

Bills Committee on Smoking (Public Health) (Amendment) Bill 2005
Administration's Supplementary Reply to the
Assistant Legal Adviser's Letter of 6 June 2006

Further to the Reply provided by the Administration at the meeting of the Bills Committee on 15 June 2006, this paper provides the following supplementary responses to the letter from the Assistant Legal Adviser dated 6 June 2006 to the Secretary for Health, Welfare and Food.

The ECJ Case in *R v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd (Japan Tobacco Inc. and JT International SA)* [2003] 1 CMLR 14

2. The letter (at pp. 8 to 10) refers to the ECJ case. It is argued in the letter (at p. 10) that “if the decision in the ECJ is adopted in local courts, the ban proposed under Section 10(3) on tobacco packages is likely to be decided as a restriction on a registered trade mark only and not amount to deprivation of the intellectual property right of the owner. The issue whether there is de facto deprivation of property under Basic Law Article 105 will not arise as property or rights of the Owner will not be deprived by the operation of Section 10(3).”

3. For the purpose of deciding whether clause 11 of the Smoking (Public Health) (Amendment) Bill 2005 (“the Bill”) would cause a de facto deprivation of the property right of the relevant trademark, reference has been made to the jurisprudence on Article 1 of the First Protocol to the European Convention on Human Rights (“the European Provision”) (as summarized in LegCo Paper No. CB(2) 1897/05-06(01)) (provided by HWFB in April 2006). However, the wording of BL 105 is unique and is significantly different from both the European provision and various versions of the clause on property protection in Commonwealth constitutions. The crucial issue therefore is what is the meaning of the text of BL 105?

4. BL 105 provides, inter alia, that the HKSAR shall, in accordance with law, protect the right of individuals and legal persons to compensation for lawful deprivation of their property (“Compensation Rule”). The compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay. In other words, compensation equivalent to the real value of the property shall be payable where there is deprivation (“zhengyong”) of private property by the state. Thus legislative or executive acts resulting in the deprivation of property without compensation corresponding to its real value will be unconstitutional.

5. This rule is similar to the second part of the following provision which forms part of the Fifth Amendment to the American Constitution: “No

person shall ... be deprived of ... property without due process of law; nor shall private property be taken for public use, without just compensation.” The following constitutional provisions are also comparable: “The Parliament shall ... have power to make laws ... with respect to ... the acquisition of property on just terms ...” (Australian Constitution, s. 51(xxxi)) “No law shall provide for the compulsory acquisition or use of property without adequate compensation.” (Malaysian Constitution, art. 13(2)) “No property ... shall be taken possession of compulsorily ... except by or under the provisions of a law that ... requires the payment of adequate compensation therefor ...” (Nigerian Constitution, s. 31(1))¹

6. It may be observed that many Commonwealth constitutions require compensation only for “acquisition” of property, whereas BL 105 requires compensation for “deprivation”. However, there also exist provisions in some Commonwealth constitutions referring to compensation for “deprivation” of property. Such provisions usually take the form of an introductory provision in the constitutional bill of rights which is expressly made subject to limitations designed to ensure that the enjoyment of rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. Such a provision in the Constitution of Mauritius was held by the Privy Council in *Societe United Docks v Government of Mauritius*² to be “not a mere preamble” but to confer substantive rights.³

7. In applying the Compensation Rule (as defined in para 4 above) in BL 105, the main issue is whether the relevant interference with property rights amounts to a deprivation of property. In this regard, there is considerable room for Hong Kong courts to develop a doctrine of de facto deprivation or regulatory takings as discussed in LegCo Paper No. CB(2) 1897/05-06 (01). However, Commonwealth case law suggests that courts have been able to interpret the meaning of “acquisition” or “deprivation” in the text of Commonwealth constitutions without resorting to the proportionality or fair balance test. Indeed, as pointed out by Allen, “[t]he proportionality test has not played an important role in the Commonwealth jurisprudence on property to date, although there is a type of balancing process evident in many cases.”⁴

8. Allen continues as follows: “[T]here are certain points where Commonwealth courts tend to take a rigid view and seem to foreclose the application of a full proportionality test. In particular, most courts and framers

¹ See generally Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000), chapter 3.

² [1985] 1 AC 585.

³ See also *La Compagnie Sucriere de Bel Ombre Ltee v The Government of Mauritius* [1995] 3 LRC 494 (PC); *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 (where the Privy Council left undecided whether the relevant provision in the constitution is a mere preamble or has independent legal force).

⁴ Allen note 1 above at 194.

assume that the constitution guarantees full market value for property. Consequently, comparatively few individuals whose interests are adversely affected by the state receive compensation, but those who are compensated are treated quite generously. *There is no principle of partial compensation; the individual is entitled either to full compensation or to no compensation whatsoever.* As a matter of general principle, *a proportionality test would require only that the individual's loss should be proportionate to the public benefit. Hence, the amount of compensation would depend partly upon the importance and amount of the public benefit.* In the Commonwealth, the possibility that a balance could be struck at something *less than full compensation* has not even been raised by most courts.” (emphasis supplied)⁵

9. Allen further points out that, if some kind of proportionality principle were adopted in Commonwealth constitutional jurisprudence, “the right to property would apply to a greater number of situations, but *guarantee something less* than it now does. ... [A]s long as it is *not necessary to require full compensation* in every case where an acquisition (or deprivation) of property (or property rights) has occurred, the emphasis can shift to a more general question of whether an adequate balance has been struck” (emphasis supplied).⁶ Given that BL 105 insists on full compensation (equivalent to the “real value” of the property) for deprivation of property, the quoted passage (in para 8 above) is pertinent in explaining that it may be difficult to apply the European version of the proportionality test to the Compensation Rule in BL105. It is to be noted that the right to compensation for lawful deprivation of property is not even mentioned in the European Provision.

10. **In the absence of a proportionality test, it is perfectly feasible for a Hong Kong court to apply the Compensation Rule simply by considering whether, in the circumstances of a particular case, there has been a deprivation of property that entitles its owner to compensation equivalent to its real value.** This is how American courts apply the relevant provision in the Fifth Amendment, by considering whether there has been a “taking” of private property without just compensation. This is also how courts in the Commonwealth have applied constitutional provisions on property protection of the kind mentioned in para. 5 above.

11. The above approach may be illustrated as follows. In the oft-cited case of *Grape Bay Ltd v Attorney-General of Bermuda*,⁷ the Privy Council decided that there was in the circumstances no deprivation of property without compensation within the meaning of section 1(c) of the Bermuda Constitution. No proportionality analysis of the kind adopted in European jurisprudence was applied. To quote from Lord Hoffmann’s judgment: “It is well settled that restrictions on

⁵ Ibid., 194-195.

⁶ Ibid., at 198.

⁷ [2000] 1 WLR 574.

the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid. ... Whether a law or exercise of an administrative power does amount to a deprivation of property depends of course on the substance of the matter rather than upon the form in which the law is drafted. ... Their Lordships consider that this case is clearly within the principle of general regulation in the public interest.”⁸

12. Thus the issue is (a) whether the particular interference with property rights challenged in the case constitutes a deprivation of property, rather than (b) whether the interference fails to satisfy the proportionality test. Where a court emphasizes question (a), the interference is determined to be *either* a deprivation (which will be unconstitutional if compensation has not been provided) *or* a regulation of property rights not constituting deprivation (where no constitutional remedy is available). On the other hand, the jurisprudence on the European Provision focuses on question (b): the proportionality principle is applied to *all* interferences with property rights irrespective of whether the interference constitutes deprivation or not, and any interference that fails to satisfy the proportionality test will violate the European Provision.⁹

13. As in *Grape Bay*, in the following Hong Kong cases the court simply considered whether the relevant restrictions on property rights constituted a deprivation of property within the meaning of BL 105 without applying any proportionality principle: *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277 (CA); *Yook Tong Electric Company Limited v Commissioner for Transport* HCAL 94/2002 (CFI, 7 Feb 2003); *Kaisilk Development Limited v Urban Renewal Authority* [2004] 1 HKLRD 907 (CA) (here the court emphasized that there was no “acquisition” of the plaintiff’s property¹⁰); *Fine Tower Associates Ltd v Town Planning Board* HCAL 5/2004 (CFI) (here the concept of de facto deprivation was discussed).

14. It cannot therefore be assumed that the European version of the proportionality test would be applicable to the Compensation Rule under BL105.

15. Following the above analysis, the issue to be considered is whether the ban proposed under clause 11(b) of the Bill would amount to a (de facto) deprivation of property, rather than whether the ban would fail to satisfy the proportionality test. As explained in the Administration’s paper provided to the Bills Committee on 15 June 2006, there is a serious risk that the cumulative effect

⁸ Ibid. at 583-4.

⁹ See Tom Allen, *Property and the Human Rights Act 1998* (2005), p. 124, and more generally, chapters 4 and 5.

¹⁰ See para. 40 of the judgment. Lord Hoffman’s judgment in *Grape Bay* was also extensively cited in this case.

of clause 11 and other provisions of the Bill (particularly those relating to tobacco advertisements) and the existing law as contained in the Smoking (Public Health) Ordinance would amount to such a deprivation.

Australian Competition and Consumer Commission

16. The letter (at pp. 12-14) also refers to an undertaking given for the purposes of section 87B of the Australian Trade Practices Act by Imperial Tobacco Australia Limited (“Imperial Tobacco”) on 3 November 2005. It is to be noted that the undertaking is not given as a result of a court order. The background of the undertaking is (as stated at p. 13 of the letter) the investigations conducted by the Australian Competition and Consumer Commission leading to its forming the view that “Imperial Tobacco has:

- (a) engaged in conduct that is misleading or deceptive or likely to mislead or deceive in contravention of section 52(1) of the Act;¹¹
- (b) falsely represented that Low Yield Cigarettes are of a particular standard, quality, value, grade, composition, style or model, in contravention of section 53(a) of the Act;
- (c) represented that the Low Yield Cigarettes have performance characteristics or benefits which they do not have, in contravention of section 53(c) of the Act;¹²
- (d) misled the public as to the characteristics of Low Yield Cigarettes in contravention of section 55 of the Act.”¹³

17. Insofar as similar allegations or findings against the manufacturers or distributors of cigarettes with the relevant trademarks in Hong Kong do not exist, and insofar as the owners of the relevant trademarks have not done anything in contravention of the laws of Hong Kong, it is doubtful whether the Australian incident is relevant to the constitutional issue of whether the Bill contravenes BL 105.

¹¹ [Our own footnote :] Section 52(1) provides that “[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

¹² [Our own footnote :] Section 53(a) and (c) provide: “A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services: (a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; ... (c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have”.

¹³ [Our own footnote :] Section 55 provides: “A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.”

18. As pointed out in para. 11 of the paper provided by the Administration on 15 June 2006, the existing Hong Kong law specifically permits the words now prohibited by clause 11 to be used in trademarks if the tar yield of the relevant cigarettes satisfies the requirements of the existing section 10(3) of the Ordinance. Furthermore, as pointed out in para. 10 of that paper (see particularly footnote 1), the Registrar of Trade Marks in Hong Kong is bound by law not to register a trademark that is likely to deceive the public. The registration of the relevant trademarks thus implies that the Registrar did not consider that they were likely to deceive the public. Moreover, even after a trademark has been registered, the possibility remains of its being revoked under section 52 of the Trade Marks Ordinance (Cap. 559) on the ground that in the circumstances of its use the trademark is liable to mislead the public. The fact that it has not been so revoked would seem to suggest that it has not been established that it is liable to mislead the public.

The Macdonald Case

19. It is noted that the letter (at pp. 17 to 19) refers to the Canadian Case of *J.T.I. MacDonald Corporation v The Attorney General of Canada and the Canadian Cancer Society* (Superior Court of Quebec, Case No. : 500-05-031299-975, 13 December 2002) in which a constitutional challenge to restrictions on tobacco advertising on the basis of freedom of expression was unsuccessful. The relevance of the case to the question of deprivation of property rights in trademarks under BL 105 is doubtful, particularly in view of the considerations peculiar to trademarks set out in paras. 10 to 11 of the paper provided by the Administration on 15 June 2006 (as well as in the Annex to that paper prepared by the Intellectual Property Department on “Smoking (Public Health) (Amendment) Bill 2005 & Hong Kong SAR’s International Intellectual Property Legal Obligations”).

20. The letter (at p. 19) states that “if the stance taken in ECJ and the Macdonald’s case is adopted in the local court, public health will also be preferred. The restriction on trade marks as proposed under Section 10(3) is unlikely to be held to fail “the fair and balance test”.” This may be contrasted with the discussion in the paper provided by the Administration on 15 June 2006. As indicated there, it is strongly arguable that the cumulative effect of the Bill and the Ordinance is to leave the owners or licensees of the relevant trademarks with no meaningful and economically viable use of the trademarks and hence there is a serious risk of clause 11 causing a (de facto) deprivation.

Conclusion

21. To conclude, we recognize that there are strong arguments in support of the constitutionality of the existing clause 11. However, in view of the development of local constitutional jurisprudence under BL 105 and comparative

constitutional jurisprudence in other common law jurisdictions, it is considered that there is a serious risk that the cumulative effect of clause 11 and other provisions of the Bill (particularly those relating to tobacco advertisements) and the existing law as contained in the Ordinance amounts to a (de facto) deprivation as far as registered trademarks incorporating the words mentioned in clause 11 are concerned. This proposition applies to a certain extent also to trademarks duly registered after the gazetting of the Bill and before its enactment and commencement.