

立法會

Legislative Council

LC Paper No. LS137/01-02

Paper for the Subcommittee on matters relating to the implementation of railway development projects

Legal Adviser's comments on the Administration's paper considered at the meeting on 22 July 2002

Purpose of paper

At the meeting of the Subcommittee on matters relating to the implementation of railway development projects on 22 July 2002, the Administration provided a paper on the legal basis for providing funding support for the Mass Transit Railway Penny's Bay Rail Link Project (LC Paper No. CB(1)2322/01-02(01)). This paper sets out Legal Adviser's comments on the Administration's paper.

Whether the power to waive claims under section 38(1)(a) of the Public Finance Ordinance covers claims to dividends yet to be declared

2. The Administration seeks to argue that the concept of "claim" is a broad one and quotes as an example a definition of "claim" adopted in a Canadian case decided by the Court of Appeal in Ontario to support its conclusion that "there is no doubt that the word "claims" in section 38(1)(a) of the Public Finance Ordinance (Cap. 2) (PFO) covers the right of the Financial Secretary Incorporated (FSI) to dividends as shareholder of the Corporation (MTRCL)". Legal Service Division has offered its views on the proper interpretation of "claims" in its paper issued to Members for the meeting on 16 July 2002¹. Since the issue here necessarily involves a degree of

¹ Please see paragraph 12 of LC Paper No. LS133/01-02: "In any case, there is doubt as to whether the "waiver" is within the contemplation of section 38 of PFO at all in the light of section 58 of MTRO. It would appear that if it is intended that the Government should have the power to waive the dividends and as a result the dividends need not go into the general revenue, this should have been expressly provided in MTRO. The lack of an express empowering provision in MTRO would suggest that the dividends declared by MTRCL should be paid into the general revenue following the general requirement provided by section 3 of PFO.

subjectivity in the analysis, it would be difficult for Legal Adviser to advise categorically that the interpretation put by the Administration on the word "claim"² would not be able to withstand challenge in law.

3. It appears from paragraph 8 of the Annex to the Administration's paper that those advising the Administration saw the legal difficulty in arguing for an expanded scope of "claim" to include "contingent claim"³. The approach which appears to have been adopted now is to take the line that the power to waive the right of FSI to dividends as shareholder of MTRCL will be exercised by the Financial Secretary (FS) when dividends are being declared by MTRCL. According to the Administration's paper, FS will, by an agreement with MTRCL, bind himself contractually to exercise his power under section 38(1)(a) of PFO "from time to time as and when dividends are declared by the Corporation". As regards the legality of such an agreement, it is stated that "[t]here is nothing to prevent the FS from indicating, in any agreement to be reached with the Corporation, that he will exercise such power at the relevant time, provided such agreement is in no way inconsistent with his duties and functions as the FS and such exercise of the power is in the public interest".

4. In view of the approach referred to in paragraph 3 above, it may be necessary to consider whether the Government's entering into such an agreement with MTRCL would amount to fettering of FS's discretion in the context of exercising his power under section 38(1)(a) of PFO and render his exercise of power not valid for that reason. This question may be considered from the perspectives of the agreement to be entered into and the Government's policy of providing funding support to MTRCL. General principles relevant to the issue of adopting a policy which would affect the exercise of discretion by a public body are explained in LC Paper No. LS126/01-02⁴. As for entering into contract by a public authority, the general principle is that a public authority may not by contract fetter itself so as to disable

² According to the *New Shorter Oxford English Dictionary*, "claim" means a demand for something as due; a statement of one's right to something; a demand for payment in accordance with law, an insurance policy, etc.; a right to make a demand on a person etc. In *Haydon v Lo & Lo (a firm)*, [1997] 1 HKC 124, the Privy Council, in construing the word "claim" in an insurance policy, held that the primary meaning of the word "claim" is such as to attach it to the object that is claimed and a claim is not the same thing as the cause of action by which a claim may be supported.

³ In the Administration's letter dated 15 July 2002 (CB(1)2297/01-02(02)), it was stated that "Section 38(1)(a) of the PFO provides for the Financial Secretary to exercise his discretion to waive any claim by or on behalf of the Government and we consider that it covers any contingent claims in respect of dividends payable by MTRCL".

⁴ For ease of reference, herewith is a summary of the general principles referred to in LC Paper No. LS126/01-02: In law, a public body endowed with a statutory discretion may legitimately adopt general rules or principles of policy to guide itself as to the manner of exercising its own discretion in individual cases, provided that certain criteria are satisfied. The courts will look at whether such rules or principles are legally relevant to the exercise of the powers of the public body, consistent with the purpose of the enabling legislation and not arbitrary, capricious or unjust and will decide the issue based on the facts of individual cases.

itself from exercising its discretion as required by law. Its paramount duty is to preserve its own freedom to decide in every case as the public interest requires at the time. But at the same time its powers may include the making of binding contracts. The important question is whether there is incompatibility between the purposes of the statutory powers and the purposes for which the contract is made⁵. Legal Adviser has not been able to find any judicial authority based upon which he could confidently advise that the agreement to be entered into between the Government and MTRCL would necessarily have the effect of rendering an exercise of power by FS under section 38(1)(a) invalid. At the last meeting of the Subcommittee, Acting Law Officer (Civil Law) referred to the House of Lords decision in *Birkdale District Electric Supply Company v Corporation of Southport* [1926] AC 355 as an authority for the principle that an authority vested with statutory powers and duties may enter into an agreement, a commercial agreement in particular, restricting its future exercise of its discretion provided that there is no incompatibility with its statutory powers or duties. Application of that principle turns on the facts of each case and the situation the Subcommittee is interested in is complicated by the fact that the agreement in question is to be entered into between MTRCL and the Government.

Issues relating to Financial Secretary Incorporated's role and function under the Mass Transit Railway Ordinance

5. Paragraphs 9 to 13 of the Annex to the Administration's paper seek to deal with the effect of section 58(1) of the Mass Transit Railway Ordinance (Cap. 556) (MTRO) on section 38(1)(a) of PFO in order to address some of the doubts expressed in the Legal Service Division's paper⁶.

6. It is common ground that FSI is a corporation sole with a separate legal identity from FS. They have their respective functions and powers. According to the case of *Financial Secretary Incorporated v Chan Po Kee* [1988] HKSC 59, it was made clear that FSI was used for administrative convenience and should be regarded as acting as the Crown⁷. In Legal Adviser's view, "Crown" may be adapted as "the Government" for present purposes.

⁵Wade & Forsyth, *Administrative Law*, Seventh Edition, pages 366-367

⁶ LC Paper No. LS133/01-02.

⁷ The Court of Appeal has decided in the case of *Financial Secretary Incorporated v Chan Po Kee* [1988] HKSC 59 that the legal status of Colonial Treasurer Incorporated which is the predecessor of FSI was and always had been "an emanation of the Crown" and despite the reference to the Colonial Treasurer Incorporated in legislation, the Colonial Treasurer Incorporated was used for administrative convenience and he was and at all material times had been acting as the Crown.

7. The doubts raised by the Legal Service Division were based on its analysis that a court might be prepared to find that the expression "held by the Financial Secretary Incorporated in trust on behalf of the Government" in section 42 of MTRO reflects the legislature's intention to impose a governmental obligation on FSI. And, although section 58(1) of MTRO only refers to "monies received", FSI may have an obligation to receive any dividends declared by MTRCL. It was also suggested that from the lack of detailed discussion of how dividends declared would be handled under section 58 of MTRO when the Mass Transit Railway Bill was being scrutinized by Members, it was an indication that the intention was for all dividends declared by MTRCL to be paid into and form part of general revenue and that it was not contemplated that section 38(1)(a) of PFO would be applicable.

8. It should be clear from the Legal Service Division's analysis that sections 42 and 58 of MTRO and the general provisions in PFO are related to the public policy relating to the control and management of the public finances of Hong Kong, albeit in different contexts. It is arguable that the courts would take that into account if it was thought reasonable in the overall context of control and management of public finances of Hong Kong to restrict the scope of application of section 38(1)(a) of PFO. However, a literal interpretation of section 58(1) of MTRO does give the meaning that FSI is only used as a statutory conduit for dividends declared to become part of the general revenue when they have become monies received.

Conclusion

9. Legal Adviser expressed the view at the last meeting that the Administration's approach in interpreting section 38(1)(a) of PFO was an example of "pushing the envelope", i.e. stretching statutory interpretation to its very limits. He also suggested that it might be opportune to consider whether the legislative framework provided by PFO⁸ for the control and management of public finances of Hong Kong meets current needs of Hong Kong. Having considered the Administration's views very carefully, Legal Adviser believes that there are no firm

⁸ The Public Finance Ordinance (Cap.2) was enacted in 1983. According to the Financial Secretary's second reading speech, the Public Finance Bill 1982 was "to provide a statutory framework for the control and management of the public finances of Hong Kong. Its provisions are consistent with the provisions of the Letters Patent and the Royal Instructions. ... The Bill, Sir, will facilitate the delegation of financial authorities by simplifying the chain and method of delegation. There is an undoubted need to extend the limits of delegation in view of the increasing complexity and pace of Government business."

legal grounds for him to advise categorically that the conclusions reached by the Administration would not be able to stand up to challenge in law. However, whether the proposed exercise of power by the FS under section 38(1)(a) of PFO to waive the share dividends to be declared by MTRCL is appropriate would be a matter for the Administration to justify to the satisfaction of Members.

10. Some Members had queried whether Legislative Council could apply for a judicial declaration on the legality of the proposed arrangements in providing funding support to MTRCL for the Mass Transit Railway Penny's Bay Rail Link Project. The legal issues involved for determining whether Legislative Council has the capacity to make an application in court are very complex and there is no binding judicial authority which is directly on point. Arguments on both sides are finely balanced. The argument against Legislative Council having that capacity would be based on more orthodox legal analysis. On the other hand, the argument on the other side would depend on whether the court would be prepared to adopt a more liberal approach in interpreting the Basic Law or to find an exception in the general law on legal capacity to sue.

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