



### Summary of Judicial Decision

**Designing Hong Kong Limited (“the Appellant”) v The Town Planning Board  
 (“the Respondent”) & Secretary for Justice (“the Intervener”)  
 FACV 4/2018; [2018] HKCFA 16**

**Decision** : **Appeal dismissed**  
**Date of Hearing** : **19 April 2018**  
**Date of Judgment/Decision** : **15 May 2018**

#### Background

1. The Appellant is a company limited by guarantee and a non-profit organization. On 8 May 2014, it lodged an application for leave to apply for judicial review (“Form 86”) against the Respondent’s decision dated 14 February 2014 not to amend the draft Central District (Extension) Outline Zoning Plan No. S/H24/8 (“the DOZP”) in accordance with its representations. Specifically, the Appellant’s challenge was in relation to a strip of a waterfront site (“the Site”) to the north of the People’s Liberation Army Hong Kong Garrison Headquarters which has been zoned “Other Specified Uses” annotated “Military Use (1)” under the DOZP for the planned Central Military Dock. The Appellant alleged that the zoning of the Site under the DOZP affected the original planning intention of a continuous waterfront promenade through the Central area. Leave to apply for judicial review was granted on 21 July 2014.
2. In the Form 86, the Appellant applied, *inter alia*, for a Protective Costs Order (“PCO”) protecting it from liability to bear any of the Respondent’s costs of the proceedings or alternatively, that the Respondent’s costs be capped at certain amount. In general terms, a PCO is a costs order in public law proceedings in which a party (usually an applicant) seeks at an early stage an order protecting or limiting its liability to bear costs in such proceedings in the event that that party is unsuccessful.
3. The application for a PCO was heard by the Court of First Instance (“CFI”) on 16-17 December 2014. By a judgment dated 30 April 2015, CFI refused the application on the basis that the Appellant did not fully disclose the financial resources available to it, including the financial position of its shareholders or directors, and so failed to show that it was genuinely not in a position to bear the Respondent’s costs if the judicial review should fail. (full text of the CFI judgment at [http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=98224&QS=%2B&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=98224&QS=%2B&TP=JU))
4. The refusal to grant a PCO was upheld by the Court of Appeal (“CA”) by its judgment dated 16 February 2017. (full text of the CA judgment at [http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=108194&QS=%28designing%2Bhong%2Bkong%29&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=108194&QS=%28designing%2Bhong%2Bkong%29&TP=JU))
5. The Appellant applied for leave to appeal to the Court of Final Appeal (“CFA”). On 30 October 2017, CFA granted leave for the Appellant to appeal.



### **Issues in dispute**

6. The key issues in dispute are:-
  - (i) when considering whether to grant a PCO, what is the correct approach or principle to be applied to the concept of “financial resources available to the applicant”?
  - (ii) specifically, where the applicant is a body corporate, are the private financial resources of the directors and/or members of the applicant to be treated as relevant, and if so, is the applicant for a PCO required to obtain and disclose the financial resources of its directors and/or members?

### **Department of Justice’s Summary of the Court’s rulings**

(full text of the CFA’s judgement at [http://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=115161](http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=115161); press summary issued by the Judiciary at [http://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2018/FACV000004\\_2018\\_files/FACV000004\\_2018ES.htm](http://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2018/FACV000004_2018_files/FACV000004_2018ES.htm))

7. CFA remarked that the United Kingdom case of *R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600* provides useful guidance as to when PCOs should be granted in Hong Kong. CFA endorsed the general principles laid down in *Corner House* as set out below at (a) to (e), and considered that they should apply in Hong Kong:- (a) the issues are of great public importance; (b) the public interest requires that those issues should be resolved; (c) the applicant has no private interest in the outcome of the case; (d) having regard to the financial resources of the parties and the amount of costs involved, it is fair and just to make the order; and (e) if the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. On the approach to the granting of PCOs, CFA remarked that Hong Kong’s relatively generous system of legal aid (compared with many other jurisdictions) has ensured that most cases of public importance have over the years been determined by the Courts. (paragraphs 26 and 27(5))
8. CFA held that in considering the above *Corner House* principles, the Court should firmly bear in mind three underlying aspects, namely (i) exceptionality of a PCO (i.e. it being made at an early stage of the proceedings and having the effect of denying the costs of a potentially successful party even at this early stage), (ii) rationale for granting a PCO (i.e. to ensure that proceedings of great public importance are not stifled through a lack of financial means), and (iii) overall fairness and justice, which concern *Corner House* principle (d) and essentially require looking at the financial ability of the applicant for a PCO. (paragraphs 22-27)
9. CFA laid down general guidance on the application of the *Corner House* principle (d) by holding that the burden is on an applicant for a PCO to provide details of its financial ability to bear the likely costs of the other side in the



proceedings, and that it is legitimate, in the case where the applicant is a corporation, for the Court to inquire not only as to assets belonging to the company, but also to other sources of funding to which the company would have access. However, there is no fixed approach in examining the issue of financial ability and whether or not it is appropriate to look at the financial ability or resources of the shareholders, directors, guarantors and other supporters depends on the circumstances of each case. The Court will look at the underlying realities of the company's financial position and adopt a common sense view of the matter. For example, the Court would usually expect evidence of why persons who have supported the company in the past no longer wish to do so. (paragraphs 30, 31 and 36)

10. After examining the financial ability of the applicant, the Court will look at the overall fairness and justice of an application for a PCO. A flexible approach will be adopted. It is not an arithmetical exercise in which one compares the financial resources available to the applicant with the costs liability if it is unsuccessful in the judicial review. Sometimes it will be fair and just to make an order even though an applicant's resources might appear to be adequate to meet a potential adverse costs order (e.g. where its resources may be committed to other identified liabilities and it would be unreasonable to divert them to a costs liability instead). In other situations, it may be fair and just not to make a PCO even though an applicant's resources are limited and its resources may be inadequate to meet an adverse costs order (e.g. where a limited liability company is used as a means to insulate the persons behind the company from costs of the proceedings). (paragraphs 40-43)
11. Fairness and justice mean that the position of the other party to the proceedings is always taken into account. Hence, whether those acting for the applicant are doing so on a *pro bono* basis is relevant as this will limit the costs liability of the other side in the event he is unsuccessful. (paragraph 44)
12. Applying the above principles to the present case, CFA held that given the unwillingness of the Appellant's directors to provide details of their financial ability, it was assumed that they had the means to finance the judicial review application, but were unwilling to do so. Further, it could not be said that there was no prejudice to the Respondent, even though it was funded by the public purse, in the event that it was unable to recover its costs. Thus, as a matter of overall fairness and justice, a PCO should not be granted. (paragraph 48)

**Civil Division**

**Department of Justice**

**June 2018**