立法會房屋事務委員會

終審法院就房委會押後檢討租金的決定的司法覆核作出裁決

目的

本文件旨在告知議員終審法院就公屋租金司法覆核所作的裁決。

背景

2. 2002年，兩名公屋租戶就房屋委員會(下稱「房委會」)於2001年至2002年押後檢討公屋租金的決定申請司法覆核。2003年7月11日，高等法院原訟法庭裁定該兩名公屋租戶勝訴。根據高等法院在2003年8月12日頒布的判令，房委會須「立即按《房屋條例》(第283章)第16(1A)條的真正意思及規定，檢討申請人公屋單位所屬類別(或組別)的公屋單位的租金，並作出更改租金的釐定」。

3. 房委會其後就高等法院原訟法庭的裁決提出上訴，並獲准暫緩執行有關的法庭判令，條件是房委會須承諾檢討有關公屋單位的租金，並作出更改租金的釐定。為符合法庭判令，房委會於2004年3月30日通過一項方案。根據該方案，領取綜援的公屋住戶將獲豁免租金，而其他並無領取綜援的住戶則一律減租10%，但方案實施與否，須視乎上訴結果是否不利於房委會。

4. 上訴法庭於2004年11月22日裁定房委會上訴得直。其後，其中一名申請人上訴至終審法院。

終審法院裁決

5. 終審法院於2005年11月21日以4比1大多數裁決駁回申請人的上訴，裁定房委會勝訴。判詞副本載於附件。扼要來說，終審法院裁定-

(a) 房委會決定押後檢討租金，並不視為更改租金的決定。

(b) 房委會並無法定責任檢討和調整租金，以確保租金與入息比例中位數不超逾10%的水平。

(c) 房委會是否應每三年調整租金一次，甚或是否應調整租金，以確保租金與入息比例中位數不超逾 10%，上訴人對此並不能存有合理期望。

(d) 「更改租金的釐定」一詞，是就加租的決定而言，並不包括減租的決定。

(e) 10% 租金與入息比例中位數並非對負擔能力所下的法定定義。

(f) 房委會有法定責任確保來自其屋邨的收入足以應付其經常開支。

6. 正如陳兆愷常任法官在其判詞中指出，此上訴討論的問題，顯示應就整套公屋政策，包括租金與入息比例中位數這方法和現行時被批評為一項武斷規定的 10% 租金與入息比例中位數上限，進行長遠而全面的檢討。我們贊同陳兆愷法官的看法。上述司法覆核個案，清楚顯示建立一套更可行和有助公營房屋計劃長遠持續發展的租金調整機制十分重要，我們稍後會就「檢討租金政策專責小組委員會」就租金政策檢討的初步結果諮詢事務委員會及公眾。

提交參考

7. 請議員備悉附件所載的終審法院裁決。

房屋及規劃地政局
2005 年 11 月

[Chinese Translation - 中譯本]

終院民事上訴 2005 年第 1 號

何賽雲 對 香港房屋委員會

<u>終審法院判案書撮要</u>

本撮要由司法機構擬備，

並非判案書的一部分，亦沒有法律效力。

終審法院

1. 終審法院[即首席法官李國能、常任法官陳兆愷、常任法官李義和非常任法官苗禮治勳爵，（常任法官包致金持異議）]裁定房屋委員會(下稱“房委會”)勝訴，並駁回上訴。理由如下：

(a) <<房屋條例>>第 16(1A)條(下稱“第 16(1A)條”)中“更改租金的釐定”一詞，意指任何加租的決定;這個詞語的意思不能延伸解作減租的決定。(參看下文第 13 至第 16 段有關非常任法官苗禮治勳爵的判詞撮要)；

(b) 即使以“更改租金的釐定”一詞可包括加租或減租的決定作爲理據，本院亦不能接納上訴人就 3 個爭論點所提出的論據。本院更裁定房委會職責上無須檢討租金，將租金更改，以求將租金調整至一個符合百份之十的租金與收入中位比例(下稱“中位比例”)的水平。這個百份之十的中位比例，本意並不是作爲“負擔能力”一詞的法定定義。在條文中加上這個中位比例，是要限制房委會在作出任何更改租金的釐定時，必須依循這個中位比例行事。(參看下文第 2 至第 12 段有關首席法官李國能的判詞撮要)。

終審法院首席法官李國能的判詞

2. 判詞裡處理了三個爭論點，而這三個爭論點是以第 16(1A)條中“更改租金的釐定”一詞解作包括加租或減租的決定作爲基礎。

3. 房委會的宗旨是，向經濟上無能力負擔私人樓宇的人，提供他們能力可以負擔的租屋。除現時居住於公營房屋的人士外，公屋輪候名冊上仍有相當大數量的申請人。

4. 今次上訴涉及房委會在更改租金方面的法律問題。上訴的結果除會影響租戶外，亦會影響房委會在其他各方面發展所需的資源，包括現有公共屋邨的改善工程，以及爲容納輪候名單上申請人而計劃的新公共屋邨的興建。

5. 第 16(1A)條所發揮的作用是，對房委會作出更改租金的釐定的權力，施加以下限制:-

(a) 次數限制：房委會對公共屋邨所作出更改租金的釐定，須於就該同一屋邨的任何上次的釐定的生效日期起計最少 3 年後才生效。

(b) 百份之十的中位比例限制：房委會就任何一個公共屋邨所釐定的更改租金數額，須令所有公共屋邨的中位比例，不得超逾百份之十。

6. 1997 年年底之前，香港經濟多年來一般都是急速增長，通漲一直向上攀升，普羅大眾收入水平增加，而房委會亦一貫增加公共屋邨租金。當時的立法會考慮到公共屋邨加租次數頻繁及加租款額過大的弊處，於是立法通過 16(1A)條，保障公共屋邨的居民免受加租困苦。

7. 香港經濟其後經歷一段通縮時期，這點是立法會所始料不及的。在這個經濟通縮期，第 16(1A)條在執行上會帶來不尋常的後果。這種情況無疑是立法會所意想不到的。

(1) 房委會若要減租，則依照規定，須在該有關公共屋邨對上一次租金釐定後相隔最少 3 年方可生效。這樣便有損公共屋邨居民的利益。

(2) 房委會對公共屋邨檢討租金時，慣常的做法是分批進行，這點必然是立法會早已意料到的事。倘若中位比例超逾百份之十的話，則按照第 16(1A)條的規定，如要將這個用作所有公共屋邨釐定比率的中位比例下調，以保持於百份之十的水平時，便須對某批公共屋邨大幅度削減租金，甚至削減至零租金。

(3) 第 16(1A)條會過份限制可以扣減租金的數額。房委會檢討某批公共屋邨租金而要減租時，其數額只可減至由房委會就所有公共屋邨釐定的中位比例，不超逾百份之十的水平。在這樣的情況下，即使理由如何充分，房委會亦不能減少減租額。

8. 自從 1998 年 3 月，第 16(1A)條開始生效實施以來，房委會便將租金凍結。其後香港經濟不景，中位比例在 2000 年第 2 季開始超逾 10%；於 2005 年的第 1 季，

更維持於 14.6%的水平。與此同時，獲綜合社會保障援助(下稱“綜援”)的公屋租戶亦大量增加。(根據所得數字顯示，在 1998 年第 4 季獲綜援的公屋租戶佔全港公屋租戶的 12.4%，而在 2003 年第 2 季，這個數字上升至 19.3%)。這些公屋租戶當中有大部分是由政府墊支租金。因此，對他們來說，負擔能力的問題根本不會出現。

第 1 個爭論點

9. 上訴人提出論點，指凍結租金的決定，相當於第 16(1A)條中所指的“更改租金的釐定”。對於這個論點，本院不敢苟同。任何更改必會涉及改變，因此作出不改變的決定不能視作爲“更改租金的釐定”。

第 2 個爭論點

10. 上訴人爭論謂房委會有責任檢討租金，將租金調整至一個符合百份之十的中位比例的水平。換句話說，房委會有責任確保這個中位比例不可超逾百份之十。本院不能接納這個論點。有關的法例條文，對於何謂“能力可以負擔的房屋”沒有下任何定義。百份之十的中位比例並不是爲“負擔能力”這個詞語作出立法定義。在條文中加上這個中位比例，是要限制房委會在作出任何更改租金的釐定時，必須依循這個中位比例行事。

第 3 個爭論點

11. 上訴人提出論據，指她本人有合理期望，期望房委會每 3 年檢討及調整租金一次，從而確保這個中位比例不超逾百份之十。本院並不贊同這個論據。房委會於 1997 年之前所採用的慣常做法並不能支持這個論據，因爲(i)有關的立法背景截然不同，而(ii)當時的經濟環境亦有基本迥異。房委會於 1998 年 3 月以後凍結租金的做法，並不能支持上訴人這番論據。

12. 但是，房委會有責任爲貫徹提供能力可以負擔的房屋這個宗旨而檢討租金及不時考慮是否需要調整租金。現時的公屋租戶和輪候冊上的申請人均須獲提供能力可以負擔的房屋。在履行這個職責時，房委會理應考慮一系列因素，當中包括按照租金援助計劃提供與租戶的援助，接受綜援的公屋租戶戶數，現時輪候冊上申請人的人數和輪候時間，更改租金的釐定(如須作釐定時，則須符合次數限制和百份之十的中位比例限制)所會造成的影響，房委會的財政狀況，和根據<<房屋條例>>第 4(4)條的規定房委會執行政策時須確保收支平衡的責任。房委會履行這些職責而作出的決定，法庭是可以進行司法覆核的。但在本案中並沒有人說房委會違背這個職責。誠然，自 1998 年 3 月以來，房委會多次決定取消加租及延遲租金檢討；從這些決定可以看到房委會已履行了這個職責。

非常任法官苗禮治勳爵的判詞

13. 第 16(1A)條條文中"更改"一詞純粹是"改變"的意思，是一個非常普遍的詞語。但這個詞語在有關文中出現時，語段的上下文語境可將這個詞語的普遍性局限於某一類別的改變。在第 16(1A)條條文中，"更改"一詞是"向上更改"的意思，而"更改租金的釐定"這詞語的意思是指增加租金的決定，並不能延伸解作包括扣減租金的決定。

14. 有關"更改租金"這個詞語的意思，解釋全繫於立法的本意，這點可以從條文的考慮看出來。立法條文的宗旨及作用是要限制房委會不能動輒加租，以及限制房委會可以加租的幅度。房委會在經濟通漲時可能加租的情況下，這條條文便大有道理，可以保障公屋租戶免受加租次數頻繁或加租幅度過大之苦。

15. 但是第 16(1A)條，於房委會在經濟通縮時可能減租的情況下，則是完全沒有意義的，因爲租戶不會因減租次數頻繁而需要保障。有關的法定計算公式(即百份之十的中位比例)並沒有將租金金額無論何時都限定於某一水平，只是釐定租金在改變後不能超越的水平。在計算租金扣減數額時，這個公式定出一個最低水平。然而，立法會沒有可能會用"更改租金"這個詞語，來限制房委會的權力，在適當時，不時減租及釐定減幅。

16. 限制房委會加租的權力這個措施有重大社會意義，同時亦合乎租戶的利益。但是，若針對房委會減租的權力而加以限制，便與租戶利益背道而馳，況且亦毫無意義。因此，限制減租不可能是立法會的立法本意。

常任法官包致金(持異議)

17. 根據法例，提供市民能力可以負擔的房屋，是房委會的首要責任。

18. 第 16(1A)(a)條爲保障公屋租戶不會因個人收入增加而要面臨過於頻繁的加租，但它沒有限制減租的次數。房委會可以而且應該在切實可行範圍內，盡量多次減租，以便履行提供市民能力可以負擔的房屋的責任。

19. 第 16(1A)(b)條爲保障公屋居民而限定租金與收入的中位比例，任何時刻，無論在經濟通漲時或經濟通縮時，都必須維持爲百份之十。提供能力可以負擔的房屋的意思，就是說租金不能超逾百份之十這個限定的比例。房委會在法例上有責任將租金扣減，而扣減幅度須令租金與收入的中位比例下調至不超逾百份之十這個比例的上限。

FACV No. 1 of 2005

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 1 OF 2005 (CIVIL)
(ON APPEAL FROM CACV NO. 251 OF 2003)

Between:

HO CHOI WAN	**Appellant**
- and -	
HONG KONG HOUSING AUTHORITY	**Respondent**

Court:	Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Lord Millett NPJ
Dates of Hearing:	17 and 18 October 2005
Date of Judgment:	21 November 2005

J U D G M E N T

Chief Justice Li:

1. The object of the Housing Authority ("the Authority") is the provision of affordable rental housing ("public housing") to members of the community who, being on low income, are unable to afford private housing. This has been described by the Authority as its core function. At present, around 30% of the population live in public housing. Further, there are a substantial number of people on the waiting list for public housing, having to wait a few years before it is available.

2. The rent charged by the Authority for public housing is an all inclusive rent, so that tenants need not pay separately for rates, Government rent, management fees or maintenance charges. The rents charged are substantially below market rates.

3. This appeal raises the question as to what the Authority's legal position is regarding the variation of rents of public housing. This is an important question. The question has arisen in the context of deflationary times. The answer would obviously affect the large number of existing public housing tenants. But it would also impact on the resources available to the Authority for various purposes, including the improvement of existing estates to enhance living conditions and the construction of new estates to accommodate those on the waiting list who are in need of public housing.

The Ordinance

4. The Authority was incorporated by the Housing Ordinance, Cap. 283 ("the Ordinance"). Its object is laid down in s. 4(1) as follows:

> "The Authority 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 Authority thinks fit for such kinds or classes of

> persons as the Authority may, subject to the approval of the Chief Executive, determine."

As has been noted, its core function is to provide affordable public housing to those who cannot afford private housing.

5. By s. 4(4), the Authority's policy:

> "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."

The Authority is under a statutory duty to pursue this policy of balancing its books.

Section 16(1)

6. Section 16(1) provides:

> "Subject to this Ordinance, the Authority 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 Authority may determine; and
>
> (b) fix the terms, covenants and conditions on which any land in an estate may be let or occupied."

7. Without prejudice to its general power in s. 16(1)(a), the Authority may require tenants in an estate to pay different rents based on their total household income or total household income and assets. Section 16(4). The Authority has the power to remit rent in whole or in part and for such period as it thinks fit. Section 17.

The amendments

8. By the Housing (Amendment) Ordinance 1997 enacted in late June 1997, shortly before the transfer of the exercise of sovereignty, section 16(1A) was introduced into s. 16. By the Housing (Amendment) Ordinance 1998, s. 16 (1B), (1C), (1D) and (1E) were added to s. 16. The

two Ordinances were brought into operation on the same day, 13 March 1998, by the Secretary for Housing by Gazette notices dated 7 March 1998.

The central provision: Section 16(1A)

9. The central provision of the amendments introduced by the two Amendment Ordinances is s. 16(1A) which was added in 1997 ("s. 16(1A)" or "the central provision"). This provides:

> "(a) Any determination of variation of rent after the commencement of the Housing (Amendment) Ordinance 1997 … by the Authority 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.
>
> (b) 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 Authority, shall not exceed 10%."

10. Sections 16(1B) to (1E) added in 1998 are supplemental to the central provision. Sections 16(1B) and (1C) exclude certain matters from its scope. Section 16(1B) disapplies s. 16(1A) to land subject to licences to occupy or permits to occupy granted by the Authority. Section 16(1C) disapplies s. 16(1A) to an adjustment in the rent of a person where the total household income and/or the total value of the household assets as determined by the Authority is (i) greater than a threshold established by the Authority for the purposes of an increase in the rent or (ii) lesser than a threshold so established for the purposes of a decrease in the rent. The effect of s. 16(1C) is to exclude from the scope of s. 16(1A) any rent adjustment in relation to (i) better off tenants who pay additional rent and (ii) tenants who enjoy rental concessions under the Authority's Rent Assistance Scheme.

11. Section 16(1D) clarifies how the median rent to income ratio laid down in s. 16(1A)(b) is to be arrived at. It provides that such ratio shall be determined in accordance with a procedure established by the Authority which may involve sampling to determine the incomes to be used for the purpose of its calculation. Section 16(1E) is an evidentiary provision. It renders a certificate purporting to be signed by the Director of Housing, stating what the median rent to income ratio is on a specified date (as determined in accordance with the Authority's procedure) conclusive proof of the fact stated therein. It also provides that such certificate shall be admitted in legal proceedings without further proof and shall be presumed, unless the contrary is proven, to have been signed by the Director.

12. Section 16(1)(a) confers on the Authority the power to let to any person for any period any land in an estate subject to the payment of such rent as the Authority may determine. Under this provision, the Authority has the power to enter into a tenancy and to determine the rent payable. The standard tenancy agreement of a residential unit contains a provision whereby the rent may be varied by the Authority giving the tenant one month's notice in writing of such increase. Although variation by reduction is not expressly provided for in the agreement, the Authority could plainly reduce the rent.

13. The central provision has effect on any "determination of variation of rent" by the Authority under s. 16(1)(a) in respect of any class (whether determined by the nature of the land or status of the lessee) of land in a public housing estate. As is accepted by the parties, the phrase "determination of variation of rent" does not cover the fixing of

rent by the Authority for the first time for new units. As no rent had been previously fixed, there could not be any determination of variation of rent.

14. In both courts below, and for most of the argument in this Court, it was common ground that the phrase "determination of variation of rent" includes upwards variations in rent (ie. increases) as well as downwards variations in rent (ie. reductions). In the course of his argument, Mr Pannick QC for the Authority put forward a new submission that this basis was not correct and that the phrase "determination of variation of rent" should be interpreted to refer only to increases in rent. I shall come to this argument in due course. For the moment, this judgment will proceed on the basis that the phrase covers both increases and decreases in rent.

The frequency limitation

15. The central provision circumscribes the Authority's power to make a determination of variation of rent by imposing two limitations. The first limitation is a limitation on the frequency at which determinations of variation of rent can take effect:

> "any determination of variation of rent … in respect of any class … of land … 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."

("the frequency limitation"). The limitation does not impose any duty on the Authority to make a determination of variation of rent at three yearly intervals. Strictly, it does not affect when it can make such a determination. What it does limit is the time when such a determination can *take effect*. The earliest time when it can take effect is at least 3 years from the date when "any immediately preceding determination" took effect. It prohibits a determination of variation of rent from coming into

effect more frequently. The phrase "any immediately preceding determination", in referring simply to "determination", covers both a previous variation as well as an initial determination of rent for new units.

The 10% MRIR limitation

16. The second limitation imposed by the central provision is a limitation on amount. "Any determination of variation of rent" in respect of any housing estate:

> "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%."

By this limitation, the amount of "any determination of variation of rent" in respect of any estate must be such that the median rent to income ratio ("the MRIR" or "the ratio") in respect of *all* public housing estates shall not exceed 10% ("the 10% MRIR limitation").

The MRIR

17. As has been pointed out, the MRIR shall be determined by the Authority in accordance with a procedure established by it which may involve sampling to determine the incomes to be used. Section 16(1D). The MRIR is compiled by the Authority in the following way. The Census and Statistics Department conducts quarterly the General Household Survey. This survey collects rent and income data with a sample size of around 24,000 to 27,000 households. Of these households, about 7,000 households reside in the Authority's public housing estates. The MRIR is derived from the data collected from these 7,000 sampled households. Using such data, the rent to income ratios for individual households are worked out, that is, the amount of rent expressed as a percentage of the household income. The rent to income ratios for all the

sampled households living in public housing are then placed in an ordered sequence, either in ascending or descending order, and the middle rent to income ratio is the median rent to income ratio, the MRIR. This is the median ratio of all households living in public housing units. By definition, 50% of the relevant households' rent to income ratio will be below the MRIR while the other 50% will be above it.

18. Before discussing how the central provision with the frequency limitation and the 10% MRIR limitation operates, the position before the enactment of the central provision in 1997 should be referred to.

The Authority's practice before 1997

19. For over 20 years before 1997, the Authority reviewed and revised the rent for public housing estates every two years. This was done in batches of estates. Up until 1999, there were 11 batches. Each batch involved a number of estates but the sizes of the batches were not the same. By 2001-2002, the number of batches of estates had been reduced to six.

20. In its bi-annual rent review exercise for a particular batch, a principal factor which the Authority took into account was the tenants' affordability.

(a) Since about 1986, the Authority had adopted the MRIR as a general indicator for measuring tenants' affordability. In a particular review exercise, this meant the MRIR of the batch of estates under review.

(b) Prior to 1998, the Authority adopted two MRIRs as general benchmarks for assessing the affordability of prospective

tenants and took them into account when setting rents of new estates completed after 1986 and 1991 respectively.

(i) an MRIR of 15% set in 1986 for a space allocation standard of 5.5 square meters internal floor area per person; and

(ii) 18.5% set in 1991 for a higher space allocation standard of 7 square meters internal floor area per person.

In calculating the MRIR in the rent setting exercises for newly completed estates, only the rent to income ratios of the prospective tenants of those estates were included. The projected MRIRs at the time of intake were normally well below the 15% and 18.5% set which were considered as limits.

(c) Further, the Authority took into account the 15% and 18.5% MRIR benchmarks when increasing the rents of existing estates. (These would include new estates when their initially set rents arose for review.) For this purpose, only the MRIR of the tenants in the batch of estates subject to the rent review was assessed.

21. The rent to income ratios included in the determination of the MRIR include the ratios for public housing households in receipt of Comprehensive Social Security Assistance ("CSSA"). However, as the rent paid by the great majority of such households is in fact reimbursed by Government through the Social Welfare Department, the question of affordability of rents does not arise for these households.

22. Apart from the principal factor of the tenants' affordability, other considerations which the Authority took into account in reviewing rent included estate value, location, facilities, rates, maintenance and management costs, private market rents, the Authority's financial position and s. 4(4) of the Ordinance requiring the Authority's policy to be directed to ensuring that the revenue accruing to it from its estates should be sufficient to meet its recurrent expenditure on its estates.

Background to the legislation

23. For many years before late 1997, Hong Kong's economy enjoyed generally rapid growth. During this period, with an inflationary trend, income levels increased. When the Authority engaged on its bi-annual reviews, rents were consistently increased.

24. It is crucial to remember that this was the background against which legislation was proposed as a private member's bill and enacted in June 1997 in the form of the central provision. What was considered to be the mischief were rent increases which were too frequent and too much. Legislators were concerned to protect tenants against such increases. Apart from suggesting a three year rent review cycle, the original bill proposed tying increases to the rate of inflation to be measured by the Consumer Price Index (A). Various amendments to the bill were proposed suggesting other solutions. Eventually, the Legislature settled on the central provision to protect tenants against the mischief of rent increases. At that time, a period of deflation, which Hong Kong had then not experienced for many years, was simply not within its contemplation.

Inflationary times

25. During inflationary times as contemplated by the Legislature, the central provision would work effectively to protect tenants against too frequent and too substantial increases. The Authority's practice in dealing with rent reviews and revisions in batches of estates would not occasion any problem. As far as frequency is concerned, the rent review and revision cycle has been lengthened to a minimum of three years. Rent cannot be increased for at least three years from the last increase or from an initial determination of rent for a new estate. Tenants would enjoy certainty and would be protected against any increase during that period. As far as the amount of increases is concerned, the 10% MRIR limitation would operate as a ceiling for increases. The increased rent must be confined to such an amount that the MRIR which is determined in respect of all public housing estates does not exceed 10%.

Deflationary times

26. It was not within the contemplation of the Legislature in enacting the central provision that Hong Kong would be entering a deflationary period. Between late 1997 and mid 2004, there was more or less a consistent trend of deflation and income levels decreased.

27. On the basis that "determination of variation of rent" includes decreases (see para. 14), the central provision would have to operate in deflationary times. As this was a situation which was not envisaged by the Legislature, it is not surprising that its operation during a period of deflation would give rise to extraordinary consequences.

28. First, instead of working as a protection for tenants, the frequency limitation would work against their interests. Where the

Authority wishes to reduce rent for the estates under review, it would be precluded by this limitation from doing so until at least three years have elapsed since the last rent determination for those estates took effect. Where the last determination was a rent increase made say at the end of an inflationary period, the Authority would have to wait for at least three years before any rent reduction could take effect. Again where the last determination was a rent decrease and the Authority wishes to implement a further rent reduction, it would be precluded from doing so for at least three years by the frequency limitation.

29. Secondly, the Authority's practice of conducting rent reviews in batches of estates must have been within the Legislature's contemplation when it enacted the central provision. Where the MRIR has exceeded 10% at the time of a particular review, the 10% MRIR limitation would have the extraordinary consequence that the rents of the particular batch of estates under review may have to be drastically reduced in order to bring the MRIR, which is a median ratio in respect of *all* housing estates, down to 10%. Indeed, if the size of the batch of estates under review is relatively small and the MRIR has substantially exceeded 10%, rents may have to be reduced down to zero for the estates in question in order to bring the MRIR to 10%. It is conceivable that the circumstances may be such that even then, the 10% MRIR could still not be achieved. A drastic reduction of rents for a particular batch of estates would provide a windfall for their tenants and this may be unfair. When the next batch of estates are under review, their rents may not have to be reduced to the same extent or conceivably at all in order for the 10% MRIR to be complied with.

30. Thirdly, the 10% MRIR limitation has another extraordinary consequence. It imposes a straightjacket on the amount of permissible reduction. Where the MRIR has exceeded 10%, the Authority must reduce rents for the estates under review to such an extent that the MRIR in respect of *all* public housing estates does not exceed 10%. It does not have the option of reducing rent by a lesser amount, since the MRIR although reduced would exceed 10%. This is notwithstanding that the Authority may have good reasons for a more limited reduction. For example, it may be constrained by its financial position, taking into account the continuing need to construct public housing for those on the waiting list and the desirability of improving conditions in existing estates.

31. It should be noted that the extraordinary consequences referred to above may be alleviated by using means outside the operation of the central provision. For example, the use of the Authority's power to remit rent may assist in dealing with the first and third consequences. In relation to the second consequence, the problems caused by batching may be alleviated by combining batches for review, although that would delay rent reduction for earlier batches. But one is here concerned with the operation of the central provision in deflationary times which were not addressed by the Legislature and these extraordinary consequences do illustrate the difficulties of operating it in such times.

Post March 1998

32. Between March 1998 when the legislation was brought into operation and October 2002 when the present judicial review proceedings were instituted, the Authority made a number of decisions concerning public housing rents. In July and September 1998 and January 1999, after reviewing rents for various batches of estates, it decided to increase

rents in accordance with the central provision, with the MRIR staying below 10% even with such increases. But at the same time, having regard to the economic downturn, it decided to waive the increases. Subsequently, between 1999 and 2002, the Authority made a number of decisions each relating to a batch of estates which extended the waivers of the rent increases and deferred rent reviews. The effect of these decisions is that rent has been frozen since the legislation came into force in March 1998.

33. At the same time, the Authority introduced a number of relief measures for tenants. These included the waiver of rent for the month of December 2001, passing on to tenants the benefit of the rates concessions made by Government for 2002 and enhancing the Rent Assistance Scheme which increased substantially the number of eligible households. In October 2002, the Authority stated publicly that the rents for the majority of public housing flats "are still at 1995 level with 65% of our tenants paying a monthly rent of $1,500, rates and management expenses included".

34. With the economic recession, the MRIR started to exceed 10% in the 2nd quarter of 2000. It was at 10.2%. Since then, it has remained at above 10% except for the 4th quarter of 2001 when it dropped to 7.6% as a result of the waiver of rent for December 2001. In 2002, it rose steadily from 11.2 (1st quarter) to 12.1 (4th quarter). In 2003 and 2004, the lowest was 12.8% (3rd quarter of 2003) and the highest was 14.7% (3rd and 4th quarters of 2004). For the 1st quarter of 2005, it remained at 14.6%.

35. At the same time, the number of public housing households in receipt of CSSA has substantially increased. (On the available figures, the increase was from 12.4% of all public housing households in the 4th quarter of 1998 to 19.3% in the 2nd quarter of 2003.) As has been noted (see para. 21), the rent paid by the great majority of these households is reimbursed by Government and the question of affordability does not arise for them.

The appellant

36. The appellant is an elderly widow who is retired. She is in receipt of Old Age Allowance. In 1998, she moved into a flat in a new housing estate, the Kwai Chung Estate, at a monthly rent of $2,110. At the time, having been offered a choice of new and refurbished flats with monthly rental ranging from $892 to $2,110, she chose the flat in question and signed a declaration that she was not willing to move to a refurbished flat in the same area with a cheaper rent. She has lived there with one of her sons. The Ordinance defines "household", in relation to a tenant of a public housing flat, to include the persons whose names are listed in the lease and who are allowed to occupy it under its terms. In the standard form lease dated 11 February 1998 signed by the appellant with the Authority, she listed not only the son living with her but also another son as part of her family who would be entitled to live in the flat under its terms.

37. In April 2001, May 2003 and September 2005, the appellant completed income declarations for the Authority setting out the incomes of the two sons listed in the lease. (Only the first declaration was before the courts below). Based on the rent of $2,110 per month and household incomes so declared (and set out in brackets below), the rent to income

ratio for her household was about 12% in April 2001 ($17,500), about 15% in May 2003 ($14,000) and 9.6% in September 2005 ($22,000).

38. As noted above, the Authority had made successive decisions deferring rent reviews for various batches of estates. The appellant's estate was a new estate in 1998 when rents were set for the first time. Following the frequency limitation in the central provision, rents could only be reviewed in 2001. In late October 2001, the Authority decided to defer rent review for certain estates, including the appellant's estate, from 1 December 2001 to 1 December 2002. And in late October 2002, it decided to defer further rent review for these estates until 1 December 2003.

Judicial review proceedings

39. In October 2002, leave was granted to the appellant to apply for judicial review of the Authority's decisions. In essence, she challenged the Authority's decisions to freeze rents of public housing estates, including her estate, at a level such that the MRIR exceeds 10%. She succeeded before the Judge (Chung J). *Ho Choi Wan v Hong Kong Housing Authority* [2003] 2 HKLRD 819 (11 July 2003). On 12 August 2003, the Judge handed down a decision on relief. For a digest, see [2003] 3 HKLRD J2. He ordered the Authority to forthwith review and determine the variation of rents of the class (or batch) of public housing units to which the appellant's unit is part according to the true meaning and effect of the central provision.

40. On 26 August 2003, upon the Authority's undertaking to review and determine the variation of rents as ordered whilst the appeal is underway, the Judge stayed the execution of his order in so far as its

implementation requires the Authority to have the variation of rents so determined taking effect ahead of the conclusion of its appeal.

41. The Court of Appeal (Ma CJHC, Stock and Yeung JJA) allowed the Authority's appeal and quashed the Judge's orders. *Lam Kin Sum v Hong Kong Housing Authority* [2005] 3 HKLRD 456 (22 November 2004). Lam had applied for similar reliefs as the appellant. Both the Judge and the Court of Appeal's judgment dealt with both cases together. Lam however has not pursued the matter further. With the Court of Appeal's leave, the appellant appeals to this Court.

The issues

42. On the basis that "determination of variation of rent" in the central provision includes rent decreases, three issues arise for consideration.

(1) Whether the Authority's decisions to defer rent reviews for various estates, including the appellant's estate, amounted to determinations of variation of rent within the central provision ("*the 1st issue*").

(2) Whether the Authority is under a statutory duty to review rents and to revise them so as to ensure that the 10% MRIR is not exceeded. ("*the 2nd issue*").

(3) Whether the appellant has a legitimate expectation that the Authority would review rents and revise them at three yearly intervals so as to ensure that the 10% MRIR is not exceeded ("*the 3rd issue*").

The 1st issue

43. Mr Chan SC for the appellant submits that the Authority's decision in October 2001 and also its decision in October 2002 for various estates, including her estate, to defer rent reviews constituted a "determination of variation of rent" within the central provision. If this is right, as any determination within that provision must comply with the 10% MRIR limitation, then each decision should have decreased rents for the estates in question in order to bring the MRIR down to 10%.

44. The Authority's decision in October 2001 and that made in October 2002 to defer rent reviews were decisions to freeze rents. In other words, on each occasion, the Authority decided not to make any change to the rents, that is, not to vary rents. Each decision was no doubt a "determination". But it plainly was not "a determination of variation of rent" within the central provision. "A determination of variation of rent" means a decision to vary rents. It does not include a decision of no variation of rent. "Variation of rent" must involve some change to the rent and a decision not to make any change simply cannot be a determination of "variation of rent". Further, in the central provision, a determination of variation is something which 'takes effect' on a date which is subject to the frequency limitation. A decision to leave rents unchanged does not involve a date when that decision "takes effect".

45. Alternatively, the appellant argues that where the MRIR exceeds 10%, and rents must therefore be reduced if "a determination of variation of rent" were made, a decision to freeze rents would amount to a determination to increase rents and hence a determination of variation of rents. This argument must be rejected. As a matter of language and common sense, a decision not to vary rents plainly cannot amount to a

decision to increase rents. And it cannot be transformed into such a decision on the ground that if a decision to change rents were to be made, the change would in the circumstances have to be a reduction in order to bring the MRIR down to 10%.

The 2nd issue

46. Mr Dykes SC for the appellant submits that the Authority is under a statutory duty to review and vary rents to a level that accords with the 10% MRIR. In other words, the Authority has a duty to ensure that the 10% MRIR is not exceeded. It is maintained that this is an incidental duty arising out of the Authority's power to let land in an estate under s. 16(1)(a) read in the context of its object of providing affordable housing in s. 4(1). Alternatively, it is argued that if the Authority only has the power but not the duty to review and vary rents, then that power could only be properly exercised in one way, that is, to ensure compliance with the 10% MRIR. The exercise of the power in any other way would thwart the policy of the statute and would be improper.

47. It is not suggested by the appellant that the duty contended for is an express duty imposed by the statute. Plainly, it is not. Can the duty be implied? The relevant statutory provisions do not provide any basis for such implication and the duty contended for must be rejected. Section 16(1)(a), which is relied on, confers the power to let. Read in the context of the object laid down in s. 4(1), this power must be exercised by the Authority in a manner which is consistent with the provision of affordable housing. These provisions were on the statute book prior to the enactment of the central provision. Neither s. 4(1) nor s. 16(1)(a) refer to, let alone define, what amounts to affordable housing. Under these provisions, the question of affordability is a matter for the judgment

of the Authority. The central provision in s. 16(1A) enacted in 1997 does not take the matter further. The 10% MRIR limitation provided for therein does not purport to be a statutory definition of affordability. It is introduced as a limitation which must be adhered to by the Authority for any determination of variation of rent *if* one is made.

48. The appellant's alternative argument of a power to review and revise rents that could only be exercised to ensure compliance with the 10% MRIR must also be rejected. In substance, it is another way of formulating the appellant's argument based on the existence of a duty. The essential question remains whether the legislative intent is that, as a matter of policy, the MRIR ratio is a statutory definition of affordability which the Authority must ensure is not exceeded. For the reasons discussed above in rejecting the duty contended for, no such intent can be attributed to the Legislature.

49. It must, however, be noted that the Authority is under a duty to keep rents under review and to consider from time to time whether to revise rents in accordance with its object of the provision of affordable housing. But it must be remembered that both existing tenants as well as those on the waiting list have to be provided with affordable housing. In discharging this duty, it is proper for the Authority to take into account a range of factors, including the assistance provided to tenants under its Rent Assistant Scheme, the number of public households in receipt of CSSA, the number of people on the waiting list and the waiting time, the impact of any determination of variation of rent which, *if* made, must comply with the frequency limitation and the 10% MRIR limitation, its financial position and its duty to pursue the policy prescribed in s. 4(4) of balancing its books. Mr Pannick accepts that this duty rests on the

Authority and that it is susceptible to judicial review for its discharge. But as he rightly pointed out, it has not been suggested that the Authority is in breach of this duty. Indeed, it is evident from its various decisions waiving increases and deferring rent reviews after March 1998 that the Authority has performed this duty.

The 3rd issue

50. Mr Chan SC for the appellant relies on the doctrine of legitimate expectation. It is submitted that she has a legitimate expectation that the Authority would review and revise rents at three yearly intervals so as to ensure that the 10% MRIR is not exceeded. This submission must be considered in the context of the conclusions on statutory interpretation already reached in this judgment on the 1st and 2nd issues.

51. The doctrine of legitimate expectation was considered by this Court in *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFAR 1 at paras. 87 to 99. It is of course essential for the appellant to establish as a matter of fact the legitimate expectation contended for. Generally speaking, a legitimate expectation arises as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority. *Ng Siu Tung* at para. 92.

52. The principal matter relied on by the appellant as giving rise to her legitimate expectation was that for over 20 years, prior to the enactment of the central provision in 1997, the Authority had adopted the practice of reviewing and revising rent at regular intervals (namely, once every two years) with a view to keeping housing affordable. It is submitted that this practice gave rise to a legitimate expectation that after

the central provision came into force, the Authority would continue to review and revise rents at three yearly intervals in accordance with the 10% MRIR, which the appellant argues is a statutory definition of affordability.

53. As has been held, the 10% MRIR is not a statutory definition of affordability. The practice over the years before 1997 cannot give rise to the legitimate expectation contended for and the appellant's submission must be rejected for two reasons. First, the regular rent reviews and revisions before 1997 were made in quite a different statutory setting. In that setting, the Authority's power was not statutorily circumscribed. With the central provision, the position is fundamentally different. As has been discussed, once the Authority makes any determination of variation of rent, such determination must comply with the frequency limitation and the 10% MRIR limitation. The previous practice of rent review and revision developed in the absence of these statutory limitations cannot give rise to any legitimate expectation that such practice would continue in the new statutory setting when any rent revision would now have to comply with the newly introduced limitations.

54. Secondly, the regular rent reviews and revisions before 1997 took place in the context of inflationary times and resulted consistently in rent increases. Even if the statutory setting had remained the same which of course is not the case, the previous practice of reviews and increases developed in inflationary times may give rise to a legitimate expectation that it would be followed in continuing inflationary times. But it could not form a viable basis for an expectation that it would be followed in the fundamentally different economic circumstances of deflationary times.

55. For completeness, it should be noted that the conduct of the Authority between March 1998 when the central provision was brought into force and in October 2002 when the present judicial review proceedings were commenced provides no support for the legitimate expectation contended for. In the deflationary times which then prevailed, the pre-1997 practice was not followed after March 1998. Between July 1998 and January 1999, the Authority decided to increase rents in accordance with the central provision but froze such increases. Subsequently, it decided to continue to freeze rents by extending the waivers of increases and deferring rent reviews.

56. Having regard to conclusions reached on the 1st, 2nd and 3rd issues, the appeal must be dismissed.

Increases only?

57. As has been stated (see para. 14), this judgment has proceeded on the basis that "determination of variation of rent" in the central provision includes rent decreases. In the course of his argument, Mr Pannick advanced the submission that this phrase properly interpreted covers only rent increases. I have read the judgment of Lord Millett upholding this submission and I agree with it. The appeal must also be dismissed on this ground.

Orders

58. Accordingly, the appeal must be dismissed both (i) on the grounds of the conclusions reached on the 1st, 2nd and 3rd issues in this judgment and (ii) on the ground dealt with in Lord Millett's judgment.

59. I would make an order nisi for costs in favour of the Authority. Any party seeking a different order should submit written submissions within 14 days and the Registrar may give such further directions as may be appropriate on further submissions. There shall be an order that the appellant's costs be taxed in accordance with the Legal Aid Regulations.

Mr Justice Bokhary PJ:

60. Affordable housing is what this case is about. So the case is vitally important to a great many people. In 1973 the Hong Kong Housing Authority ("the Authority") came into being. It was created by the Housing Ordinance, Cap. 283, which became law in that year. Then, as now, many households could not afford private sector housing. The Authority was created to provide such households with affordable housing i.e. adequate housing at affordable rent. Providing affordable housing is the Authority's core function. We said that in the Link Reit case (*Lo Siu Lan v. Hong Kong Housing Authority* [2005] 3 HKLRD 257). As it happens, that case was not about the Authority's core function. But this case is. So the two cases are fundamentally different in nature.

Duty to provide affordable housing

61. Today nearly a third of the population lives in public housing i.e. in the Authority's estates at subsidized rent. Many others are in the queue. What they are queuing up for is affordable housing. So defending that concept is in their interests, too. Section 4(1) of the Housing Ordinance provides that "[t]he Authority shall exercise its powers and discharge its duties under this Ordinance so as to secure the provision of housing … for such kinds or classes of persons as the Authority may, subject to the approval of the Chief Executive,

determine." Although not as often as in daily life, even the law sometimes forbears to state the obvious. Here is an instance of that. The statute does not state in terms that it means housing for persons who cannot afford private sector housing. But what else can it sensibly mean? I see that meaning as a necessary implication of the statute's provisions purposively read as a whole and in context. My reasons for taking this view are as follows.

62. In its printed case the Authority cites — but is not assisted by — the Privy Council's acceptance in *Matadeen v. Pointu* [1999] 1 AC 98 at p.108 F-G of the South African Constitutional Court's statement in *State v. Zuma* [1995] 1 LRC 145 at p.156d that "[i]f the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination". Under the Housing Ordinance affordable housing is infinitely more than a mere value of general resort. Providing affordable housing is obviously the Authority's *raison d'être*. Governance under the rule of law is a matter of enforceable duty, not mere grace and favour. And the statute would be bereft of sense and reason if it did not oblige the Authority to provide affordable housing.

63. For the disposal of the present appeal, the foregoing is probably all that it is strictly necessary to say about "values". But for wider purposes, it is as well to take the precaution of saying at least a little more on that topic. *Zuma's* case concerned legislation which rebuttably presumed the voluntariness of any confession made to a magistrate and reduced to writing. That legislation was declared unconstitutional. When the statement about "divination" is read in context, one sees that it does not deny the relevance of the values underlying the instrument to be interpreted. At p.156b it is said that even

though the task is one of interpretation, the courts "must always be conscious of the *values* underlying the Constitution". And in a crucial passage at p.163 e-f the following points are made. The "common law rule on the burden of proof is *inherent* in the rights specifically mentioned" in the relevant provision of the constitution. And "this interpretation promotes the *values* which underlie an open and democratic society and is entirely consistent with the language of" that provision. (All foregoing emphasis supplied.) Values cannot replace text but can shed light on it.

64. I now return to the Housing Ordinance. To avoid being undeservedly credited (or debited) with originality, I should disclose this. In speaking of the sense and reason of the statute, I have in mind the note which Edmund Plowden famously added to his report of the Court of Common Pleas' decision in *Eyston v. Studd* (1574) 2 Plowden 459; 75 ER 688. He wrote (at p.465; p.695) that "it is not the words of the law, but the internal sense of it that makes the law, [which] consists of two parts, viz. of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law". The imagery is of another age, but accords with the modern view of the law as a rational problem-solver. It also accords with the concept of giving a statute the construction that best furthers its policy. A repressive or mean spirited law can be called soulless. But the Housing Ordinance is not a law of that dreadful or dismal nature. In my view, providing affordable housing is the Authority's duty and, indeed, its paramount duty.

65. I should indicate that I have formed that view even without taking the International Covenant on Economic, Social and Cultural Rights ("the ICESCR") into account. Having so indicated, I wish to guard against being thought to have decided that the ICESCR is irrelevant in a context such as this one. Let me explain.

66. Provided that one does not forget their interrelationship, it can sometimes be helpful to think in terms of two broad categories of human rights. One category consists of traditional human rights: being the civil and political ones. The other category consists of the more recently recognised human rights: being those of an economic, social or cultural nature. Among these is the right to adequate housing. Internationally the ICESCR is the most significant source or reflection of economic, social and cultural rights. Article 11(1) thereof provides:

> "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including *adequate* food, clothing and *housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent." (Emphasis supplied.)

The right to adequate housing is described in 14 *Halsbury's Laws of Hong Kong* (2001) at p.551, para. 210.269 as a "human right … of central importance for the enjoyment of all economic, social and cultural rights".

67. Our constitution the Basic Law speaks of the ICESCR in the same breath as it does of the International Covenant on Civil and Political Rights ("the ICCPR"). Article 39 of the Basic Law provides that "[t]he provisions of [the ICCPR, the ICESCR], and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws" of Hong Kong. I am not saying that economic, social and cultural rights enjoy precisely the same status as

civil and political rights under our constitutional arrangements. For one thing, civil and political rights are contained in the Hong Kong Bill of Rights which embodies the ICCPR's application to Hong Kong while economic, social and cultural rights are not contained in any such instrument. And then there are the differences thus noted in *International Human Rights in Context* (eds Steiner & Alston), 2nd ed. (2000) at p.246:

> "There are many differences between the two major Covenants, including terminology. For example, the ICCPR contains terms such as 'everyone has the right to…', or 'no one shall be…', whereas the ICESCR usually employs the formula 'States Parties recognize the right of everyone to …'. Two major differences should be noted, both appearing in the key provision of Article 2(1). First, the obligation of states parties stated in that provision is recognized to be subject to the availability of resources ('to the maximum of its available resources'). And second, the obligation is one of progressive realization ('with a view to achieving progressively')."

68. In his ever-helpful book, *Hong Kong's New Constitutional Order*, 2nd ed. (1999), Prof. Yash Ghai draws attention (at p.411, footnote 11) to the United Nations Committee on Economic, Social and Cultural Rights' 7 December 1994 report on Hong Kong. There the Committee expressed its regret that the ICESCR had not been incorporated into Hong Kong domestic law. Hong Kong may not have legislated for economic, social and cultural rights in their entirety. But as far as housing is concerned, we have the Housing Ordinance. The context in which a statute is to be construed means (as Viscount Simonds said in *Attorney General v. Prince Ernest Augustus of Hanover* [1957] AC 436 at p.461) its context in the "widest sense". If it were necessary to do so in order to establish that the Authority is duty-bound to provide affordable housing, it might well be possible to pray the ICESCR powerfully in aid of construing the Housing Ordinance to impose that duty. As it happens, however, I have arrived at that construction even without taking the ICESCR into account.

How housing is kept affordable: median rent to income ratio

69. How is housing to be kept affordable? In the mid-1980s the Authority began to do that by reference to a median rent to income ratio. Underlying that method is the straightforward idea that, leaving aside any capital, your income dictates what you can afford. The method is statistical, and works like this. From data collected through the Census and Statistics Department's territory-wide quarterly General Household Survey, the Authority extracts the rent to income ratio of a sample of households in its estates. And it then takes the ratio in the middle of the spectrum provided by those samples. That ratio is the median rent to income ratio. It is expressed in terms of a percentage, being the percentage of income that is spent on rent. Across the spectrum, rent increases if the percentage is raised and decreases if the percentage is lowered.

70. For the "median rent income ratio" method to achieve the Housing Ordinance's object, it is necessary that the ratio be one that brings about affordable housing as envisaged by the statute.

Ratio capped by statute at 10%

71. For over 20 years leading up to the economic downturn which began in the autumn of 1997, public housing rent was reviewed every two years. And each of those reviews resulted in a rent increase. 13 March 1998 saw the commencement of the Housing (Amendment) Ordinance 1997 which had been passed on 29 June 1997. This amendment Ordinance added a subsection (1A) to s.16 of the principal Ordinance.

72. The Authority's power to determine public housing rent from time to time is — and has always been — contained in s.16(1)(a). Thereunder the Authority is empowered to "let to any person, for any period, any land in an estate, subject to the payment of such premium, rent or other consideration as [it] may determine". Subsection (1A) provides:

> "(a) Any determination of variation of rent [after 13 March 1998] by the Authority 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.
>
> (b) 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 Authority, shall not exceed 10%."

73. So, by virtue of s. 16(1A)(b), the "median rent to income ratio" method, which had been used administratively since the mid-1980s, acquired a statutory status on 13 March 1998. At the same time the way in which the median rent to income ratio is determined also became statutory. That resulted from the addition of subsections (1D) and (1E) to s. 16. Those subsections were added by another amendment Ordinance, namely the Housing (Amendment) Ordinance 1998 which was passed on 5 March 1998 and commenced on the 13th of that month. They read:

> "(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 Authority and, without prejudice to the generality of the foregoing, the Authority may establish a procedure involving sampling to determine the incomes to be used for the purpose of calculating the ratio.
>
> (1E) A certificate purporting to be signed by the Director of Housing stating what the median rent to income ratio (as determined in accordance with the procedure established by the Authority) is on a specified date, is conclusive proof of the fact stated therein and shall be admitted in evidence in any proceedings before a court without

> further proof and shall be presumed, until the contrary is proven, to have been signed by the Director of Housing."

74. The capping of the median rent to income ratio for all public housing at 10% is helpful to public housing residents. For that percentage can be contrasted with the 15% adopted by the Authority in 1986 for newly built public housing units with a space allocation of over 5.5 but under 7 sq. m. per person. And it can be even more strongly contrasted with the 18.5% adopted by the Authority in 1991 for more spacious units.

75. Limiting the frequency of variations of rent helps public housing residents in inflationary times of rising income when the variations would naturally be increases. And it was in such times that the legislation imposing such limitation was passed. But by the time the limitation came into effect, we were in deflationary times of falling income. Where income has fallen since their last rent review, public housing residents would naturally be eager for a fresh rent review. For upon an application of the same median rent to income ratio as the last time, the fresh review would result in a rent reduction. And if a lower ratio were applied, then of course rent would go down even further. Does s.16(1A)(a) limit the frequency of rent *reductions*? I will give my answer later on in this judgment.

10% cap exceeded

76. Various measures have been implemented to help public housing residents to cope with their financial difficulties in the economic downturn of autumn 1997 onwards. These measures include waivers of rent increase, the Comprehensive Social Security Assistance Scheme, the Rent Assistance Scheme and giving public housing residents the choice

of moving into cheaper units. But there has been no reduction of public housing rent since s.16(1A) came into effect on 13 March 1998. That absence of rent reduction is what has led to this litigation.

77. The litigation began as judicial review proceedings commenced in October 2002. They were brought against the Authority by one of its tenants Madam Ho Choi Wan, an elderly widow subsisting on Old Age Allowance and what she occasionally receives from one of her sons. Her ultimate objective was — and is — a rent reduction. She sought — and seeks — to achieve that objective by compelling the Authority to conduct a rent review. For at the time when she commenced proceedings, the median rent to income ratio exceeded the 10% cap set by s.16(1A)(b). Our latest information takes us to the first quarter of 2005. The median rent to income ratio for that quarter stood at 14.6%.

78. What if a decision had been made in October 2002 to reduce rent so as to lower the median rent to income ratio to 10%? The Authority says that it would in consequence have suffered an annual loss of rent of $1.52 billion. What the Authority sees as a loss of rent to it would, I expect, be seen by public housing residents as a saving of rent for them. The Chief Judge of the High Court was plainly right when he spoke to the effect, as he did in the Court of Appeal, that hardship to one side or the other cannot deter the courts from deciding the case as the law requires.

In the courts below

79. Madam Ho succeeded before Chung J in the High Court. The judge found that the 10% cap had been exceeded. He held, as a matter of the true construction of the Housing Ordinance, that the

Authority was duty-bound to review rent every three years and to reduce rent so as to bring it within that cap. And he also held that Madam Ho had a legitimate expectation of the rent review and rent reduction which she sought. By an order of *mandamus*, he ordered the Authority forthwith to "review and determine the variation of rents of the class (or batch) of public housing units to which [Madam Ho's] public housing unit is part, according to the true meaning and effect of" s.16(1A). He awarded Madam Ho costs (to be taxed if not agreed) against the Authority, and ordered legal aid taxation of her own costs.

80. The Court of Appeal (Ma CJHC and Stock and Yeung JJA) held that the Authority did not have those duties. And they held that Madam Ho did not have that legitimate expectation. Accordingly they concluded that she was not entitled to any relief. So they allowed the Authority's appeal with costs (to be taxed if not agreed) before them and at first instance, ordering legal aid taxation of Madam Ho's own costs. They also expressed the view that, in any event, the order made by the judge was too wide in that it required action by the Authority in respect of persons other than Madam Ho (and the other judicial review applicant who was before the Court of Appeal but is not before us).

81. By leave to appeal granted by the Court of Appeal, Madam Ho now appeals to this Court.

Madam Ho's main points

82. Madam Ho's main points, as set out in her printed case and developed by Mr Philip Dykes SC and Prof. Johannes Chan SC on her behalf, are as follows:

(a) A duty to review rent periodically so as to make sure that it is — and continues to be — affordable arises under s.16(1)(a). It arises because of the governing duty under s.4(1) requiring the Authority to exercise all powers under the Housing Ordinance to secure the provision of housing to eligible persons. That duty predates the amendments to s.16. Those amendments do not affect that primary duty.

(b) When rent is reviewed the Authority need not make a 'determination of variation of rent' under s.16(1)(a), but it must do so if the rent review shows that the statutory indicator of affordability in s.16(lA)(b) would be breached by the Authority continuing to exercise its statutory power to let out residential housing at the prevailing rent levels.

(c) The new s.16(1A) simply includes a statutory indicator of affordability, and provides for the consequences of a rent review involving a 'determination of variation of rent' under s. 16(1)(a).

(d) The Authority's actions in deferring rent reviews in the face of facts that show that the statutory indicator of affordability has been breached amount to non-compliance with its overriding duty to secure the provision of affordable housing to residential tenants.

(e) Madam Ho has a legitimate expectation, induced by the long and consistent practice of the Authority over 20 years and by numerous representations by it, that it would carry out periodic reviews of rent and adjust the rent if circumstances warranted it.

The Authority's main points

83. The Authority's main points, as set out in its printed case and developed by Mr David Pannick QC on its behalf, are as follows:

(a) The Housing Ordinance does not impose a duty on the Authority to ensure that rents do not exceed a median rent to income ratio of 10%. Madam Ho is inviting the Court to rewrite the statute to impose such a duty.

(b) Neither s.16(1)(a) nor s.4(1) (on which Madam Ho relies) imposes any duty on the Authority to adopt a particular method of assessing rent, a particular timetable for assessing rent or a particular median rent to income ratio figure (in respect of all lands in all estates let for residential purposes at all times) which must not be exceeded. On the contrary, and as one would expect, those statutory provisions leave such matters to the judgment of the Authority, subject to judicial review on traditional principles of perversity, taking account of relevant factors and acting for a proper purpose.

(c) Section 16(1A) imposes specific and limited duties on the Authority which do not assist Madam Ho in the circumstances of this case.

(d) Madam Ho has no relevant legitimate expectation in this context.

Analysis

84. Having analysed the arguments and counter-arguments, for which I thank counsel on both sides, I would state my reasons and conclusion in the following way.

85. I can see that the Authority's position is not an easy one. Section 4(4) provides that the Authority's "policy … 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". In response to a question by me in the course of the argument, Mr Pannick very properly accepted that a duty to direct one's policy to ensuring something is not the same as a duty to ensure it. Moreover the Authority was, after all, not brought into being for the purpose of balancing its books. It was brought into being for the purpose of providing affordable housing to households that cannot afford private sector housing.

86. Item (d) of para. 34(7) of the Authority's printed case says:

> "The duties for which [Madam Ho] contends would inevitably have made it difficult for the Authority to obtain sufficient revenue to meet recurrent expenditure and so satisfy [s.4(4)] without further injection of funds from the Government. Other Hong Kong residents would be paying for those benefits."

I am not persuaded by that point. Quite apart from anything else, I note that item (f) of the same sub-paragraph says:

> "There are other relief measures to assist public housing tenants who need assistance: rent-increase waivers, the Comprehensive Social Security Assistance Scheme, the Rent Assistance Scheme, and the option of moving to a cheaper unit."

Those relief measures, too, would in the same sense be paid for by other Hong Kong residents. And so would any other government measures implemented to assist households that need extra assistance because public housing rent has risen above the 10% cap.

87. Dissenting in *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security*[1981] AC 800, Lord Wilberforce said this (at p.822 B-E):

> " In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question `What would Parliament have done in this current case—not being one in contemplation—if the facts had been before it?' attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself."

Persuasive from the start, that statement has been rendered even more so by the House of Lords' acceptance of it in *R (Quintavalle) v. Secretary of State for Health* [2003] 2 AC 687. I, too, respectfully accept Lord Wilberforce's statement. So I turn to the use which the Authority seeks to make of it.

88. The Authority says that Madam Ho's case involves attributing to the legislature an intention to impose an implied duty by reference to economic circumstances which were not envisaged at the time of enacting the amendments concerned. In my view, Madam Ho's case does not involve doing that. Whatever the economic trend, it is for the Authority to determine rent in its estates. Times naturally tend to change. So in order to carry out — and keep on carrying out — its core function of providing affordable housing, the Authority must of course make such determinations of rent from time to time.

89. This brings me to a point which I raised in the course of the argument. It involves the difference between paragraphs (a) and (b) of s.16(1A). The limitation which paragraph (a) places on the frequency of variations of rent is obviously meant to help public housing residents in times of rising income. For in such times any variation would naturally be an increase. It is true that on a literal reading paragraph (a) would limit the frequency of any variation, whether by way of reduction or by way of increase. But as Judge Learned Hand said when giving the judgment of the United States Court of Appeals in *Cabell v. Markham* 148 F.2d 737 (1945) at p.739: "Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute." So paragraph (a) should not be read to inhibit rent reductions in times of falling income. I hold that s.16(1A)(a) does not in any way limit the frequency of rent reductions. The Authority can — and should — reduce rent as frequently as practicable to carry out its duty to provide affordable housing.

90. Just as fidelity to the statute's purpose dictates confining paragraph (a) to times of rising income, so does it dictate leaving paragraph (b) to operate at all times. Falling income does not make it easier to pay rent. And the 10% cap set by paragraph (b) serves the policy of affordable housing whether income is rising, stable or falling. Therein lies the crucial difference between paragraphs (a) and (b). Both serve the policy of affordable housing, but in very different ways. Paragraph (a) does so by protecting housing residents against excessively frequent rent increases in times of rising income. And paragraph (b) does so by capping the median rent to income ratio at 10% at all times.

91. Just because part of a statute is directed to giving protection during one economic trend, it does not mean that the entire statute is predicated on the premise that that trend will last forever. There is no policy reason for tying paragraph (b) to paragraph (a) in such a way that confining the operation of paragraph (a) to increases means so confining paragraph (b)'s operation too. Nor is there any linguistic reason for such a course. It is true that paragraph (b) speaks of "[t]he rent determined under paragraph (a)". But when one looks at paragraph (a) itself, one sees that it speaks of "[a]ny determination of rent … under subsection (1)(a)". And the power under s.16(1)(a) is not confined to increasing rent. It extends also to decreasing rent.

92. Respectfully adopting Lord Wilberforce's use of the word "genus" in the *Royal College of Nursing* case, I would put it like this. The 10% cap operates to limit the extent of any increase of public housing rent during inflation. And it also operates to require an appropriate decrease of public housing rent during deflation. Either way it serves the policy of affordable housing. So inflation and deflation are within the same genus as far as the 10% cap is concerned.

93. The Authority draws attention to s. 17 of the Housing Ordinance. Under this section the Authority "may remit, in whole or in part and for such period as it thinks fit, the payment of any rent, premium or other consideration payable under any lease." Rent remission is one measure by which the government is able, at its discretion, to ease the burden of public housing residents. There are, as we have seen, various discretionary measures by which that can be done. What must always be remembered is that they are *discretionary*. That makes them crucially different from the protection given to public housing residents by the

legislature when it capped the median rent to income ratio at 10%. For such protection is *as of right*.

94. Discretionary relief measures have their proper role. But they do not supplant the protection due to people as of right. And the courts must guard against treating discretion as if it supplanted rights. Having a right rather than being dependent upon how someone else exercises a discretion naturally makes you more autonomous and secure. This is especially so where very important matters are concerned. And I would be surprised to hear it said that the affordability of the roof over your head is not very important indeed.

95. I have already said — and given my reasons for saying — that providing affordable housing is the Authority's duty and, indeed, its paramount duty. As to how housing is to be kept affordable, I have already explained that it is done by determining rent in accordance with the median rent to income ratio. That ratio, as I have already pointed out, has been capped by statute at 10%. So it is not a matter of affordability being left to the Authority's opinion subject only to judicial review on traditional principles. In short, the legislature has spoken: affordable housing is to be provided and affordable housing means public housing rent not exceeding a median rent to income ratio cap of 10%. But public housing rent has, as I have already noted, long risen well above that cap.

96. In order to comply with its statutory duty to provide affordable housing to households that cannot afford private sector housing, the Authority must, in my judgment, reduce public housing rent to the extent necessary for bringing the median rent to income ratio down to a level that does not exceed the 10% cap. This case being in the nature

of a test case, I reject the Authority's complaint that the order of *mandamus* made by the judge is too wide. In public law litigation of a test nature the courts declare the law for it to be applied equally to all persons affected by the law as so declared.

Conclusion

97. For the foregoing reasons, I would allow Madam Ho's appeal and declare that the Authority is duty-bound in law to reduce public housing rent to the extent necessary for bringing the median rent to income ratio down to a level that does not exceed the 10% cap. Although that declaration should be enough, I would also restore the order of *mandamus* made in Madam Ho's favour by the judge. As to costs, I would make an order *nisi* (to become absolute within 21 days) awarding Madam Ho costs (to be taxed if not agreed) here and in the courts below, and would of course order legal aid taxation of her own costs.

Mr Justice Chan PJ:

98. I agree with the judgment of the Chief Justice and the judgment of Lord Millett NPJ. For the separate reasons given by them, I too would dismiss the appeal.

99. I would only add that in my view, the problems discussed in this appeal illustrate the desirability of having a long term and comprehensive review of the whole public housing policy, including the MRIR methodology and its ceiling now fixed at 10% which has been criticized by some as arbitrary. After all, public housing affects not only 30% of our population, but also those anxiously waiting in the long queue and a lot more families who cannot afford private housing.

Mr Justice Ribeiro PJ:

100. I have had the benefit of reading in draft the judgments of the Chief Justice and of Lord Millett NPJ. I respectfully agree that for the separate reasons contained in each of those judgments, the appeal must be dismissed.

Lord Millett NPJ:

101. In both courts below, and for most of the argument in this court, it has been common ground that the words "variation of rent" in s.16(1A)(a) of the Housing Ordinance, Cap. 283 ("the Ordinance"), which was introduced in 1997, cover downwards variations (i.e. reductions) in rent as well as upwards variations (i.e. increases) in rent. I agree with Li CJ and for the reasons he gives that, even on this basis, the appeal cannot succeed. But I would also decide this case on another and logically anterior ground, namely that in this particular context the words do not cover downwards variations in rent.

102. The word "variation" simply means change or alteration, and is a word of the most general kind. It is not ambiguous, and in its literal meaning includes change of any kind and in any direction, both upwards and downwards. But words take their meaning from their context, and the context may restrict the generality of the word to change of a particular kind. I am satisfied that the word "variation" in s.16(1A)(a) of the Ordinance means "upwards variation" only and that the words "any determination of variation of rent" mean any decision to increase the rent and do not extend to a decision to reduce it.

103. The objects and core function of the Housing Authority, derived from s.4(1) of the Ordinance, are to provide low-cost housing to lower-income households. To enable it to perform this important social function it must keep the cost of living and the means of lower-income households under constant review; and must reserve the right to vary the rents (upwards or downwards) from time to time in order to ensure that they remain appropriate in the light of changes in the cost of living. Section 16(1) gives the Housing Authority the necessary powers to grant periodic tenancies or include suitable provisions in its tenancies to enable it to vary the rents whenever this is appropriate.

104. Even before 1997, therefore the Housing Authority had a duty both to keep the level of rents under constant review and to fix new rents and increase or reduce existing rents having regard among other things to changes in the cost of living and it had all the necessary powers to enable it to do so. Save to the extent that its powers have been curtailed by s.16(1A) the position remains unchanged today. The consistent practice of the Housing Authority over many years was to review the rents of comparable estates in batches and where appropriate vary them every two years. For more than twenty years before 1997 the cost of living and household incomes rose continuously, and every review during this period led to an increase in rent.

105. This was the background against which s.16(1A) was introduced into the Ordinance in 1997. Its operative provisions are triggered by what is described as a "determination of variation of rent". This somewhat ungainly expression simply means a decision to vary the rent. A decision not to vary the rent is obviously not a decision to vary it, though it is a decision and so is amenable to judicial review. Moreover,

there is no date from which a decision not to vary an existing rent can be said to "take effect" as provided by s.16(1A)(a). While, therefore, the Housing Authority's decisions to defer its periodic review and variation of rent are subject to judicial review, they were not "determinations of variation of rent" within s.16(1A)(a).

106. The new s.16(1A) left the duties of the Housing Authority unaffected but circumscribed its powers in two respects. (It is necessary to bear in mind that the Section limited the powers of the Housing Authority; it imposed no new duties and conferred no new powers. This is why I am respectfully unable to accept the dissenting opinion of Mr Justice Bokhary PJ.) Paragraph (a) dealt with the frequency with which the Housing Authority might vary the rent of any particular class of land. It provided that any determination of variation of rent in respect of any class of land should only take effect "at least three years" from the date on which the last determination in respect of the same class of land came into effect. Paragraph (b) dealt with the amount of any variation. It provided that "the rent determined under paragraph (a) in respect of any such class of land" should not exceed an amount which would enable it to comply with a particular statutory formula applicable to all classes of land let for residential purposes by the Housing Authority.

107. The meaning of the expression "variation of rent" in s.16(1A) depends on the legislative intent, and this sufficiently appears from a consideration of the Section itself. Its purpose and effect is to limit both the frequency with which (para.(a)) and the amount by which (para.(b)) the Housing Authority may vary the rent. In relation to potential *increases* in rent in times of inflation, this makes good sense. The Section protects tenants from rent increases which are too frequent or too

great. Once the rent has been fixed or varied, paragraph (a) prevents the Housing Authority from increasing it for at least three years. The Housing Authority is not bound to increase the rent after the three years have expired and may delay any increase indefinitely ("*at least* three years"), but it may not impose a rent increase which takes effect before the three years have expired. Paragraph (b) allows the Housing Authority to increase the rent while maintaining it at an appropriate level provided that the new rent does not exceed a level set by a statutory formula. This has the effect of capping the amount of any increase which might otherwise be justified by rising incomes.

108. In relation to potential *reductions* in rent in times of deflation, however, s.16(1)(A)(a) makes no sense at all. Why should the Housing Authority be forbidden to reduce a rent which has become inappropriately high merely because less than three years have passed since the rent was last fixed or varied? Tenants need to be protected from too frequent *increases* in rent; but they do not need to be protected from too frequent *reductions* in rent. A literal interpretation of the word "variation" to cover downwards as well as upwards variations is to the disadvantage of the tenants; it prevents the Housing Authority from reducing rents when, absent s.16(1A)(a), it would do so.

109. Paragraph (b) is not free-standing but has effect only when the rent is determined under paragraph (a). Unless and until the Housing Authority decides to vary an existing rent, it is without effect; and then it operates to limit the powers of the Housing Authority. This also makes no sense in relation to *reductions* in rent. The statutory formula does not cap the level of rent which must be maintained at all times but merely provides a level which the rent must not exceed after it has been varied.

This limits the extent of any variation to a *maximum* in the case of an increase in rent but imposes a *minimum* in the case of a reduction in rent. Unless the reduction in the rent applicable to a particular estate or batch of estates has the effect of bringing the median rent to income ratio in respect of all the Housing Authority's estates below the statutory ceiling, it cannot be made at all. As Li CJ has explained, it may be necessary to reduce the rent of a particular estate or batch of estates to an unjustifiably low level, possibly to a nominal amount or even to zero, in order to comply with the statutory formula; and even this may not be sufficient. It cannot have been the intention of the legislature in these circumstances to compel the Housing Authority to maintain the rent at an inappropriate level. In this case also a literal interpretation of the word "variation" to cover downwards as well as upwards variations is to the disadvantage of the tenants; in a time of deflation it prevents the Housing Authority from reducing rents of an estate or batch of estates to an appropriate level when, absent s.16(1A)(b), it would do so.

110. In the present context, therefore, the appearance of symmetry between upwards and downwards variations and between inflation and deflation is illusory. Limiting the Housing Authority's powers to increase rents makes social sense and is in the tenants' interests. But placing constraints on its powers to reduce rents is contrary to the tenants' interests and makes no sense. It cannot have been the intention of the legislature to do so.

111. In construing the language of a statute, it is the task of the court to ascertain and give effect to the intention of the legislature. But that does not mean that the Court must give a literal construction to every

word or phrase in the statute. As Lord Bingham of Cornhill said in *R (Quintavalle) v. Secretary of State for Health* [2003] 2 AC 687 at p.695

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose."

Whenever the legislature enacts or amends an Ordinance, its purpose is to remedy a perceived mischief or defect in the pre-existing legislation. It is to be presumed that it did not intend the statute to go wider in its operation than is necessary to remedy the mischief or defect in question. If it has inadvertently employed general words which, if given their fullest effect, are wider than necessary, the court not only may but must restrict them by construing them in a narrower sense which, while still falling within the ordinary meaning of the words, gives effect to the legislative intent but does not go beyond it, still less frustrate it.

112. There are many examples of this in the reported cases. It is necessary to refer to only a few of them. In *Re St. James' Club* (1852) 2 De G.M.&G. 383 the question was whether a members' social club was an "association" for the purpose of the winding-up provisions of the Joint Stock Companies Acts. The club was plainly an association within the ordinary meaning of the word; but Lord St. Leonards LC held that it was not an association within the meaning of the word in the statute. Although he felt unable to say what associations were within the Acts, he declined to give the word its fullest application so as to include every cricket club, archery society, charitable association or club of every kind.

113. In *Re International Tin Council (C.A.)* [1989] Ch 309, the Court of Appeal affirmed my decision that an international organisation was not an "association" within the meaning of the Companies Acts. At p.329 Nourse LJ said:

> "….. the sole question is whether [the International Tin Council], an international organisation, is an 'association' within section 665. Mr. Morritt submitted that here we have an ordinary word in the English language, with a plain and unambiguous meaning, which is apt to describe [the International Tin Council] and to which effect must be given accordingly. Referring to observations made in the House of Lords in *Inland Revenue Commissioners v. Collco Dealings Ltd.* [1962] A.C. 1, Millett J. convincingly disposed of that submission in these words [1987] Ch. 419, 450_{A-B}:
>
> > 'it is one thing to give effect to plain and unambiguous language in a statute. It is quite another to insist that general words must invariably be given their fullest meaning and applied to every object which falls within their literal scope, regardless of the probable intentions of Parliament.'
>
> We entirely agree. Like most canons of statutory construction, it is only a matter of common sense."

114. In *DPP v. McKeown* [1997] 1 All ER 737 the question was whether the result of a breathalyser test contained in a document generated by a computer was admissible in evidence. In order for the document to be admissible the prosecution had to show that any respect in which the computer was not operating properly was not "such as to affect the production of the document or the accuracy of its contents." There was an error in the computer's time display, and accordingly the document in question showed the wrong time. At p.743 Lord Hoffmann said:

> " The question is therefore whether [the error in the time display] was 'such as to affect the production of the document or the accuracy of its contents.' If the words are read literally, it did. The document said that the first test had occurred at 23.00 GMT when it was in fact 00.13 BST. … The inaccuracy of the time reading therefore affected the accuracy of a part of the contents of the document.
>
> In my view, however, the paragraph was not intended to be read in such a literal fashion. … What if there was a software fault which caused the document to be printed in lower case when it was meant to be in upper case? The fault has certainly affected the production of the document. But a rule which excluded an otherwise accurate document on this ground would be quite irrational."

After considering the object of the statutory rule, Lord Hoffmann, with whom the rest of their Lordships agreed, concluded that a malfunction was relevant only if it affected the way in which the computer processed, stored or retrieved the information used to generate the statement tendered in evidence. Other malfunctions did not matter. It followed that the statutory definition must be read subject to the overall qualification that the paragraph was referring only to those aspects of the document or its contents which were material to the accuracy of the statement tendered in evidence.

115. In *Crook v. Edmondson* [1966] 2 QB 81 it was held that, in a statute relating solely to sexual offences, Parliament could not be supposed to have used the words "for immoral purposes" in their general sense as comprising all immoral or wrongful conduct. The immoral purposes in question must be immoral in respect of some sexual activity.

116. In like manner, the legislature cannot be supposed to have used the words "variation of rent", in an amendment intended to protect tenants from oppressive variations in rent, in their full sense so as to curtail the powers of the Housing Authority to reduce rents as often and by as little as might be appropriate.

117. As I said in *Quintavalle (supra)* at p.708, the Court cannot give effect to the legislative intention if the text does not permit it. But restricting the meaning of the word "variation" in s.16(1A)(a) of the Ordinance to "upwards variation" does not distort the meaning of the word or extend it to cover a situation not contemplated by the legislature. Although this is sometimes possible, Lord Wilberforce drew attention to the difficulties in doing so in *Royal College of Nursing of the United*

Kingdom v. Department of Health and Social Security [1981] AC 800 at p.822. Nor is it necessary to read the word in an unusual or secondary sense. The word "variation" undoubtedly covers an increase in amount, and while it would normally cover a reduction in amount also, the effect of giving the word its fullest meaning would frustrate the object of the legislature to give a degree of statutory protection to tenants. I think it is a classic example of a case where the legislature has inadvertently used a word which has a wider meaning than necessary to achieve its purpose. It may have done so because it did not have the possibility of deflation in mind. But it is not necessary to explore the reasons for its use of inapposite language; it is enough that it has done so.

118. Having regard to the legislature's purpose and the consequences of including downwards variations, in my opinion s.16(1A) restricts the frequency and amount of any increase in rent which the Housing Authority may impose, but it does not prevent it from reducing the rent as often and by as little as it may consider appropriate.

119. By removing all constraints on the Housing Authority's power to reduce rents in times of deflation, a decision on this ground will afford tenants better and fuller protection than they would obtain by a dismissal of the appeal simply on the grounds argued below.

120. I would dismiss the appeal on this ground also.

Chief Justice Li:

121. The Court (with Mr Justice Bokhary PJ dissenting) dismisses the appeal and makes the costs orders and directions set out in the concluding paragraph of my judgment.

(Andrew Li)	(Kemal Bokhary)	(Patrick Chan)
Chief Justice	Permanent Judge	Permanent Judge

(R.A.V. Ribeiro)	(Lord Millett)
Permanent Judge	Non-Permanent Judge

Mr Philip Dykes SC and Mr Johannes Chan SC (instructed by Messrs Ho, Tse, Wai & Partners and assigned by the Legal Aid Department) for the appellant

Mr David Pannick QC and Mr William Marshall SC (instructed by Messrs Simmons & Simmons) for the respondent