HCAL 174/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW
LIST NO. 174 OF 2002

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IN THE MATTER of an Application for Judicial Review by Madam Ho Choi Wan

AND

IN THE MATTER of Section 16 (1A), Housing Ordinance, Cap. 283

BETWEEN

HO CHOI WAN — Applicant

AND

HONG KONG HOUSING AUTHORITY — Respondent

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HCAL 198/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW
LIST NO. 198 of 2002

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IN THE MATTER of an Application for Judicial Review by Madam Lam Kin Sum

AND

IN THE MATTER of Section 16 (1A), Housing Ordinance, Cap. 283

BETWEEN

LAM KIN SUM Applicant

AND

HONG KONG HOUSING AUTHORITY Respondent

Coram: Hon Chung J in Court

Dates of Hearing: 12 and 13 May 2003

Date of Handing Down Judgment: 11 July 2003

J U D G M E N T

Introduction

1. This Judgment is concerned with two applications for judicial review (collectively "*the applications*" and individually "*HCAL 174*" and "*HCAL 198*" respectively). Leave to apply for judicial review was given, in the case of HCAL 174, on 25 October 2002 and, in the case of HCAL 198, on 6 December 2002. Parts of the relief sought in the applications are different. Subject to that, it is accepted by all concerned the grounds on which the applications are based, and hence the issues between the parties, are in essence the same. The applications have therefore been ordered to be heard together.

Background Facts

2. Before dealing with the issues in the applications, a few facts need to be mentioned to help understand how those issues come about. These facts are about (a) public housing in Hong Kong generally, namely, the size of Hong Kong's population residing in public housing, the amendment of the Housing Ordinance (Cap. 283) in June 1997 and the manner in which rents have been adjusted in relation to public housing units in Hong Kong; and (b) the relevant personal particulars of the applicants.

3. Unless otherwise specified, all references to public housing and public housing units are intended to refer only to residential public housing and residential public housing units.

(1) Public Housing in Hong Kong

4. Hong Kong is a relatively small place for the size of its population. About slightly over 1,000 square kilometers of land has to accommodate about 7 million people. Because of the pressure put on land by its population, Hong Kong's land prices have for the most part of its past been relatively high. The costs of finding a home have consequently posed a problem for many, especially the less privileged sector of its population. One solution adopted by the Government is to provide relatively cheaper public housing for that sector of the population. The Housing Authority was set up in the 1970's to shoulder the task. According to an affirmation filed by the respondent, over 30% of Hong Kong's population resides in public housing (consisting of 178 housing estates and 693,300 public rental housing units, most of which are under the respondent's management): see also *Hong Kong 2002*, pp. 201, 206.

5. According to the Government, for over 20 years before 1997, the rent of public housing units has consistently been reviewed and revised every 2 years. Sources which confirm such practice include para. 3, *Memorandum on Rent Review for Harmony Blocks of New Housing Authority Estates*, 3 September 1998, Housing Authority; the speech of the Secretary for Housing, LegCo Proc., 27 June 1997, p. 1463; *Hong Kong Annual Report 1996*, p. 187;

para. 2, *Adoption of 15% and 18.5% MRIR ceilings for Public Rental Housing*, a paper prepared for the LegCo. Housing Panel by the Housing Branch, Government Secretariat, 22 May 1997, CB(1) 1672/96-97(02).

6. It has been the respondent's policy to keep the rent of public housing units at an affordable level. Since about 1986, the respondent has adopted what has become known as the "median rent to income ratio" (sometimes called "MRIR") ("*the median ratio*") in determining whether the rent of public housing units was affordable. According to the parties, the median ratio is a statistical median compiled on a quarterly basis calculated from the most up-to-date rent and income data. The data were collected from the territory-wide General Household Survey conducted by the Census and Statistics Department. Two stages are involved in the calculation: the first is to find out the rent to income ratios from a sample of households living in public housing, and the second is, after the rent to income ratios have been obtained, to identify the ratio in the middle of the entire spectrum.

7. Prior to the amendment of Cap. 283 in June 1997, the median ratio ceilings were set administratively respectively at:-

> (a) 15% (set in 1986) for units with a minimum space allocation standard of 5.5 square metres internal floor area per person;
>
> (b) 18.5% (set in 1991) for units with a higher space allocation standard of 7 square metres internal floor area per person:

Adoption of 15% and 18.5% MRIR Ceilings for Public Rental Housing, 22 May 1997, Housing Branch, Government Secretariat. The amendment of Cap. 283 in June 1997 introduced, among other things, s. 16(1A)(b) which provides:-

> "The rent determined under paragraph (a) [that is, s. 16(1A)(a)] in respect of any such class of land shall be of such amount that the median rent to income ratio in respect of all classes of land in all estates let for residential purposes, as determined by the Authority, shall not exceed 10%".

The applicants say that since then, the rent of public housing units cannot exceed the 10% statutory ceiling whereas the respondent contends that the ceiling is only applicable when there has been a determination of variation of rent under s. 16(1A)(a). This issue will be discussed below.

8. June 1997 must have been one of the busiest months for the Hong Kong Legislative Council. About 55 pieces of ordinances of all kind (Ord. No. 54 of 1997 to Ord. No. 109 of 1997) have been passed in that month. The busiest period in that month must have been from 26 to 29 June 1997 because some 38 ordinances (Ord. No. 71 of 1997 to Ord. No. 109 of 1997) were passed during that period. Among those passed during the busiest period in June 1997 was the Housing (Amendment) Ordinance (Ord. No. 108 of 1997) (enacted on 29 June 1997, when it was assented to by the former Governor) ("*the 1997 amendment*"). The 1997 amendment has its origin in the Housing (No. 3) (Amendment) Bill, a bill promoted by one of the legislative councillors.

9. Before turning to the applicants' position, one more matter needs to be mentioned. In the decade or so before 1997, Hong Kong's economy has generally enjoyed a relatively rapid growth, with the result that Hong Kong has a generally inflationary economy. As shown in the documents relating to the 1997 amendment placed before the Legislative Council at the time, inflation must have been an important reason which brought about the 1997 amendment. What has by now become widely known as the "Asian economic crisis" has changed all that. Since about October 1997 up to now, Hong Kong has faced a more or less consistent trend of deflation. This in turn brought about economic problems such as depreciation in property value, reduction in income level and unemployment. The significance of these matters to the applications will be discussed below.

(2) The Applicants

10. The applicant in HCAL 174 is a 73-year old lady who has already retired. She is entitled to, and receives, Old Age Allowance of $705 per month. Out of her several children, her youngest son, who works as a lorry driver earning $8,000 monthly, contributes irregularly to her daily expenses. She pays rent of $2,110 per month for her public housing unit. The rent to income ratio in her case is 24.2%. During the hearing, the respondent informed the court that the applicant is entitled to apply for Comprehensive Social Security Assistance from the authorities.

11. The applicant in HCAL 198 is married and lives with his wife and 3 children all at school age. He works as a security guard and his wife works in a fast food shop. Their total monthly income is about $12,000. The rent to

income ratio in his case is 17.6%.

12. There is no need to describe in detail the hardship each applicant has to face suffice it to say they live a relatively frugal life. The parties do not dispute that there has been a drop in the applicants' income levels resulting in the "excessive" median ratio (if s. 16(1A)(b) is applicable).

Facts which Brought About the Applications

13. The 1997 amendment came into effect on 13 March 1998. Since that date, the respondent has on several occasions announced an increase in the rent of public housing for different housing estates/blocks but simultaneously announced that the increase be waived for one year: the decisions were respectively made on about 9 July 1998, 3 September 1998 and 6 January 1999. Further, the respondent has on 31 May 1999, 8 July 2000 and 29 January 2001 announced the extension of the rent increase waiver for one year. On 23 October 2001 and 31 October 2002, the respondent respectively deferred the review of rent effectively to 1 December 2003 and the rent increase waiver was also extended correspondingly.

14. In a press release, the respondent admitted in January 2002 that the median ratio has exceeded 10%. The applicants' case (which is undisputed by the respondent) is that the median ratio exceeded 10% since the second quarter of 2000.

15. Of the above decisions made by the respondent, the applicants accept that only the one dated 31 October 2002 needs to be addressed in this Judgment.

Issues in the Applications

16. The applicants have helpfully set out the issues in the applications in their skeleton submission. These issues can be summarised as follows:-

> (1) whether the respondent's decision made on about 31 October 2002 to (a) freeze the rent and (b) defer the rent review due in December 2002, constitutes a determination of variation of rent within the meaning of s. 16(1A), Cap. 283;
>
> (2) in any event, whether the respondent's failure or refusal to review rent despite the median ratio having exceeded 10% since the second quarter of 2000 constitutes a breach of s. 16(1A), Cap. 283; alternatively, whether the same has frustrated the policy of Cap. 283 and/or is inconsistent with the respondent's duties thereunder;
>
> (3) further or in the alternative to (2) above, whether the respondent's failure or refusal to review rent in the above circumstances is *Wednesbury* unreasonable and/or inconsistent with its conduct which gives rise to a legitimate expectation on the applicants' part that rents would be periodically and regularly reviewed.

These will be dealt with in turn below.

Relevant Provisions in Cap. 283

17. The respondent is a statutory body formed pursuant to the provisions of Cap. 283. Cap. 283 also contains provisions regarding the respondent's powers and duties. As stated above, the 1997 amendment introduced s. 16 (1A), a provision on which the applicants have placed the greatest emphasis in the applications. But before setting out the relevant parts of s. 16(1A), s. 4, which provides for the respondent's powers and duties, should be set out. S. 4(1) provides:-

> "s.4 *General powers and duties of the [respondent]*
>
> (1) The [respondent] shall exercise its powers and discharge its duties under this Ordinance so as to secure the provision of housing and such amenities ancillary thereto as the [respondent] thinks fit for such kinds or classes of persons as the [respondent] may, subject to the approval of the Chief Executive, determine".

The respondent's power to let public housing units and to charge rent for doing so is contained in s. 16(1)(a) and (b):-

> " ... the [respondent] may-
>
> > (a) let to any person, for any period, any land in an estate, subject to the payment of such premium, rent or other consideration as the [respondent] may determine; and
> >
> > (b) fix the terms, covenants and conditions on which any land in an estate may be let or occupied".

The policy of the respondent's budget is also statutorily regulated (s. 4(4)) :-

> "The policy of the [respondent] shall be directed to ensuring that the revenue accruing to it from its estates shall be sufficient to meet its recurrent expenditure on its estates".

18. S. 16(1A)(a) provides for the minimum period of time after a determination of variation of rent and before the next determination can take effect. It reads:-

> "Any *determination of variation of rent* after the commencement of [the 1997 amendment] by the [respondent] under subsection (1)(a) in respect of any class (whether determined by the nature of the land or status of the lessee) of land in an estate for residential purposes shall only *take effect at least 3 years* from the date on which any immediately preceding determination in respect of the same such class of land came into effect" (emphasis supplied).

Further, s. 16(1A)(b) provides for the ceiling regarding any determination to vary rent under s. 16(1A)(a):-

> "The *rent determined under paragraph (a)* in respect of any such class of land shall be of such amount that the *median rent to income ratio* in respect of all classes of land in all estates let for residential purposes, as determined by the [respondent], shall *not exceed 10%*" (emphasis supplied).

The procedure for determining the median ratio is left to the respondent by virtue of s. 16(1D):-

> "For the purposes of subsection (1A)(b), the median rent to income ratio ("the ratio") shall be determined in accordance with a procedure established by the [respondent] and, without prejudice to the generality of the foregoing, the [respondent] may establish a procedure involving sampling to determine the incomes to be used for the purpose of calculating the ratio".

As the procedure for determining the median ratio is not in issue in the applications, s. 16(1D) is only mentioned for completeness.

Has the Respondent Made Any Decision under S. 16(1A)?

19. It is the applicants' case that the respondent's decision made on about 31 October 2002 to (a) freeze the rent and (b) defer the rent review due in December 2002, constitutes a determination of variation of rent within the meaning of s. 16(1A), Cap. 283. This is denied by the respondent.

20. The applicants' argument is in short as follows. The enactment of s. 16(1A) has to be looked at in its historical context, relying on **Attorney General v. Prince Ernest Augustus of Hanover** [1957] AC 436, 461:-

> "... words and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense ... its preamble, the existing state of the law, other statutes in pari material, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy ... I must admit to a consciousness of inadequacy if I am invited to interpret any part of any statute without a knowledge of its context in the fullest sense of that word".

Reliance is also placed by the applicants on **Oliver Ashworth v. Ballard Ltd.** [2000] Ch 12, 34G-37D in support of

the above proposition.

21. I do not find it necessary to repeat the various versions of the bill (set out in the applicants' skeleton submission) which led to the 1997 amendment. For the purpose of the applications, it is of importance that one of the main purposes of the 1997 amendment is to change the biennial rent review period to a triennial period. This is evidenced by inter alia the Government's objection in the Legislative Council through the Secretary for Housing:-

> "Mr Chairman, under normal circumstances, the rent of public housing is currently reviewed once every two years. As I said during the Second Reading debate, this arrangement has been implemented for more than 20 years and proved effective. The review will gradually adjust the rent to a level which is both realistic and affordable for public housing tenants.
>
> I would like to reiterate that some Members' *proposal for at least a three-year rent review cycle is unnecessary* for tenants and the Housing Authority alike. *This is because tenants have already accepted and adapted to the two-year rent review cycle* ... " (emphasis supplied): (1996-97) LegCo Proc., 1463.

22. But there is another main purpose to the 1997 amendment: the Legislative Council also intended to limit the ceiling of any rent variation. Again, it is unnecessary to set out the different formulae proposed in the Legislative Council which ultimately resulted in the 1997 amendment. This intention of the Legislative Council is evidenced by the enactment of s. 16(1A)(b) itself.

23. From the above background, the applicants contend that the ordinary meaning of "determination" is a "decision", a "conclusion" or a "calculation". The word "determination", so it is contended, can be a decision to do something, or a decision to refrain from doing anything, or even a decision to delay to do something. Hence, a "determination" under s. 16(1A)(a) can include a determination to freeze (or not to vary) rent, or to maintain the existing level of rent.

24. I do not consider the background facts leading to (or indeed the legislative history of) the 1997 amendment of assistance to this part of the applicants' case. After all, the statute to be construed is the 1997 amendment (especially s. 16(1A)(a)) in its enacted form. S. 16(1A)(a) in its present form is not simply about the word "determination". Rather, it is concerned with a "determination of variation of rent". Once that important difference is recognised, this part of the applicants' case must be rejected.

25. The applicants also argue that a "determination of variation of rent" does not mean there must always be a variation of rent, so that s. 16(1A) can only be triggered when there is a decision to vary rent. They argue if the legislature had intended that, the phrase any "variation of rent" would have been used in s. 16(1A)(a) instead. I agree that the use of the last-mentioned phrase would have made the matter utterly beyond argument. However, the phrase "determination of variation of rent", although to certain extent superfluous, is plain enough: it has the same meaning as the phrase "variation of rent".

26. That this must have been the intention of the legislature is reinforced by the part of s. 16(1A)(a) which lays down that any "determination of variation of rent" can only take effect "at least 3 years from the date on which any immediately preceding determination ... came into effect". It is only meaningful for a provision to say that something should take effect from a certain time if that thing has not already taken effect (or is not already in effect). A simple example will illustrate the point. Suppose on an earlier occasion, the respondent has already determined the rent for a public housing unit to be $x. Suppose also one year later it determines that the rent should remain at $x. It could not be the intention of s. 16(1A)(a) that the second determination can only take effect 3 years from the date when the respondent first determined the rent should be $x.

27. Having concluded that, as a matter of construction, the phrase a "determination of variation of rent" does not include a decision to freeze (or not to vary) rent, or to maintain the existing level of rent, I turn to consider the respondent's decision said to be liable to be challenged. The decision, made on or about 31 October 2002, merely deferred the review of rent to 1 December 2003 and extended the rent increase waiver correspondingly. In view of the conclusion I reached above, I do not find this decision to fall within s. 16(1A)(a). This part of the applicants' case therefore fails.

28. For completeness, I shall also deal with an alternative argument of the respondent. The respondent asks the court not to adopt a "rectifying construction" of the 1997 amendment because the court cannot be abundantly sure of the intention of the statute: para. 35, the respondent's outline of submissions. A "rectifying construction" has been described by *Bennion* (citing **R v. Moore** [1995] 4 All ER 843, 850) as a presumption that:-

> "... the legislator intends the court to apply a construction which rectifies any error in the drafting of the enactment, where it is required in order to give effect to the legislator's intention".

In view of the above conclusion, there is no need to discuss the respondent's alternative argument further.

29. On the other hand, the applicants rely on s. 39(1), Interpretation and General Clauses Ordinance (Cap. 1) which provides:

> "Where any Ordinance confers any power or imposes any duty, then the power may be exercised and the duty shall be performed from time to time as occasion requires".

I agree with the respondent that this is a general provision and is insufficient to assist this part of the applicants' case.

Is there a Duty to Review Rent?

30. There is now a feature in the applications which in all probabilities was not apparent at the time of the 1997 amendment: Hong Kong in a state of economic depression and deflation. This feature may at times cloud one's thoughts when one is dealing with this aspect of the applications. In order to simplify the discussion, I will first discuss this aspect assuming Hong Kong still faces inflation and a general increase in the median ratio over time. I will then discuss this aspect having regard to the actual economic situation in Hong Kong at present.

31. In the private sector (and leaving aside the effect of statutes such as Part II, Landlord and Tenant (Consolidation) Ordinance (Cap. 7)), the level of rent depends very much on the prevailing market, that is, the economic forces of demand and supply. The level of rent of public housing is different. While prevailing market rent is a factor in determining the rent of public housing, it is only one factor to be considered; many other factors, especially the affordability of the tenants, must be considered as well. In fact, affordability of the tenant must have been one of the reasons for the introduction of s. 16(1A)(b).

32. If Hong Kong had still faced inflation and a general increase of the median ratio over time, as the Secretary for Housing pointed out to the Legislative Council in June 1997,

> "... under normal circumstances, the rent of public housing [would, but for s. 16(1A)(a), have been] reviewed once every two years ... ".

Further, according to the Secretary for Housing:

> "... this arrangement has been implemented for more than 20 years and proved effective ... [and] tenants have already accepted and adapted to the two-year [and, since s. 16(1A)(a), three-year] rent review cycle ... ".

If there had not been the 1997 amendment, one can confidently expect the respondent to continue with its practice of reviewing (and increasing) rent every 2 years.

33. With the 1997 amendment, and again assuming an inflationary economy, one can confidently expect the respondent to act in accordance with s. 16(1A)(a), and, instead of reviewing (and hence increasing) rent every two years, it will do so every three years. One can also confidently expect the respondent to act in accordance with s. 16 (1A)(b), and increase rent to no more than the maximum amount provided for in that sub-section.

34. As stated above, the ultimate goal of the introduction of s. 16(1A) is obvious: it was intended to enhance the protection to the tenants of public housing units by controlling the speed and amount of rent increase. This is achieved by:-

> (a) lengthening the rent review cycle so that they do not have to face a rent review (and the resultant rent increase) every 2 years. The rent review (and rent increase) can only take place every 3 years at the earliest;
>
> (b) limiting the rent (when increased) to an amount not exceeding 10% of the median ratio.

The provision was introduced at a time of inflationary economy. But that fact does not alter its ultimate goal.

35. The respondent argues neither s. 16(1A) nor its past practice "... implemented for more than 20 years ... " has created any duty on its part to review rent, irrespective of whether there has been a change in the Hong Kong economic situation. Alternatively, they argue that even if s. 16(1A) has created such a duty, the change in the Hong Kong economic situation has swept s. 16(1A) of the very basis upon which it was enacted, namely, the prevention of excessive rent increase (whether in speed or amount) for public housing.

36. I cannot accept either argument and conclude that the respondent is under a duty to review rent regularly. The word "regular" should be understood to mean, prior to the 1997 amendment, a cycle of every 2 years and, since the 1997 amendment, a cycle of every 3 years.

37. While this duty is not in any doubt, the exact nature of such duty (that is, whether it is statutory, or merely one arising out of a legitimate expectation) is a more difficult question. Because of the enactment of s. 16(1A), I find that the duty arises as a result of the combined effect of s. 16(1A) and the respondent's past consistent practice. Whether one chooses to call it a statutory duty or a common law duty arising out of legitimate expectation (as modified by the 1997 amendment) is likely to be a matter of semantics. The reasons for my conclusion will be set out below. Insofar as one chooses to call it a statutory duty, the discussion will be set out below under this heading. Insofar as one chooses to call it a legitimate expectation, the discussion will be set out under the next heading.

38. The respondent argues that the express provision in s. 16(1A)(a) is only about limiting the frequency of any determination of variation of rent. There is nothing in the wordings of that provision itself to show that there is a duty on the respondent's part to determine a variation of rent. There is also nothing in the text of Cap. 283, read as a whole, to indicate that the statute intended such a duty to be created.

39. While the respondent agrees with the applicants that a statute must be construed in context and not in isolation, the respondent's argument is in gist that context means only the text of the statute under consideration. In this connection, the respondent relies on the following passage in the judgment of the Court of Final Appeal in **Chong Fung Yuen v. Director of Immigration** [2001] 2 HKLRD 533 in relation to the courts' role in interpreting the Basic Law:-

> "[Their role is] ... to construe the language used in the text of the instrument in order to ascertain *the legislative intent as expressed in the language*. [The court's task] is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain *what was meant by the language used* and to give effect to the *legislative intent as expressed in the language*. ...
>
> The courts do not look at the language of the article in question in isolation. The language is considered in the light of its context and purpose. See *Ng Ka Ling* at pp 28-29. ... As was observed in *Minister of Home Affairs (Bermuda) v. Fisher* [1980] AC 319 at p. 329E, a case on constitutional interpretation: 'Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language'" (at p. 546C-G).

Support for this approach, according to the respondent, can also be found in cases such as **Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg** [1975] AC 591 and **R (on the application of Quintavalle) v. Secretary of State for Health** [2003] 2 All ER 113.

40. On the other hand, the applicants contend that the context of a statute is not limited to its text. The relevant part of the judgment in the **Prince Ernest Augustus of Hanover** in support of this contention has already been set out in para. 20 above and will not be repeated. In short, "context" can include, among other things, the mischief which the statute is intended to remedy. In fact, this contention appears to be undisputed by the respondent: see para. 23 to 26, the respondent's outline of submissions.

41. The significance of "context" or the "factual or social settings" which brought about the enactment of a statute has been discussed in *Bennion: Statutory Interpretation* (2002) 4th Ed., Part XIX in relation to the presumption that parliament intends the court to apply the remedy provided by the statute in order to remedy the mischief aimed at. According to *Bennion*, the term "mischief", as used in statutory interpretation, has two different meanings. One meaning is identified by *Bennion* as "a mischief 'on the ground'", that is, a factual condition that is causing concern: *Bennion*, Comment to Section 290 (at p. 784). *Bennion* chooses to call it "social mischief": see Section 292. The courts can discern this social mischief by a combination of general knowledge and inferences from the matters set out in the **Heydon's Case** (1584) 3 Co. Rep. 7a: *Bennion*, Section 291 and Comment to Section 300 (at p. 801),

namely,

> "That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:
>
> (1) what was the common law before the making of the [statute];
>
> (2) what was the mischief and defect for which the common law did not provide;
>
> (3) what remedy the [Legislative Council] hath resolved and appointed to cure the disease of [Hong Kong]; and
>
> (4) the true reason of the remedy,
>
> and then the office of all the judges is always to make such construction as shall-
>
> (a) suppress the mischief and advance the remedy, and
>
> (b) suppress subtle inventions and evasions for the continuance of the mischief *pro privato commodo* (for private benefit), and
>
> (c) add force and life to the cure and remedy according to the true intent of the makers of the [statute] *pro bono publico* (for the public good)": *Bennion*, p. 786.

42. As stated above, it is clear that the Legislative Council intended s. 16(1A)(a) to enhance the tenants' protection by lengthening the times between which rent reviews can take effect. In doing so, the Legislative Council must have assumed the respondent would continue its consistent practice of reviewing rent regularly. To put it in another way, in making the 1997 amendment (especially in enacting s. 16(1A)(a)) in such factual setting, the statute must by necessary implication have intended the respondent should continue with such practice, albeit the cycle should from hence on be 3 years instead of 2.

43. If s. 16(1A)(a) by itself (and read in the factual and/or social setting in which it was introduced) is somehow still insufficient to show, by necessary implication, it intends that the respondent is under a duty to review rent regularly, s. 16(1A)(a), when read together with s. 16(1A)(b), should be sufficient for this purpose. It is inconceivable that in (a) lengthening the rent review cycle, and (b) placing a maximum on the amount of rent which the respondent may determine to increase, the Legislative Council somehow intended that the respondent be free to in effect get away from such restriction by departing from its past practice.

44. I now turn to deal with the respondent's argument that the change in Hong Kong's economic situation has an effect on the applicability of s. 16(1A). The respondent argues that, even if s. 16(1A) should have intended a duty on its part to review rent regularly, s. 16(1A) is clearly only intended to apply in the context of an inflationary economy; in other words, it only covers a determination of variation of rent which would result in an increase in rent.

45. In this connection, the respondent submits that, at common law, the explanatory memorandum of a bill has always been regarded as admissible evidence of the factual context and mischief of a statute: **Director of Lands v. Yin Shuen Enterprises Ltd. and Another**, unrep., 17 January 2003, FACV Nos. 2 and 3 of 2002 applying **Elson-Vernon Knitters Ltd. v. Sino-Indo-American Spinners Ltd.** [1972] HKLR 468; **Westminster City Council v. National Asylum Support Service** [2002] 4 All ER 654. The respondent says that the explanatory memorandum shows that the legislators were only concerned with rent increases beyond 10% of the median ratio, and not with an excess which results from a contraction of the income of the tenants.

46. In fact, I do not consider that one needs to look up the explanatory memorandum to arrive at the above conclusion. In the factual context in which the 1997 amendment, namely, the introduction of a 3-year rent review and a rent increase ceiling, the 1997 amendment was obviously enacted with an inflationary economy in mind. Tenant's protection would be enhanced by a longer rent review cycle only if there is a trend of rent increase. When there is a trend of rent decrease, the tenants will benefit more if the rent is reviewed (and adjusted downwards) more frequently.

47. Having said so, the question to be asked in the applications remains: should the change in Hong Kong's economy trend during the last years deprive the 1997 amendment of its force? The answer to this lies in keeping in mind the ultimate goal of the introduction of s. 16(1A). That the 1997 amendment was made at a time of inflation (and a trend of rent increase) is a factor to be borne in mind. But the lengthening of the rent review cycle and the imposition of a rent ceiling are not the goal of the 1997 amendment; they are only the means to a goal. Its goal, as stated above, was to enhance the protection to tenants. The tenants' need for protection from "unaffordable" rent (affordability has been defined by s. 16(1A)(b)) is not any less at times of depression and/or deflation, as at times of inflation. In relation to the so-called literal rule of construction (that is, construing a statute having regard to its text, or language: see, for example, *Bennion*, p. 468), there is nothing in the wording of either s. 16(1A), or the whole of Cap. 283, to limit its operation to rent increases only.

48. Indeed, the respondent appears to have overlooked its own contention that:-

> "The Applicants also contend ... that if s. 16(1A) does not apply when there is no variation of rent, then 'rent could always go up but will never have to go down'. But the actual position is reflected in section 16(1C)(ii) which expressly contemplates the possibility of 'a decrease in rent' being determined": para. 28(vii), the respondent's outline of submissions.

This contention was made in relation to whether a "determination of variation" also covers a determination of no variation of rent. However, the respondent cannot contend that, in relation to s. 16(1C), which was introduced as part of the 1997 amendment together with s. 16(1A), the statute had borne in mind rent decrease, yet contend, in relation to the present heading, that s. 16(1A) was not intended to cover rent decrease (whether resulting from the prevailing market or other matters such as deflation is immaterial).

49. The respondent also relies on s. 4(4) which relates to its policy to "balance" its own budget. It is submitted that if the 1997 amendment is construed as having established a duty on the respondent to review (and hence reduce) rent, this would render the 1997 amendment to be inconsistent with s. 4(4). I do not see any inherent inconsistency between the two. A reduction in rent does not necessarily mean an "unbalanced" budget: revenue may be available from other sources, and/or recurrent expenditure may be reduced.

50. The respondent also refers to various kinds of rent (or other) assistance provided to the tenants by the authorities. I do not consider the respondent's case can be advanced in the applications.

51. I therefore conclude that the respondent's duty under s. 16(1A) is the same, irrespective of whether Hong Kong faces an inflationary or deflationary economy.

52. The applicants also rely on so-called "parliamentary materials" such as the speech of the promoter of the bill and other speeches in the debates in the Legislative Council, to establish their case of a duty on the respondent's part to review rent. As has been set out above, I have been able to arrive at a conclusion without the need to resort to such materials. The respondent opposes the applicants' reliance on "parliamentary materials": para. 29 to 31, the respondent's outline of submissions. If it were necessary to say anything about this aspect:-

> (a) I would have agreed with the respondent that the threshold questions set out in *Pepper v. Hart* [1993] AC 593, which must be strictly insisted upon before parliamentary materials can be read by the courts, have not been met. This is because the 1997 amendment has not only undergone contentious exchanges in the Legislative Council, there were also many amendments to the original bill before it was finally enacted;
>
> (b) even if those materials were admissible, they only confirm that the promoter and the other members of the Legislative Council who have spoken on the bill have focused their minds on rent increases only.

I therefore do not find that the applicants' case can be assisted by the "parliamentary materials".

53. In relation to the respondent's so-called alternative argument relating to "rectifying construction", I do not find that there is any error in the drafting of the 1997 amendment.

Legitimate Expectation

54. The respondent objects this aspect on several grounds. The first ground is the court is being asked to deal with

how a public authority should exercise its statutory powers which are set at a *macro* level, namely, powers which directly affect a large section of the community, and entail questions of economic and social policy.

55. With respect, I do not see the issue in that light. What the court has been asked to determine is a doctrine which has by now been recognised in quite a number of cases from the highest courts: see, for example, **Ng Siu Tung v. Director of Immigration** (2002) 1 HKLRD 561. The matters which the court is asked by the applicants to take into account are well-recognised matters relevant to whether a legitimate expectation can be found. The legitimate expectation relates to a well-defined area: in relation to the length of the rent review cycle, the applicants contend it is to be found from the combined effect of the respondent's past practice as lengthened by s. 16(1A)(a); in relation to the amount of rent ceiling, it is as defined by s. 16(1A)(b); in relation to whether rent should be reviewed in batches of public housing blocks/estates, the applicants do not dispute the respondent can follow its past practice; in relation to how the median ratio is to be ascertained, the applicants also do not dispute the respondent can adopt the method it has adopted in the past.

56. The respondent also argues that the law recognises a public authority must remain free to choose its policies from time to time: **Ng Siu Tung**, at p. 41G; **Hughes v. Department of Health and Social Security** [1985] AC 776; **R v. Criminal Injuries Compensation Board ex p P** [1995] 1 WLR 845, 857. But the respondent's above argument only holds good if the policies have not been regulated by statute. As I found above under the previous heading, the 1997 amendment has, by necessary implication, assumed that the respondent has a duty to review rent "regularly".

57. The respondent then submits that an expectation that it will review the rent is not a legitimate expectation because there is no substantial benefit inherent in the review exercise: the respondent may at the end decide not to vary the rent. Again, this submission is only valid if there had not been statutory "intervention". In this connection, I agree with the applicants' proposition to the effect that the respondent's decision must not thwart or run counter to the ascertained policy of the 1997 amendment: para. 11, the applicants' skeleton submission, citing *Bennion*, pp. 657-670; **Padfield v. MAFF** [1968] AC 997. I have found that the 1997 amendment had intended that the respondent is under a duty to review rent, and when it does so, the s. 16(1A)(b) rent ceiling should be abide by.

58. The respondent says that there is no evidence of any clear and unambiguous representation on its part to found a legitimate expectation. I do not agree. The speech of the Secretary for Housing to the Legislative Council in June 1997 is clear evidence that the tenants knew and accepted the pre-1997 amendment practice of the respondent. Representation can be inferred from conduct provided the conduct is clear and obvious. Reliance on the representation can also be inferred: tenants must have arranged their finance based on the respondent's past practice relating to the rent review cycle. Merely because they still manage to pay rent (effectively maintained by the respondent since the 1997 amendment up to now) is not evidence that they never relied on the respondent's past practice. Reliance on the representation was also acknowledged by the Secretary for Housing in his said speech in June 1997.

59. Finally, the respondent argues that there are overriding reasons of policy to exclude the operation of this doctrine. The good policy reasons put forth are:-

> (a) an *Ad Hoc* committee has been appointed by the respondent to review domestic rent policy. This committee has already commenced its work. Its terms of reference require it to take into account the need to reflect tenants' affordability while ensuring public housing subsidy is given according to need and so on. The review will be comprehensive and the committee's work would probably have been completed but for the applications;
>
> (b) there is limitation to the use of the median ratio as a means of measuring affordability to pay rent;
>
> (c) satisfying the applicants' legitimate expectation does not necessarily mean all tenants will immediately be given a rent reduction. Rent reviews have always been conducted for batches of estates;
>
> (d) relief measures to lessen the financial burden of tenants have already have implemented by the authorities;
>
> (e) the respondent has to operate according to the constraints laid down by s. 4(4).

60. In short, I do not consider the matters set out, whether taken individually or collectively, justify an exclusion of the doctrine of legitimate expectation in the applications. In so concluding, regard must be taken to the fact that, as

has been set out in the above paragraphs, there is a statutory element in the legitimate expectation which the applicants are relying on in the applications. I repeat what has been stated in para. 37, 42 to 43 and 57 above.

Wednesbury Unreasonableness

61. In brief, the applicants argue that it was *Wednesbury* unreasonable for the respondent to have failed or refused to review rent given the circumstances relied upon in the applications. There is no need to discuss this aspect in detail suffice it to say I regard this part of the applicants' case should stand or fall with the matters set out under the two previous headings.

Conclusion

62. I find in the applicants' favour in the applications.

63. At para. 67 to 80 of the respondent's outline of submissions, the respondent contends that it has not made any decision which justifies judicial review. I do not propose to elaborate those contentions here and merely say that nothing stated therein is sufficient to affect my conclusion.

Relief

64. If necessary, I shall hear the parties as to the precise terms of the orders to be made in the applications in light of the conclusion reached above (and the reasons for the conclusion).

65. At the moment, I am minded to make an order in terms of:-

(a) para. 2 of the relief sought in HCAL174;

(b) para. 2 of the relief sought in HCAL 198.

66. The respondent also asks this court to exercise its discretion to refuse to grant any relief: para. 83, the respondent's outline of submissions. It claims that if the court grants the relief sought, the respondent would likely face an administrative difficulty, or even impossibility, because this may open a flood-gate of claims against it. The alleged problem is very probably over-stated. The applicants do not agree with this claim either.

Costs Order Nisi

67. There is no apparent reason to justify a departure from the usual rule that costs should follow the event. Costs of the applications are to be paid by the respondent to the respective applicant to be taxed if not agreed. The applicants' own costs are to be taxed in accordance with the Legal Aid Regulations.

(Andrew Chung)
Judge of the Court of First Instance
High Court

Representation:

Mr Philip Dykes, SC and Mr Johannes Chan, SC, instructed by Messrs Ho Tse Wai & Partners, assigned by DLA, for the Applicants in both applications

Mr Gerard McCoy, SC leading Mr P Y Lo, instructed by Messrs Denton Wilde Sapte, for the Respondent in both applications