the consultation and decision-making process led to the Legislative Council setting up a Joint Sub-Committee to monitor the implementation of the West Kowloon Cultural District Project: 'to monitor issues relating to the implementation of the West Kowloon Cultural District project, including the work of the West Kowloon Cultural District Authority, the project's interface with arts and cultural development, and other related matters'.[14]

The perceived inadequate consultation process triggered legislative oversight of the development and implementation of the process. This further check on government would not have been necessary if the consultation process had been properly managed. It is to prevent issues like this that other jurisdictions develop and publish codes of practice or formal guidance for the government to follow on written consultations. An example is the Guidance document on Public Consultations published by the Cabinet Office in the English context.[15] This Guidance document, although not binding, sets out minimum best practice standards for written consultations by government departments and agencies.

The Guidance document highlights the need to focus on real engagement during a consultation exercise rather than a token consultation; consultation should be done early in the decision-making process; the consultation should be targeted and tailored to the relevant participants and issues; the public should be provided with easy to understand information; it should be made clear how feedback will be taken into consideration and the need for the relevant government agency to have clear objectives on the consultation exercise to avoid an unnecessarily costly exercise. Such guidance is currently missing in the Hong Kong context. However, the Panel on Home Affairs of the Legislative Council has confirmed they will be considering introducing guidance on this in the future.[16]

In addition to public consultation exercises on specific issues, the government has set up a general Public Affairs Forum. This is a consultative forum established to advise on public issues from time to time and, in particular, the views of members from the business and professional sectors. These categories of individuals were selected on the basis that they are underrepresented on statutory and advisory bodies (such bodies are discussed further below).[17] The forum operates through a website.[18] Topics for discussion are posted on the website which members of the forum can discuss online. The discussion is monitored and processed by the Home Affairs Bureau which administers the website. Topics for discussion vary from the Chief Executive's annual policy address to specific issues such as the introduction of a medical priority system for the dispatch of ambulances.[19]

14 http://www.legco.gov.hk/general/english/panels/yr08-12/wkcd.htm.

15 https://www.gov.uk/government/publications/consultation-principles-guidance.

16 http://www.legco.gov.hk/yr13-14/english/panels/ha/papers/ha1010cb2-8-appv-e.pdf, para 8.

17 Home Affairs Bureau to the Legislative Council Panel on Home Affairs, *Interim Report No 14 on the Review of Advisory and Statutory Bodies* (LC Paper No CB(2)2176/04-05(04), July, Hong Kong).

18 See https://www.forum.gov.hk/main/default.asp.

19 See https://www.forum.gov.hk/en/summaries/index.asp.

As with public consultation exercises on specific issues (as discussed above), the government will need to ensure there are adequate processes in place for filtering the comments received on this forum. There is a lack of evidence on how this is done by the Government.

(d) *Statutory Advisory Bodies*

In certain areas of government there exist statutory and advisory bodies which provide, *inter alia*, advisory support to the government. These bodies may have been created by statute or by the executive body they are assisting. For example, the Antiquities Advisory Board is established pursuant to section 17 of the Antiquities and Monuments Ordinance (Cap 53) and provides the Antiquities Authority (acting through the Secretary for Home Affairs) with advice on the historical grading of a building or site. This assists the Authority in deciding whether or not it should declare that site a monument for the purposes of preservation. Other advisory bodies are established by the executive bodies they advise.[20] These include the Regulatory Affairs Advisory Committee of the Telecommunications Authority[21] and the Transport Advisory Committee of the Transport and Housing Bureau.[22]

The Chief Executive's comments on the role of such bodies in Hong Kong in his Policy Address in 2004 highlights the executive's view that they are to be regarded as an integral part of the political system:

> Advisory and statutory bodies form an integral part of our political system and play an important role in supporting the Administration. They are also an important channel for people to participate in public policy formulation. The Government attaches importance to the function, role and composition of some 500 advisory and statutory bodies.
>
> Our objectives are:
>
> - streamlining structure to avoid excessive duplication in organisation and membership;
> - bringing in more talents from different backgrounds to enhance representativeness;
> - reinforcing the role of these bodies as important partners of the administration and strengthening their participation in the decision-making process;
> - increasing their role in reconciling different interests in our community;
> - further using them as important channels for public participation in public affairs;

20 A full list is available at http://www.legco.gov.hk/yr03-04/english/panels/ha/papers/ha0213cb21263-03e.pdf – a report prepared by the Home Affairs Bureau for the Legislative Council Panel on Home Affairs, (February 2004) at pp 9-70.

21 This Committee advises the Telecommunications Authority on 'all economic and technical regulatory issues related to the development of telecommunications in Hong Kong, except specific issues which are handled by other competent advisory committees created under the auspices of the Telecommunications Authority,' Terms of Reference of the Committee (available at http://www.ofta.gov.hk/en/ad-comm/raac/raactr.html).

22 Broadly speaking, this Committee advises the Chief Executive-in-Council 'on broad issues of transport policy with a view to improving the movement of both people and freight,' Terms of Reference of the Committee (available at http://www.thb.gov.hk/eng/boards/transport/land/tac.htm).

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- enhancing their role in grooming leaders;
- reinforcing their function in connecting the Government and the community;
- explaining public policies and encouraging public discussions; and
- improving how their performance should be evaluated and elevating their status as public policy think tanks.[23]

Accordingly, the objective is that such bodies should add to the information available to executive decision-making bodies when such bodies are reaching decisions on important areas of public policy. The government's policy has been that such bodies should be staffed by appropriately qualified persons in specialist areas and should also be representative of a cross-section of society.[24] The idea is that this representativeness of the bodies should facilitate a more thorough and considered decision-making process on the part of the government that is ultimately more reflective of the views of stakeholders and the general public.

There are, however, several issues relating to these bodies:

(i) The precise role and impact of the advice of such advisory bodies (or the lack thereof) on government decisions has been tested in judicial review proceedings. This was in issue in the judicial review proceedings relating to the government's decision not to declare Queen's Pier a monument: *Chu Hoi Dick & Ho Loy v Secretary for Home Affairs*.[25] One of the questions for the court was the role of the advice provided by the Antiquities Advisory Board (AAB) on Queen's Pier. In this case, the AAB had classified (by a majority vote) Queen's Pier as a Grade I building. The implications of this (from the AAB's perspective) was that such buildings are of 'outstanding merit' and 'every effort should be made to preserve [them] if possible'.[26] However, ultimately the court reached the view (on the basis of, *inter alia*, the underlying legislation relating to the AAB) that this classification by the AAB had no statutory standing and was simply a consideration that the Antiquities Authority had to take into account when reaching its decision but was not bound by it. The precise impact of the advice of these bodies therefore falls to be determined by the framework under which they are established, whether statutory or by the terms of reference assigned to it by the government body which establishes such bodies. In this respect, this case demonstrates that in some instances the role of such advisory bodies is fairly weak.

(ii) The accountability and the representativeness of these bodies have also been the subject of scrutiny. In 2003, the Home Affairs Bureau carried out a public consultation exercise 'to review advisory and statutory bodies in the public sector in order to enhance their openness, effectiveness,

23 Chief Executive's Policy Address 2004, (available at http://www.policyaddress.gov.hk/pa04/eng/index.htm), at para 67.

24 Home Affairs Bureau, *Consultation Paper to Review of the Role and Functions of Public Sector Advisory and Statutory Bodies* (April 2003) at para 5, (available at http://www.info.gov.hk/archive/consult/2003/statutory-e.pdf).

25 [2007] 4 HKC 428 (CFI). This case is discussed further in Chapter 9.

26 Home Affairs Bureau, (n 24 above) at para 7.

representativeness and transparency'.[27] This review was carried out as part of the POAS reforms. The Legislative Council had queried, *inter alia*, how the POAS and system of advisory and statutory bodies would interact with each other in terms of the overall accountability of government in relation to their decisions. As stated in the Consultation Paper: '[a]s regards advisory bodies, the basic principle is that such bodies should provide independent expert advice and community input in the policy making process. As regards statutory bodies, the basic principle is that such bodies should not detract from the role, authority, responsibility and accountability of principal officials. The role and responsibilities of principal officials with regard to advisory and statutory bodies is being examined in this review.'[28] One of the concerns evident in the responses to the public consultation exercise was that in order to contribute to the transparency and accountability of government, such bodies themselves should also be transparent and accountable both in terms of the appointment of their members and in terms of their decisions.[29] In relation to the appointment of members, the Home Affairs Bureau responded by proposing an increase in the diversity of members appointed to such boards. In particular, the Home Affairs Bureau proposed increasing the number of women, ethnic minorities, people with disabilities and younger members of society. This proposal would be implemented by issuing a 'circular memorandum to bureaux and departments to advise and encourage them to target women, people with a disability, members of ethnic minorities and young persons for appointment to advisory and statutory bodies'.[30] In relation to the transparency of decision-making by such bodies, various proposals have been put forward, including opening up meetings of such bodies to the public and requiring the reporting of decision-making by such bodies to the Legislative Council but these proposals have yet to be formally implemented.

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4. Non-Judicial Controls in Hong Kong: Tribunals

Tribunals are intended to make up for certain limitations that affect the operation of judicial review. For example, a common criticism made of most court-based remedies, such as judicial review, is that they can be expensive and time-consuming to obtain. A further limitation of judicial review is that judges can only review the 'legality' or lawfulness of a decision and not the merits of the decision, and at the conclusion of a judicial review the judge must remit the decision back to the original decision-maker to reconsider.[31] A

27 See n 23 above.

28 See n 23 above, at p 6.

29 Home Affairs Bureau to the Legislative Council Panel on Home Affairs, *Progress Report on the Review of Advisory and Statutory Bodies* (February 2004, LC Paper No. CB(2) 1263/03-04(03)) (available at http://www.legco.gov.hk/yr03-04/english/panels/ha/ papers/ha0213cb2-1263-03e.pdf).

30 Home Affairs Bureau to the Legislative Council Panel on Home Affairs, *Interim Report No. 9 on the Review of Advisory and Statutory Bodies* (July 2004, LC Paper No. CB(2)3059/03-04(01)) at para 15, (available at http://www.legco.gov.hk/yr03-04/ english/panels/ha/papers/ha0704cb2-3059-1e.pdf).

31 What constitutes 'legality' or 'lawfulness' is the subject matter of discussion in Part III, Chapters 7 to 12 dealing with the various grounds of judicial review. You will see from those chapters that the distinction between the legality and the merits of a decision is not always clear.

corollary of this limitation is that remedies in judicial review are procedural in their outlook: this means that if judges determine that the relevant decision being reviewed was illegal or unlawful, the judge cannot substitute their own view for that of the decision-maker and make a fresh decision. So, for instance, the remedy of *certiorari* in judicial review allows a judge to quash the original decision but does not then permit the court to make a fresh decision. Similarly, through the remedy of *mandamus* the court may mandate the original decision-maker to make a fresh decision by taking into account certain relevant considerations but the court cannot prescribe the weight to be attached to the consideration[32] that the decision-maker failed to consider in making their primary decision.[33] The rationale behind this limitation of judicial remedies is primarily the need to maintain the separation of powers and prevent judges (whom, it is argued, lack appropriate training and knowledge) from exercising executive powers.[34]

In contrast, tribunals do not have similar limitations. Tribunals are intended to provide a less costly and less time-consuming alternative to judicial remedies through a simpler procedure. In addition, tribunals are intended to provide a specialised form of redress as tribunals tend to be staffed by specialists in various areas of government and not just lawyers. Tribunals are also regarded as part of the executive branch of government (from a separation of powers point of view) and in this respect could potentially provide constitutional benefits that are absent in the case of judicial review. However, as will be seen below, this technical absence of a separation of powers problem, does not necessarily mean that tribunals are given the powers to make fresh decisions on behalf of the original decision-maker.

There are a variety of tribunals in Hong Kong that handle appeals from government decisions.[35] They can be divided into two main categories: general and specialist.[36] The main general tribunal in Hong Kong is the Administrative Appeals Board ('AAB') which hears appeals against government decisions made under a variety of legislation. Key specialist tribunals in Hong Kong include the Immigration Tribunal, the Social Security Appeals Board and the Appeal Board Panel (Town Planning). This section looks mainly at the different aspects of design of the AAB as well as issues arising from the design of the AAB. The specialist tribunals will also be briefly discussed.

The powers and duties of the AAB are set out in the Administrative Appeals Board Ordinance (Cap 442), the key provisions of which are set out below.

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32 Judicial review on the basis of a failure to consider relevant considerations is discussed in Chapter 8.

33 The remedies available in judicial review proceedings (including *certiorari* and *mandamus*) are discussed further in Chapter 6.

34 This limitation on judicial review remedies is discussed further in Chapter 6 below.

35 The discussion here focuses on tribunals that adjudicate disputes between citizens and the government and not tribunals that adjudicate disputes between citizens (such as the Labour Tribunal).

36 There are difficulties with classifying tribunals and with the criteria that should be used to do so. See M Bharwaney, *Administrative Tribunals in Hong Kong* [1976] HKLJ 189 for a discussion of these difficulties. The classification used in this text is for the purposes of exposition only.

Administrative Appeals Board Ordinance
(Cap 442)

...

Application

3. This Ordinance applies to –

(a) the Ordinances mentioned in column 2 of the Schedule in relation to any decision of the description mentioned in column 3; and

(b) any other decision in respect of which an appeal lies to the Board.

Amendment of Schedule

4. (1) The Chief Executive in Council may, by order, amend the Schedule.

...

(3) Without affecting the generality of subsection (1), the power of the Chief Executive in Council to amend the Schedule shall include a power –

(a)to delete an Ordinance from the Schedule;

(b)to add an Ordinance to the Schedule;

(c)to amend an Ordinance mentioned in the Schedule;

(d)to amend an Ordinance at the same time that it is added to the Schedule;

(e)in the case of any amendment of the description mentioned in paragraph (c) or (d), to amend that Ordinance so as to, and only so as to –

(i) substitute the Board for any person to whom an appeal may be made under or by virtue of that Ordinance;

(ii) provide that any person bound by a decision shall be furnished with a statement in writing which sets out-

(A) the reasons for the decision;

(B) the policy, if any, relied upon by the person who made the decision when the decision was made;

(iii) prescribe or, not prescribe a period within which an appeal may be made;

(iv) provide that a decision that is appealed against shall be suspended in its operation as from the day on which notice of the appeal is lodged with the Secretary under this Ordinance until such appeal is disposed of, withdrawn or abandoned unless the advice or notice of the decision given to any person bound by the decision is accompanied by a statement in writing to the effect that, in the opinion of the person who made the decision, such suspension would be contrary to the public interest;

(f) for the purposes of section 22(5), to add a note to the Schedule or to amend or repeal any note mentioned in it.

(4) An order under this section may contain such incidental, consequential, supplemental and transitional provisions as may be necessary or expedient for the purpose of giving effect to the order.

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amenable to review.[71] In *R (Beer) v Hampshire Farmer's Market Ltd*[72] the court said that unless the source of power provided a clear answer, then the nature of the function fulfilled had to be carefully considered to see if it had a sufficient public element, flavour or character to make it amenable to review. In Anderson Asphalt, the court noted that even a commercial decision could, if there was sufficient public element to the decision, be amenable to review. The court, found that there was no sufficient public element in the case at hand, and went on to say that what constituted a 'sufficient' public element was a question of fact and degree and that this would vary on a case by case basis. Arguably this represents an expansion of the court's willingness to review decisions that previously may have been deemed unreviewable on the source or function tests. Alternatively, given the fairly nebulous nature of what will in fact constitute a 'sufficient public element' in any given case, this test could also be drawn so as to exclude from consideration cases where the decision-maker is exercising statutory power or fulfilling a function that on any other test would be said to exist within the public domain. That the latter outcome is more likely is suggested by the statement of the court in *Chau Tam Yuet Ching v Director of Lands* that: 'The mere presence of some public element in the Government's decisions is not sufficient to transform such decisions into public law decisions'.[73] Nonetheless, the correctness of the 'sufficient public element' approach was confirmed in *King Prosper Trading v Urban Renewal Authority.*[74] In this case the decision under challenge was a decision by the Urban Renewal Authority not to buy the applicant's property as part of an urban renewal scheme, under its acquisition policy. Such a purchase would have been on more favourable terms for the owner of the property than any subsequent compensation paid for the compulsory resumption of the title to the land under the Land Resumption Ordinance. The Authority declined to purchase the property because some doubt existed as to whether the owner's title to the property was good. The court had to decide whether the Authority's decision not to purchase the property under the acquisition policy was amenable to review. It was held that it was not amenable to review because, despite the statutory powers exercised and the function of urban renewal being fulfilled in the public interest, this decision did not itself carry any element sufficient to take it beyond a decision made in pursuit of the good commercial sense entailed in not buying a property where there was doubt as to the quality of the title held by the vendor.

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Later, in *Wan Yung Sang v Housing Authority,*[75] while the court again stated that amenability to review is based on there being 'sufficient' public element to the decision under challenge, the outcome as to amenability was different. In this case, the court found the necessary sufficiency of public element existed due to two combined elements: the particular statutory power to issue and enforce a notice to quit on a Housing Authority tenant coupled with the broader function for which the Housing Authority is empowered to act. The court said: 'The Housing Authority in managing the public housing estates via the tenancy

71 See *Anderson Asphalt Ltd v Secretary for Justice* [2009] HKEC 415 at para. 57(k). See also De Smith's *Judicial Review*, 6th ed, para 3-060 at p 140.
72 [2004] 1 WLR 233.
73 [2012] HKCU 1485 at para 23.
74 [2010] HKCU 2767.
75 [2011] HKCU 1293.

agreements is discharging a public function to provide low cost housing to the needy sector of the public in Hong Kong. In discharging its duties in managing these public housing estates, it is thus also concerned with, and conscious of, the fair and proper distribution and use of public resources. As mentioned above, this is one of the considerations it had taken into account when considering whether or not to issue the NTQ (notice to quit). It is therefore not, as submitted by Mr Chan, acting purely or predominantly as a private landlord. There are clearly sufficient public elements underpinning the HA's exercise of rights or discretion in enforcing the tenancy agreement whether under individual provisions or as a whole'.[76]

It is perhaps surprising that the broad framework of urban renewal policy and statutory underpinning was not equally sufficient to render King Prosper's challenge amenable to review in the same way that the Housing Authority's broad policy framework and statutory underpinning rendered *Wan Yung Sang*'s challenge amenable. Any attempt to reconcile these two cases would have to turn on the factual differences between the two cases, most significantly the decision not to buy in King Prosper, notwithstanding the urban renewal policy backdrop, is no more nor less than a function capable of being undertaken by purchasers in both public and private domains while the ability to issue a notice to quit, backed up by criminal enforcement procedures is not something a private landlord could ever do. Hence it may be possible to advance a theory that a 'sufficient public element' may arise only in those cases where the power and function of the decision-maker is something not remotely akin to the powers and functions of private individuals or corporate entities. This does however raise the problem, as in *King Prosper*, of the difficulties inherent in separating out the individual decision under challenge from the wider policy goals pursued by that same decision maker.

One approach which might add clarity to the process of identifying the sufficiency of public element has been articulated by Elias J in *Molinaro*:

> 65. In my view, the fact that a local authority is exercising a statutory function ought to be sufficient to justify the decision itself being subject in principle to judicial review if it is alleged that the power has been abused. Nor do I see any logical reason why an abuse of power made pursuant to some policy should be treated differently to one made on a specific occasion.
>
> 66. Of course, in many circumstances the nature of the complaint is one that identifies no public law principle. In such cases the fact that the defendant is acting pursuant to statute is irrelevant. For example, if the Council sues for the rent due from a tenant, no public law issue arises. Indeed, in general questions of construction of the contract or breach will attract no special public law principles, and judicial review is not an appropriate procedure to resolve such disputes. The fact that a public body is a party to the proceedings is, in such cases, irrelevant to the action formulated or to the relief granted. There is no justification then for treating the local authority in any different way to private bodies.

76 *Ibid* at para 35; see also *Chan Chiu Wah v Housing Appeal Tribunal* [2011] 3 HKC 399; see also however the section below on Landlord and Tenant cases as exceptions to the exclusivity principle.

> 67. But public bodies are different to private bodies in a major respect. Their powers are given to them to be exercised in the public interest, and the public has an interest in ensuring that the powers are not abused. I see no reason in logic or principle why the power to contract should be treated differently to any other power. It is one that increasingly enables a public body very significantly to affect the lives of individuals, commercial organisations and their employees.[77]

The Hong Kong courts have acknowledged the abuse of power approach but only in limited terms: a commercial decision, if undertaken by a statutory body, would not usually be amenable to review. However, where there is fraud, corruption, bad faith or breach of law, then the courts have indicated a willingness to find the decision amenable to review.[78]

5. *What generally is not a 'public law' matter?*

a) Commercial or Contractual Transactions:

Without reference to a universal test, without exclusive reliance on the source of power test and without a more developed theory of abuse of power, how does one identify whether a decision maker is functioning within the realm of public law and more precisely with a sufficiency of public element so as to render the decision under challenge amenable to review? One approach may be first to carve out those decision which do not fulfill a 'public function'. One clear principle which runs through the decisions of the courts has been that engaging in contractual or commercial relationships will not generally fall within the meaning of a 'public function'. In *Ngo Kee Construction Ltd v Hong Kong Housing Authority*,[79] the court commented that:

> The Housing Authority is a public body set up by legislation. However not every one of its decisions is amenable to judicial review. One can envisage three situations. The first being a decision in connection with its public duty of providing low cost housing to the public. If, for example, it makes a decision on the criteria in which the individuals are entitled to acquire the houses, without going too deeply into the issue, one would have thought that this is a matter that is subject to judicial review because of the public element involved. On the other end of the scale, to use the example relied upon by Mr Pannick, QC, counsel for the Housing Authority, when it purchases office stationery such as elastic bands, its decision is unlikely to be amenable to judicial review since this is in its nature a commercial decision and subject to private law. Between these two extremes, if, for example, the Housing Authority, in order to discharge its statutory function of providing low cost housing requires building contractors to carry out the construction work, and maintains a list of approved contractors who are entitled to bid for its work, the tendering process cannot be a matter of judicial review because of its commercial nature. Likewise the decision to suspend an approved contractor from tendering for contract is, in my view, also a commercial decision and is not subject to judicial review. If the failure to obtain a contract after tendering is not subject to judicial

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77 *R (on the application of Molinaro) v Kensington & Chelsea RLBC* [2001] EWHC Admin 896.

78 *Matteograssi SpA v The Airport Authority* [1998] 2 HKLRD 213; *Ngo Kee Construction Co Ltd v Hong Kong Housing Authority* [2001] 1 HKC 493; *Lee Shing Yue Construction Co Ltd v Director of Architectural Services & Another* [2001] 1 HKLRD 715: all as cited in *King Prosper Trading v Urban Renewal Authority* [2010] HKCU 2767 at para 29.

79 [2001] 1 HKC 493.

> review, I fail to see how a decision to suspend the applicant from tendering would make him so entitled. It is still part of the tendering scheme which, in the absence of statutory underpinning, a public body is entitled to make up its own mind on who should be awarded the contract. The mere fact that the applicant was told in advance that for the next 24 months it would not be allowed to tender is clearly no different from a situation where each tender by the applicant would not be accepted. After all, the underlying rationale is that it is a commercial dispute.[80]

Therefore, although the decision maker may be a statutory body, exercising what are broadly public functions, if the particular decision being challenged falls within a commercial or contractual aspect of the decision maker's function it may be deemed to be a private function rather a public function, particularly where there is an absence of bad faith.

b) Employment Contracts:

Similarly, when an application for judicial review turns on challenge to a decision by a public body regarding the employment of one of its employees, the fact that the employer is a public body will not be sufficient to make a decision regarding employment amendable to judicial review. If the decision under challenge is an exercise of power under the contractual terms of employment of the applicant by a statutory body, the source of power being exercised is not the statutory power conferred on the body but the contract and hence unreviewable. The classic formulation of the test for reviewability of employment decisions made by statutory bodies is found in the English case of *R v East Berkshire Health Authority Ex p Walsh*.[81] As Harris notes 'The classic illustration is the decision of the Court of Appeal in *R v East Berkshire Health Authority Ex p Walsh* that *certiorari* was not available in respect of the termination of the employment of a senior nursing officer by a health authority in the absence of any element of "public law" in the particular complaints raised by him. Such an element could, however, arise where Parliament directly restricted the freedom of the public authority to dismiss or required the authority to enter contracts or specified terms which it then refused to do".[82] Thus, whilst a challenge raised in relation a decision made under an employment contract will not be reviewable, if the employer has had its power to enter into an employment contract curtailed in some way by statute, then any decision made in reference to the controls imposed on that power to contract may be reviewable. As Harris goes on to note: 'Properly analysed, the key propositions for which Walsh stands as authority are merely (1) that contractual terms entered as the result of an exercise of a statutory power are not themselves automatically enforceable in public law through judicial review as limits on the powers of the public body concerned; and (2) that claims for breach of contract should not be pursued by an application for judicial review. It does not support broader propositions that decisions relating to the employment position of public sector employees can never be challenged in judicial review proceedings; that contracting decisions generally are as a class immune or that the fact that a decision is taken in the exercise (or non-exercise) of a statutory power can never provide a sufficient

80 *Ibid* at 506–507.

81 [1984] 3 WLR 818.

82 SH Bailey-Harris, *Judicial Review of Contracting Decisions* (2007) Public Law 444 at p 448.

basis for amenability to judicial review. It is also submitted that Walsh is not inconsistent with the approach in *Molinaro*. Walsh did not concern an alleged abuse of power and can be seen as a case where the nature of the complaint identified no public law principle.'[83]

The approach established in Walsh has been accepted in Hong Kong. *Fraser v Chief Executive of the HKSAR & Another*[84] concerned the refusal to renew the employment contract of a police officer. The application for judicial review sought to challenge the refusal to renew the officer's contract based on the existence of a statutory scheme regulating the discipline and dismissal of police officers. The applicant took the view that this statutory scheme limited the employer's contractual powers of employment and thereby made the decision not to renew his contract a public law matter and thus reviewable. Had the decision not to continue to employ the officer been made as a result of proceedings under the statutory scheme of discipline and dismissal then the decision may, following *Walsh*, have been reviewable. However, despite there having been disciplinary proceedings against the officer, the decision not to continue to employ him arose not from those proceedings but was a decision not to renew a contract which had expired naturally at the end of its term. Thus there was no dismissal under the statutory scheme. The court, citing *Walsh*, noted:

> As Sir John Donaldson MR held in *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152 at p 165: The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee "public law" rights and at least making him a potential candidate for administrative law remedies …
>
> In this case, the right to dismiss a police officer arises by virtue of the statute, namely the Police (Disciplinary) Regulations, and as a result of disciplinary offences provided by reg 3. But this is not a case of dismissal. It is not necessary for me to consider the questions of whether if there was actually a dismissal, then such a decision is subject to the supervision of the court, and whether a disciplinary procedure had been incorporated into the contract of service which deprived the procedure and compliance of them with any public law character as discussed in cases like *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152 and *R v Secretary of State for the Home Department, ex p Benwell* [1985] QB 554 (per Hodgson J) at p 573:
>
> While the decision not to renew the contract was based on the conviction, there is no challenge against the conviction. I cannot see how the matter can come under the supervision of the court. The applicant's remedy, if any, is by way of private litigation. One may add that in private law in Hong Kong, even if a dismissal is found to be wrongful, an employee cannot seek specific performance of a contract for personal service. His remedy lies in damages. This being the position in private law, the question of reinstatement simply would not arise in the present case. The applicant's remedy, if any, is by way of private litigation. In my view, the applicant has not made out any ground of challenge for a judicial review… [85]

83 *Ibid* at pp 456-457.
84 [2000] 3 HKLRD 492.
85 *Ibid* at p 497.

Similarly, in *Chen Chun Ngai v Hospital Authority*,[86] the court held that without a statutory provision to the contrary, the mere fact that the employer of the aggrieved applicant was a public body was not sufficient to inject the necessary 'public element' into the decision which the applicant sought to have reviewed. Similarly, a challenge to the decision of the Lingnan University Appeals Committee was not deemed to be reviewable despite the fact that the University was itself a creation of statute.[87]

c) The State as Landlord

On of the earliest significant cases in Hong Kong to deal with the question of whether the state when acting in its capacity as landlord is exercising a public or private function was *Hang Wah Chong Investment Co Ltd v Attorney-General*.[88] In that case the appellants sought to demolish a building and rebuild on the plot of land. The Director of Works said that permission to redevelop the land would be given if the appellants paid a special premium. The appellants' case was, in addition to other arguments not relevant here, that the Director of Works was also the Building Authority and thus, he was acting in the public domain. Moreover, when he set the requirement to pay a special premium the requirement was tantamount to an abuse of his public power. The Privy Council rejected the appellants' arguments noting that 'the view expressed by Huggins, JA in the Supreme Court that 'The Director of Public Works has many responsibilities besides those imposed by the Buildings Ordinance' appears well established, one of those responsibilities being that of acting as the Crown's land agent… The vital question is whether for the purposes of Special Conditions 6 and 7 he can properly be regarded as being entitled to act in his capacity of land agent for the Crown. It is not open to serious doubt that those Conditions relate directly to the landlord's interests, economic and otherwise, and their Lordships conclude that the Director was entitled to act, and did act, in that role when granting his qualified approval to the appellants' plans'.[89] Hence the principle established in *Hang Wah Chong* is that the interests of the State in relation to land may be exercised either in the public domain or the private domain but where the State is exercising powers to achieve interests which are held in common with private landlords, such as maximizing the economic potential of its landholdings, then the State is not acting in the public domain but only in the same way as any private landlord, and therefore its decisions are not amenable to review.

The *Hang Wah Chong* principle was applied in *Hong Kong & China Gas Co Ltd v Director of Lands*.[90] In this case the result of applying the principle was that the Director of Lands was exercising powers that went beyond the role of the State as a private landlord only. The Director of Lands had made a decision to not extend the lease of land in the New Territories to the applicant company. Originally the land was leased under a Crown lease which had been due to expire

86 HCAL 000202/2002.
87 *Leung Chak Sang v Lingnan University* [2001] 2 HKC 435. See also *Tan Shih Ying v City University of Hong Kong* [2012] HKCU 2498 at n 68 above.
88 [1981] HKLR 336.
89 *Ibid* at p 341.
90 [1997] HKLRD 1291; see also *Kam Lan Koon v Secretary for Justice* [1999] 3 HKC 591.

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It follows from this analysis that remedies in judicial review seek to preserve a distinction between the relevant decision maker and the courts in the performance of their distinct constitutional functions. When reading this chapter, it is important to bear in mind the inherent limits of judicial remedies and the perceived imperative for the courts to confine relief to questions of legality, rather than remedies that impinge on the merits of a particular decision.

2. Public Law Remedies

(a) *Certiorari and prohibition*

(i) *Certiorari and prohibition: definition and scope*

Certiorari has the effect of invalidating acts or decisions, whereas an order of prohibition will forbid acts or decisions being made. Where a matter is not within the jurisdiction of the Court of First Instance, these orders cannot be issued. However, all inferior courts and tribunals (including inferior appellate courts) are subject to the orders, as are the decisions of public authorities.[9] *Certiorari* and prohibition can apply to any body that has the legal authority to decide questions affecting (a) common law, (b) constitutional rights, (c) statutory rights, or (d) any other obligations placed upon individuals.[10] For this reason, *certiorari* and *prohibition* may also lie to non-statutory decision makers and public authorities.[11] As long as a public duty is involved, then it is likely that public law will apply, and *certiorari* and prohibition will be available as appropriate.[12] However, judicial review will not lie where a decision-maker only has authority over the parties before it by virtue of their consent.[13] In such cases, it is arguable that the parties have left public law and entered an area of private law (which is why these cases are often referred to as contractual). As such, a clear and unequivocal arbitration agreement may be sufficient to remove the ability to apply for judicial review.[14] For further reading on this topic, see Chapter 3.

9 *R v Murphy* [1921] 2 IR 190; *R v Herford* (1860) 29 LJQB 249; Re Mansergh (1861) 1 B & S 400.

10 See: *R v Electricity Commissioners, ex parte London Electricity Joint Committee (1920) Ltd* [1924] 1 KB 171.

11 This includes common law rights (*R v Barnsley Metropolitan Borough Council, ex parte Hook* [1976] 1 WLR 1052 and the exercise of prerogative powers (*R v Criminal Injuries Compensation Board, ex parte Lain*). See also: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, discussed in Chapter 10 where the applicants were unsuccessful in their application for certiorari but not on jurisdictional grounds.

12 *Rank Profit Industries Ltd v Director of Lands* [2007] 2 HKC 168.

13 See eg *The Stock Exchange of Hong Kong v New World Development Co Ltd* [2006] HKCFA 49 (CFA) and *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815.

14 Unless the arbitrator is a statutorily-created one. See further: *Wong King Chuen v The Hong Kong Football Association* [2007] HKCU 1413 (CFI).

(ii) *Certiorari and prohibition as complementary remedies*

Both these remedies are frequently sought together; *certiorari* to quash the decision and prohibition to restrain its execution. While *certiorari* applies retrospectively to acts of public authorities, prohibition is forward looking in preventing a future unlawful act or one that is continuing.[15] While *certiorari* and prohibition are often sought together, sometimes the courts prefer to grant one remedy instead of the other. This was the case in *Ng Yuen-shiu v Attorney General*,[16] where the Court of Appeal found a breach of natural justice on the part of the Immigration Department in failing to provide the applicant with a fair hearing before a removal order was issued. The applicant sought to quash the removal order. Instead, the court granted prohibition to prevent the removal order's execution until the applicant had been given an opportunity to put all the circumstances of his case before the Director of Immigration. Prohibition, rather than *certiorari*, appeared to be the more appropriate remedy in this case because of the nature of the right sought to be protected. As the applicant was entitled to a procedural, rather than a substantive legitimate expectation, the court did not consider it necessary or desirable to quash a removal order when the applicant had no substantive entitlement to remain in Hong Kong, at least until his hearing had concluded.[17]

(iii) *The need for a final determination*

For *certiorari* or prohibition to issue, there must be a final decision or determination to be quashed, as illustrated in the following decision.

Television Broadcasts Ltd v Communications Authority

[2013] HKCU 1103

The applicant, TVB, sought to challenge the Communications Authority's recommendation to the Chief Executive to grant new domestic free-to-air television broadcasting licences. TVB contended that the Communications Authority's recommendation was unlawful in a number of respects. However, no decision had yet been taken by the Chief Executive in Council (CEIC) under his statutory powers to approve applications for domestic free-to-air television broadcasting licences. The applicant sought a number of remedies, including prohibition to prevent the CEIC from granting further licences and certiorari to quash the recommendations of the Communications Authority.

15 *R v Electricity Comrs, ex p London Electricity Joint Committee Co; Longbottom v Longbottom* (1852) 8 Exch 203, (Atkin J).

16 [1980] HKC 333, [1981] HKLR 352.

17 For further discussion on legitimate expectations, see Chapter 10.

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Au J:

20. As can be immediately seen, all the grounds raised in support of the intended judicial review and the reliefs sought (other than the prohibition) are related to complaints about the interlocutory and preparatory procedures leading to the Recommendation and the Recommendation itself. … Further, even the prohibition sought is similarly premised on these complaints but not an extant final decision. For convenience, I would collectively refer to these complaints as the "alleged interlocutory wrongs".

21. In other words, there are no substantive final decisions which are under challenge in the intended judicial review. The only relevant substantive decision is the CEIC's decision, which is yet to be made.

22. However, it is trite that, save in exceptional circumstances, judicial review is focused upon ultimate actions or decisions with substantive legal consequences. As said by Carnwath LJ in *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] 3 All ER (CA) 54 at paragraphs 32 and 33:

> 32. "Judicial review, generally, is concerned with actions or other events which have, or will have, substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting existing legal rights or interest. Typically there is a process of initiation, consultation, and review, culminating in the formal action or event ("the substantive event") which creates the new legal right or restriction. For example, the substantive event may be the grant of a planning permission, following a formal process of application, consultation and resolution by the determining authority. Although each step in the process may be subject to specific legal requirements, it is only at the stage of the formal grant of planning permission that a new legal right is created.
>
> 33. Judicial review proceedings may come after the substantive event, with a view to having it set aside or 'quashed'; or in advance, when it is threatened or in preparation, with a view to having it stayed or 'prohibited'. In the latter case, the immediate challenge may be directed at decisions or actions which are no more than steps on the way to the substantive event. In the planning example, judicial review may be directed at a local authority resolution to grant permission while it is still conditional on, say, the completion of a highways agreement, even thought the resolution can have no legal effect until the issue of the formal permission." (emphasis added)

23. Similarly, in adopting *R (Shrewsbury and Atcham Borough Council,* Lam J (as he then was) recently in *ATV v Chief Executive in Council* [2012] 3 HKLRD 1. has also said these at paragraphs 19 to 22:

> 19. "In the present context, the decision that would have substantive legal consequences is the determination of the CE in C, not the recommendation by the Authority. Although there could be cases where challenge may be brought in respect of decisions or actions which are no more than steps on the way to the substantive event (see para 33 of *Shrewsbury and Atcham BC v Secretary of State*) it is a matter of this court's discretion with regard to the circumstances of the case before it to decide whether such challenge should be entertained, see HCAL 45/2011, 11 July 2011.
>
> 20. In *Financial Secretary v Wong* (2003) 6 HKCFAR 476, Litton NPJ said at para 93,
>
> 'It is not every decision by a decision maker which is susceptible to review: were it otherwise the functioning of the executive arm of government and of statutory bodies and tribunals would be ensnared in multiple applications in the courts.'
>
> 21. After referring the passage from Wade and Forsyth, His Lordship continued at para 94, 'The emphasis here is on the decisive nature of the exercise of power.'
>
> 22. In the same case, Bokhary PJ said at para 14,
>
> 'The courts' judicial review jurisdiction is of a supervisory nature. This extremely important jurisdiction is not meant for the purpose of micro-managing the activities of subordinate tribunals or administrative decision-makers. It should hardly ever be exercised to review decisions that go only to procedure rather than to the end result.'"

24. This strict approach of the court in not to entertain challenges of intermediary or preparatory steps in the decision making process has been repeatedly approved and followed in Hong Kong in judicial review cases [citations omitted].

25. These relevant principles governing when the court may entertain challenges of intermediary or preparatory steps by way of judicial review have been helpfully summarised by [counsel] in their skeleton for the Authority as follows:

> (1) Judicial review focuses on ultimate actions with substantive legal consequences and a decisive or determinative effect.
>
> (2) The supervisory jurisdiction of the court is not to micro-manage the administrative actions of public bodies and the court must be vigilant against doing so.
>
> (3) Intermediate steps should normally only be reviewed as part of the entire process after the determinative and

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36. In any event, assuming TVB can show some forms of prejudice that have been caused to it by the interlocutory wrongs, such prejudice is not irretrievable. As I have repeatedly emphasised, TVB is entitled to apply for judicial review seeking to quash the CEIC's decision after it has been made on the same basis. No irretrievable prejudice is thus suffered by TVB by reason of the alleged interlocutory wrongs.

37. Third, Mr McCoy says TVB has committed to invest some $6b in its television business as a result of the earlier interim review conducted by the Authority. At that time, the Authority did not indicate that it would consider (as it did now) opening up the domestic free TV market for additional licensees. As a result, TVB has a legitimate expectation (given its very significant financial commitment) that it should be properly, fairly and comprehensively consulted on this very important question as to whether, and if so, how many new licensees should be approved to enter the market. The alleged interlocutory wrongs therefore have a significant impact on TVB's said financial interest, and have infringed on its legitimate expectation.

38. There is also nothing in this contention.

39. As far as I can see, the said financial commitment and allegation of legitimate expectation add nothing further to TVB's earlier arguments. In substance, all TVB is saying under this contention is still that it should be entitled to a fair consultation, and because of the alleged interlocutory wrongs, no such fair consultation has been conducted by the Authority. As such, it has suffered prejudice. However, for the same reasons I have explained above, I do not accept that TVB has suffered any substantive adverse legal consequences or clear or irretrievable prejudice at this stage by reason of the alleged interlocutory wrongs.

40. In the premises, none of the matters advanced by Mr McCoy affect my views set out in paragraph 28 above.

41. I have therefore come to the clear view that the court should not entertain the intended judicial review before the CEIC has made the decision…[18]

COMMENTARY

1. Not every decision by a public authority is capable of giving rise to a remedy; if it were otherwise the authorities would be ensnared in multiple applications in the courts.[19] It may be that an intermediate decision is taken, or recommendations by an advisory body pending a final decision. It often happens that the effect of questionable decisions made at an

18 Unless otherwise indicated, footnote citations were omitted from this case extract.

19 *Financial Secretary v Wong* (2003) 6 HKCFAR 476 , at para 93 (Litton NPJ).

intermediate stage of a process are dissipated or overtaken by subsequent developments and turn out to have little or no impact by the time the final decision is reached.[20]

2. As the outcome in *Television Broadcasts Ltd v Communications Authority* demonstrates, the remedies of *certiorari* and prohibition can only generally be invoked where there has been a decisive exercise of discretion by an authority. By a 'decision' it is meant that the decision maker has performed a definite action, for example the issuance of a search warrant.[21] If not, the application will be rejected for want of jurisdiction (in cases where there will not be a decision)[22] or being premature (in cases where the decision has yet to be issued).[23] It is only in exceptional circumstances that a departure from this rule is justified and only where the intermediate decision has substantial legal consequences giving rise to 'irretrievable prejudice'. If *certiorari* or prohibition cannot be pursued for a lack of finality in the decision being challenged, an alternative course of action may be to apply for a declaration or injunction to obtain the same outcome (see below).[24]

(b) *Mandamus*

An order of *mandamus* is issued by the Court of First Instance to enforce the performance of a public duty.[25] It arose from a practice of restoring to office individuals who had been improperly removed.[26] It then became extensively used to compel the performance of public duties, as well as forcing an inferior tribunal to exercise their jurisdiction or discretion.[27] Unlike *certiorari*, which quashes a decision, or prohibition, which prevents a decision from being made, *mandamus* imposes a positive obligation on the subject of the order. It is therefore a far more intrusive exercise of the court's powers.[28]

20 *Ibid* at para 14 (Bokhary PJ).

21 See *RMBSA Corporate Services Ltd v Secretary For Justice* [2008] 5 HKLRD 351 (CA); *Philip K H Wong & Kennedy Y H Wong (A Firm Of Solicitors) v The Commissioner Of The Independent Commission Against Corruption* [2009] 5 HKC 335 (CA) (CFI); *Apple Daily Ltd v Commissioner of the Independent Commission against Corruption* [2000] 1 HKC 295.

22 *The Association of Expatriate Civil Servants of Hong Kong v The Secretary of Civil Service* [1998] 2 HKC 138 (CFI).

23 See *PCCW-HKT Telephone Ltd v The Telecommunications Authority* [2007] 2 HKC 302; *Shum Chiu v Secretary for Justice* [2007] HKCU 1608 (CFA).

24 High Court Ordinance (Cap 4) s 21K(2).

25 See *Ho Choi Wan v Hong Kong Housing Authority* [2005] HKCU 1635 (CFA).

26 Bagg's (1615) 11 Co. Rep. 93b. See *Spruce v University of Hong Kong* [1991] 2 HKLR 444 (CA) for the application of this principle to universities.

27 In Hong Kong, cases where *mandamus* was sought to compel an exercise of discretion include *R v Director of Immigration ex p Chan Heung Mui* [1993] HKPLR 533 (CA); *Commissioner of Inland Revenue v Board of Review (Inland Revenue Ordinance)* [2007] HKCU 997 (CA); *Secretary for Security v Sakthevel Prabakar* [2004] HKCU 638 (CFA).

28 See *P v The Commissioner of the Independent Commission Against Corruption* [2007] HKCFA 36 (CFA).

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However, *mandamus* cannot require the subject of the order to do more than what they are legally obliged to.[29] As a matter of practice, the courts will rarely make an order to compel a public authority to arrive at a particular decision. Instead, there can be orders that require the individual or corporate body to exercise the discretion (if there is a duty to do so) and to exercise the discretion in a bona fide manner or a manner grounded in legal principle.[30] This was the case in *Prem Singh v Director of Immigration*,[31] where the Court of Final Appeal made an order for *mandamus* against the Director of Immigration to reconsider an application for permanent resident status in light of matters raised in the judgment with respect to the legality of the decision.

In order for *mandamus* to be issued, the subject of the order must owe a public duty to the applicant, that is, the duty must be one of a public nature (see Chapter 3). As long as the duty concerned is a public one, then an order of *mandamus* may arise from statute, prerogative or common law.[32] The public duty must be owed either to the specific applicant or a specific class of individuals, of which the applicant is a member.[33] The question of to whom a duty is owed is one of construction. Generally, the applicant ought to be able to show that he is especially prejudiced by the failure to perform the duty or has a special interest in seeing that duty performed, one that is greater than that of the general public.[34]

Further, *mandamus* will only issue when the applicant has already demanded performance of the public duty. This is because the courts will not order a party to do something unless that party has been made aware of the duty and considered whether to perform it or not.[35] The 'demand' for performance is usually satisfied by a request made after the initial refusal to comply with the duty.[36]

29 *R v Caledonian Railway Co* (1850) 16 QB 19; *R v Tucker* (1824) 3 B & C 544, per Abbott CJ at 547.
30 See *R v Port of London Authority, ex parte Kynoch Ltd* [1919] 1 KB 176; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
31 [2003] HKCFA 33, (2003) 6 HKCFAR 26.
32 *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815. See also *Ex p Napier* (1852) 18 QB 692; *R v Secretary of State for War* [1891] 2 QB 326; and, *R v Criminal Injuries Compensation Board, ex parte Clowes* [1977] 3 All ER 854.
33 *R v Secretary of State for War* [1891] 2 QB 326.
34 *R v Whiteway, ex parte Stephenson* [1961] VR 168.
35 *R v Brecknock and Abergavenny Canal Co* (1835) 3 Ad & El 217.
36 See: *R v Brecknock and Abergavenny Canal Co* (1835) 3 Ad & El 217 and *Re Civil Service Association of Alberta and Alberta Human Rights Commission* (1976) 62 DLR (3d) 351.

3. Private Law Remedies

(a) Declaration

(i) Introduction

A declaration is a non-coercive remedy where the courts will provide a statement on the legal position between the parties. Unlike an order for *mandamus*, there is no liability on the public authority if they do not follow the legal position as stated by the court. In practice, of course, a decision maker is unlikely to adopt a course of action that they know to be unlawful.

As a remedy, declaratory relief does not possess the same formalities as the public law remedies of *certiorari*, prohibition and *mandamus*. Rather, it is precisely because of the limitations of the public law remedies that declaration is particularly valuable as an alternative or supplementary remedy. This is reflected in the High Court Ordinance, where the courts are able to grant declaratory relief where 'just and convenient to do so' having regard to all the circumstances and whether one of the public law remedies would suffice.[37]

Declaratory relief was not established as a remedy until the early twentieth century, in the seminal English decision, *Dyson v Attorney General*.[38] In this case the applicant was notified by the tax authorities that he was required to submit certain information to them, of which failure to do so would lead to the imposition of a penalty. The applicant argued that the information was not requisitioned under any statutory authority, and sought a declaration that he was not obliged to meet the request. The court did not require the applicant to wait until some cause of action was created by which he could defend himself. Whilst the sending of the notice did not threaten his interests, and would not until and unless he refused to provide the information, the court did not require him to wait for this threat to materialise. As Fletcher Moulton LJ said:[39]

> So far from thinking that this action is open to objection on that score, I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty.

37 High Court Ordinance (Cap 4), ss 21K(2)(a)–(c).
38 [1911] 1 KB 410.
39 [1912] 1 Ch At 168.

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conferring clause has been challenged as resulting in an illegal decision has been where the statutory provision is framed in subjective language, granting what appears to be unfettered or unlimited discretion to the decision maker to act as he thinks fit. The courts have had to consider whether the statutory provision, read alone, confers a full discretion on the decision-maker to decide as he wishes or whether the statutory discretion must be read, notwithstanding the subjective language in which it is drafted, within the meaning of the legislative framework as a whole.

Padfield v Minister for Agriculture, Fisheries and Food [1968] AC 997

The appellants were members of the south east regional committee of the Milk Marketing Board. Under s 19(3)(b) of the Agricultural Marketing Act 1958, they complained to the minister about the Board's pricing structure: that it did not take into account regional differences in cost of production. The appellants asked for their complaint to be transferred, as allowed under the Act, to a committee of investigation. Previous similar requests had been unsuccessful. The minister refused to refer the matter to the committee stating in letters dated 1 May 1964, and 23 March 1965, that he had fulfilled his duty to consider the suitability of the complaint for investigation and that he did not think it suitable. The minister was also of the opinion that the statute gave him unfettered discretion.

Lord Upjohn:

> In 1931 Parliament, in order to produce better conditions within the agricultural industry and more efficient and economical methods of production and distribution, enacted the Agricultural Marketing Act 1931 which provided for schemes to be prepared for the control of various sections of the industry. In 1933 pursuant to the provisions of the Act the Milk Marketing Scheme 1933 for England and Wales was prepared and approved by Parliament and is, subject to many subsequent amendments, still in force; I shall refer to it as 'the scheme' … the Act now controlling these schemes is the Agricultural Marketing Act 1958, an Act consolidating the Act of 1931 and later amending Acts. For all relevant purposes schemes have statutory force.
>
> … the scheme empowered the board … to resolve that registered producers should sell only to the board and then only at the price and on the terms prescribed by the board. No one doubts that these provisions were greatly to the advantage of the industry as a whole but a scheme which put the milk industry into such a straight jacket may produce anomalies and individual discontent. In my opinion it was with this (*inter alia*) in view and in the realization that such matters should receive review at ministerial level that Parliament enacted the provision now to be found in s 19 of the Act of 1958. That section provided that the minister should appoint two committees, a consumers' committee and a committee of investigation … The committee of investigation is by s 19(3)(b):
>
> … charged with the duty, if the minister in any case so directs, of considering, and reporting to the minister on … any complaint made to the minister as to the operation of any scheme which … could not be considered by a consumers' committee …

> Section 19(3) as a matter of language confers a discretion on the minister whether any complaint made to him should be referred to the committee of investigation, the relevant words being 'if the minister in any case so directs' plainly words of discretion and not of duty. … So it is clear that the Minister has a discretion and the real question for this House to consider is how far that discretion is subject to judicial control.
>
> … The minister in exercising his powers and duties conferred on him by statute can only be controlled by a prerogative order which will only issue if he acts unlawfully. Unlawful behaviour by the minister may be stated with sufficient accuracy for the purposes of the present appeal (and here I adopt the classification of Lord Parker CJ in the divisional court): (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration. There is ample authority for these propositions which were not challenged in argument. In practice they merge into one another and ultimately it becomes a question whether for one reason or another the minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings which I have mentioned.
>
> In the circumstances of this case which I have sufficiently detailed for this purpose it seems to me quite clear that prima facie there seems a case for investigation by the committee of investigation … So I must examine the reasons given by the minister, including any policy on which they may be based, to see whether he has acted unlawfully and thereby overstepped the true limits of his discretion, or as it has been frequently said in the prerogative writ cases, exceeded his jurisdiction. Unless he has done so the court has no jurisdiction to interfere. It is not a court of appeal and has no jurisdiction to correct the decision of the minister acting lawfully within his discretion, however much the court may disagree with its exercise.
>
> …The first letter, that of 23 March 1965, in which the minister gave his reasons was, so far as relevant, in these terms:
>
> > The minister's main duty in considering this complaint has been to decide its suitability for investigation by means of a particular procedure. He has come to the conclusion that it would not be suitable. The complaint is of course one that raises wide issues going beyond the immediate concern of your clients, which is presumably the prices they themselves receive. It would also affect the interests of other regions and involve the regional price structure as a whole.
>
> In any event the minister considers that the issue is of a kind which properly falls to be resolved through the arrangements available to producers and the board within the framework of the scheme itself. Accordingly he has instructed me to inform you that he is unable to accede to your clients' request that his complaint be referred to the committee of investigation under s 19 of the Act.
>
> This letter seems to me to show an entirely wrong approach to the complaint. The minister's main duty is not to consider its suitability for investigation; he is putting the cart before the horse. He might reach that conclusion after weighing all the facts, but not until he has done so …

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His next statement - that it raises wide issues etc - shows a complete misapprehension of his duties, for it indicates quite clearly that he has completely misunderstood the scope and object of s 19 … It was just because it was realized that the board structure might produce within its framework matters for complaint by those vitally affected that the machinery of s 19 was set up. This letter shows that the minister was entirely misdirecting himself in law based on a misunderstanding of the basic reasons for the conferment on him of the powers of s 19. I turn to his second letter, that of 3 May 1965, which so far as relevant was in these terms:

> You will appreciate that under the Agricultural Marketing Act, 1958 the Minister has unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation. In reaching his decision he has had in mind the normal democratic machinery of the milk marketing scheme, in which all registered producers participate and which governs the operations of the board.

This introduces the idea, much pressed on your Lordships in argument, that he had an 'unfettered' discretion in this matter; this, it was argued, means that provided the minister considered the complaint bona fide that was an end to the matter. Here let it be said at once, he and his advisers have obviously given a bona fide and painstaking consideration to the complaints addressed to him; the question is whether the consideration given was sufficient in law.

My Lords, I believe that the introduction of the adjective 'unfettered' and its reliance thereon as an answer to the appellants' claim is one of the fundamental matters confounding the minister's attitude, bona fide though it be. First, the adjective nowhere appears in s 19, it is an unauthorized gloss by the minister. Secondly, even if the section did contain that adjective, I doubt if it would make any difference in law to his powers, save to emphasize what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully, and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion on the minister rather than by the use of adjectives.

… The matter, however, does not end there for in his affidavit the minister referred, as I have already mentioned, to Mr Kirk's letter of 1 May 1964, without disapproval. That letter contained this paragraph:

> 3. In considering how to exercise his discretion, the minister would, amongst other things, address his mind to the possibility that if a complaint were so referred and the committee were to uphold it, he in turn would be expected to make a statutory order to give effect to the committee's recommendations. It is this consideration, rather than the formal eligibility of the complaint as a subject for investigation, that the minister would have in mind in determining whether your particular complaint is a suitable one for reference to the committee. We were unable to hold out any prospect that the minister would be prepared to regard it as suitable.

This fear of parliamentary trouble (for in my opinion this must be the scarcely veiled meaning of this letter) if an inquiry were ordered and its possible results is alone sufficient to vitiate the minister's decision which, as

I have stated earlier, can never validly turn on purely political considerations; he must be prepared to face the music in Parliament if statute has cast on him an obligation in the proper exercise of a discretion conferred on him to order a reference to the committee of investigation.

Chan Noi Heung & Others v Chief Executive in Council

[2007] HKEC 885

Hartmann J:

Introduction

1. All societies that consider themselves to be built on principles of social justice – and Hong Kong stands among them – recognise that every worker, no matter how humble his labour, is entitled to a liveable wage. The International Covenant on Economic, Social and Cultural Rights, to which Hong Kong adheres, recognises the right of everyone to 'just and favourable' conditions of work including a fair wage. The difficulty, of course, is how best to ensure, by the execution of socio-economic policies, that everyone does receive a fair wage.

2. This application for judicial review looks to whether the Chief Executive, sitting in Council, is obliged by law, in particular by the dictates of the Trade Boards Ordinance, Cap 63, to adopt one socio-economic policy in preference to another.

5. Over the past few years there has been an on-going debate in the Legislative Council as to whether the Government should introduce a regime of fixed minimum wages to protect workers in the most lowly paid occupations, particularly those employed as cleaners and security guards. Those pressing the Government to introduce such a regime have done so, not only on the basis that it is the correct policy, but also on the basis, as I have just said, that the necessary legislation is already in existence to enable the policy to be put into effect.

6. The legislation in question is the statute to which I have referred, the Trade Boards Ordinance. It provides that the Chief Executive in Council may, at any time he thinks fit, fix minimum wages for any occupation if he is satisfied that the wages being paid to workers in that occupation are unreasonably low: see s 2(1). The legislation also provides for the establishment of Trade Boards which the Chief Executive may authorize to advise him in connection with the fixing of any minimum wage : see s 2(2).

9. It is, as I understand it, the Government's present position that a pragmatic approach, one of encouragement and voluntary participation, will achieve more positive results than the introduction of statutory minimum wages. In October 2006, in respect of the cleaning and security guard sectors, Government introduced an initiative called the Wage Protection Movement. In a policy address given in that month the Chief Executive said:

> "We will actively encourage corporations and contractors to join this Movement to ensure that employees in these two sectors will receive wages not lower than the average market rates of the relevant

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limits of his statutory powers. To do otherwise is to render his decision illegal.

McCarthy & Stone (Developments) Ltd v Richmond Upon Thames London Borough Council

[1991] 4 All ER 897

Prior to receiving a formal application for planning permission from property developers, the council had adopted a policy of charging a fee for pre-application consultations between the council and the developer. The plaintiffs questioned the legality of that fee and sought a judicial review of the council's decision to continue to charge the fee. At first hearing, the court found that the council had power to charge a fee in respect of pre-application consultations by virtue of s 111 of the Local Government Act 1972, which conferred on local authorities 'power to do any thing ... which is calculated to facilitate, or is conductive or incidental to, the discharge of any of their functions'. The case was appealed all the way to the House of Lords.

Lord Lowry:[17]

My Lords, I have said that the power to charge a fee for the relevant service must, if it exists, be found in s 111(1) either expressly or by necessary implication. This provision, as both sides agree, gives statutory recognition to the common law rule governing the activities of local authorities and other statutory corporations, as recognized in such well-known authorities on the doctrine of *ultra vires* as *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653, *Attorney-General v Great Eastern Rly Co* (1880) 5 App Cas 473 and *Attorney-General v Fulham Corp* [1912] 1 Ch 440. A local authority could at common law do anything which was reasonably incidental to its functions and the council here relies on the proposition that to impose a charge for pre-application advice is reasonably incidental, not merely to the giving of that advice, but also to the council's function of considering and determining applications for planning permission.

The definition of 'function' is important and I would therefore refer at this point to the recent case of *Hazell v Hammersmith and Fulham London BC* [1990] 3 All ER 33, [1990] 2 QB 697, DC and CA; [1991] 1 All ER 545, [1991] 2 WLR 372, HL, where certain local authorities had engaged in speculative financial transactions and their power to do so was in question. In the Divisional Court Woolf LJ reviewed s 111(1) and continued ([1990] 3 All ER 33 at 49–50, [1990] 2 QB 697 at 722–723):

> This subsection puts in a statutory form the long-established principle that local authorities have implied power to do anything which is ancillary to the discharge of any of their functions. The fact that s 111(1) is expressly made subject to 'the provisions of this Act' makes it clear that it is important to construe s 111(1) in its context. The references to expenditure, borrowing or lending etc within the brackets in the subsection do not themselves confer any power to expend, borrow or lend money etc, but only make it clear that the fact that those activities are involved does not prevent the activities being within the power of the authority which are authorized by this subsection. The critical part of the subsection is the words 'calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions'. Before the subsection can authorize an activity which is not otherwise authorized there must be some other underlying function which is authorized, to the discharge of which the activity will facilitate or be conducive or incidental. What is a 'function' for the purposes of the subsection is not expressly defined but in our view there can be little doubt that in this context 'function' refers to the multiplicity of specific statutory activities the council is expressly or impliedly under a duty to perform or has power to perform under the other provisions of the 1972 Act or other relevant legislation. The subsection does not of itself, independently of any other provision, authorize the performance of any activity. It only confers, as the sidenote to the section indicates, a subsidiary power. A subsidiary power which authorizes an activity where some other statutory provision has vested a specific function or functions in the council and the performance of the activity will assist in some way in the discharge of that function or those functions.

... In the same vein Lord Blackburn said (at p 481): '... those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited.' Section 111 embodies these principles. I agree with the Court of Appeal that in s 111 the word 'functions' embraces all the duties and powers of a local authority: the sum total of the activities Parliament has entrusted to it (see [1990] 3 All ER 33 at 83, [1990] 2 QB 679 at 785). Those activities are its functions.

... It is, accordingly, clear that the consideration and determining of planning applications is a function of the council, but the giving of pre-application advice, although it facilitates, and is conducive and incidental to, the function of determining planning applications, it not itself a function of the council.

Thus, it is one thing to say that the giving of pre-application planning advice facilitates or is conducive or incidental to the council's planning functions but it is quite another thing to say that for the council to charge for that advice also facilitates or is conducive or incidental to those functions.

17 At p 901.

Re Sea Dragon Billiard and Snooker Association

[1991] HKCU 406

The plaintiffs were the owners of a billiard hall and had sought a licence to function as a billiard establishment hall. As part of the licensing process the Director of Fire Service was asked to assess the property in terms of fire safety. He reported that the commercial enterprise of the billiard hall was located in an industrial building and as such the location of the billiards hall in an industrial building represented a fire hazard to customers who would not be sufficiently aware of the risks of entering an industrial building. The Director issued a fire hazard abatement notice (FHAN) which, in effect, would require the business to relocate. On the basis of the fire safety assessment, the licence was not granted. The owner sought a judicial review of the decision to issue the FHAN.

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granting the power to borrow money for such an action to be a legal exercise of power on the part of the authority and that the authority had acted in excess of their power.[20]

Although the courts have been willing to infer the existence of ancillary powers to be exercised by the decision-maker where such exercise would be incidental to the objectives of the main power, the courts have been unwilling to do so where there is no evidence of any statutory intention to that effect. In *Wong Kam Kuen v The Commissioner for Television and Entertainment Licensing & Anor*,[21] the issue of ancillary powers arose in relation to the licensing of amusement games centres. The Commissioner had attempted to regulate the types of games available in the centres to patrons younger than 16 years old. The court found that the power to grant a licence did not include the power to censor which games should be available. The existence of a full regulatory framework in relation to censorship of obscene articles, including video games, meant that any regulation for censorship should proceed through this statutory framework rather than by implication of an extension to the licensing power of the commissioner. Thus, the commissioner had the power to license but not the power to censor. Any attempt to introduce censorship provisions into the grant of a licence would be in excess of his power and therefore illegal.

3. *Excess and unduly harsh outcomes*

Where a decision maker exercises a power for a proper purpose, he may be acting in excess of that power if the outcome is one which achieves a result which is more harsh than would have been anticipated when the power was conferred on him. In the *Sea Dragon* case,[22] the director had the power to issue a Fire Hazard Abatement Notice (FHAN). However, the only way in which the company could comply with the abatement notice was to relocate the business out of its current location. Here, the power was to require the abatement of a hazard. However, it was not envisaged that the discontinuation of the business itself would be the only way in which to abate the fire hazard. Thus the court found that the Director had the power to issue the FHAN within the context of the power-conferring statute only and that meant the FHAN had to apply to a hazard which was 'capable of abatement' without resulting in the cessation of business. This draconian result would extend the power of the director beyond that intended. Similarly, in *Congreve v Home Office*,[23] the Home Secretary had the power to require the purchase of a television licence by all people who wished to watch television in their homes and to set the price for that licence, including raising the price at certain intervals. However, when the Home Secretary raised the cost of the licence and the plaintiff purchased his early to avoid the date on which the increased fee would come into being, the Home Secretary attempted to require the plaintiff to pay the difference between the old price and the new increased price. The court found that the Home Secretary had acted in excess of his powers as he had the powers to regulate the licensing system but this power

20 *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 HL. See also *Credit Suisse v Waltham Forest London Borough Council* [1997] QB 362 CA.
21 [2003] 2 HKLRD 596.
22 *Re Sea Dragon Billiard and Snooker Association* [1991] HKCU 406.
23 [1976] QB 629.

did not extend to saying when the licence had to be purchased, only that one was required to have a valid, unexpired licence.

Illegality due to acting in excess of one's powers requires the court to consider not the purpose for which the powers are being exercised but the extent of the power to be exercised. The question of extent will include a consideration of subsidiary powers incidental to the main power held by the decision maker but will not include an interpretation of his powers to include powers granted under separate statutory regimes. Equally, a power will not be considered to extend to include the exercise of power to achieve an outcome which is much harsher than would be envisaged as a result of the exercise of that power.

4. Improper Purpose

Where a statute confers a power on a decision maker, the decision maker must use that power for a purpose intended by the power-conferring statute. If he exercises the power to achieve a different purpose, the courts may find that the decision made in the exercise of his power illegal. However, difficulties may arise in identifying the purpose for which the power was granted or where there is more than one purpose being fulfilled.

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Wheeler v Leicester City Council
[1985] AC 1054

Leicester City Council had adopted a policy of discouraging any sporting links with South Africa due to that country's practice of apartheid. The council had allowed a rugby club to use its sports facilities over a number of years but when three members of the club were selected to go on a rugby tour of South Africa, the council put a number of questions to the club that were dependent upon the answer to which was the continued use by the club of the council's sporting facilities. The questions were whether: (a) it supported the government opposition to the tour, (b) it agreed that the tour was an insult to a large proportion of the local population, (c) it would condemn the tour and press for its cancellation, and (d) it would press the players not to participate in the tour. The club responded saying it was a matter of individual choice for players as to whether they went on the tour but the club had asked them to consider seriously the views of antiapartheid groups before deciding to go on the tour. The three club members did participate in the rugby tour to South Africa. Subsequently the council resolved to ban the club from its sports facilities for 12 months. Members of the club sought a judicial review of that resolution.

Lord Templeman:[24]

> My Lords, in my opinion the Leicester City Council were not entitled to withdraw from the Leicester Football Club the facilities for training and playing enjoyed by the club for many years on the council's recreation ground for one simple and good reason. The club could not be punished because the club had done nothing wrong.
>
> The 1984 Rugby Tour of South Africa was organized by the Rugby Football Union which invited individuals, including three members of the club to join

24 At p 1079.

In practice, this means that the policy must be one which reflects the empowering legislation, promotes the proper purposes of that legislation and is not directed to take into account irrelevant considerations or fails to take into account relevant considerations. In *FB*,[84] the court was critical of the policies to refuse legal advice and representation adopted by the Director of Immigration not just because they had been applied as blanket policies, admitting of no exceptions to a large category of applicants, but also because it contravened the high standards of fairness required in such cases and the policies themselves were therefore unlawful.[85]

5. *Policy as a binding undertaking*

Thus, it is clear that although a decision-maker may adopt a policy, he must keep an open mind with regard to hearing exceptional cases. Further, where a decision-maker has adopted a policy and informed affected parties of the content of that policy, those relevant parties must also be given a chance to make representations to the decision-maker before any changes to the policy are implemented against them. In the former instance, applicants will usually be seeking to avoid the adopted policy being applied to them; in the latter instance, the applicants will usually be seeking to continue to be treated according to the adopted policy. In either event, the decision-maker will be expected to give the applicants the opportunity to make representations to him. For example, in *Attorney-General of Hong Kong v Ng Yuen Shiu*,[86] the Hong Kong government had announced, in pursuance of a change to immigration policy, that all illegal immigrants would be given a hearing and each case would be decided on its merits, before a decision was made whether to issue a deportation order. The respondent was not given a hearing before the deportation order was issued. The court found that the government was bound by the undertaking given in its policy statement as to the procedure that it would follow in dealing with illegal immigrants so long as this did not contradict its statutory duties. The court took this view because the dissemination of such a policy decision would create a legitimate expectation on the part of affected parties.[87]

6. *Overlap with purpose and relevance*

The principle that the decision-maker should not fetter his discretion presents some overlap with the concepts of relevancy and proper purpose. Undue adherence to a policy may prevent the decision-maker from taking full consideration of all relevant considerations. It may also detract from the proper purpose of the power-conferring legislation.

7. Wrongful Delegation

Where the decision-making power has been conferred upon a specific person,

84 [2009] I HKC 133.
85 [2009] I HKC 133, at para 230.
86 [1983] 2 All ER 346.
87 For a further discussion of the creation of legitimate expectations, see Chapter 10.

any decision will be illegal if it is instead made by another to whom that power has been delegated without lawful authorisation.

Carltona Ltd v Commissioners of Works
[1943] 2 All ER 560

The plaintiffs were the owners of a factory making food products. During war time, they received an order requisitioning the factory. The plaintiffs contended, amongst other things, that the authority to whom the power to make the order had been granted by statute, the Commissioner for Works, had not given their mind to making the order. Instead, the order had been issued by an assistant secretary.

Lord Greene MR:[88]

> In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done, under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.

Michael Rowse v Secretary for the Civil Service & Ors
[2008] HKCU 1037

The plaintiff was a senior civil servant who had been responsible for the sponsorship of a national festival of music for Hong Kong, the festival itself being staged by the American Chamber of Commerce. Subsequent to the festival taking place, the plaintiff was charged with misconduct in discharging his duties. Disciplinary proceedings were commenced and it was found that the charges against the plaintiff were, in one instance, substantiated and in regard to the four other charges, partially substantiated. A penalty in the form of a severe fine was imposed. The plaintiff sought to appeal to the Chief Executive. He was told that the Chief Executive had delegated his power to hear an appeal to the Chief Secretary and the Chief Secretary had rejected the plaintiff's representations. The plaintiff then sought judicial review of the decisions taken against him during the disciplinary process and subsequently.

88 At p 563.

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Hartmann J:

Looking to the appeal process: Whether the Chief Executive acted *ultra vires* in delegating his powers under s 20 of the Administration Order

[211] In response, in a letter dated 1 February 2007, the applicant's solicitors made the following enquiries:

> It is stated in your letter that the Chief Executive delegated to you the authority to 'determine' our client's representations on his behalf. It would be helpful if you could explain the basis on which such authority was purportedly delegated, and the process by which you came to your determination …

[212] By letter dated 14 February 2007 the applicant's solicitors were informed that

> It is an established arrangement for the Chief Executive to delegate some of his functions to senior officials as he sees fit. Delegation under s 20 of the Public Service (Administration) Order is not precluded by the Order itself or by any legal rule or principle. Delegation under s 20 is in line with the pre1997 practice under the Colonial Regulations upon which the Order was based to ensure continuity. Delegation is also compatible with 'public expediency and justice' to individual public officers as referred to in s 20.

[213] It is the applicant's case that, whatever the 'established arrangement' may be, the Chief Executive had no power to delegate his responsibilities under s 20 of the Administration Order to another public officer. Accordingly, the Chief Executive acted *ultra vires* in making the delegation and any decision made pursuant to that purported delegation by the Chief Secretary was itself of no force or effect.

[214] On behalf of the applicant, Mr Gordon emphasized that the Administration Order itself contains a comprehensive regime in respect of delegation, one that is clear and certain in its terms. In this regard, s 19 provides:

> (1) Subject to sub-s (2), the Chief Executive may delegate to any public servant or any other public officer any powers or duties conferred or imposed on him by ss 3 and 9 to 18.
>
> (2) The Chief Executive shall not delegate the power to make regulations under s 21(2).

[215] Mr Gordon submitted that, under s 19(1), it is plainly provided that the

> Chief Executive's powers of delegation extend only to his functions under s 3 of the Administration Order and those contained in s 9 through until s 18 (inclusive). The applicant's appeal, however, was – on the advice of government itself – made pursuant to s 20 which is not included in s 19 as a section being subject to delegation …

[217] Section 20(2), said Mr Gordon, specifically relates to disciplinary matters and enables the Chief Executive, if he thinks fit, to appoint a review board to advise him. The Chief Executive may not, therefore, have the power to delegate his determination of appeals but he does have the power to seek formal advice from a body of persons - a review board - as to matters pertaining to any appeal …

[219] On behalf of the respondents, Mr Fok emphasized that the Administration Order had been intended to replicate in so far as possible the old colonial regulations so as to maintain the same system for the discipline of civil servants pursuant to the requirements of Art 103 of the Basic Law. He pointed to the fact that delegation had taken place under the old regime.

[220] Mr Fok also pointed to the fact that there is no express prohibition contained in the Administration Order against the delegation of the Chief Executive's powers and functions under s 20. In the absence of that express prohibition, it was his submission, as I understood it, that the power to delegate must be implied…

[225] Section 19(1) provides that the Chief Executive's power to delegate is limited to certain specifically identified sections. If the Chief Executive's powers and functions under s 20 were always 'understood' to be subject to delegation, why was s 20 not included as a relevant section in s 19(1)? On any ordinary reading, its omission, it seems to me, must have been intended …

[227] I regret that I do not read that second sentence in s 20(1) as implying any sort of power to delegate. To me the meaning is clear. It does no more than enable the Chief Executive, in his consideration of any representation, to balance justice to the individual civil servant with what is fit and appropriate in the public interest. In short the provision does not more than offer guidance as to how the Chief Executive may exercise his administrative discretion.

[228] That being said, there are of course practical reasons for transfer of responsibility, especially by way of delegation, in Government. If it was otherwise it would be difficult for government to function. But in looking to whether, as Mr Fok argued, the realities dictate that there must be an implied power to delegate the powers and functions of the Chief Executive under s 20, a number of factors need to be taken into account.

[229] First, what is sought to be delegated is not an ancillary or peripheral power, one that is incidental. What is sought to be delegated is the power to determine appeals by civil servants. Second, the power relates to matters of discipline which can carry consequences of real seriousness. It is a power therefore of importance …

[231] In all the circumstances, I am unable to find any convincing grounds for concluding that, despite the apparent contrary intention appearing in the Administration Order, the Order is to be read as giving an implied power to the Chief Executive to delegate his powers and functions under s 20.

[232] That being so, I must conclude that the Chief Executive acted outside of the powers given to him in the Administration Order when he purported to delegate the determination of the applicant's s 20 appeal. The delegation being invalid, so too was the Chief Secretary's

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