

立法會

Legislative Council

LC Paper No. LS38/05-06

**Paper for the Subcommittee on
Waste Disposal Ordinance (Amendment of Fourth Schedule) Notice 2006 and
Public Health (Animals and Birds) (Licensing of Livestock Keeping)
(Amendment) Regulation 2006**

Background

At the meeting of the Subcommittee on Waste Disposal Ordinance (Amendment of Fourth Schedule) Notice 2006 and Public Health (Animals and Birds) (Licensing of Livestock Keeping) (Amendment) Regulation 2006, members requested the Legal Service Division to advise on whether the legislative amendments in the two items of subsidiary legislation are consistent with the protection of property right under Article 105 of the Basic Law (“BL105”).

Basic Law

2. The following articles of the Basic Law are relevant to protection of property:—

- (a) Article 6 of the Basic Law (“BL6”) provides that the HKSAR shall protect the right of private ownership of property in accordance with law; and
- (b) Article 105(1) provides that the HKSAR shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property;

Article 105(2) provides that such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

3. BL6 is a general statement for protection of the right of private ownership. BL105 provides compensation for lawful deprivation of property.

Deprivation of property

4. BL105 was considered in *Kowloon Poultry Laan Merchants Association and Department of Justice for and on behalf of Director of Agriculture Fisheries Conservation Department of HKSAR* (CACV1521/2001) (**Annex**). In that case, the Court of Appeal discussed the meaning of “deprivation of property” under BL105. It was an appeal against the decision of the Court of First Instance when an application for leave for judicial review by Kowloon Poultry Laan Merchants Association (“the Association”) was refused. The Association was a poultry wholesaler’s association representing 10 poultry wholesaling businesses or “laans” who from 1974 to 1997 rented stalls in Cheung Sha Wan Temporary Poultry Market where they sold chickens as wells as water birds, i.e. ducks and geese until the outbreak of the “bird flu” in December 1997. As a result of the outbreak of “bird flu”, the Government introduced legislation to require ducks and geese and other water birds to be traded at a separate location from chickens. Another location in the Western Wholesale Food Market was made available to the Applicant from which to sell water birds. The Association claimed that its members had suffered severe financial loss as a result of the decision to separate the locations for selling chicken and for selling water birds. The Government decided that no compensation would be paid to it for the decision to separate the locations for selling chickens and for selling water birds. One of the questions to be decided by the Court of Appeal was whether it was right for the judge below to refuse leave to the Association on the basis that he did not consider that the Association had been deprived of its property under BL105.

5. The court dismissed the appeal on the following ground: The Association had not been deprived of the use of the land rented to it by the Government at the Cheung Sha Wan Temporary Poultry Market. The Association was still selling chickens there. The Association was prohibited by the new legislation to sell water birds there. That was not deprivation but rather control of use of land. The Government had provided it with an alternative location, namely Western Wholesale Food Market, from which to sell water birds. Moreover, and so far as its business of selling water birds was concerned, the Association had not been deprived of that business either by the new legislation. The reduction of profit, if any, did not result from any "deprivation of property".

6. The court in Kowloon Poultry Laan Merchants Association's case distinguished the following concepts: deprivation of property and *de facto* expropriation. The court cited with approval *Baner v Sweden*, App. No.11763/1985, 60 D.R.128 at pages 139-140¹. In the cited pages, the meaning of deprivation of property and *de facto* expropriation is explained as follows:—

- (a) Deprivation of property means where property is formally expropriated, i.e. where there is a transfer of the title to the property; and
- (b) “Deprivation” may also exist where the measure complained of affects the substance of property to such a degree that there has been a *de facto* expropriation or where the measure complained of “can be assimilated to a deprivation of possessions”.

Control the use of property

7. Given the narrow reading ascribed to “deprivation” of property, the notion of “control” of property is a correspondingly wider one². In the jurisprudence developed under the European Court of Human Rights, a “fair balance” needs to be struck between the general interests of society – which any interference with or control of property rights must aim to serve – and the protection of the individual's property rights³. It entails that in respect of any control of property, there must be a reasonable relationship of proportionality between the means employed and the aim

¹ It is a case on Article 1, First Protocol of the European Convention on Human Rights. Article 1, First Protocol reads as follows:—

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The wording between Article 1, First Protocol and BL105 is not the same. However, the Court of Appeal in Kowloon Poultry Laan Merchants Association's case did not make any reference to such difference and emphasized instead on the general character of the legislation.

² Eg *Pine Valley Developments v Ireland* A 222 paras 55-56 (1991), where the Court held that the failure to re-validate a planning permission nullified by the courts, resulting in very substantial reduction in the value of land, was not a *de facto* deprivation but a control of use.

³ Since its decision in *Sporrong and Lomroth v Sweden* [1982]EHRR35, the European Court of Human Rights has a tendency to apply a “fair balance” test when considering whether a case complies with any rule under Article 1, First Protocol.

See also Law of the European Convention on Human Rights, Harris, O'Boyle and Warbrick, 1995, at pp521-2 and p534.

sought to be realized⁴.

8. Although so far the local courts have not formally adopted the “fair balance” test, it is submitted that the local courts would likely consider the jurisprudence developed by the European Court of Human Rights in this respect. Although BL6 and BL105 do not expressly provide for limitation of property rights, the term “in accordance with law” in both articles indicates that the property rights protected thereunder are subject to restrictions that are provided by law and are compatible with the Basic Law as well as the international covenants as applied to the HKSAR by virtue of BL39⁵. Such restrictions have to be reasonable and proportionate to the general interest of the public.

Waste Disposal Ordinance (Amendment of Fourth Schedule) Notice 2006 and Public Health (Animals and Birds) (Licensing of Livestock Keeping) (Amendment) Regulation 2006

9. The two items of subsidiary legislation aim to prohibit any person from keeping not more than 20 poultry (defined to mean chickens, ducks, geese, pigeons and quail) in premises in specified areas under the Waste Disposal Ordinance (Cap. 354) and Public Health (Animals and Birds) (Licensing of Livestock Keeping) Regulation (Cap. 139 sub. leg. L).

10. The two items of subsidiary legislation were gazetted on 8 February 2006 and came into operation on 13 February 2006.

Analysis

11. In applying the process of analysis of a claim under BL105 as adopted in Kowloon Poultry Laan Merchants Association’s case, the court will consider whether the legislative amendments amount to a deprivation of property or *de facto* expropriation.

⁴ In Kowloon Poultry Laan Merchants Association’s case, at the High Court level, the Applicant’s counsel conceded that the issue of whether the business of the Applicant’s members had been deprived of, turned at the end on whether it was reasonable for the Government to move the ducks or geese operations to the Western Wholesale Food Market. On appeal, the Applicant submitted that the judge below erred when he linked entitlement to compensation under BL105 with the issue of whether the Government’s action of segregating the operation of chicken and water birds was reasonable. But the Court of Appeal did not specifically deal with that point on appeal.

⁵ See Lord Woolf said in *AG v Lee Kwong Kut* [1993]3HKPLP72 in relation to Article 11(1) of the Hong Kong Bill of Rights (presumption of innocence) that such provisions of general application are always subject to implied limitations.

12. It appears that the court would unlikely hold there is deprivation of property because the legislative amendments do not by themselves require the transfer of the title of the poultry to the Government.

13. In relation to *de facto* expropriation, the Government explains in its paper to the Subcommittee at paragraphs 14 and 15 (LC Paper No. CB(2)1226/05-06(04)) that there is no *de facto* deprivation. The Administration explains that an owner of poultry affected by the legislative amendments had options to dispose of the poultry. For example, an owner of poultry could slaughter the poultry for private consumption; or in the case of racing pigeons and pet poultry, the owner may apply for an exhibition licence; or owners of racing pigeons could sell their birds to local and overseas racing pigeons associations. However, there could also be argument for holding that there is *de facto* expropriation. The argument is that the options open to an owner of poultry are not practicable, for example a licence for exhibition of poultry is too expensive, the time allowed for an owner of poultry to dispose of the poultry was short (the items of subsidiary legislation was gazetted on 8 February 2006 and came into operation on 13 February 2006). Therefore, the property is left without any meaningful alternate use. Whether the legislative measures in the present case do or do not amount to a *de facto* expropriation is a matter of degree for the court to assess. It is to be noted that in the absence of a formal extinction of the owner's rights, the court would be cautious about accepting that a *de facto* expropriation of property qualifies as a "deprivation" for the purpose of Article 1, First Protocol⁶. Therefore, it appears that a case of *de facto* expropriation may not be easily made out in the present case.

14. If the court holds that there is neither deprivation nor *de facto* expropriation of property, in following the jurisprudence developed by the European Court of Human Rights, it may find that there is a control of use of property in the sense that a person keeping not more than 20 poultry in premises had to dispose of the poultry before the commencement of the legislative amendments. In applying the "fair balance" test to the present case, the court would consider whether the prohibition against the keeping of not more than 20 poultry in premises is proportionate to the aim of prevention of the outbreak of avian influenza in Hong Kong. The Government explains the justifications for introducing legislative

⁶ For example, in the Papamichalopoulos case, the court conceded that the physical occupation of land was so extensive and the possibility of dealing with it in any way so remote that there was a *de facto* expropriation: Law of the European Convention on Human Rights, Harris, O'Boyle and Warbrick, 1995, at p528.

amendments in this respect in paragraphs 3-6 of LegCo Brief File Ref.: HWF(F)5/6/1 of 7 February 2006 from Health, Welfare and Food Bureau, Agriculture, Fisheries and Conservation Department and Environmental Protection Department and paragraph 6 of Annex B to LC Paper No. CB(2)1226/05-06(04). Subject to the acceptance of the justifications for introducing the legislative measures as provided by the Government, it is probable that the court may hold the legislative measures to be reasonable and proportionate.

Conclusion

15. Applying the above principles to the Waste Disposal Ordinance (Amendment of Fourth Schedule) Notice 2006 and Public Health (Animals and Birds) (Licensing of Livestock Keeping) (Amendment) Regulation 2006, in the context of BL6 and BL105—

- (a) there appears to be no deprivation of property;
- (b) it appears that a case of *de facto* expropriation may not be easily made out; and
- (c) subject to the acceptance of the justifications for introducing the legislative measures as provided by the Government, it is probable that the court may hold the legislative measures to be reasonable and proportionate.

Encl

Prepared by

Legal Service Division

Legislative Council Secretariat

23 February 2006

CACV001521/2001

CACV1521/2001

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO.1521 OF 2001

(ON APPEAL FROM HCAL NO.2630 OF 2000)

BETWEEN

KOWLOON POULTRY LAAN MERCHANTS ASSOCIATION Applicant
(Appellant)

AND

DEPARTMENT OF JUSTICE for and on behalf of
DIRECTOR OF AGRICULTURE FISHERIES
CONSERVATION DEPARTMENT OF HKSAR Respondent

Coram: Hon Mayo VP and Hon Suffiad J in Court

Date of Hearing: 10 July 2002

Date of Judgment: 10 July 2002

J U D G M E N T

Hon Suffiad J : (Giving the judgment of the court)

1. This is an appeal by the appellant, originally the applicant, against the decision of Chung J given on 15 June 2001, whereby the judge refused the applicant's application for leave for judicial review.

Background

2. The appellants are a poultry wholesalers' association representing 10 poultry wholesaling businesses or "laans" who from 1974 to 1997 rented stalls in Cheung Sha Wan Temporary Poultry Market where they sold chicken as well as water birds, that is ducks and geese, until the outbreak of the "bird flu" in December 1997.

3. As a result of the outbreak of "bird flu", the Public Health (Animals and Birds) (Amendment) (No.2) Regulations was enacted on 27 February 1998, whereby ducks and geese and other water birds were required to be traded at a separate location from chicken. These regulations reflected scientific advice that avian flu was carried by ducks and geese and could spread from them to chicken and then to humans. As a result, they were not allowed to sell water birds from their stalls in Cheung Sha Wan Temporary Poultry Market but only chicken.

4. Another location in the Western Wholesale Food Market was made available to them from which to sell water birds. The appellants have been compensated for the slaughter of their poultry in December 1997. It is alleged by the appellants that each of them have suffered severe financial loss as a result of the decision to separate the locations for selling chicken and for selling water birds. The appellants say that this is due to the fact of the alternative site for selling water birds at the Western Wholesale Food Market offered by the Government is not practical because of its distance from customers and the small size of the stalls offered. This, they say, has resulted in their having to close down the duck and geese wholesaling side of their businesses. However, Government decided that no compensation would be paid to them for the decision to separate the locations for selling chicken and for selling water birds.

5. The judge below found that this decision by the Government not to compensate them was made in August 1998. It is against this decision of the Government not to compensate them that the appellants seek judicial review. The hearing for leave to issue judicial review came before Chung J who refused leave to the appellants and it is against that decision of Chung J which they now appeal.

6. The judge below refused leave to the appellants on the basis that he did not consider that the appellants had been deprived of their property, under Article 105 of the Basic Law. In so holding the judge below had this to say :

"Counsel argued that 'property' in Art. 105 should include a business or trade. She submitted that by requiring the Applicant's members to move the ducks and geese operation to the Western Wholesale Market, Government has 'deprived' them of their businesses, even though this was done in accordance with the amended Regulations and By-laws. The putative respondent denied that the businesses of the Applicants' members had been deprived and contended that they could continue their businesses in the new market. Applicant's Counsel accepted that in the light of this argument, the issue of whether the businesses of the Applicant's members had been deprived, turns at the end on whether it was reasonable for Government to move the ducks/geese operation to the Western Wholesale Food Market. I have already found against the Applicant on this point. In such case, even if 'property' should include a trade or business, I do not consider that the Applicant has been deprived of its property."

7. The appellants put forward two grounds of appeal. Firstly, the judge erred in finding that there is no deprivation of the appellant's property pursuant to Article 105 from the Basic Law; and secondly, the judge was wrong not to grant the appellant an extension of time to apply for leave for judicial review. Article 105 of the Basic Law provides as follows :

"The [HKSAR] shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay."

The appellant's argument

8. Firstly, the appellants relied on the definition given to "property" by the Interpretation and General Clauses Ordinance (Cap. 1) which provides that :

"property includes :

(a) money, goods, choses in action and land; and

(b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition;"

9. It is submitted by the appellants that the reduction of profit, as a result of being deprived of continuing their duck and geese wholesaling businesses at the Cheung Sha Wan Temporary Poultry Market is a deprivation of property within the meaning of Article 105 of the Basic Law which entitles the appellants to compensation.

10. It is further submitted by the appellants that the judge below erred when he linked entitlement to compensation under Article 105 with the issue of whether the Government's action of segregating the operation of chicken and water birds was reasonable. They say that even if such action was reasonable on the part of the Government, the appellants are still entitled to compensation under Article 105 if there had been a deprivation of the property.

11. The appellants further complained that the judge should not have penalized the appellants for the delay by refusing to extend time because the intervening period between October 1998 and August 2000 was taken up with attempts by the appellants to persuade the Government to reconsider its position and it is commendable that the appellants should attempt to resolve the matter by negotiation before resorting to litigation.

The respondent's arguments

12. The respondent was not called upon at the hearing. The argument presented by the respondent contained in their skeleton argument is quite simply that there is here no deprivation of property but that the new regulations and By-laws control the use of the land rented by the Government to the appellants. They say that there has been no taking away of the land used by the appellants and that the appellants are still enjoying the use of that land in the Cheung Sha Wan Temporary Poultry Market to sell chicken, albeit that they cannot sell water birds there.

13. They further submit that since there was delay of some two years, the burden is on the appellants to show good reason why the court should extend time for leave to issue judicial review. In the absence of any good reason advanced, the court should not exercise its discretion in the appellants' favour.

Decision

14. It is accepted that the test for leave to issue judicial review has a low threshold and that it depends on the potential arguability of the matter brought by the applicant.

15. The crux of this dispute as we see it is whether or not the appellant had made out an arguable case that they have suffered a "deprivation of property" as it is understood in Article 105 of the Basic Law such that they should be given leave for judicial review. Accepting for present purposes that the profit, business or goodwill, even relating to the future, can amount to "property" has there been any deprivation? In our view, there has not been any deprivation made out in this case for the following reasons. The appellants have not been deprived of the use of the land rented to them by the Government at the Cheung Sha Wan Temporary Poultry Market. They are still selling chicken there. They are prohibited by the new regulations and By-laws to sell water birds there. That is not deprivation but rather control of use of land. Moreover and so far as their businesses of selling water birds is concerned, they have not been deprived of that business either by the new regulations and/or by the new By-laws. Their reduction of profit, if any, does not result from any "deprivation of property".

16. Indeed, Government has provided them with an alternative location, namely the Western Wholesale Food Market, from which to sell water birds. In that sense, there is no deprivation. Even if they have suffered a reduction of profit selling water birds at this alternative location for the reasons advanced by them, that does not equate with a "deprivation of property" under Article 105 of the Basic Law. To that extent, we agree with the judge below that the appellants have not made out any case to show that there has been a deprivation of property under Article 105.

17. If authority be needed for the view which we have taken above, that is to be found in the judgment of the European commission, which made the following observations and the case of Baner v. Sweden, App. No.11763/1985, 60 D.R. 128 at pages 139-140 :

" As regards the question whether the applicant has been deprived of property, the Commission recalls that, according to the established case-law, deprivation of property within the meaning of Article 1 of Protocol No.1 is not limited to cases where property is formally expropriated, i.e. where there is a transfer of the title to the property. 'Deprivation' may also exist where the measure complained of affects the substance of the property to such a degree that there has been a de facto expropriation or where the measure complained of 'can be assimilated to a deprivation of possessions' (cf. Eur. Court H.R., Sporrang and Lonroth judgment of 23 September 1982, Series A no.52 p. 24 para. 63).

It is clear that the applicant has not been formally deprived of his property. He still retains the title to it. The applicant has also not been deprived of his right to fish,

including the right to fish with hand-held tackle. What he has lost is his right to exclude others from fishing with hand-held tackle.

Legislation of a general character affecting and redefining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is thereby interfered with or even taken away. There are many examples in the Contracting States that the right to property is redefined as a result of legislative acts. Indeed, the wording of Article 1 para. 2 shows that general rules regulating the use of property are not to be considered as expropriation. The Commission finds support for this view in the national laws of many countries which make a clear distinction between, on the one hand, general legislation redefining the content of the property right and expropriation, on the other.

The Commission has for the same reasons in cases concerning rent regulations, which have seriously affected the right to property, nevertheless held that such regulations fall to be considered under the 'control of use' rule (cf. *Mellacher and Others v. Austria*, Comm. Report 11.7.88, at present pending before the European Court of Human Rights)."

18. The view that we have taken can be tested in a very simple way. If the appellant be correct in the view that they have taken, then it follows that **future legislative restrictions on land use, such as planning control and zoning, can amount to "deprivation of property" and would have to be compensated for under Article 105. That cannot be correct** and underlines the fallacy of the argument presented by the appellants. Having reached the decision above that the appellants have not made out any case as to deprivation, the arguments as to the failure of the judge below to extend time for leave to judicial review falls away. We cannot see how the judge could be faulted for refusing to extend time in this matter.

19. For the reasons given above, the appeal is dismissed.

(Simon Mayo) (A.R. Suffiad)
Vice-President Judge of the Court of First Instance,
High Court

Representation:

Mr Paul Wu and Miss Lorinda Lau, instructed by

Messrs Lawrence K.Y. Lo & Co., for the Applicant (Appellant)

Mr Kwok Sui Hay, instructed by Secretary for Justice, for the Respondent