Official Receiver v Zhi Charles, formerly known as Chang Hyun Chi and Another

FACV No. 8 of 2015 (5 November 2015)[1]
CFA

The issue before the CFA was the constitutionality of section 30A(10)(a) of the Bankruptcy Ordinance (Cap. 6) ("the Ordinance") which provides that, where a bankrupt has left Hong Kong before the commencement of the bankruptcy, the relevant period for an automatic discharge shall not start to run until he returns to Hong Kong and notifies the trustee in bankruptcy of his return.

Background

The respondent is a national of South Korea. He came to Hong Kong in 1993 to work. He left Hong Kong in August 2003 to live in the USA. A petition in bankruptcy was presented on 3 July 2006. A warrant for his arrest was issued on 3 May 2012 as the respondent failed to attend the examination by the trustee of his property ("the trustee"). While the respondent visited Hong Kong on various occasions between 2006 and 2011, he did not notify the trustee of his return. Upon his arrival in Hong Kong on 10 May 2012, the respondent was arrested and brought the following day before the Master. The examination of the respondent was adjourned upon his intimation that he wished to challenge the constitutionality of section 30A(10)(a). The application for these declarations was dismissed by the CFI on 2 May 2013. The CA reversed the CFI's decision as to the constitutionality of the impugned provision and, accordingly, granted a declaration that the provision was unconstitutional and that the bankruptcy had been discharged on 21 December 2010. On 16 April 2015, the CA granted leave to the Official Receiver ("the OR") to appeal on the issue whether section 30A(10)(a) of the Ordinance is constitutional.

The scheme of the Bankruptcy Ordinance

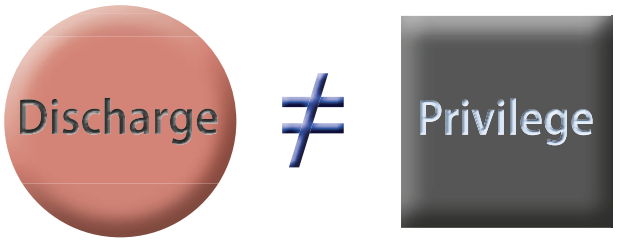
Amendments to the Ordinance in 1996 introduced a scheme regulating discharge from bankruptcy, which previously was "virtually impossible". Sections 30, 30A and 30B now provide for automatic discharge from bankruptcy after specified periods of time: four years for a person not previously adjudged bankrupt and five years for a person previously adjudged bankrupt ("the relevant period of bankruptcy") under section 30A(1) and (2). Under section 30, the relevant period of bankruptcy begins on the day the order is made and continues until he is discharged either automatically under section 30A, or, in limited circumstances, by early discharge on the application of the bankrupt under section 30B (*Official Receiver & Trustee in Bankruptcy of Chan*

[1] Reported at (2015) 18 HKCFAR 467.

Wing Hing v Chan Wing Hing & Secretary for Justice[2] *"Chan Wing Hing"*, at paragraphs 10-12).

Section 30A(3) empowers the court to extend the relevant period of bankruptcy by a further period of four years for a first-time bankrupt or three years for a previous bankrupt, for a new maximum period of eight years in either case. There are eight grounds for making a section 30A(4) order. The ground specified in section 30A(4) relevant to *Official Receiver v Zhi Charles* is in paragraph (e) of the subsection. Section 30A(4)(e) refers to departure of the bankrupt from Hong Kong and failure to return immediately to Hong Kong after a request to return from the OR or the trustee as a reason to make an order extending a period of bankruptcy.

The purpose of the system of automatic discharge is to encourage bankrupts to cooperate with the trustee in bankruptcy and ensure the bankrupt's eventual rehabilitation from bankruptcy (Report on Bankruptcy[3], paragraph 17.16). Discharge is now a matter of right rather than privilege (relevantly, rule 150 of the Bankruptcy Rules (Cap. 6A) also imposes duties on the bankrupt regarding the state of his affairs). However, the right depends on the bankrupt's cooperation with the trustee in bankruptcy in the administration of the estate in matters such as, first, submitting a statement of his affairs with particulars of his creditors, debts and other liabilities, and of his assets pursuant to section 18; and, secondly, complying with duties regarding the discovery and realisation of his property specified in section 26. Failure of the bankrupt to cooperate may be a ground to object to the automatic discharge of the bankruptcy. To that extent, the discharge is conditional on the bankrupt's compliance with those duties (*Chan Wing Hing*, at paragraphs 75-76).



Section 30A(10)

In *Chan Wing Hing* the CFA considered the constitutionality of section 30A(10)(b)(i), which operated to stop the relevant period of bankruptcy running when, after the bankruptcy commenced, the bankrupt left Hong Kong without first notifying the trustee of his itinerary and where he could be contacted. By majority, the CFA held that the provision did not satisfy the proportionality test and was unconstitutional because it infringed the right to travel protected under both BL 31 and Article 8(2) of the BoR ("BoR 8(2)").

Section 30A(10)(a) provides that "[n]otwithstanding section 30A(1)–(3), where a bankrupt...has, before the commencement of the bankruptcy, left Hong Kong and has not returned to Hong Kong, the relevant period under subsection (1) shall not commence to run until such time as he returns to Hong Kong and notifies the trustee of his return". Section 30A(10)(a) prevents the relevant period of bankruptcy from beginning at all where the bankrupt has left Hong Kong before the bankruptcy order was made and provides that it does not do so until he has physically returned to Hong Kong and has notified the trustee of his return. The issue in *Official Receiver v Zhi Charles* was whether section 30A(10)(a) is constitutional. In *Chan Wing Hing*, at paragraphs 16 and 52,

[2] (2006) 9 HKCFAR 545.

[3] Report on Bankruptcy by the Law Reform Commission of Hong Kong published in May 1995 (Report on Bankruptcy).

the CFA expressly declined to give views on the constitutionality of either section 30A(10)(a) or (b)(ii).

Principles for approaching an issue of constitutionality

The CFA set out the sequence of questions that must be addressed when an issue of constitutionality is raised. The first question is whether such constitutional right is engaged. If not, the constitutional challenge fails *in limine*. The next question is whether the legislative provision or conduct complained of amounts to an interference with, or restriction of, that right. If the answer is no, the challenge fails. If the answer to that question is yes and those rights are absolute, then no infringement or restriction is permitted and no question of proportionality arises, or, if not absolute, then whether the relevant infringement or restriction can be justified on the proportionality analysis.

The proportionality analysis involves asking, first, whether the infringement or restriction pursues a legitimate societal aim; secondly, whether the infringement or restriction is rationally connected with that legitimate aim; and thirdly, whether the infringement or restriction is no more than is necessary to accomplish that legitimate aim.

The constitutional right engaged

In *Official Receiver v Zhi Charles*, both the OR and the Bankrupt contended that the constitutional rights engaged were in BL 31 (freedom of movement: specifically, freedom to travel and to enter and leave the HKSAR; and, unless restrained by law, holders of valid travel documents are free to leave without special authorisation), and BoR 8(2) (everyone shall be free to leave Hong Kong). Consistently with the view expressed in *Chan Wing Hing*, the parties agreed that there is no material difference between the rights conferred by BL 31 and those conferred by BoR 8(2), and that it is appropriate to refer to the relevant right engaged in the present case as "the right to travel".

On the assumption that the scope of the right to travel in BL 31 and BoR 8(2) includes a right to stay away and that the operation of section 30A(10)(a) amounts to an infringement of that right, the CFA held that section 30A(10)(a) did impose a sanction or adverse consequence on a person declared bankrupt in his absence from Hong Kong whilst exercising his right to travel, namely, the non-commencement of the automatic period of discharge from bankruptcy. The person's right to stay away was infringed because a sanction or adverse consequence was attached to his exercise of that right.

The proportionality analysis

Consistently with *Chan Wing Hing*, the CFA found that the restriction on the right to travel constituted by section 30A(10)(a) pursues a legitimate aim, namely, to keep the bankrupt on the trustee's radar in order to facilitate the effective administration of his estate, and that the restriction in question is rationally connected primarily with the protection of the rights of creditors and also the public interest in the proper administration of bankrupts' estates. As was the single issue in respect of section 30A(10)(b)(i) in *Chan Wing Hing*, the CFA considered that the sole question for determination in the present case was whether section 30A(10)(a) is proportionate as being no more than is necessary to protect primarily the rights of creditors.

The threshold

The OR submitted to the CFA that the appropriate test to determine the proportionality of section 30A(10)(a) was to ask whether it was "manifestly without reasonable foundation". The OR submitted that the restriction in section 30A(10)(a) was not manifestly without reasonable foundation since it served to tackle the problem of bankrupts who are absent from Hong Kong when the bankruptcy order is made. Section 30A(10)(a) was necessary to ensure the bankrupt's cooperation in the administration of his estate and to address the difficulties faced by trustees when dealing with absconding bankrupts. Accordingly, the OR submitted that the CA was wrong in the present case to apply the CFA's analysis in *Chan Wing Hing* to section 30A(10)(a). The OR contended that the harshness of the sanction in section 30A(10)(b)(i) which led the majority in *Chan Wing Hing* to declare that restriction disproportionate did not

arise in respect of section 30A(10)(a).

However, the CFA commented that the threshold test of whether the restriction is "manifestly without reasonable foundation" was not the test applied in *Chan Wing Hing*. The CFA considered that the test to be applied arises from the fact that the impugned provision impinges upon fundamental rights. Included in the rights protected by BL 31 and BoR 8(2) are the right freely to move about within Hong Kong, the right to decide where in Hong Kong to live, the right to leave temporarily or permanently and the right of residents to return. Those rights are an aspect of the liberty of the individual and the CFA rejected the suggestion that restrictions on these rights are permissible unless they are "manifestly without reasonable foundation".

The CFA applied the approach in *Kong Yunming v Director of Social Welfare*[4]. The court held that, since section 30A(10)(a) restricts the freedom to travel – which is a fundamental right – the restriction in the present case could only survive constitutional scrutiny if it met "the minimal impairment" test. The burden of showing that is on the party seeking to justify the restriction. The restriction does not have to be the very least intrusive method of securing the objective which might be imagined or devised. However, the CFA noted that what "minimal impairment" means in this context was explained in the judgment of the Supreme Court of Canada in *RJR-Macdonald Inc v Canada*[5] as follows:

> "… the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within the range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement … On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law must fail."

Is section 30A(10)(a) no more than necessary?

The CFA considered that section 30A(10) is clearly intended to operate as a coherent scheme regarding the running of time for the purposes of the period of automatic discharge from bankruptcy — with subsection (a) governing the position of absence before the commencement of the bankruptcy, and subsection (b) governing absence after its commencement.

Section 30A(10)(a) operates automatically and without exception regarding any bankrupt who is already outside Hong Kong on the date when the bankruptcy order is made. Even where the bankrupt is willing to cooperate with the trustee, he might be prevented for reasons wholly outside his control from returning to Hong Kong so that the period of automatic discharge from bankruptcy could begin to run. For example, he

[4] (2013) 16 HKCFAR 950 at 39.

[5] [1995] 3 SCR 199 at 160.

may be precluded from travelling back to Hong Kong for wholly innocent reasons such as illness, impecuniosity or incarceration. The OR had failed to present any evidence or argument to show why a materially less rigid scheme would not equally protect the rights of creditors and the public interest in the administration of the estates of bankrupts. For example, it is not clear why the same objective could not reasonably be met if there were provision to cater for innocent cases and for cases of cooperation – and which also gave the court discretion to mitigate the sanction.

The CFA considered that the reasons regarding the harshness of the operation of section 30A(10)(a) are substantially the same as those which apply *mutatis mutandis* to section 30A(10)(b)(i) (*Chan Wing Hing*, at paragraphs 47-49). However, the position regarding section 30A(10)(a) is even harsher. In order for the sanction not to apply, the bankrupt must both physically return to Hong Kong and notify the trustee of his return. This is plainly a more onerous obligation than the mere notification requirement of section 30A(10)(b)(i) by which a bankrupt must notify the trustee of his itinerary and where he could be contacted before he left Hong Kong.

The CFA considered that there is no material distinction regarding the potentially indiscriminate operation of the two subsections. Section 30A(10)(b)(i) might have applied to a bankrupt who left Hong Kong immediately after the making of the bankruptcy order and who then chose never to have any contact with the trustee, just as section 30A(10)(a) might apply to a bankrupt who chose to stay away to defeat the trustee's efforts to administer his estate for the benefit of his creditors.

Finally, the CFA considered that the consequences of accepting that section 30A(10)(a) was constitutional would be anomalous. The CFA noted that a bankrupt who waited until a bankruptcy order was made, but who then left the next day, would be able to stay away from Hong Kong for a period of eight years and, since section 30A(10)(b)(i) has been declared unconstitutional, take advantage of the automatic discharge from bankruptcy. In contrast, if section 30A(10)(a) were constitutional, a bankrupt who was outside Hong Kong on the date of the bankruptcy order would not, until his return, be able to take advantage of the scheme of automatic discharge from bankruptcy and, if he did not return, would remain bankrupt indefinitely. The bankrupt in the latter case might be unable to return for reasons beyond his control and notwithstanding his readiness and willingness to cooperate fully with the trustee.

In conclusion, the CFA held that in the light of the Court's earlier decision in *Chan Wing Hing* in respect of section 30A(10)(b)(i) and the absence of any material distinction in the operation of section 30A(10)(a), section 30A(10)(a) cannot be regarded as no more than necessary to protect the rights of creditors and does not satisfy the proportionality test. Accordingly, the CFA declared that it is unconstitutional.

Hong Kong Television Network Limited v Chief Executive in Council

CACV No. 111 of 2015 (6 April 2016)[1]

CA

Hong Kong Television Network Limited ("the applicant") lodged a judicial review to challenge the decision of the CE in C dated 15 October 2013 refusing the applicant's application for a domestic free television ("FTV") programme service licence under the Broadcasting Ordinance, Cap. 562 ("the Ordinance") on the basis, *inter alia*, that CE in C departed from the Government's policy and was in breach of the applicant's legitimate expectation, and that the decision infringed its freedom of speech and was unconstitutional. The CFI quashed the decision of the CE in C and the latter appealed to the CA. The CA allowed the appeal.

The Facts

In 1998, the Government carried out a major review of television policy. Following the review, the Government announced its decision to open up the television market. In relation to domestic FTV, the Government stated publicly and in the LegCo brief on the 1998 review of television policy that "Under the new technology-neutral licensing regime, there would be no limit on the number of domestic free licences to be issued." In line with the policy, the Ordinance was enacted in July 2000. Under sections 8(1), 9 and 10(1) of the Ordinance, the CE in C was vested with the discretion to decide whether to grant a licence (subject to any conditions as the CE in C thinks fit to impose) to an applicant for providing FTV programme services.

The statutory provisions had, however, not specified any limit on the number of FTV licences to be issued by the CE in C. Hence, any interested applicant may apply to the Communications Authority, formerly the Broadcasting Authority ("the Authority") for the grant of a FTV licence at any time. Once an application was received, the Authority would consider such an application and make recommendations thereon to the CE in C. Having considered the Authority's recommendations, the CE in C would consider whether or not, in the exercise of his discretion, to grant a FTV licence to an applicant.

To facilitate any interested party to apply for a FTV licence, the Authority had since 2002 promulgated a "Guidance Note for Those Interested in Applying for Domestic Free Television Programme Service

[1] Reported at [2016] 2 HKLRD 1005.

Licences in Hong Kong" ("the Guidance Note") which sets out the criteria it would use to assess an application for a FTV licence before making recommendations to the CE in C under the Ordinance. Paragraph 1.3 of the Guidance Note says that it does not bind the CE in C and/or the Authority to consider any application or to grant any licence, or to the terms and conditions of the licence to be granted. It further says that the Guidance Note shall not be relied upon to create any expectation that a licence will be granted to the applicant on the terms and conditions referred to in the Guidance Note or otherwise. Paragraph 1.4 goes on to say: "There is no pre-set ceiling on the number of licences to be issued".

In 2009 and 2010, the Government received three applications for FTV licences, including one from the applicant (then known as City Telecom (HK) Limited). A consultant engaged by the Authority when processing the applications ranked the applicant second amongst the three licence applicants in terms of overall competitiveness and was of the opinion that the free television market might not be able to sustain five players (inclusive of two then incumbent FTV licensees). In July 2011, the Authority recommended that approval-in-principle ("AIP") be given to all applicants for the grant of a FTV licence. The CE in C eventually came to the provisional decision that it would be in the public interest to adopt a "gradual and orderly approach" in granting additional FTV licences, and the CE in C might not necessarily approve all three applications on this occasion, while not precluding the possibility of allowing more FTV operators as and when appropriate in future.

The CE in C considered that as a matter of fairness, the licence applicants should be informed of his provisional view and be invited to make further representations. The licence applicants all made representations in response to the intended gradual and orderly approach and the possibility that less than three licences would be granted. All three complained that the gradual and orderly approach was something new to them.

In October 2013, the CE in C took into account various factors, including the "overriding consideration" of public interest, and particularly, "sustainability of the free TV market in the broad sense" as described as a facet of public interest. The CE in C decided that a gradual and orderly approach should be adopted and that AIPs be granted to the two licence applicants other than the applicant. The three licence applicants were notified of the results by letters dated 15 October 2013. The CE in C informed the applicant that he had taken into account the factors set out in an annex to the letter of rejection in reaching his decision.

Decision of CFI

The CFI quashed the decision of the CE in C[2] and held that the refusal, being based on a gradual and orderly approach, involved a misinterpretation of the Government's own broadcasting policy which included the point that "no artificial limit should be set for the number of players in the field". And this misinterpretation had frustrated a legitimate expectation of the applicant. On those grounds, the CFI remitted the licence application to the CE in C for reconsideration in the light of the policy as construed by the judge and taking the applicant's legitimate expectation into account.

However, the CFI rejected the other grounds relied

[2] Reported at [2015] 2 HKLRD 1035.

on by the applicant, that is, the CE in C failed to seek the views of the Authority; the applicant was precluded from amending its application; the CE in C failed to give reasons for his decision; and the CE in C's reliance on the consultant's reports was flawed. The CFI further rejected a constitutional challenge against the decision based on freedom of speech guaranteed in BL 27 and Article 16 of the BoR ("BoR 16") (incorporating Article 19 of the ICCPR ("ICCPR 19") pursuant to BL 39(1)). Finally, the CFI also rejected a challenge against the decision based on conventional public law grounds (that is, the decision was irrational and contrary to the policy and legislative aim).

Appeal to the CA

The CE in C, the respondent in the judicial review, appealed to the CA and contended that the judge was wrong in holding against the CE in C in relation to the interpretation of policy and legitimate expectation, but supported the judge's rejection of the other bases relied upon by the applicant to mount its application for judicial review.

In addition to supporting the judge's judgment on the grounds on which it had succeeded at the CFI, the applicant contended that the refusal by the CE in C (i) failed to meet the constitutional requirement of being "prescribed by law"; (ii) was disproportionate; (iii) was vitiated by failure further to consult the Authority; (iv) involved procedural unfairness; and (v) was to be faulted for reliance on the consultant's reports.

The CA allowed the appeal and set aside the judgment of the CFI. The CA held that the Government's broadcasting policy, which included the point that "no artificial limits should be set for the number of players in the field" did not prevent the CE in C from adopting a gradual and orderly approach as it had. So it had not misinterpreted the policy. The applicant's "legitimate expectation" argument also failed since that argument was based on the proposition that the adoption of a gradual and orderly approach had frustrated the applicant's legitimate expectation. Regarding the other grounds relied on by the applicant which includes a constitutional challenge against the CE

in C's decision, the CA agreed with the CFI and held that the refusal of CE in C did not fail to meet the constitutional requirement of being "prescribed by law"; was not disproportionate; was not vitiated by failure further to consult the Authority; did not involve procedural unfairness; and could not be faulted for reliance on the consultant's reports.

Constitutional issues

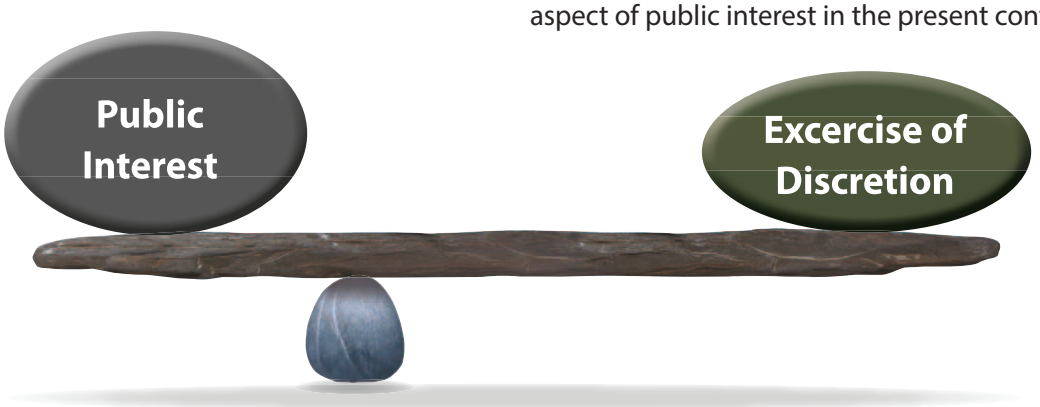
The applicant argued that the unfettered discretion given to the CE in C under section 10(1) of the Ordinance is too uncertain to satisfy the "prescribed by law" requirement. In particular, the suggestion that the CE in C may take into account "public interest" in the exercise of his discretion makes the discretion a legally uncertain one inasmuch as the rubric "public interest" is legally uncertain.

"Prescribed by law"

BL 27 protects Hong Kong residents' freedom of speech. BoR 16, incorporating ICCPR 19, protects everyone's right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print, in the form of art, or through any other media of his choice. BoR 16(3) specifies that the exercise of such rights may be subject to restrictions, but these restrictions shall only be such as "provided by law". Likewise, BL 39(2) provides that the rights and freedoms enjoyed by Hong Kong residents, including those rights and freedoms stipulated in the ICCPR as applied to Hong Kong and implemented through the Hong Kong Bill of Rights Ordinance (Cap. 383), shall not be restricted unless as "prescribed by law". There is no difference between "provided by law" and "prescribed by law".

Was the restriction prescribed by law?

The CA pointed out that whether a norm or legal concept is legally certain to pass the "prescribed by law" requirement depends to a considerable degree on the content of law in question, the field it is designed to cover and the number and status of those to whom it is addressed. In particular, a norm is "foreseeable" when it affords a measure of protection against arbitrary interference by the public authorities. The CA considered that "public interest" was a wholly appropriate consideration for the exercise of the discretion granted under section 10(1) of the Ordinance. The understanding of the concept is guided by the context of the regulation of domestic FTV programme services. The context also includes the publicly announced government broadcasting policy and policy objectives. It is further guided by the Guidance Note issued by the Authority which deals with the content requirements of the programmes, thus providing guidance on what type of public interest consideration one should be alerted to. Moreover, market sustainability is a reasonably foreseeable aspect of public interest in the present context.



The CA added that in determining whether a concept such as public interest is legally certain enough, one should adopt a holistic approach and bear in mind all relevant requirements and characteristics of the common law which includes the requirement of fairness because the bottom line of the requirement of legal certainty is fairness. It would be useful in avoiding uncertainty by requiring a licence applicant to be given an opportunity to be heard on any particular policy consideration that was not reasonably foreseeable at the time of making an application.

The CA opined that the CE in C has correctly recognised the common law requirement of fairness by giving the three licence applicants a chance to make representations in the middle of the deliberation process regarding their applications in the light of the introduction of the gradual and orderly approach and the resulting possibility that less than three licences would be granted. The three licence applicants were invited to make representations, which they all did. Accordingly, all three licence applicants were able to deal with all matters pertaining to public interest before any decision was made on their applications. In addition to the above reasons, the CA was in general agreement with the reasons given by the CFI in rejecting the applicant's argument based on "prescribed by law".

Proportionality

As regards proportionality, Counsel for the applicant contended that (i) as the consultant has in general, ranked the applicant second; and (ii) the applicant was only ranked below the licence applicant who ranked third in relation to one aspect, namely, programming strategy and capability; the CE in C's decision to reject the application altogether was "more than was necessary" as it has never considered the possibility of imposing licensing conditions, particularly licensing conditions relating to programme quality and contents, to make up for the perceived deficiencies on the part of the applicant in that area.

The CA rejected this argument. The CA noted that the overriding reason of the CE in C in granting only two licences out of the three applications was the concern about market sustainability. The CA held that it is a policy matter which cannot be challenged by the court. Nor can there be any

challenge regarding what weight the CE in C chose to give to the four criteria in question respectively. The Ordinance has entrusted the CE in C, not the court, with the power and responsibility to decide who should be granted a domestic FTV licence. The court is not asked to substitute its own opinion for that of the CE in C. As the CE in C has decided to adopt a gradual and orderly approach and under that approach only two licences will be granted on this occasion – these are policy matters which cannot be challenged by way of judicial review, the CA considered that it is simply not open for the applicant to say that nonetheless, a third licence should be granted albeit subject to conditions.

The CA held that in this case, as the issue encountered is one involving a complicated polycentric social economic issue raising sensitive questions of resource allocation, a broad margin of appreciation must be accorded to the Government's decision, when deciding whether the relevant restriction is or is not "no more than is necessary" (*Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2015] 5 HKLRD 881, para. 8). As such, the CE in C's concern as to the risk of vicious competition arising from an over-saturated market was a matter plainly within the broad margin of appreciation afforded to the Government.

The CA agreed with Counsel for CE in C's submission that as the concern was the risk of industry fallout in an over-saturated market, the CE in C was entitled to take a prudent and cautious view that an over-crowded market should be avoided so that the risk would not materialize. Moreover, the option chosen must also be considered against the context that the CE in C has by the same decision granted his AIP to add two broadcasters, thereby increasing the number of licences by 100%, and did not preclude the grant of further licences in the future. In essence, what was involved in the present case was a temporal decision dictated basically by prevailing economic and commercial considerations over a choice of which of the three contenders should be permitted to exploit the free television medium for commercial expression for the time being. As the applicant is not forever barred from applying for a licence, the CA rejected the applicant's proportionality argument.

Keen Lloyd Holdings Limited and Others v Commissioner of Customs and Excise and Another

CACV Nos. 97 & 107 of 2015 (22 April 2016)[1]
CA

These were appeals by the Commissioner of Customs and Excise ("C&E") and the Department of Justice ("DoJ") and a cross-appeal by the Keen Lloyd group ("the applicants") against the judgments of the CFI in judicial review proceedings concerning the execution of search warrants and the provision of some seized materials to Mainland law enforcement agencies.

Background

The C&E conducted a joint investigation with the Huangpu Customs of the PRC ("the Mainland Customs") to investigate the suspected cross-border smuggling of goods by Keen Lloyd Holdings Limited and its subsidiaries. 16 search warrants were issued judicially on various dates: 3 September 2011 (six warrants), 6 September 2011 (five warrants), 2 November 2011 (two warrants), 18 January 2012 (two warrants) and 30 January 2012 (one warrant). Half of the warrants were issued by a district judge under the Organized and Serious Crimes Ordinance, Cap. 455 ("OSCO"). The other eight were issued by a magistrate under the Import and Export Ordinance, Cap. 60 ("IEO"). Except for the three warrants issued in January 2012, the warrants were executed on 12 January 2012, between two to four months after they were issued.

Of the warrants issued under the IEO, three were in respect of non-domestic premises. From 31 January 2012 to 21 June 2012, C&E provided to the Mainland Customs copies of some of the documents seized during the searches plus hard discs cloned from some of the seized computer hard discs. Judicial review challenges were made to (i) the decision of C&E to provide law enforcement agencies in the Mainland with documents seized pursuant to the warrants; (ii) the decision of C&E to obtain the 16 search warrants for the main or substantial purpose of providing law enforcement agencies in the Mainland with data, documents and materials seized, to further the investigation of offences committed in the Mainland and eventually to use the seized properties for prosecution purposes in the Mainland; (iii) the decision of C&E to execute 13 search warrants three to four months after they were issued; and (iv) the decision of C&E to apply

[1] Reported at [2016] 2 HKLRD 1372.

for three search warrants under the IEO against three commercial premises, the decision of the magistrate to issue those three search warrants and the decision of C&E to execute those search warrants invalidly issued. The challenge of the decisions in (iv) went to the constitutionality of section 21(1)(a) of the IEO.

The CFI handed down the judgment on 23 December 2014 ("1st judgment") and declared that (i) the three warrants issued in respect of commercial premises, purportedly under section 22(2) of the IEO, were issued without legal authority. Insofar as the entry into those three premises could have been made without a warrant under section 21(1)(a) of the IEO, it was declared that this provision is inconsistent with BL 29 and is unconstitutional; (ii) of the 13 warrants executed two to four months after they were issued, it was held that they were not executed within a reasonable time from the date of their issue and had lapsed by the date of their execution; (iii) the C&E's decision to provide copies of some of the seizures to the Mainland Customs was unlawful; and (iv) C&E's decision to apply for the warrants was not for an unlawful or improper purpose.

After the 1st judgment was handed down and before the order was sealed, C&E and DoJ applied to vary the order declaring that section 21(1)(a) of the IEO is unconstitutional. They sought a remedial interpretation of this provision to make it compliant with the BL and the BoR. In a judgment dated 16 April 2015 ("the 2nd judgment"), the judge refused the application for remedial interpretation. Two appeals[2] were brought by C&E and the DoJ challenging the 1st and 2nd judgments. The applicants cross-appealed to challenge the finding that they have failed to show there was impropriety in the decision of C&E to apply for the 16 warrants. The CA allowing the appeals in part, granting a remedial interpretation to make section 21(1)(a) of the IEO constitutionally compliant, and dismissing the cross-appeal.

Issues

The main issues before the CA were:

(i) whether section 21(1)(a) of the IEO is unconstitutional ("the constitutionality issue");

(ii) if so, whether the court should apply a remedial interpretation to make the provision compliant with the BL and the BoR ("the remedial interpretation issue");

(iii) whether the delay of two to four months in executing the 13 warrants after they were obtained rendered the execution unlawful ("the time limit issue");

(iv) whether the decision of C&E to apply for the 16 warrants was unlawful for the improper purpose of facilitating the investigation of the Mainland Customs ("the warrants application issue");

(v) whether the decision of C&E to provide copies of some of the seized materials to the Mainland Customs was unlawful in that it was done for dual purposes, one of which was the impermissible purpose of assisting the Mainland Customs to carry forward the Mainland investigation ("the information provision issue").

The constitutionality issue

Section 21(1)(a) of the IEO provides that "Subject to section 22, any member of the Customs and Excise Service and any authorized officer may, if he reasonably suspects that there is, in or on any premises or place, vessel, aircraft or vehicle, any article in respect of which an offence has been

[2] CACV 97 of 2015 and 107 of 2015, 22 April 2016.

committed under this Ordinance or which is, or contains, evidence of the commission of such offence – (a) enter and search any such premises or place …". Section 22(1) provides that "No domestic premises shall be entered and searched by a member of the Customs and Excise Service or an authorized officer unless – (a) a magistrate has issued a warrant under subsection(2) …".

The CA noted that in common law, it had been established since *Entick v Carrington*[3] that a law enforcement officer did not have any general prerogative power to enter private property to seize documents as evidence. Entry to private property by a law enforcement officer has to be supported by specific legal authority. Apart from common law powers of a police officer to enter premises without a warrant in connection with arrest and breach of peace, the CA noted law enforcement officers in Hong Kong mostly derived the lawful authority to enter private premises from statutory powers. Most of these statutory powers have to be exercised with the support of a warrant issued by a judicial officer. But there are also provisions conferring such power without the need to go through the process of obtaining a judicial warrant. The CA referred to the case of *R v Yu Yem Kin*[4] in which it was decided that the statutory power under the then section 52 of the Dangerous Drugs Ordinance, Cap.134 contravened several provisions of the BoR. One of those provisions was Article 14 ("BoR 14") which provides:

> "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence ...
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

[3] (1765) 2 Wils. K.B. 275.

[4] (1994) 4 HKPLR 75.

BL 29 is also relevant:

> "The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited."

In the 1st judgment, the CFI held that section 21(1)(a) of the IEO restricted fundamental rights and it had to satisfy the proportionality test in order to be constitutionally valid. Though the CFI held that the power conferred by section 21(1)(a) is not arbitrary or unlawful, it concluded that it failed to satisfy the proportionality test in authorizing warrantless search for non-domestic premises. The CFI also held that the proportionality test was applicable by way of an implied justification provision as in *HKSAR v Lam Kwong Wai*[5]. However, in the present context, the CA found it difficult to regard *Lam Kwong Wai* as the basis to apply the proportionality test.

In *Lam Kwong Wai*, the CFA upheld the proposition that an absolute right is capable of derogation provided that the derogation can satisfy the proportionality test. By contrast, the CA considered the right of privacy was not expressed in absolute terms in BL 29 and BoR 14 and that if the interference, search or intrusion was not arbitrary or unlawful, the rights under these provisions would not be infringed so there was no need for any implied derogation. The broad concept of arbitrariness in the context of the BL forms the juridical basis for the applicability of the proportionality test relating to BL 29 and BoR 14, provided that the test must be applied cautiously so that only a statutory provision which is manifestly disproportionate would be struck down as arbitrary.

While the CA considered that it would not be right to directly transplant the reasoning in cases decided in Canada and the United States to the present context, it found the following dicta of Dickson J in *Hunter v Southam Inc*[6], to be enlightening in application of the proportionality test:

> "[The purpose of the constitutional protection under s8] ... is to protect individuals from unjustified State intrusions upon their privacy. That purpose requires a means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of *prior authorization*, not one of subsequent validation."

Dickson J also noted that there could be exceptions to the requirement of prior authorization. The CA recognized the possibility of justifications for making an exception other than the infeasibility of obtaining prior authorization in meeting the proportionality test in the context of BoR 14 and BL 29. Nevertheless, each justification has to be tested against the well-established criteria in the proportionality test. It was also considered that the person giving the authorization need not be a judicial officer. The CA noted that, regarding proportionality, the European Court relevantly emphasised examining whether there were adequate and effective safeguards against abuse. Notwithstanding the different wording of Article 8 of the European Convention on Human Rights and BoR 14, the CA considered that this approach should be adopted when considering whether a statutory power of search is consistent with BoR and BL 29 for purposes of Hong Kong jurisprudence. There was also a duty on an applicant to place all material

[5] (2006) 9 HKCFAR 574 at 593.
[6] (1984) 14 C.C.C. (3d) 97, at p.109.

information before the judicial officer[7].

The CA emphasized that the vetting of an application for a warrant by a judicial officer provided important safeguards against arbitrary interference with the right of privacy guaranteed by BoR 14 and BL 29. The CA pointed out that there could be justifications for not obtaining a judicial warrant in the overall assessment of proportionality. An obvious case for exception is a situation where it would not be reasonably practicable to obtain a warrant in light of the risk of destruction or loss of the relevant evidence or materials. However, as section 21(1)(a) of the IEO permits warrantless search regardless of the practicality in obtaining a warrant, it was necessary to examine whether there was any other justification to support the proportionality of such a wide power.

Proportionality of section 21(1)(a) of the IEO

The CA noted that subject to section 22, the power of entry and search could be exercised without any need to apply to a judicial officer or other independent authority for a warrant. The prerequisite is that such member or authorized person reasonably suspects that there is any article in respect of which an offence has been committed under the IEO or which is, or contains, evidence of the commission of such offence. The net effect is that, for domestic premises, except in cases within section 22(3)(b), the power of entry and search has to be authorized by a magistrate's warrant. However, there is no need for any authorization in respect of the exercise of the power of entry and search for non-domestic premises.

The CFI considered that the difference in the expectation for privacy in domestic and non-domestic premises could not justify a warrantless entry and search for non-domestic premises and concluded that section 21(1)(a) was not a proportionate response to the problem it seeks to address, and therefore is inconsistent with BL 29.

The CA considered that the crucial question was whether it is proportionate to permit an intrusion of privacy by a warrantless search and the proportionality test required the court to consider

[7] *Hunter v Southam Inc* (1984) 14 C.C.C. (3d) 97, *Philip KH Wong v Commissioner of Independent Commission Against Corruption (No 2)* [2009] 5 HKLRD 379 applied.

if the means used to impair the right is no more than was necessary to accomplish the legitimate purpose in question. The legitimate purpose involved in this case is to provide for the effective investigation of IEO offences. In assessing whether the statutory power is no more than was necessary to achieve the legitimate purpose, the court must consider the need to protect against executive abuse. Though sometimes such need could be outweighed by cogent justification for having a warrantless power of search – such as where there is a serious risk of destruction or loss of the relevant evidence or materials occasioned by the need to obtain a warrant – the court has to ask what is the justification for overriding such protection when this is not the case.

The CA agreed with the CFI that the difference in the expectation of privacy in domestic premises and non-domestic premises could not be a valid justification, and that a blanket warrantless power of search is more than is necessary to achieve such legitimate purpose. The CA found that section 21(1)(a) is manifestly disproportionate and upheld the CFI's conclusion on the constitutionality of section 21(1)(a).

The remedial interpretation issue

The CA agreed with the respondents that the court should consider whether the legislative provision in question can become BL-compliant by remedial interpretation before holding that it is constitutionally invalid. The CA noted that, in *HKSAR v Lam Kwong Wai*, Sir Anthony Mason NPJ explained that in the context of the BL, the concept of judicial power necessarily includes the making of remedial interpretations similar to those employed by courts of other jurisdictions.

In the 2nd judgment, the CFI declined to make a remedial interpretation that would give constitutional validity to section 21(1)(a) of the IEO. The Judge held that this would involve a significant departure from a fundamental feature of the IEO entry and search regime. This could lead to repercussions that the court was unable to anticipate fully.

The CA, however, proposed an interpretation which involves expanding the expression "domestic premises" in section 22 to mean "premises or place". In other words, for the purpose of section 21, the section 22 regime would apply across the board to all premises and places, irrespective of whether they are domestic or non-domestic in nature.

The CA disagreed with the CFI's view that the distinction between domestic and non-domestic premises is a fundamental feature of the IEO. The CA considered that the main purpose of Part V of the IEO (which includes sections 21 and 22) is to provide for the powers of investigation of the C&E in furtherance of the objectives of the IEO. The legislative scheme of the power of entry and search in sections 21 and 22, is to confer required investigative powers on the C&E regarding private

places and premises, whether domestic or non-domestic. The legislature also saw a need to confer some protection against the abuse of such power. That protection is the requirement that a judicial warrant be obtained in some cases. The CA therefore considered that the extension of similar protection to non-domestic premises or places would not produce an essentially different scheme.

Accordingly, the CA concluded that it was appropriate to adopt a remedial interpretation of section 21 and allowed the relevant appeal. Such power of remedial interpretation is reinforced by the decision of the Supreme Court of Canada in *R v Grant* [1993] 3 R.C.S. 223 at p.243-5. The declaration that section 21(1)(a) of the IEO is inconsistent with BL 29 and hence unconstitutional was set aside. Consequently, as the C&E officers had applied for warrants under the IEO for the search of the non-domestic premises, the CA also set aside the declaration that the 3 search warrants issued by a magistrate in respect of non-domestic premises under section 22(2) IEO were issued without legal authority.

The time limit issue

The CFI declared that ten search warrants which were issued under either OSCO or IEO, had lapsed as both section 5 of OSCO, section 22 of IEO and the search warrants were silent on the duration of the warrants and the warrants were to be read as containing an implied qualification that they would lapse after a reasonable period. The CFI considered that unless a warrant is executed shortly after it was issued, the knowledge of the law enforcement officer would have changed and it may have changed in a way that the judicial officer would consider relevant to his determination of whether or not the criteria for granting a warrant had been satisfied by the time the warrant is executed. The CFI found that whether or not this is the case is a matter that should be determined by the judicial officer. It is not a matter that should be determined by the law enforcement officer.

The CA held that if a warrant remains unexecuted longer than the period within which the judicial officer is likely to have anticipated it would be executed, it lapses unless it is extended by the judicial officer. The fact that there is no reference to the imposition of time periods on warrants in the various ordinances that provide the power to issue them was probably because it was assumed quite reasonably that warrants are executed immediately or very promptly, rather than a conscious decision not to impose on law enforcement agencies an obligation to execute warrants within a particular time frame. The CA found that the CFI's decision and reasoning on the time limit issue was correct, with the result that the ten warrants had lapsed by the time they were executed. In the light of the decision, the CA would expect in future warrants to specify their duration, after which they will automatically lapse unless the warrant has been extended.

The warrants application issue

This issue arose from the cross-appeal of the applicants against the CFI's finding that they have not succeeded in showing there was impropriety in the decision of C&E to apply for the 16 search warrants.

The CA considered that the proper legal test to be applied where, as in the present case, there is a plurality of purposes for an exercise of power is that adopted in *Re Kelly and Shiels*[8]. Regarding the factual findings, the CA found that the judge analysed the evidence, tested the assertions against the evidence, and considered what inference should be drawn in the circumstances. The CA considered that the judge's finding of fact could not be faulted. The burden is on the applicants to establish as a compelling inference that very senior officers of C&E had deliberately and improperly made misleading representations to the judicial officers for the ulterior purpose alleged (i.e. that the warrants were sought for the dominant purpose of assisting the Mainland investigation), sufficient to overcome the inherent improbability that they would have done so. The CA confirmed that the judge was right to hold that the applicants had failed to discharge the burden of establishing that the warrants were applied for the primary or dominant purpose of assisting the Mainland Customs.

The information provision issue

The CFI made a finding of fact by inference that the decision of C&E to provide copies of some of the seizures to the Mainland Customs was for dual purposes. Applying the dominant purpose test, the judge found that the dual purposes were so inextricably intermingled that they could not be separated. Therefore each purpose was equally important. The CFI considered that it would be unrealistic to describe one of them as the dominant purpose. It therefore held that the decision to provide the Mainland Customs with copies of some of the seizures was unlawful.

The CA ruled that the question was whether the judge was right to hold that each of the dual purposes was inextricably intermingled and equally important so that it could not be said that the dominant purpose of the decision was for the permissible purpose of advancing C&E's own investigation. The CA was satisfied that it could be found on such evidence that the furtherance of the Mainland side of the investigation was intended to further and did further the Hong Kong side of the investigation. The CA noted this was a material factor that the judge did not appear to have taken into consideration when he applied the dominant purpose test.

The CA held that, although the decision to provide information to the Mainland Customs may serve dual permissible and impermissible purposes, the impermissible purpose constituted only an incidental consideration and the purpose of furthering C&E's own investigation far outweighed the impermissible purpose. The CA held that the true or dominant purpose for the decision to provide copies of some of the seized materials to the Mainland Customs was to further C&E's investigation. The CA ruled that the applicants' challenge on this ground failed.

---

[8] [2000] N.I. 103 at 113h to 117d.

Hysan Development Company Limited and Others v Town Planning Board, and Oriental Generation Limited (Intervener)

FACV Nos. 21 & 22 of 2015 (26 September 2016)

CFA

Background

The appellants in both appeals are all companies within the Hysan Group owning extensive and substantial properties on various sites in Causeway Bay and Wanchai (collectively referred to as "Hysan"). They objected to a series of planning restrictions imposed on their sites under two draft Outline Zoning Plans ("OZPs") gazetted by the Town Planning Board ("TPB"). Those restrictions included building height restrictions, podium height restrictions, non-building areas and building setbacks. The TPB stated that the purpose of some of the planning restrictions was to facilitate air ventilation and pedestrian traffic flow and it rejected most of the Hysan's representations against the restrictions. Hysan therefore challenged TPB's decisions to reject its representations by way of judicial review. Likewise, in relation to two other draft OZPs, the Intervener brought judicial review proceedings against TPB's decision in imposing certain planning restrictions on its site.

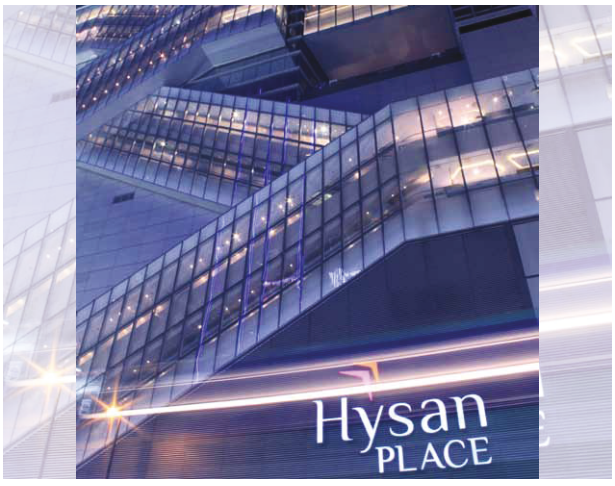
In the courts below, while both Hysan and the Intervener had succeeded in having TPB's decisions quashed on traditional judicial review grounds, they had unsuccessfully contended that the planning restrictions represented a disproportionate and therefore unconstitutional infringement of their property rights in contravention of BL 6 and BL 105. Hysan appealed to the CFA on the constitutional issues with the Intervener granted leave to intervene with a view to ensuring that when reconsidering its decisions regarding the planning restrictions, the TPB would have CFA's guidance as to the relevance and application of BL 6 and BL 105.

Issues

The main issues before the CFA were:-

(i) are BL 6 and BL 105 engaged where landowners complain about planning restrictions imposed by the TPB on the use of their land? ("The First Question")

(ii) if so, must the restrictions be subjected to a proportionality analysis? ("The Second Question")



(iii) if so, what standards or tests should the Court apply in conducting a proportionality assessment in a case like the present? ("The Third Question")

The First Question: Are BL 6 and BL 105 engaged?

The CFI and CA earlier held that BL 6 and BL 105 were not engaged in the context of TPB's planning restrictions. In holding so, the CA interpreted the words "in accordance with law" in BL 6 and BL 105 as qualifying or restricting the protection conferred so that such protection is limited exclusively to a requirement that property rights be protected by legally certain and accessible laws. The CA further held that BL 6 and BL 105 were not engaged because the rights of Hysan and the Intervener as property owners were intrinsically defined by and subject to legal restrictions, including the power of the TPB to impose planning restrictions, as incidents of their ownership in accordance with the general law, and thus the planning restrictions whenever imposed did not represent incursions into their property rights and did not need to be justified.

In support of CA's judgment, the TPB pointed out that BL 105 is not in Chapter III of the BL dealing with fundamental rights and that under BL 7, the HKSAR retains responsibility for the "management, use and development" of land in Hong Kong; and that no provision is made for compensation for interference with land short of expropriation.

The CFA rejected the above interpretation and held that BL 6 and BL 105 were plainly engaged. Far from diminishing the protection conferred by BL 6 and BL 105, the CFA clarified that the words "in accordance with law" confer added protection of legal certainty, requiring the rights guaranteed by the Articles to be regulated by laws which are accessible and precisely defined. The CFA did not accept all the ancillary arguments put forward by the TPB, holding that whether a BL provision confers constitutional protection on any rights depends on its proper interpretation and not merely on the Chapter heading of the section in which it is located; that BL 7 has no bearing on whether BL 6 and BL 105 are engaged; and that the conferment of a right to compensation in deprivation cases does not diminish the protection conferred against interference on private property rights in cases short of deprivation.

Contrary to the views taken by the CA and the TPB, the CFA held that statutory power to impose planning restrictions existed prior to the owner's acquisition of the site does not mean that new and more intrusive constraints imposed by a TPB decision made after the land's acquisition can be disregarded as mere incidents of ownership so as to exclude the protection of BL 6 and BL 105. Interference with the owners' protected rights occurs when the new restrictions take effect derogating from those rights and thus engaging BL 6 and BL 105.

The Second Question: Must the restrictions be subjected to a proportionality analysis?

In CFA's judgment, private property rights protected by BL 6 and BL 105 are not absolute and that the law may validly create restrictions limiting such rights. Where restrictions on such rights are established, it is for the Court to determine the permissible extent of those restrictions by conducting a proportionality analysis. As BL 6 and BL 105 make no express provision regarding the permissible restrictions, the CFA referred to the principles evolved in similar cases (where the constitutional right invoked is not absolute and no express guidance is given by BL or BoR as to the allowable limits of derogations from that right) and came to view that a proportionality analysis of the planning restrictions was required. Such a proportionality assessment involves a three-step process of asking (i) whether the intrusive measure pursues a legitimate aim; (ii) if so, whether it is rationally connected with advancing that aim; and (iii) whether they represent a proportionate means of achieving that end.

Having considered a substantial body of authority including the Canadian, UK, European and Hong Kong jurisprudence, the CFA explicitly added a fourth step to the proportionality analysis in the present context, which involves asking whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

Whilst acknowledging that where an intruding measure passes the first three tests, it would be unlikely to fail the test at the fourth stage, the CFA pointed out that one may exceptionally be faced with a law whose content is such that its application produces extremely unbalanced and unfair results that oppressively impose excessive burdens on the individuals affected. The CFA took the view that without the inclusion of the fourth step, the proportionality assessment would be confined to gauging the incursion in relation to its aim and that the balancing of societal and

individual interests against each other would not be addressed. The fourth step therefore requires the Court to decide whether the impugned law or governmental decision, despite having satisfied the first three requirements, operates on particular individuals with such oppressive unfairness that it cannot be regarded as a proportionate means of achieving the legitimate aim in question.

The Third Question: What standards or tests should the Court apply in assessing proportionality?

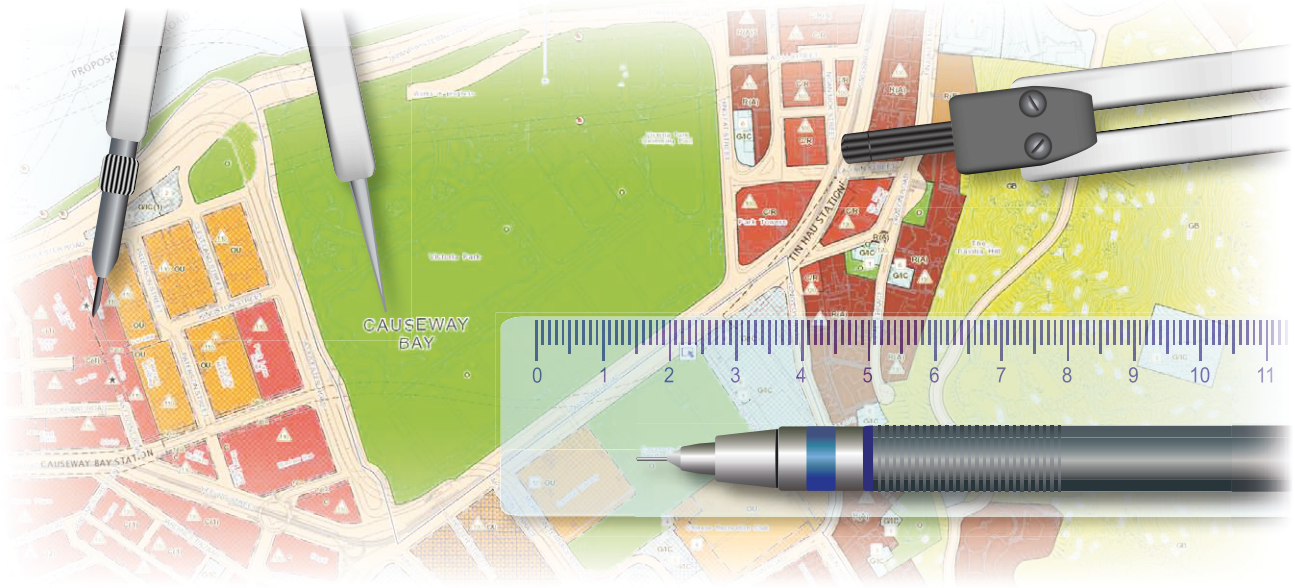
In deciding the standard applicable at the third stage of the inquiry which involves asking whether an impugned measure is a proportionate means of achieving the legitimate aim in question, two main standards have been applied: (i) whether the impugned measure is "no more than necessary" to achieve the legitimate aim (for which standard Hysan and the Intervener advocated), and (ii) whether the measure is "manifestly without reasonable foundation" (for which standard the TPB argued).

The CFA understood the "no more than is necessary" test as a test of reasonable, but not strict, necessity. Under the "reasonable necessity" test, if the Court is satisfied that a significantly less intrusive and equally effective measure is available, the impugned measure may be disallowed. The CFA however reiterated that it does not mean that the restriction must be the very least intrusive method of securing the objective which might be imagined or devised.

The "manifest" standard, on the other hand, is closely related to the concept of "margin of appreciation" in the European jurisprudence. The CFA noted that it has been used at both supra-national as well as domestic levels where the Court recognises that the originator of the impugned measure is better placed to assess the appropriate means to advance the legitimate aim espoused. In this connection, the CFA noted that the "manifest" standard has been applied in Hong Kong cases, including *Fok Chun Wa v Hospital Authority*[1] and *Kong Yunming v Director of Social Welfare*[2] which concerned the implementation of government's socio-economic policies involving the allocation of limited public resources.

The CFA explained that the difference between the standards is one of degree and that they are on the same spectrum of reasonableness. Having considered the European jurisprudence, the CFA concluded that the choice of the standard would depend on the circumstances of the case and the factual bases claimed for the incursion. The location of the standard in the spectrum of reasonableness depends on many factors relating principally to (i) the significance and degree of interference with the right; (ii) the identity of the decision-maker; and (iii) the nature and features of

[1] (2012) 15 HKCFAR 409.
[2] (2013) 16 HKCFAR 950.



the encroaching measure relevant to setting the margin of discretion.

It was held that if the assessment of the proportionality calls for the application of purely legal principles and an assessment which the Court is the expert to make, the primary decision-maker having no special competence or expertise, it is likely that the margin of discretion will have little role to play and that the Court will simply adopt a standard of reasonable necessity.

On the other hand, a "manifest" standard may apply where the decision-maker is likely to be better placed than the Court to assess what is needed in the public interest, for instance, the decision-maker had special access to information; special expertise in its assessment; or an overview enabling him to assess competing and possibly prior claims for scarce resources. The Court might also refrain from intervening because the measure reflects a predictive or judgmental decision which it was the institutional role of the decision-maker to take and as to which no single "right answer" exists. The Court is also likely to take such an approach in relation to matters touching on national security and, specifically in the Hong Kong context, matters touching on defence and foreign policy. The CFA added that a broad margin of discretion might also be mandated by separation of powers principles and recognition of the different institutional roles played by the Court and the relevant decision-maker.

In the present case, it was acknowledged that the constitution and decision-making machinery of the TPB as the originator of planning restrictions strongly favoured the adoption of a broad margin of discretion near the "manifestly without foundation" end of the spectrum. It further recognised that planning is a holistic process involving balancing numerous factors. In general, where the TPB reaches decisions which are not flawed on traditional judicially reviewable grounds, the CFA considered that any planning restrictions should be subject to constitutional review applying the "manifestly without reasonable foundation" standard. It further commented that it is highly unlikely that Board decisions imposing planning restrictions arrived at lawfully and in conformity with the principles of traditional judicial review, would be susceptible to constitutional review unless the measures are exceptionally unreasonable.