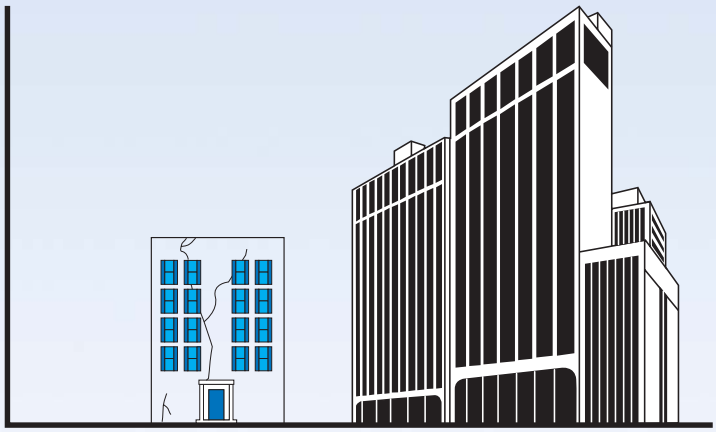
JUDGMENT UPDATE

Kaisilk Development Limited v Urban Renewal Authority

CACV No 191 of 2002 (9 April 2003)

BACKGROUND

Kaisilk Development Limited ("Kaisilk") was a property developer and the Urban Renewal Authority (the "Authority") was a corporation established under the Land Development Corporation Ordinance (Cap 15)[1]. This was an appeal from the judgment of the CFI in which Kaisilk's statement of claim in a civil action had been struck out on the basis that it did not disclose a reasonable cause of action and was an abuse of the process. By the action Kaisilk sought a declaration that it was entitled to compensation from the Authority calculated by reference to the difference between the "true" value of property which it held in Wanchai as at July 1997 (or any other material date as might be determined by the court), and the amount of compensation payable or paid to Kaisilk under the Lands Resumption Ordinance (Cap 124). It also sought an order for payment of that compensation and damages.



Urban Renewal

Three bases for the claim were put forward by Kaisilk. The first was breach of statutory duty. The second was breach of common law duty and the third was estoppel by convention.

The claim arose from negotiations which took place between Kaisilk and the Authority's predecessor, the Land Development Corporation. In May 1995, the Land Development Corporation started negotiations with Kaisilk for the acquisition of its properties in Wanchai (the "Properties"). Negotiations between Kaisilk and the Authority extended between 1996 and 1998. The first two offers of the Authority respectively made in November 1996 and 11 August 1997 to purchase the Properties were not acted upon. After the lapse of those offers the Authority requested the Secretary for Planning, Environment and Lands to recommend to the CE in C that the Properties be resumed. On 4 May 1998, the third offer was made, which was expressed to have been open for 14 days and a letter 3 days later stated that, if the offer were not accepted, the Authority would await the outcome of the application for a recommendation for compulsory acquisition.

The third offer was then accepted in respect of part of the Properties. On 21 September 1998, Kaisilk offered to sell the remainder of the Properties on the terms set out in the Authority's third offer but that was rejected.

[1] Cap 15 was repealed by s 36 of the Urban Renewal Authority Ordinance (Cap 563) which commenced on 1 May 2001.

THE UNDERLYING COMPLAINTS

Kaisilk's grounds of complaints stemmed from the fact that there was a substantial fall in the value of property in Hong Kong starting in October 1997. Kaisilk's concern was that the Lands Tribunal would be required to assess the amount payable under Cap 124 on the basis of the value of the resumed property at the date of the resumption. It put its complaints on the basis that the Authority delayed at least in the period from September 1997 when the second offer (that was made in August 1997) lapsed. The delay was alleged to have been a lengthy period up until May 1998 during which period Kaisilk claimed to have pursued the Authority with a view to coming to an agreement.

Neither BL 105 nor the Land Development Corporation Ordinance gave a private right of action in respect of the formulation and submission of proposals for development, the obtaining of planning permission and the grant of that permission.

Underlying Kaisilk's claims was the proposition that the mechanism of Cap 15, under which the Authority was established and operated, inevitably put a "blight" on the relevant property once the Authority had commenced steps with a view to redevelopment of the property. It argued that because of the planning restrictions and the Authority's obvious intention to purchase the property, a land owner lost the opportunity to develop the property itself or otherwise deal with the property and had to stand by whilst its property fell in value.

THE BL ISSUE – PROPERTY RIGHT PROTECTION AND BREACH OF STATUTORY DUTY

As noted above, the first basis of the claim put forward by Kaisilk was that there was a breach of statutory duty. Among other things, Kaisilk argued that the Authority had the implied statutory duties to take into account the requirements of BL 8 and 105 with a view to Kaisilk receiving compensation for any blighting effect. It also relied upon BL 6 and 105 to reinforce its claim that a statutory duty existed that could found a private law cause of action.

Kaisilk argued that the way in which Cap 15 required the Authority to go about formulating plans, obtaining planning permission and ultimately acquiring the land, should be regarded as depriving the land owner of some of the rights of ownership of the land, or at the very least creating in effect a restriction on the exercise of those rights. The loss which was said to have occurred was to be measured by the fall in the value of the Properties during the period of the blight. The CA considered that that would not help to establish a private law cause of action. Still less would any loss suffered in that respect be recoverable outside the ambit of compensation under Cap 124.

In advancing the argument, Kaisilk made particular reference to the terms of BL 105 and emphasized the words "…right of individuals and legal persons to the acquisition, use, disposal and inheritance of property…". It was said that it went to establish the existence of some private right of action under Cap 15. For the reasons summarized below, the CA did not see that those provisions gave a right of action in respect of the formulation and submission of proposals for development, the obtaining of planning permission and the grant of that permission.

SUPPORTING AUTHORITY

The CA referred to the following passages of the Privy Council's decision in *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574:

JUDGMENT UPDATE

Kaisilk Development Limited v Urban Renewal Authority

CACV No 191 of 2002 (9 April 2003)

> "It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid. The best example is planning control…
>
> The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest. The principles which underlie the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application, which is enacted for the public benefit. That is so even if, as would inevitably be the case, the legislation in general terms affects some people more than others..."

The CA also highlighted the following principle approved by the Privy Council in the *Grape Bay* case:

> "In deciding whether a particular governmental action has effected a taking, this court focuses rather both on the character of the action and on the nature and extent of interference with the rights in the parcel as a whole…"

BLIGHT AND BL 105

On this basis, the CA held that Kaisilk failed to establish any right based upon the alleged blight. The Authority was carrying out its duties which were imposed in the public interest (eg to acquire properties for the purpose of urban renewal). No complaint was made in relation to any matter pertaining to the choice of location or the appropriateness of urban renewal of the area in which the Properties were located.

Therefore, even on the basis that the Authority's actions could be considered as amounting to a restriction other than analogous to a planning restriction (which was very doubtful), it did not seem legitimate to divide the right of property in such a way that the court would recognize a right for a land owner to be protected against a restriction on use or disposal. The matter must be looked at as a whole. The whole in the context being compensation on the basis of s 15 of Cap 15 with the backdrop of Cap 124.

Moreover, the so-called blight amounted at the most to a restriction. It did not amount to an acquisition by the Authority of Kaisilk's property. Kaisilk's property was acquired on resumption. Fundamentally, Cap 15 was of general application. It applied to areas that were in need of urban renewal. The area which the Properties situated were such an area. There was no allegation that the statutory parameters had been exceeded. No case could be founded by Kaisilk simply on the proposition that some scheme or planning consent encompassed the area within which the Properties lay. The fact that the legislation affected Kaisilk but did not affect a property owner in an area which was not in need of urban renewal did not assist Kaisilk.

RESULT

After considering the above and other bases of the claim, the CA dismissed the appeal. BLB

JUDGMENT UPDATE

Yook Tong Electric Company Limited v Commissioner for Transport

HCAL No 94 of 2002 (7 February 2003)

BACKGROUND

Yook Tong Electric Company Limited ("Yook Tong") carried on business as a wholesaler and retailer in electrical goods from a building situated at 5 Tai Yuen Street in Wanchai for many years. There was no carpark or loading bay within the structure of the building. Vehicles always had to park on Tai Yuen Street, a public road, or find parking elsewhere in the area.

In 2001, by notice in the Gazette pursuant to reg 14(1)(a) of the Road Traffic (Traffic Control) Regulations (Cap 374, sub leg G), the Commissioner for Transport (the "Commissioner") designated a portion of Tai Yuen Street to be a "prohibited zone". Such designation prohibited driving of all motor vehicles within the prohibited zone between 10:00 am and 6:00 pm daily. Yook Tong's building fell into that zone. As a result, during the prohibited hours, the nearest loading and uploading point would no longer be Yook Tong's shopfront but a designated area some 38 to 40 metres from its building. Yook Tong contended that it had lost a number of customers as a result. Yook Tong's written objection to such designation was not upheld and its application to the Commissioner for the issue of "prohibited zone" permits was also refused.

APPLICATION FOR JUDICIAL REVIEW

Yook Tong sought judicial review of the following decisions made by the Commissioner:

(1) His decision to designate the above "prohibited zone".

(2) His decision refusing to uphold Yook Tong's objection to the above designation.

(3) His decision declining to issue prohibited zone permits to Yook Tong.

BL 105 ARGUMENT

One of the four grounds relied on by Yook Tong in challenging the lawfulness of the Commissioner's decisions was that the Commissioner ignored Yook Tong's constitutional right under the Basic Law to the use of its property.

During the course of argument, it became apparent that the real substance of Yook Tong's challenge sprang from BL 105. In this regard, the CFI noted that Yook Tong was not the owner of the building at 5 Tai Yuen Street. Its "property" in terms of BL 105 must therefore be its business. Assuming, without in any way deciding the issue, that "property" in terms of BL 105 included the economic interest in commercial enterprises, the following two questions arose for determination:

(1) had the Commissioner's decisions interfered with Yook Tong's right to use its property?

(2) if there had been an interference contrary to BL 105, had it amounted to a deprivation of Yook Tong's business, entitling it to compensation?

Interference and Public Facilities

In determining question (1), it was necessary to define what use, if any, had been interfered with. As noted above, Yook Tong's building had no integral facilities

for vehicles. At all times in running the business, Yook Tong had had to look to public facilities in so far as they permitted vehicles to draw up in front of or near its building. It shared those facilities with other members of the public. Thus, Yook Tong had never pretended to have any exclusive right to the use of the parking spaces in front of or near its building.

The facilities which it shared had not been removed. They had been restricted. Vehicles might still enter Tai Yuen Street outside normal working hours. Nor could it be said that the restriction had prevented Yook Tong from receiving or delivering goods during normal working hours. That could still be done but the required vehicles might not park in Tai Yuen Street itself. They had to park at alternative sites, the main one being just 38 to 40 metres from Yook Tong's premises.

The use of property must always be subject to the principle of general regulation in the public interest

What Yook Tong complained of therefore was that there had been a restriction placed on the public facilities that it had legitimately been able to exploit (in competition with other users) in order to enhance its business operations. The restriction on the use of those public facilities had resulted not in an inability to conduct business but rather in an inconvenience to the efficient conduct of that business. That inconvenience had led customer to use other suppliers.

The CFI held that, while BL 105 afforded protection to Yook Tong to use its property, it did not extend to the use by Yook Tong of public facilities. It would be misconceived to state that if a business, for the enhancement of its operations, had placed itself close to public facilities, it would thereby assume a constitutional right protected by BL 105 in respect of those facilities. Read with BL 6, BL 105 provided protection for the "acquisition, use, disposal and inheritance" of private property, not property in the public domain.

The CFI considered that even if it was wrong in that regard, the use of property must always be subject to the principle of general regulation in the public interest and the actions of the Commissioner were of a regulatory nature carried out for the protection of the public on pedestrian safety grounds. Looking to the substance of the matter, it was clear that there had been no hindrance or interference with Yook Tong's right to the use of its property.

Restriction on Use and Deprivation

Having considered in particular two of the judgments of the European Court of Human Rights on Article 1 of Protocol No 1 of the European Convention on Human Rights ("Art 1/P 1"), the CFI noted that Art 1/P 1 was far more broadly worded than BL 105 and the situations in the two European judgments were different from the present case. Yook Tong's business had not been directly controlled by the exercise of public authority but instead had been prejudiced by a restricted access to public facilities imposed in the public interest. The present case was also different from an absolute denial of access which had resulted in the owner losing all control of his property.

In the circumstances, the CFI was satisfied that the Commissioner's decisions had not interfered with Yook Tong's right to use its property in terms of BL 105. It must follow that any restrictions imposed by the Commissioner did not amount to a deprivation of Yook Tong's property that would entitle it to compensation.

SUPPORTING AUTHORITY

The CFI based the above on a number of authorities but it considered that it needed to cite only the judgment of *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583:

[please refer to the first two paragraphs of Grape Bay quoted in the judgment summary of Kaisilk at pp 9-10 of the Bulletin]

RESULT

Having considered the above and other grounds challenging the lawfulness of the Commissioner's decisions, Yook Tong's application for judicial review was dismissed. BLB

JUDGMENT UPDATE

Director of Lands v Yin Shuen Enterprises Limited & Nam Chun Investment Company Limited

FACV Nos 2 and 3 of 2002 (17 January 2003)[1]

BACKGROUND

The land of Yin Shuen Enterprises Limited and Nam Chun Investment Company Limited (the "Land Owners"), which was resumed in 1999 for public housing, was unimproved agricultural land in the New Territories. It was zoned for residential use and, in each case, the land was held under a Government lease, and was demised as agricultural or garden land and was subject to restrictive covenants, including a covenant which prohibited the erection of any building on the land without the approval of the Government's surveyor.

The Land Owners' comparables were challenged by the Government's valuer on the ground (among other things) that the prices paid contained a large element of "hope value", ie the amount which a purchaser was prepared to pay in excess of the market price of the land for the use permitted under the lease in the hope or expectation of obtaining a modification of the terms of the lease to permit development. He contended that the comparables in question should be disregarded because s 12 (c) of the Lands Resumption Ordinance (Cap 124) excluded that element of the value of the land from compensation. Section 12(c) of Cap 124 provided that "no compensation shall be given in respect of any expectancy or probability of the grant or renewal or continuance, by the Government or by any person, of any licence, permission, lease or permit whatsoever…"

Both the Lands Tribunal and the CA held in favour of the Land Owners. The Director of Lands (the "Director") appealed to the CFA.

THE BL 105 ARGUMENT – REAL VALUE COMPENSATION

One of the arguments put forward by the Land Owners was that, if s 12 (c) of Cap 124 had the effect for which the Government contended, then it was incompatible with BL 105. Among other things, BL 105 protected rights of individuals and legal persons to compensation for lawful deprivation of their property. Such compensation should correspond to the real value of the property concerned at the time and should be freely convertible and paid without delay.

> **"Real value" compensation in BL 105 did not refer to the price which exceeded the true value of the property concerned**

In this regard, the CFA considered that the following two points called for comment:

(1) BL 105 did not require compensation to be based on the open market value of the property concerned but on its "real value". In general, property was worth what it would fetch, and its open market value reflected its real value. But as the Courts of Hong Kong had repeatedly emphasised, that was

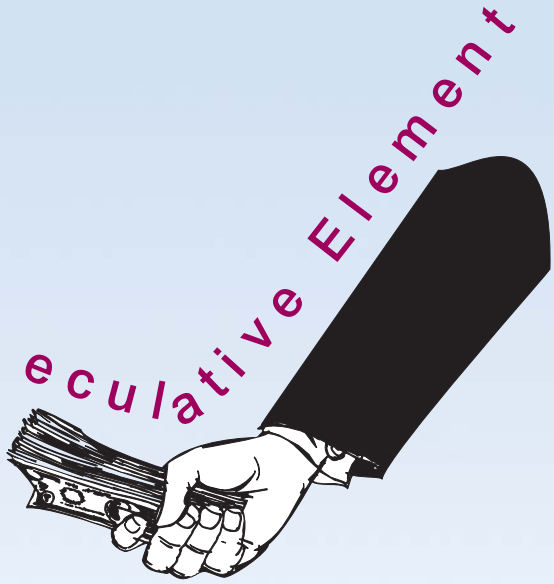
[1] Reported in [2003] 2 HKLRD 399.

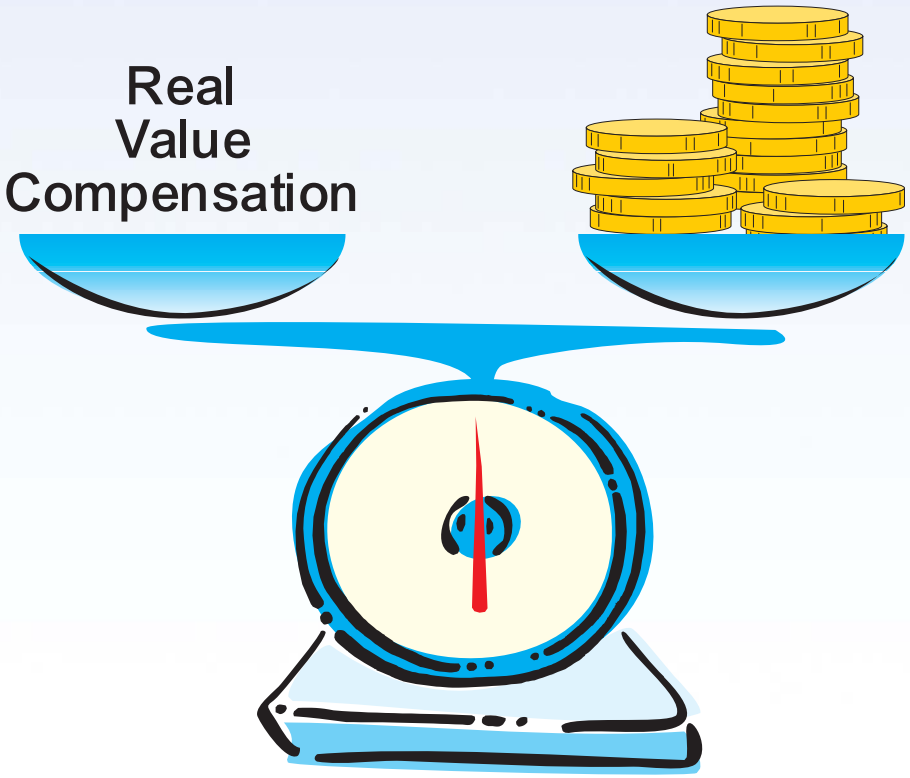
not always the case. Sometimes the market was prepared to pay a speculative price which exceeded the true value of the property and reflected an element for which the resuming authority ought not to be required to pay. There was nothing in BL 105 which required it to do so.

(2) Compensation was only required to be paid for "the property concerned", ie for the interest acquired. In the present case, that meant the land for the duration of the Government lease and subject to the user restrictions in the lease. The right to exploit the development potential of the land by using it as building land was not disposed of by the Government and remained the property of the Government for which it ought not to be required to pay. If the Land Owners' argument was correct, then the Government's practice in charging a full premium on modification of the terms of a Government lease was also open to challenge under the Basic Law. The CFA did not consider that that was right.

RESULT

Having considered the above and other submissions of the parties, the CFA allowed the appeal of the Director. The CFA discharged the assessments and remitted both cases to the Lands Tribunal to reconsider the assessment of the compensation on a full evaluation of all the evidence and in the light of this judgment. BLB





JUDGMENT UPDATE

Kowloon Poultry Lann Merchants Association v Director of Agriculture, Fisheries and Conservation

CACV No 1521 of 2001 (10 July 2002)[1]

BACKGROUND

Kowloon Poultry Lann Merchants Association (the "Association") represented 10 poultry wholesaling businesses. From 1974 to 1997, these wholesalers rented stalls in Cheung Sha Wan Temporary Wholesale Poultry Market (the "Original Market") where they sold chickens and water birds (including ducks and geese).

As a result of the outbreak of "bird flu" in December 1997 the Public Health (Animals and Birds) (Amendment) (No 2) Regulation 1998[2] was enacted and they were not allowed to sell water birds in the Original Market but only chickens. These regulations reflected scientific advice that avian flu was caused by ducks and geese and could spread from them to chickens and then to humans. The Government, however, made available to them an alternative location in the Western Wholesale Food Market (the "Alternative Market"), from which they could continue to sell water birds.

The wholesalers alleged that they had suffered severe financial loss as a result of the Government's decision to separate the locations for selling chickens and water birds. This was due to the fact that they had to close down the duck and goose wholesaling side of their businesses as the Alternative Market was far from customers and the stalls were small. Application for leave to issue judicial review against the Government's decision not to compensate them for the above loss was refused. The Association then appealed to the CA.

BL 105 ARGUMENT

One of the arguments put forward by the Association was that the reduction of profit, as a result of the wholesalers' being deprived of their duck and goose wholesaling businesses at the Original Market, was a deprivation of property within the meaning of BL 105 which entitled them to compensation.

NO DEPRIVATION OF PROPERTY

The CA held, even assuming that the profit, business or goodwill (even relating to the future) could amount to "property", that there had not been any deprivation. The wholesaling businesses had not been deprived of the use of the land rented to them at the Original Market. They were still selling chickens there, though they were prohibited by the new regulations and By-laws from selling water birds there. That was not deprivation but rather control of use of land. They had not been deprived of their businesses of selling water birds either

> General rules regulating the use of property were not considered as expropriation

[1] Reported in [2002] 4 HKC 277.

[2] LN 165 of 1998.

by the new regulations and/or the new By-laws. Their reduction of profit, if any, did not result from any "deprivation of property".

Indeed, the Government had provided them with the Alternative Market from which to sell water birds. In that sense, there was no deprivation. Even if they had thereby suffered a reduction of profit, that did not equate with a "deprivation of property" under BL 105.

Supporting Authority from the European Commission

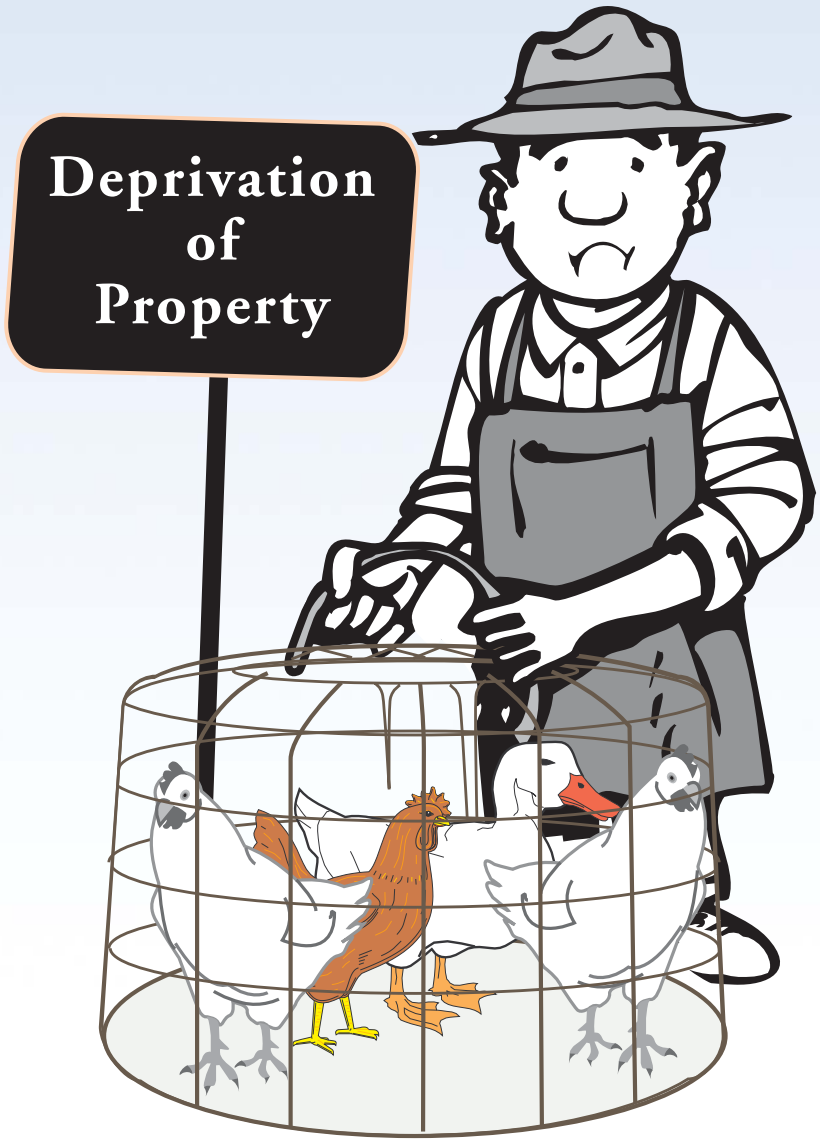
The CA found support for the above view from a decision of the European Commission on Human Rights on Article 1 of Protocol No 1 of the European Convention on Human Rights ("Art 1/P 1"). Like BL 105, Art 1/P 1 also protected property rights. In that decision, the European Commission observed that deprivation of property within the meaning of Art 1/P 1 was not limited to cases where property was formally expropriated, ie where there was a transfer of title to the property. Deprivation might also exist where the measure complained of affected the substance of the property to such a degree that there had been a *de facto* expropriation or where the measure complained of could be assimilated to a deprivation of possessions. Legislation of a general character affecting and redefining the rights of property owners could not normally be assimilated to expropriation even if some aspect of the property right was thereby interfered with or even taken away. General rules regulating the use of property were not to be considered as expropriation.

The CA then considered that if the Association's arguments were correct, it would mean that future legislative restrictions on land use, such as planning control and zoning, could amount to "deprivation of property" and had to be compensated for under BL 105. That could not be correct and underlined the fallacy of the Association's argument.

RESULT

Having reached the above decision that the Association had not made out any case as to deprivation, the other argument put forward by the Association as to the failure of the judge below to extend time for leave to judicial review fell away.

The appeal was dismissed. BLB



JUDGMENT UPDATE

Prem Singh v Director of Immigration

FACV No 7 of 2002 (11 February 2003)[1]

BACKGROUND

Prem Singh ("Singh"), an Indian national, first arrived in Hong Kong as a visitor in January 1988 and was granted permission in March 1988 to remain in Hong Kong to work.

On 17 July 1998, Singh was granted permission to work at a club and to extend his stay until 17 July 1999 or 2 weeks after termination of his contract of employment, whichever might be the earlier. As Singh's employment with the club ended on 27 September 1998, his permission to remain in Hong Kong expired on 12 October 1998.

On 24 October 1998, Singh applied to the Immigration Department for an unconditional stay. On 3 May 1999, Singh was convicted of indecent assault and sentenced to 2 weeks' imprisonment. The Director of Immigration (the "Director") refused on 4 June 1999 Singh's application for an unconditional stay on the basis of the 2 weeks' imprisonment and other factors. Singh sought to have the refusal re-considered. On 9 October 1999, the Director upheld his earlier refusal.

Singh's solicitors wrote to the Director on 30 May 2000 claiming permanent resident status for Singh. The claim was refused on 14 June 2000.

Singh's application for judicial review against the above decisions of the Director was rejected by the CFI and the appeal was dismissed by the CA. Singh appealed to the CFA.

QUALIFYING CONDITIONS FOR PERMANENT RESIDENT STATUS

The CFA said that BL 24(2)(4) required non-Chinese persons to satisfy the following three conditions if they were to qualify for permanent resident status:

(1) having entered Hong Kong with valid travel documents (the "entry requirement");

(2) having ordinarily resided in Hong Kong for a continuous period of not less than seven years (the "seven-year requirement"); and

(3) having taken Hong Kong as their place of permanent residence (the "permanence requirement").

Singh was able to satisfy the entry requirement, but his ability to meet either the seven-year requirement or the permanence requirement was in dispute.

RELEVANT PROVISIONS

Relevant provisions of the Basic Law and the Immigration Ordinance (Cap 115) were as follows:

BL 24(2)(4)

> "The permanent residents of the Hong Kong Special Administrative Region shall be:
> ...

[1] Reported in [2003] 1 HKLRD 550.

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region".

CAP 115

(1) Paragraph 2(d) of Schedule 1 set out a provision which was identical in all material respects to BL 24(2)(4).

(2) In elaboration of the permanence requirement, paragraph 3(1)(c) of Schedule 1 provided:

"For the purposes of paragraph 2(d), the person is required -

...

(c) to be settled in Hong Kong at the time of the declaration."

(3) The requirement that the applicant be "settled in Hong Kong" was further elaborated by paragraph 1(5)(b) of Schedule 1 as follows:

"A person is settled in Hong Kong if -

...

(b) he is not subject to any limit of stay in Hong Kong."

(4) Section 2(4)(b) provided:

"... a person shall not be treated as ordinarily resident in Hong Kong ... during any period ... of imprisonment or detention pursuant to the sentence or order of any court."

DIRECTOR'S CONTENTIONS

The Director contended:

(1) since Singh had throughout been subject to a limit of stay, he had never been able to satisfy the permanence requirement and so could not qualify as a permanent resident;

(2) Singh failed to satisfy the seven-year requirement because his imprisonment in May 1999 broke the continuity of his ordinary residence in Hong Kong over the relevant period; and

(3) the application made by Singh on 24 October 1998 was merely an application for an unconditional stay and that no application for permanent resident status was made until 30 May 2000.

SINGH'S RESPONSES

Singh responded:

(1) the purported necessity for an applicant to secure the lifting of any limit of stay imposed by the Director before being able to satisfy the permanence requirement was inconsistent with BL 24(2)(4) and unconstitutional (the "limit of stay issue");

(2) his imprisonment for a period of two weeks should be ignored as *de minimis* since it constituted a trivial interruption of the requisite period of ordinary residence (the "*de minimis* issue"); and

(3) his application for permanent resident status was made, or should in law be taken to have been made, on 24 October 1998 (the "time of application issue").

JUDGMENT UPDATE

Prem Singh v Director of Immigration

FACV No 7 of 2002 (11 February 2003)

THE LIMIT OF STAY ISSUE

It was well-established that a fair and reasonable statutory scheme for the proper verification of a person's claim to right of abode was constitutional. Accordingly, a non-Chinese person claiming the right to permanent resident status had to apply to the Director for his claim to be verified. In accordance with BL 24(2)(4), the Director was entitled to seek evidence which would establish that the applicant satisfied the entry, seven-year and permanence requirements.

BL 24(2)(4) required that persons claiming the status to "have taken Hong Kong as their place of permanent residence". This meant that an applicant, at the moment of putting forward his claim for verification by the Director, was required to point to facts which had already occurred permitting him to say that he had, starting at some point in time prior to the making of his application, already taken Hong Kong as his place of permanent residence. The CFA was of the view that BL 24(2)(4) implicitly regarded satisfaction of the permanence requirement as achievable at a time when an applicant was still subject to a limit of stay.

Accordingly, the CFA held that Cap 115, in translating the Basic Law's permanence requirement into a condition that the applicant be "settled in Hong Kong" (paragraph 3(1)(c) of Schedule 1 to Cap 115) and defining "settled" as requiring that the applicant be "not subject to any limit of stay in Hong Kong" (paragraph 1(5)(b) of Schedule 1 to Cap 115), purported to impose a requirement which was incompatible with the requirements of BL 24(2)(4). Cap 115 was therefore to that extent unconstitutional.

The permanence requirement in BL 24(2)(4) demanded that the intention of an applicant had to

be to reside, and the steps taken by him had to be with a view to residing, in Hong Kong permanently or indefinitely, rather than for a limited period. Such intention and conduct had also to be addressed to Hong Kong alone as the applicant's only place of permanent residence. These were requirements which could and had to be met prior to the date of application for verification of permanent resident status, notwithstanding that the applicant was still, at that stage, subject to a limit of stay. Upon verification of an applicant's status, the limit of stay would fall away as a matter of law.

THE *DE MINIMIS* ISSUE

The maxim *de minimis non curat lex* (the law does not concern itself with trifling matters) is a common law principle of construction that applies unless a contrary intention appears. The CFA was of the view that, as no intention to exclude the *de minimis* principle was detectable in BL 24(2)(4), the *de minimis* approach to construction was therefore in principle applicable to the interpretation of BL 24(2)(4). The CFA held that the two-week period of imprisonment was not *de minimis*. The exclusion of periods of imprisonment from the ordinary and natural meaning of the words "ordinary residence" in BL 24(2)(4) did not depend on the duration of such periods being substantial or on their amounting to a substantial fraction of the seven-year qualifying period. The exclusion was qualitative. The incarceration, reflecting sufficiently serious criminal conduct to warrant an immediate

custodial sentence, fell outside what could qualify as "the settled purposes" underlying a person's ordinary residence in the ordinary and natural sense of those words. It was this qualitative aspect of time spent in prison that had led to such periods being excluded from the concept of "ordinary residence" in successive statutory schemes (eg, s 2(4)(b) of Cap 115) and in the Basic Law.

The "permanence requirement" in BL 24(2)(4) demanded that the intention of an applicant had to be to reside, and the steps taken by him had to be with a view to residing, in Hong Kong permanently or indefinitely, rather than for a limited period.

THE TIME OF APPLICATION ISSUE

On 24 October 1998, an Immigration Officer at a counter at the Immigration Department suggested to Singh that he should be seeking an unconditional stay as the first step towards obtaining permanent resident status. Singh complied. The evidence clearly showed that on 24 October 1998, Singh was not merely seeking an unconditional stay but had initiated his application for permanent resident status under BL 24(2)(4).

The CFA in *Fateh Muhammad v Commissioner of Registration & Another* (2001) 4 HKCFAR 278[2] held (at p 285) that the relevant qualifying period "must come immediately before the time when an application for Hong Kong permanent resident status is made in reliance on those seven continuous years." The application made by Singh on 24 October 1998 constituted the relevant application for such purposes. Accordingly, as at 24 October 1998, the requisite qualifying period had not been interrupted by any period of imprisonment. Singh's subsequent period or periods of incarceration did not bear upon his entitlement to permanent resident status judged at the time when the relevant application was made.

RESULT

The CFA allowed the appeal. BLB

Pending Cases

On 10 June 2003, the CFI handed down its judgment in *Lau Kwok Fai Bernard v Secretary for Justice* and *Government Park and Playground Keepers Union, Shum Man Lai and Leung Tat Wah v Secretary for Justice* (HCAL Nos 177 & 180 of 2002), which upheld the constitutionality of the Public Officers Pay Adjustment Ordinance (Cap 574). The applicant in HCAL No 177/2002 has filed an appeal to the CA. The Government's application to strike out the appeal (on the basis that the applicant lacks the *locus standi* in the appeal following his dismissal) is fixed for hearing in February 2004, while appeal against the judgment in HCAL No 180/2002 (CACV 259/2003) will be heard in July 2004. A similar application for judicial review which was heard in October 2003 was also dismissed by the CFI in a judgment on 7 November 2003.

[2] Please refer to p 21 of Issue No 2 for a summary of the judgment.