



Protection of Property Rights under BL 6 and BL 105



Articles 6 and 105 of the Basic Law (BL 6 and 105) are two key provisions of the Basic Law which protect private property rights in Hong Kong. BL 6 provides that the Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law. BL 105 provides that the Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay. The ownership of enterprises

and the investments from outside the Region shall be protected by law. This article gives a general survey of these two important constitutional provisions, particularly in the light of the jurisprudence developed by local courts.

The notion of “property” under BL 6 and 105

In *Michael Reid Scott v The Government of the HKSAR*, HCAL 188/2002, Hartmann J (as he then was) considered the notion of “property” in BL 105. He said (at paragraphs 71 – 72):

“ ... The word ‘property’ has not been defined [in art. 105] but is qualified by the fact that its



‘acquisition, use, disposal and inheritance’ is protected. Those qualifications, in my view, constitute an aid in interpreting the meaning and extent of ‘property’ as it is used in the article.

If ‘property’ within the meaning of art. 105 may be acquired, used and disposed of, including disposal by way of inheritance, then it must surely be capable of being brought into possession and being transferred out of possession. In short, it must in most cases have two features: it must be capable of being possessed and of being transferred. I have qualified those attributes with the phrase ‘in most cases’ because I accept of course that in common law the word ‘property’ is of very wide import and when used in a document of constitution demands wide and purposive interpretation ...”

Hartmann J further held that BL 6 and 105 protect only existing property rights, not anticipated rights (e.g. the amount of pay not yet earned). They do not extend their protection to what in effect is no more than an expectation (paragraphs 77 and 79). This approach is consistent with the European jurisprudence on Article 1 of Protocol No.1 of the European Convention on Human Rights which also protects property right.¹ As commented by Jessica Simor and Ben Emmerson, QC in *Human*

Rights Practice (at paragraph 15.009):

“Article 1 of Prot. No.1 relates only to ‘existing possessions’. Thus the possibility of acquiring a possession in the future is unlikely to constitute a property right protected by Art.1 of Prot. No.1. Nor is any right to acquire or inherit property at some time in the future protected ... Future income is only a ‘possession’ once it has been earned, or an enforceable claim to it exists ...”

The meaning of “deprivation” in BL 105

Formal expropriation

In *Weson Investment Ltd v Commissioner of Inland Revenue* [2007] 2 HKLRD 567, Tang VP held that the word “deprivation” in BL 105 is used in the sense of “expropriation” which is the expression used in its original Chinese (namely, “徵用”).² In his opinion, genuine action taken to enforce payment of tax or to recover a penalty or a fine, even if subsequently turned out to be wrong, does not come within the scope of lawful expropriation of property under BL 105 (paragraph 79). This approach was followed by the Court of First Instance in *Harvest Good Development Ltd v Secretary for Justice & Ors*

¹ Article 1 of Protocol No.1 of the European Convention on Human Rights provides:
“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

² The decision of the Standing Committee of the National People’s Congress adopted on 28 June 1990 provides:
“... the English translation of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China which has been finalised upon examination under the auspices of the Law Committee of the National People’s Congress shall be the official English text and shall be used in parallel with the Chinese text. In case of discrepancy between the two texts in the implication of any words used, the Chinese text shall prevail.”



[2007] 4 HKC 1 and *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd (No.5)* 2007 5 HKC 122, as well as by the Court of Appeal in 巫振漢 對 漁農自然護理署, CACV 143/2007. In 巫振漢, the applicant challenged the forfeiture of certain birds by the Agriculture, Fisheries and Conservation Department pursuant to section 8 of the Public Health (Animals and Birds) Ordinance (Cap.139).³ Referring to Tang VP's construction of "deprivation" in *Weson*, the Court of Appeal held that section 8 is consistent with BL 105 and dismissed the applicant's claim. (paragraphs 33-35)

In *Harvest Good Development Ltd*, after noting Tang VP's approach in *Weson* of interpreting "deprivation" in BL 105 as meaning "expropriation", Hartmann J said (at paragraph 134):

"As to the definition of the term 'expropriation', in his text, *Constitutional Property Clauses* (1999, Juta & Co Ltd) Professor AJ van der Walt, at p 18, wrote:

'The term expropriation ... does not apply to or adequately explain the position in all jurisdictions. When referring to the acquisition of property in terms of the power of eminent domain, most constitutions in the Anglo tradition refer to compulsory acquisitions, whereas most jurisdictions in the Germanic tradition refer to expropriations, with the two terms having roughly the same meaning. *The fairly widely accepted interpretation is*

that these terms require the state to actually acquire property or derive a benefit from the expropriation or acquisition in some way, thereby excluding state actions that destroy or take away property without any benefit for the state.'" (emphasis original)

De facto deprivation

However, in *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553, the Court of Appeal held that reliance on the Chinese text of BL 105 (which, in the event of discrepancy between the English and Chinese versions, must prevail) is of no consequence as it is to the reality rather than the form to which the courts will look to see if there has been expropriation. In its view, action adversely affecting use of property, despite falling short of formal expropriation, may in certain circumstances properly be described as deprivation, in which case there is a right to compensation. To ascertain whether there has been a deprivation, the court looks to the substance of the matter rather than to the form. Absent a formal expropriation, the question whether there has been a *de facto* deprivation is perforce case specific, a question of fact and degree (paragraphs 16 – 18).

The Court of Appeal further held that *de facto* deprivation for the purpose of establishing a right to compensation under BL 105 contemplates the removal or denial of all meaningful use, or all economically viable use, of the property

³ Section 8 of the Public Health (Animals and Birds) Ordinance (Cap.139) provides that the senior veterinary officer, or any person acting under his direction, may seize any animal, bird or thing dealt with in contravention of Cap.139 or of any regulation thereunder, and may order the forfeiture of such animal, bird or thing, and the same shall thereupon be destroyed, sold or otherwise disposed of as the senior veterinary officer may direct.



(paragraphs 19 – 25). In this regard, it cited with approval, at paragraph 21, the following passage from Mulcahy (ed.), *Human Rights and Civil Practice* (2001) on the approach taken by the European Court of Human Rights to the issue of *de facto* deprivation (at paragraph 16.72):

“A *de facto* expropriation of this kind can only occur where there has been so substantial an interference with the ownership and use of the possession concerned that it effectively equates to the total extinction of ownership notwithstanding the fact that the owner retains legal title. Deprivation may thus occur if the owner is deprived of all meaningful use of his property. However, any form of provisional or temporary loss of rights is very unlikely to constitute deprivation. Equally, interferences which do not affect the value of the possession at all, or which affect its value to a severe degree but not so as to render it worthless, are also unlikely to be considered deprivations. A finding of *de facto* expropriation is accordingly, and is likely to remain, extremely rare.”

The measure of “real value” compensation in BL 105

BL 105 provides for a right to compensation for lawful deprivation of property and such compensation shall correspond to the real value of the property concerned at the time. In *Penny’s Bay Investment Company Limited v Director of Lands*, LDMR 23/1999 and LDMR 1/2005, a case concerning compensation under the Foreshore and Sea-bed (Reclamations) Ordinance (Cap



127), Lam J held (at paragraphs 42 – 45) that there is no difference in substance between the real value test laid down in BL 105 and the fair compensation generated from the principle of equivalence succinctly set out by Lord Nicholls in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 at 125:

“The purpose of these provisions, in Hong Kong and England, is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. ... [A] claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone,



with its two facets, that all claims for compensation succeed or fail.”⁴

Lam J, at paragraph 45, cited with approval the following three conditions referred to by Lord Nicholls as ones that must be satisfied in the assessment of a fair compensation:

- (a) there must be a causal connection between the resumption or acquisition and the loss in question;
- (b) to qualify for compensation the loss must not be too remote;
- (c) those who claim recompense are expected to behave reasonably to eliminate or reduce the loss and to avoid unreasonable expenditure being incurred.

Before the case of *Penny's Bay*, the principle of equivalence was applied by the Court of Final Appeal in *Director of Lands v Yin Shuen Enterprises Ltd & Anor* [2003] 2 HKLRD 399, a case concerning the issues of whether compensation for land resumed under the Lands Resumption Ordinance (Cap 124) can include an element of speculation and whether the relevant provision under Cap 124 which excludes such an element is consistent with BL 105. The Court of Final Appeal held that BL 105 does not require compensation to be based on the open market value of the property concerned but on its real value. While the open market value of a property generally reflects its real value, sometimes the market is prepared to pay a speculative price which exceeds the true value of the property. BL 105 does not require compensation for this speculative element. Moreover, compensation is only required to be paid for “the property

⁴ Lam J's decision in *Penny's Bay* was reversed by the Court of Appeal on appeal, but on grounds unrelated to the underlying principle of equivalence: see *Penny's Bay Investment Co Ltd v Director of Lands* [2009] 1 HKC 391. Indeed, after referring to Lord Nicholl's statements on the principle of equivalence in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* quoted in paragraph 8 above, Cheung JA said (at paragraph 58): “[a]lthough the appeal is not concerned strictly with resumption of land, the relevance of these principles in ascertaining the proper measurement of compensation is not in any way disputed by the parties.”



concerned”, that is to say for the interest acquired (paragraphs 56 – 57).

The “fair balance” test ?

For cases of interference with property rights falling short of deprivation, there is the question of whether a “fair balance test” developed under the European jurisprudence would apply as an implicit requirement under BL 6 and 105. Under this test, any interference with property rights would need to strike a fair balance between the demands of the general interest of the society (which any interference with property rights must aim to serve) and the requirements of the protection of the individual’s rights. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The above question is yet to be decided by our courts. It appears arguable that it be answered in the negative. For instance, it may be argued that neither BL 6 nor BL 105 expressly provides for the application of the proportionality principle. While Article 1 of Protocol No.1 of the European Convention on Human Rights provides that the State may control the use of property “in accordance with the general interest”, BL 6 and 105 import the legality condition (i.e. “in accordance with law”).

Further, BL 105 provides for compensation as a remedy for lawful deprivation of property and not for interference with property rights that falls short of deprivation. Hence, it may be argued that no remedies including payment of compensation

are intended to be available for such interference under BL 105.

In the European jurisprudence on Article 1 of Protocol No.1 of the European Convention on Human Rights, there is no inherent right to compensation for controls of use nor, by extrapolation, for interferences with peaceful enjoyment that do not amount to “deprivations”. However, when assessing the proportionality of the regulation in question, it will be of relevance whether compensation is available and to what extent a concrete economic loss was caused by the legislation: see Jessica Simor and Ben Emmerson, QC, *Human Rights Practice*, paragraph 15.060. In this regard, it is worth noting that in the case of *Fine Tower*, the Court of Appeal held that a mere restriction on use, falling short of *de facto* deprivation, is not compensable since otherwise the financial consequences would be such as “to cripple the legislature’s freedom to introduce ... socially beneficial legislation” (paragraph 33).

Conclusion

The discussion above shows that our courts have developed important case law on the interpretation of BL 6 and 105. With the assistance of such case law, we know with greater certainty the extent of protection of property rights in Hong Kong, which protection is the linchpin of the thriving domestic capitalist economy.