where there is evidence that the transaction is fictitious or artificial. Of course there must be something to show that a transaction is artificial or fictitious, or there would be no reason to find that it was artificial or fictitious, but nevertheless the provisions of section 68(4) of the Ordinance have to be complied with. That subsection states:–*

"(4) The onus or proving that the assessment appealed against is excessive or incorrect shall be on the appellant."

Mr. Litton conceded that before the Board of Review the burden was on taxpayer to show that the application of section 61 was incorrect, but he submitted that the burden on an assessor was not to act capriciously, but to be satisfied as to the position.'

At page 321, Scholes J answered the question in the negative and added that the taxpayer:

> *'had to satisfy the Board that section 61 of the Inland Revenue Ordinance had been wrongly applied'*.

48. In Cheung Wah Keung,[1] Deputy Judge Poon answered the question 'Did the Board err in law in failing to impose on the Commissioner the burden of proving that a case had been made out for invoking section 61 and section 61A?' with a 'no'. At paragraph 29 of the IRBRD report, Deputy Judge Poon said:

> *'The last question of law stated relates to the burden of proof. Mr Burkett relied on the Singaporean case of CEC v. Comptroller of Income Tax (1950-1985) MSTC 551. There the taxpayer had made out a* ***prima facie*** *case showing among other things that everything was above board and genuine. In such circumstances, the court said that the onus of proving a sham was on the Comptroller. However, at 555 of the judgment, the court made it abundantly clear that the burden of proof throughout, until the end of the Comptroller's case rested on the taxpayer to show that the tax is excessive. I do not find this case of particular assistance to the Taxpayer. The burden of proving that the additional salary assessments were excessive or incorrect, shall be on the Taxpayer: section 68(4). The burden rests with the Taxpayer to prove that the Commissioner was wrong. Accordingly, I would also answer the last question with a "no".'*

Redevelopment for rental income

49. The stated intention in these four appeals is to redevelop for rental income. Mr Anselmo Reyes relied on D30/01 and D11/02. Mr Benjamin Chain argued in his closing submission that these two decisions were 'rightly decided'. We extract the following from these two decisions:

(a) One should be careful with the use of the word 'properties'. The 'properties' first acquired chronologically might be a unit or units and/or a block of building or blocks of buildings and/or a piece or pieces of vacant land. In the course of time, more 'properties' comprising of units and/or more blocks and/or more pieces of vacant land might be acquired. In some cases, old buildings which formed part of the 'properties' acquired might have been demolished and new building(s) might have been constructed in which event the 'properties' sold would have comprised of shares of and in the land and of and in the new building(s) and the exclusive right to occupy defined units of the new building(s). [paragraphs 40 to 44, D30/01]

[1] The Court of Appeal has since dismissed the appeal of the taxpayer, see [2002] 3 HKLRD 773 at paragraph 52.

(b) If a person had in fact formed an intention to redevelop, he should be able to say when the intention was formed, identify the boundary of the land for the intended redevelopment, and describe the intended redevelopment and the intended new building(s). [paragraph 45, D30/01]

(c) While it is not essential for the trader to acquire all the units in the old building(s), the investor must succeed in acquiring all the units in the old building(s). For the trader, it is a question of acquisition of desired trading stock. For the investor, failure to acquire all the units means that the investment intention is simply and plainly not realisable. The appellant should tell the Board of Review what was thought at the time when the 'stated intention' was said to have been formed to be the prospects of acquiring all the floors of all the blocks in the intended redevelopment. An owner of a floor might refuse or decline to sell or might demand a price which the appellant was unwilling to pay. The relevant time is when the 'stated intention' was said to have been formed. [paragraphs 28 and 29, D11/02 and paragraph 51, D30/01]

(d) The appellant should tell the Board whether there was any contingent plan, and if so what it was, in case the appellant should fail in acquiring any further unit at all or in case the appellant should succeed in acquiring only some, but not all, of the further units. Would it have been viable for the appellant to redevelop only the block or blocks acquired at the time when the 'stated intention' was said to have been formed? Would it have been viable for the appellant to redevelop only such of the blocks as the appellant would have acquired? [paragraphs 52 to 54, D30/01]

(e) The appellant should tell the Board what was thought at the time when the 'stated intention' was said to have been formed to be the costs of the redevelopment, that is, what the appellant thought would be the purchase cost, legal fees, stamp duty, compensation to be paid to tenants, bank interests, construction costs, etc. [paragraph 55, D30/01]

(f) The appellant should tell the Board how long the appellant thought the redevelopment would take to complete all acquisitions, demolish old buildings, and complete the intended redevelopment. [paragraph 56, D30/01]

(g) The appellant should tell the Board the area of the proposed new building(s), the anticipated unit rental rate, the anticipated occupancy or vacancy rate, the costs of servicing the new units, the costs of servicing the interest element of any long term loan, and the repayment of the principal of any long term loan. In short,

there should be evidence on whether, and if so, how the intended redevelopment was thought to be a viable investment. [paragraph 57, D30/01]

(h) While the trader may sell all or some of his trading stock at any time or at any stage of the redevelopment, the investor must have the financial ability to complete the redevelopment and hold the new building(s) indefinitely. In other words, the investor must have the financial ability to complete the acquisition of all the old units, pay all expenses in vacating all occupiers at the old building(s), demolish the old buildings, construct the new building(s), and keep the new building(s) indefinitely. All borrowed funds have to be repaid at some stage. For the investment intention to be realistic or realisable, the investor must be able to service the interest element of all long term loans and to repay the principal of all long term loans. [paragraph 31, D11/02]

(i) Thus, the appellant should adduce evidence on the appellant's financial ability, with or without its shareholders and directors, to complete the proposed redevelopment and to keep the proposed new building(s) indefinitely. [paragraph 32, D11/02]

(j) Where an appellant company relies on a shareholder to finance the acquisition and holding of the redevelopment on a long term basis, there should be evidence on the shareholder's financial ability to fund and keep the redevelopment on a long term basis, including bank statements and evidence on the shareholder's worth. [paragraph 58, D30/01]

(k) While the trader may lease some of the units in the old building(s), the investor's priority is to evict all occupiers of the old building(s) and will not lease out any unit save in exceptional circumstances and for cogent reasons. Not taking any step to evict any occupier, granting one lease after another without any redevelopment break clause are factors to be considered. [paragraphs 36 to 37, D11/02]

(l) Efforts to acquire the remaining units may be a neutral factor. [paragraph 39, D11/02]

The stated intention

50. The stated intention, according to the oral evidence of the Surviving Shareholder given at the hearing of the appeals, was:

> ' We will lease it first and then we will buy all of them and then rebuild it and lease it ... there were 12 old buildings. That was the situation. We were not able to buy all of

> them in one shot, so we have to purchase them batch by batch ... [Blocks d, e, 1, 7, 2a, 6, g, 5, 8, 9, 4 and 2b] ... We made a decision to purchase ... To buy the above mentioned old building ... Not in one shot, batch by batch ... I will also have the intention that in the future we would have our big group to move to this site to use it as our office ... what I am talking about is after we purchased all of them we will rebuild them and also use it as the office of our group ... [regarding the remaining parts the Holding Company would not be occupying] we intended to sell it ... no, to lease it ... So in the year of ' 88 [the Deceased Shareholder] intend to purchase the 12 lot and, after that, at that point he wants to reconstruct it into the building for both commercial and residential usage. For that 12 lots the site was very big. We could have parking space and also it has the value for the store and also we intend to have deluxe residential floors. Each floor we can have the area size of 3,000 square feet. We would like to have three floors like this. At that time it was the kind of property very good for leasing ... First and second floor you can use it as offices ... We would reserve one floor for ourself ...'

51. Whether the stated intention was in fact the intention is a question of fact. We decide against the Appellants on this factual issue.

52. If the stated intention was in fact the intention, there is no reason why the Appellants should have put forward so many different stories in the past.

53. First and foremost, in the letter dated 22 August 1990 signed by the Surviving Shareholder and the Named Shareholder (who was appointed a director on 22 May 1990) on behalf of A2 to the then auditors of A2 in respect of the accounts for the period ended 31 December 1989, it was stated that:

> ' For audit purpose, we hereby confirm that:
>
> (1) the intention of investment properties were for rental income and held for long-term purpose' .

In A2' s audited accounts for the period ended 31 December 1989, Blocks 2b and 4 were the investment properties, defined in note 1(b) in the Notes to the Accounts as:

> ' Investment properties are interests in land and buildings in respect of which construction work and development have been completed and are held for their investment potential.'

The case presented by A2 and the Surviving Shareholder was that Blocks 2b and 4 were acquired for rental income of the old buildings. Mr Benjamin Chain stated at the hearing that acquisition for rental income from the old buildings was not the Appellants' case.

54. The second version was put forward in correspondence with the assessor. There the story was that the old buildings were acquired for the rental income from the old buildings and that it was only after June 1989 that the directors decided to redevelop the old buildings to a ' high class composite residential cum commercial building for rental purpose'. Even then there was no mention of any use as ' flagship headquarters'. The ' shopping mall' mentioned in the letters faded in significance in the Surviving Shareholder's oral evidence.

55. In the letter dated 11 June 1996 written on behalf of A4, the following version was put forward (written exactly as it stands in the original):

> ' Prior to our client's acquisition of [a half share of Block 9], the group's companies had already held [Blocks 5, 4, 2b, 1 and 2a]. Those properties were acquired in 1988 and were intended to be used for letting purpose for production of regular recurrent income every year. During the period of the group companies' ownership, the properties were used for rental purpose. Since the rental market was very good at that time, especially the return from shops at [the district asserted in the letter was in fact the district to the east of where the Blocks actually were], the group had also held various properties at the nearby locations as long term investment for letting purpose.
>
> Unfortunately, the "Tiananmen Square Massacre" occurred on 4th June, 1989 had caused much adverse effect on the confidence of the Hong Kong people and unavoidably, the rental market was affected. In view that the rental market was in a downturn, as a result, the projected rentals could not be obtained. The situation even became worsen because the Building Authority issued numerous orders requiring the owners to carry out repairing works on the buildings and also, there was problem of arrears of rent. Having studied the rental market condition after the June 4th event, it came to a conclusion that the rental market would not be recovered in the short run and even an overall renovation was carried out, in view of the depression of the property market, it was not expected that the return to the group would be in proportion to the capital expenditure involved. The board of the group then came to consider its director, [the Deceased Shareholder's] (passed away on 14th July, 1990) suggestion. [The Deceased Shareholder] who was an expert in Hong Kong property believed that the property and rental market would turn upward after few years, in particular, the demand for luxury apartments would become very strong as at that time many Hong Kong emigrants after acquiring foreign nationalities would return to Hong Kong to continue their businesses or careers. Since most of them had already sold their residences at the time of emigration, as such, they might have either to rent or to purchase flats in solving the accommodation problem. After due consideration, the directors decided to adopt [the Deceased Shareholder's] suggestion to redevelop the existing properties

together with the contiguous properties to a high class composite residential cum commercial building for rental purpose. On completion, the building would comprise luxury apartments, carparking spaces, shopping mall and advertising spaces.

...

The original plan was frustrated due to unexpected circumstances.'

56. A similar version was put forward in the letter dated 22 October 1996 written on behalf of A2 (written exactly as it stands in the original):

'3. The properties acquired in 1988 were intended to be used for letting purpose for production of regular recurrent income. It was due to the reasons as stated in (6) below, our client then decided to redevelop the properties as a high class residential cum commercial building for long term investment purpose.

...

6. ...

On 17th October, 1988 our client acquired [Blocks 2a, 2b and 4] for the purpose of long term investment for production of regular recurrent income. The market condition for rental of shops was very good during the year, in particular, the shops located at [the district asserted in the letter was in fact the district to the east of where the Blocks actually were]. It was projected that the rental market would continue to be strong and therefore, the rental of those shops and upper floors could be increased to reflect the market condition at the time the tenancy agreements were due for renewal. In fact our client's group had already held various properties at the nearby locations as investment properties. Unfortunately , the happening of the June 4th event in 1989 had caused much adverse effect on the confidence of the Hong Kong people. Despite the adverse political and economic environment in the PRC and Hong Kong, our client continued to hold the property for rental purpose.

Our client's intention to hold the properties for investment purpose can be supported by the following:

a. it accepted the tenant of [Block 4], Ground Floor to transfer the tenancy to the transferee of his restaurant business. In fact, if our client's intention of acquiring the properties was for resale purpose, surely, it would seize the opportunity to repossess the property ...

b. as a matter of formality, our client' s solicitors served formal notice to the tenant of [Block 2b], Ground Floor requiring the tenant to quit and deliver up vacant possession to our client ... The tenancy was subsequently renewed.

c. same notice as mentioned in (b) was issued to the tenant of [Block 2a], Ground Floor and the tenant quitted the tenancy and delivered up vacant possession of the premises to our client. Subsequently, the premises was let to a new tenant at a term of two years commencing from 19th February, 1990 ...

In view of the unfavourable economic environment, even though the rental of some of the properties had been increased, the amount was still far below the level as original projected. Furthermore, repeated repairing orders were received from the Building Authority ... Also, collection of rental became another problem and legal proceedings for collection of rental in arrear were needed ... In order to protect the interests of the company, the directors commenced to reassess the investment strategy.

Having studied the projection on future rental market condition given by expert consultants and considered the previous suggestion given by the late group companies' director [the Deceased Shareholder], the directors came to a conclusion that the rental market would not be recovered in the near future. It was not expected that further renewal of tenancy agreements would be resulted in significant increment in rental and the directors affirmed [the Deceased Shareholder' s] believe that the property and rental market would turn upward after few years, in particular, the demand for luxury apartments would become very strong as by that time many Hong Kong emigrants after acquiring foreign nationalities would return to Hong Kong to continue their businesses or careers. Since most of them had already sold their residences at the time of emirgation, as such, they might have to rent flats in solving the accommodation problem. After due consideration, the directors decided to redevelop the properties together with the contiguous properties to a high class composite residential cum commercial building for rental purpose.

In order to obtain a site with sufficient area for development, the group appointed property agents to negotiate with the owners of the contiguous properties. The group had successfully acquired [Blocks 7, 6, 8 and 9] subsequently. Negotiations with the owners of [Blocks d, e and g] were also in progress. If these lots could be obtained, the additional lots together with those already held by different group companies would form a single piece of

land for development of the proposed building. However, the price asked by the owners were extremely high which indicated that they were not preparing to sell their properties and instead, they indicated their interest in acquiring the properties held by our client and its group companies. According to information available, the owners of those companies were identical, and there was rumour that they were backed up by triad members. In view that a group company had come across some trouble from triad linked persons in the acquisition of [Block 6] and it was afraid that such unhappiness would be happened again, therefore, the directors decided to hold off the negotiation.

The possibility of redevelopment of the sites already held was then considered. Despite that the sites could be formed as a single site with [Block 6] being isloated, such an alternative was nearly not workable. The reason was that the Building Authority would not permit the portion of existing rear lane between [Roads 1 and 2] to be built over and included in site area calculation because [Blocks d-e] were owned by separate owner ...

Besides, eviction of the unlawful occupiers and trespassers occupying the roof tops of the properties was not as straight forward as expected. ...

In view of the above circumstances, the group' s redevelopment plan must be held up and it was later [a named company] representing the buyer approached the group offering to buy all the properties at favourable terms, the group considered to dispose of the properties.

...

12. Our client acquired the properties as capital assets for production of recurrent rental income. Due to the downturn of the rental market and circumstances as explained in the preceding paragraphs, our client decided to redevelop the properties. Such decision did not lead to any change of intention as the new building was also intended to be held for long term investment for production of rental income. The redevelopment plan could not be carried out because of unexpected circumstances mentioned above. Prior to any alternative plan could be worked out, the purchaser approached our client through its agent. The purchaser offered to buy all the lots including the isolated [Block 6] and indicated its willingness to accept a compensation as liquidated damage in case of non-delivery of vacant possession due to the problem of unlawful occupation. The group accepted the offer as it encountered the difficulties in acquiring the remaining lots and evicting the unlawful occupiers.'

57. A similar version was put forward in the letter dated 30 October 1996 written on behalf of A3 (written exactly as it stands in the original):

> ' Prior to our client' s acquisition of the property, the group' companies had already held [Blocks 5, 4, 2b, 1 and 2a]. Those properties were acquired in 1988 and were intended to be used for the purpose of long term investment for production of regular recurrent income. During the period of the group companies' ownership, the properties were used for rental purpose. The market condition for rental of shops was very good during the year, in particular, the shops located at [the district asserted in the letter was in fact the district to the east of where the Blocks actually were]. It was projected that the rental market would continue to be strong and therefore, the rental of those shops and upper floors could be increased to reflect the market condition at the time the tenancy agreements were due for renewal. In fact our client' s group had already held various properties at the nearby locations as investment properties. Unfortunately , the happening of the June 4th event in 1989 had caused much adverse effect on the confidence of the Hong Kong people. Despite the adverse political and economic environment in the PRC and Hong Kong, the group continued to hold the properties for rental purpose.
>
> In view of the unfavourable economic environment, even though the rental of some of the properties had been increased, the amount was still far below the level as original projected. Furthermore, repeated repairing orders were received from the Building Authority. Also, collection of rental became another problem and legal proceedings for collection of rental in arrear were needed. In order to protect the interests of the company, the directors commenced to reassess the investment strategy.
>
> Having studied the projection on future rental market condition given by expert consultants and considered the previous suggestion given by the late group companies' director [the Deceased Shareholder], the directors came to a conclusion that the rental market would not be recovered in the near future. It was not expected that further renewal of tenancy agreements would be resulted in significant increment in rental and the directors affirmed [the Deceased Shareholder' s] believe that the property and rental market would turn upward after few years, in particular, the demand for luxury apartments would become very strong as by that time many Hong Kong emigrants after acquiring foreign nationalities would return to Hong Kong to continue their businesses or careers. Since most of them had already sold their residences at the time of emigration, as such, they might have to rent flats in solving the accommodation problem. After due consideration, the directors decided to redevelop the properties together with the contiguous properties to a high class composite residential cum commercial building for rental purpose.

> In order to obtain a site with sufficient area for development, the group appointed property agents to negotiate with the owners of the contiguous properties. The group had successfully acquired [Blocks 7, 6, 8 and a half share of Block 9]. Another half share of [Block 9] (i.e. the subject property) was subsequently acquired by our client. Simultaneously, negotiations with the owners of [Blocks d, e and g] were also in progress. If these lots could be obtained, the additional lots together with those already held by different group companies would form a single piece of land for development of the proposed building. However, the price asked by the owners were extremely high which indicated that they were not preparing to sell their properties and instead, they indicated their interest in acquiring the properties held by our client and its group companies. According to information available, the owners of those companies were identical, and there was rumour that they were backed up by triad members. In view that a group company had come across some trouble from triad linked persons in the acquisition of [Block 6] and it was afraid that such unhappiness would be happened again, therefore, the directors decided to hold off the negotiation.
>
> The possibility of redevelopment of the sites already held was then considered. Despite that the sites could be formed as a single site with [Block 6] being isloated, such an alternative was nearly not workable. The reason was that the Building Authority would not permit the portion of existing rear lane between [Roads 1 and 2] to be built over and included in site area calculation because [Blocks d-e] were owned by separate owner ...
>
> Besides, eviction of the unlawful occupiers and trespassers occupying the roof tops of the properties was not as straight forward as expected. ...
>
> ...
>
> Due to unexpected circumstances mentioned above the original plan was frustrated.'

58. In the letter dated 8 January 1997, the following version was put forward on behalf of A1 (written exactly as it stands in the original):

> ' 4. The properties acquired in 1988 and 1989 were intended to be used for letting purpose for production of regular recurrent income. It was due to the reasons as stated in (7) below, our client then decided to redevelop the properties as a high class residential commercial building for long term investment purpose.
>
> ...

7. ...

In 1988 and 1989 our client acquired [Blocks 1, 6 and 5] for the purpose of long term investment for production of regular recurrent income. The market condition for rental of shops was very good during the time, in particular, the shops located at [the district asserted in the letter was in fact the district to the east of where the Blocks actually were]. It was projected that the rental market would continue to be strong and therefore, the rental of those shops and upper floors could be increased to reflect the market condition at the time the tenancy agreements were due for renewal. In fact our client's group had already held various properties at the nearby locations as investment properties. Unfortunately , the happening of the June 4th event in 1989 had caused much adverse effect on the confidence of the Hong Kong people. Despite the adverse political and economic environment in the PRC and Hong Kong, our client continued to hold the property for rental purpose.

Our client's intention to hold the properties for investment purpose can be supported by the following:-

a. the properties were acquired with existing tenancies.

b. the renewal of the tenancy agreements in respect of [ground floors of Blocks 1, 8 and 5] for further terms varied from two to three years.

In view of the unfavourable economic environment, even though the rental of some of the properties had been increased, the amount was still far below the level as original projected. Furthermore, repeated repairing orders were received from the Building Authority. Also, collection of rental became another problem and legal proceedings for collection of rental in arrears were needed. In order to protect the interests of the company, the directors commenced to reassess the investment strategy.

Having studied the projection on future rental market condition given by expert consultants and considered the previous suggestion given by the late group companies' director [the Deceased Shareholder], the directors came to a conclusion that the rental market would not be recovered in the near future. It was not expected that further renewal of tenancy agreements would be resulted in significant increment in rental and the directors affirmed [the Deceased Shareholder's] believe that the property and rental market would turn upward after few years, in particular, the demand for luxury apartments would become very strong as by that time many Hong Kong emigrants after

> acquiring foreign nationalities would return to Hong Kong to continue their businesses or careers. Since most of them had already sold their residences at the time of emigration, as such, they might have to rent flats in solving the accommodation problem. After due consideration, the directors decided to redevelop the properties together with the contiguous properties to a high class composite residential cum commercial building for rental purpose.
>
> In order to obtain a site with sufficient area for development, the group appointed property agents to negotiate with the owners of the contiguous properties. The group had successfully acquired [Blocks 7, 8 and 9] subsequently. Negotiations with the owners of [Blocks d, e and g] were also in progress. If these lots could be obtained, the additional lots together with those already held by different group companies would form a single piece of land for development of the proposed building. However, the price asked by the owners were extremely high which indicated that they were not preparing to sell their properties and instead, they indicated their interest in acquiring the properties held by our client and its group companies. According to information available, the owners of those companies were identical, and there was rumour that they were backed up by triad members. In view that a group company had come across some trouble from triad linked persons in the acquisition of [Block 6] and it was afraid that such unhappiness would be happened again, therefore, the directors decided to hold off the negotiation.
>
> The possibility of redevelopment of the sites already held was then considered. Despite that the sites could be formed as a single site with [Block 6] being isolated, such an alternative was nearly not workable. The reason was that the Building Authority would not permit the portion of existing rear lane between [Roads 1 and 2] to be built over and included in site area calculation because [Blocks d-e] were owned by separate owner ...
>
> Besides, eviction of the unlawful occupiers and trespassers occupying the roof tops of the properties was not as straight forward as expected.
>
> In view of the above circumstances, the group' s redevelopment plan must be held up and it was later [a named company] representing the buyer approached the group offering to buy all the properties at favourable terms, the group considered to dispose of the properties.'

59. The third version was in paragraphs 7 and 8 of his supplemental witness statement dated 10 June 2002, where the Surviving Shareholder mentioned that the user of the 12 lot ' flagship' would be ' commercial/office or simply for commercial user' . There was no mention of

residential user, 'deluxe', 'luxury' or otherwise. The following is what the Surviving Shareholder alleged shortly before the hearing (written exactly as it stands in the original):

> '(7) I wish to elaborate paragraph 28 of my Statement where states that in 1988 [the Holding Company] had in mind was a site straddling 12 lots including [Blocks d, e, 1, 7, 2a, 2b, 4, 9, 8, 5, g and 6] and would give a site of over 11,493 sq. feet with enormous redevelopment potential for construction of our flagship for investment.
>
> (8) I recall some time in 1988 that a series of discussion between [the Deceased Shareholder] and I were held wherein [the Deceased Shareholder] mentioned that our flagship would be for commercial/office or simply for commercial user . [The Deceased Shareholder] also projected that the said flagship covering 12 lots would generate annual rental income of HK$50,000,000 odd and yielded a return of around 10% in 1992/1993, that was the earliest anticipated completion date thereof.'

60. As in D30/01 and D11/02, the significance of the evidence in these appeals lies in what we have **not** been told.

61. The Appellants expressly stated that their case was not acquisition of the old buildings as capital assets for rental income from the old buildings. The Appellants did not allege that it was their intention to redevelop Blocks 1, 2a, 2b, 4, 5 and 6 (or any of them) on their own. Yet, there was **no** evidence on what was thought at the time the stated intention was said to have been formed to be the prospects of acquiring Block 7, Block 8 or Block 9. In the absence of such evidence, the onus on proof being on the Appellants, we are unable to conclude that the stated intention was realistic or realisable. The appeals must and do fail.

62. There was **no** evidence on what was thought at the time when the stated intention was said to be have formed to be the purchase cost of the 12 Blocks. There is **no** evidence on what was thought to be the time it would take to evict all occupiers. There is **no** evidence on what was thought to be the time it would take to construct the proposed new building(s). This is odd if the stated intention was in fact the intention.

63. Each of the four Appellants is a $2 company. Clearly they did not have the financial means to undertake a redevelopment in terms of hundreds of millions of dollars. They needed the support of banks, shareholders, directors and ultimate beneficial owners of the shares of the Appellants. Unless there is evidence to show that the Appellants had the financial means to fund the acquisition of the 12 blocks, to fund the eviction of all occupiers from the 12 blocks, to fund the demolition of the 12 blocks, to fund the construction of the proposed new building(s) and to keep the proposed new building(s) for an indefinite period, we are unable to conclude that the stated intention was realistic or realisable.

64. There is **no** evidence on the financial worth or net worth as at July 1988 of any of the ultimate beneficial owners of the shares in the Appellants. The Surviving Shareholder sought to demonstrate financial capability by asserting that:

> '... as at the end of July 1993 when I intended to embark on the eight-lot redevelopment project, [the Holding Company's] subsidiaries held various landed properties ... which were capable of and readily disposable for monetary consideration.'

His argument is wholly untenable for two reasons. First, the relevant time is July 1988, not July 1993. Second, financial worth or ability is not proved by pointing only to some assets, completely ignoring the liabilities. According to the financial statements of the nine companies relied on by the Surviving Shareholder, they had a net aggregate capital deficiency of $3,022,949:

Shareholders' funds capital/Capital deficiencies	$
Capital deficiencies	-165,536
Capital deficiencies	-1,047,229
Shareholders' funds	671,261
Shareholders' funds	788,843
Capital deficiencies	-203,637
Capital deficiencies	-591,625
Capital deficiencies	-1,077,324
Capital deficiencies	-321,998
Capital deficiencies	-1,075,704
Total:	-3,022,949

65. We assume that the Appellants could borrow the funds for the acquisition of the 12 blocks and eviction of all occupiers from the 12 blocks. We also assume that the Bank would lend 100% of the demolition and construction costs. We further assume that on completion of the construction of the proposed new building(s), the Bank would convert all outstanding loans, including the building loan, to an instalment loan for a long period of time. But that is still a far cry from satisfying us on financial capability. Significantly, there is **no** evidence on the Appellants' financial ability to service the proposed new building(s) and to pay off the instalment loan. There is simply **no** evidence on what was thought to be the occupancy rate of the proposed new building(s) or the unit rental. A residential unit of about 3,000 square feet at the location of the Blocks is, in our decision, practically moonshine.

Conclusion

66. For the reasons given, the Appellants have not proved any of the following:

(a) that at the time of the respective acquisitions of Blocks 1, 2a, 2b, 4, 5, 6, 7, 8 or 9, the intention of any of the Appellants was to hold any of them or any proposed new building(s) on a long term basis, whether for rental income or at all;

(b) the Appellants' financial ability, with or without their shareholders and directors and ultimate beneficial owners of their shares, to demolish the old buildings, construct the proposed new building(s), and to keep the proposed new building(s) indefinitely.

67. The Appellants have not proved that the 'stated intention' was in fact held, not to mention genuinely held, realistic or realisable.

68. The Appellants have not discharged the onus under section 68(4) of proving that any of the assessments appealed against is excessive or incorrect. All four appeals will therefore be dismissed.

69. We are of the opinion that all four appeals are obviously unsustainable. All four appellants should have realised that their appeals were hopeless after D30/01 and D11/02 had been drawn to their attention. Pursuant to section 68(9) of the IRO, we will order each Appellant to pay the sum of $5,000 as costs of the Board.

Disposition

70. We dismiss this appeal and confirm the assessment as confirmed by the Commissioner.

Costs

71. We order the Appellant in this appeal to pay the sum of $5,000 as costs of the Board, which $5,000 shall be added to the tax charged and recovered therewith.