# 立法會
# *Legislative Council*

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From : Clerk to the Finance Committee

To : Members of the Finance Committee

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**Finance Committee**

**Application for leave to apply for judicial review (HCAL78/2014)**

Members were informed vide the circulars LC Papers No. FC59/14-15, FC63/14-15 and FC127/14-15 (issued on 27 and 28 November 2014, and 19 March 2015, respectively) of Hon WONG Yuk-man's application for leave to apply for judicial review in the Court of First Instance of the High Court ("the Court") in relation to the Finance Committee's ("FC") proceedings on the funding proposal FCR(2014-15)2 – PWSC(2013-14)38 for "Advance site formation and engineering infrastructure works at Kwu Tung North new development area and Fanling North new development area" in the 2013-2014 Legislative Council session.

2. The leave application was heard before the Court on 11 June 2015 and the Court has handed down its judgment today (7 October 2015), a copy of which is attached (English version only). A relevant summary is being prepared by the Legal Service Division and will be issued to members once it is available.

(Ms Anita SIT)
Clerk to the Finance Committee

Encl.

c.c. President, Legislative Council

HCAL 78/2014

**IN THE HIGH COURT OF THE**
**HONG KONG SPECIAL ADMINISTRATIVE REGION**
**COURT OF FIRST INSTANCE**
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 78 OF 2014

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BETWEEN

WONG YUK MAN — Applicant

and

NG LEUNG SING — 1st Putative Respondent

TOMMY CHEUNG YU YAN — 2nd Putative Respondent

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Before: Hon Au J in Court
Date of Hearing: 11 June 2015
Date of Judgment: 7 October 2015

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J U D G M E N T

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*A. INTRODUCTION*

1. This is the applicant's leave application to apply for judicial review.

2. The applicant is a member of the Legislative Council ("LegCo") and also its Finance Committee ("FC"). In June 2014, the

FC approved the funding proposal ("the Funding Proposal") tabled by the Government for the advance site formation and engineering infrastructure works at Kwu Tung new development area and Fanling North new development area. The applicant seeks to challenge in this proposed judicial review the FC's approval.

3. The 1st putative respondent was the Chairman of the FC for the legislative year of 2013 – 2014, while the 2nd putative respondent was the Chairman for 2014 - 2015.

4. The relief the applicant seeks in the Form 86 are:

(1) A declaration to the effect that the FC Chairman does not have the power to stop dealing with the motions presented by members of the FC under paragraph 37A of the Finance Committee Procedure ("FCP").

(2) An order of *certiorari* to quash the FC's approval of the Funding Proposal on 27 June 2014.

5. The applicant has fairly and properly accepted that, given that the funding approval was made almost a year ago,[1] and that a significant part of the fund so approved must have already been spent, it would be unrealistic and impractical for him to continue to seek an order to quash it. However, he emphasizes that the proposed judicial review raises important question on the exercise of power by the Chairman of the

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[1] The applicant's leave application was in fact made on 8 July 2014. However, given various matters relating to questions arising from joining of the parties (see paragraphs 20 - 21 below), as well as fixing a date for hearing the leave application which could suit the applicant, the application was only eventually fixed to be heard on 11 June 2015.

FC under the FCP. The issues raised in the judicial review are therefore not academic.

6. The applicant has filed a comprehensive skeleton submission for the purpose of this hearing.

7. The leave application is opposed by the putative respondents represented by Mr Anthony Chan.

8. It is trite that the court will only grant leave if the proposed judicial review is reasonably arguable with a realistic prospect of success: *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676 *per* Li CJ at paragraphs 14 - 17.

9. Before considering the arguability of the proposed grounds of judicial review, it is helpful to first set out the relevant background leading to this leave application.

## *B. BACKGROUND*

10. The Government's proposal to develop Kwu Tung North and Fanling North has divided public opinion.

11. At the meeting on 2 May 2014, the Funding Proposal was first tabled before the FC for consideration. The FC is a committee of the LegCo established under the Rules of Procedures of the Legislative Council ("the LegCo Rules") and is entrusted with the functions under

the Public Finance Ordinance (Cap 2) to, amongst others, approve such funding.[2]

12. Throughout the deliberation of this agenda item at the FC meetings, several FC members including the applicant attempted to filibuster the approval of the Funding Proposal. In doing so, they presented a total of 5,557 proposed motions to the FC Chairman under paragraph 37A of the FCP,[3] among which 3,296 were submitted by the applicant (who once said that he wanted to submit 10,000 motions in total).

13. At the meeting on 13 June 2014 and in the midst of the filibustering attempts,[4] the 1st putative respondent (who was then the FC Chairman) mentioned to the members that he would stop dealing with any further motions presented by members of the FC under paragraph 37A of the FCP in relation to the Funding Proposal for the sake of safeguarding the operation of the FC.

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[2] See paragraph 71 of the LegCo Rules. See also for example sections 2 and 7(3) of the Public Finance Ordinance.

[3] Paragraph 37A of the FCP reads: "During the deliberation of an agenda item, prior to the question on it being put to vote, a member may move a motion without notice to express a view on the agenda item if the motion is considered by the Chairman as directly related to the agenda item and agreed by a majority of members that it should be proceeded forthwith. Any proposed motion or amendment to the motion should be presented in written form. Members may speak on the motion and amendment to the motion, if any, in a joint debate."

[4] Prior to the meeting on 13 June, the 1st putative respondent had already received 939 proposed motions presented by members under paragraph 37A of the FCP. Before the conclusion of the second meeting that day, he further received 694 new proposed motions presented by members under paragraph 37A. Among those motions reviewed by the 1st putative respondent, most were found to be not in order and none was considered by the FC as having to proceed forthwith. Yet, after the third meeting had started, the 1st putative respondent received another batch of 169 proposed motions and some members indicated that they intended to propose motions continuously.

14. Some FC members expressed their concerns when the above announcement was made. In view of this, the 1st putative respondent allowed each member to speak for three minutes in this regard. Having heard the views of those who had spoken on 13 June and 20 June 2014, the 1st putative respondent issued a written ruling on 27 June 2014 which effectively confirmed his earlier decision to stop dealing with any further motions presented by the members ("the 1st Decision").[5]

15. At paragraph 12 of his written ruling, the 1st putative respondent expressed:

> "12. I respect members' right to exert political pressure on the Administration in pursuit of their demands by means of procedural tactics. However, when such behaviour has obviously affected the proper operation of the FC, I, as FC Chairman, have the responsibility to safeguard the interests of the FC. I pointed out at the meeting of 13 June that if members continued to present motions without notice under paragraph 37A of the FCP while a meeting was in progress, it would not be possible for such motions to be dealt with immediately. In the past, when dealing with paragraph 37A of the FCP, the number of motions that may be proposed had not been considered or discussed. However, if allowing members to propose motions incessantly would have the effect of obstructing the FC from exercising and discharging its functions under the [Rules of Procedure] and the Public Finance Ordinance (Cap. 2), this, I consider, could not have been the purpose for which paragraph 37A of the FCP was made. In order to safeguard the operation of the FC, it is necessary for me to properly control the progress of meetings by reasonable means, so as to ensure the efficient use of meeting time, thereby enabling the Committee to exercise and discharge its functions properly. Therefore, I decided to stop dealing with proposed motions presented to me by members under paragraph 37A of the FCP."

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[5] The applicant argues in his written submission that the decision in question was made on 20 June 2014 or shortly afterwards. Nevertheless, as can be seen later, whether that decision was made on the date as suggested by the applicant or on the date as submitted by the proposed respondents does not affect the reasoning of this decision.

16. The 1st putative respondent continued:

> "15. I listened to views expressed by members on my decision to stop dealing with proposed motions presented to me by members under paragraph 37A of the FCP. However, judging from the development of events that had taken place in the past two weeks, I was satisfied that if I continued dealing with proposed motions presented by members, FC's procedure for dealing with the agenda item of 'advance works' would be prolonged to the extent that the FC would not be able to properly exercise and discharge its duties. Therefore, I decided to implement my aforesaid decision, and returned to the members concerned those proposed motions which had not been dealt with and those which were presented to me after I had made this decision.
>
> 16. I am satisfied that there are sufficient justifications for my decision. I also firmly believe that, in making the decision, I have struck a proper balance between respecting the rights of individual members to propose motions and express their views and ensuring the orderly and efficient conduct of FC meetings."

17. On 27 June 2014, the Funding Proposal was put to vote. However, shortly before that, some members left their seats and surrounded the 1st putative respondent complaining that they were not allowed to put forward further questions before voting and that the 1st putative respondent had thereby violated paragraph 46 of the FCP.[6]

18. The 1st putative respondent repeatedly requested them to return to their seats, but to no avail. After adjourning the meeting once, despite that those members who had left their seats were still surrounding

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[6] Paragraph 46 of the FCP states: "Before putting an item to the vote, the Chairman shall ask members if they have any further questions. When the Chairman puts a question to the Committee for its decision he shall first call upon those members who are in favour of the question to raise their hands and shall then call upon those who are against the question to raise their hands. The Chairman shall then, according to his judgment, state whether or not he thinks the majority of the members present and voting are in favour of the question. If no member challenges the statement, the Chairman shall declare the question to have been so decided. If a member challenges the statement of the Chairman by claiming a division, then the Chairman shall order the Committee to proceed to a division and the division shall be held forthwith immediately after a division bell has been rung for two minutes."

the Chairman's desk and protesting, the 1st putative respondent decided to put the Funding Proposal to vote ("the 2nd Decision").

19. In the end, whilst some members refused to return to their seats and vote, the FC by majority voted in favour of the Funding Proposal. Up to that point, a total of 28 hours had been spent by the FC on this Funding Proposal in seven meetings held between May and June 2014.

20. On 8 July 2014, the applicant applied for leave to apply for judicial review to challenge the funding approval by effectively attacking the 1st and 2nd Decisions. At that time, other than the 1st putative respondent, the FC was named as the 2nd putative respondent.

21. This court later directed a hearing of the leave application, which was also to be attended by the putative respondents. However, the LegCo Secretariat by a letter dated 27 November 2014 to this court pointed out that the FC does not have the legal capacity to sue or be sued. Accepting the FC's said position, the applicant applied by a letter dated 9 January 2015 to amend his application for leave by replacing the FC with Mr Tommy Cheung Yu Yan (the then incumbent FC Chairman) as the 2nd putative respondent.

22. Mr Cheung does not object to be so joined[7] and will adopt a neutral position in the proceedings.

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[7] Mr Cheung does not, however, agree to be joined as a representative to represent all FC members as they are divided over the present issue.

*C. THIS LEAVE APPLICATION*

*C1. The proposed grounds of judicial review*

23. The applicant raises several grounds in the Form 86 in support of the proposed judicial review. As developed in detail in his written submissions and at the hearing, these grounds can be summarised as follows:

(1) The 1st Decision should be declared invalid because:

(a) the 1st putative respondent did not have the power under paragraph 37A of the FCP to make that decision. In particular, the decision is unlawful as the 1st putative respondent had in breach of paragraph 37A failed to decide whether the proposed motions intended to be raised by the applicant were directly related to the agenda item of the meeting before disallowing the applicant (and other members) to put forward more motions;

(b) the Chairman, by making that Decision, had in effect changed the provisions in the FCP on his own; and

(c) the Decision infringed the legitimate expectations of the FC members to have reasonable time to present motions after the "deadline" had been set.

(2) The 2nd Decision should be quashed because during the FC's deliberating process that culminated in the 2nd Decision:

(a) the 1st putative respondent had already contravened paragraph 37A of the FCP by making the 1st Decision; and

(b) the 1st putative respondent contravened paragraph 46 of the FCP in that he put the Funding Proposal to a vote by the FC even though many FC members still had questions to ask on the Funding Proposal.

24. In essence and fundamentally, these grounds boil down to the contentions that the FC Chairman was in breach of the relevant rules of the FCP (ie, paragraphs 37A and 46) in making the 1st and 2nd Decisions.

25. Mr Chan for the putative respondents opposes the leave application on the main ground that, under the well established non-intervention principle (as explained below), the court should and would not intervene the inner workings of the FC by, among others, adjudicating whether there was compliance with the FCP. Alternatively, and in any event, counsel says given the power to "chair" the FC meetings under paragraph 13 of the FCP, the 1st putative respondent as the FC Chairman was entitled to exercise that power to end the filibuster, and under the non-intervention principle, the court would not then look into the manner in which the Chairman had exercised this power.

26. The critical question arising from these contentions in this leave application is thus whether it is reasonably arguable that the court should and could entertain the applicant's challenge in light of the common law non-intervention principle.

*C2. Whether the proposed grounds of judicial review are reasonably arguable*

27. The principles governing the amenability of the processes of the LegCo to review by the courts of Hong Kong have recently been authoritatively confirmed and explained by the Court of Final Appeal in *Leung Kwok Hung v The President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689.

28. In *Leung Kwok Hung*, the Government introduced to LegCo a bill which, if passed, would limit the right of a resigning LegCo member to participate in a resultant by-election. Certain members (who were against the bill) engaged in lengthy filibuster debate on the bill. After long sessions of debate had been conducted over days, the President of the LegCo purported to exercise his power under article 92 of the LegCo Rules to close the debate. The bill was eventually voted and passed by a majority of the members of LegCo.

29. After the President's ending of the debate but before the passing of the bill, the applicant, who was a member of LegCo engaged in the filibuster, applied for leave to bring a judicial review to challenge the President's decision to end the debate. Leave was refused by Lam J (as the learned VP then was) after an urgent hearing on, among others, the basis of the long established common law principle of non-intervention by the courts of the internal workings of the legislature. His Lordship's decision was upheld by the Court of Appeal and eventually the Court of Final Appeal.

30. In the judgment of the Court of Final Appeal, Ma CJ affirmed and further explained the application of the non-intervention principle in the context of Hong Kong under the written constitution of the Basic Law. These can be summarised as follows.

31. First, under the long established non-intervention principle in common law, the court will not intervene to rule on the regularity or irregularity of the internal process of the legislature but will leave it to the legislature to determine exclusively for itself matters of this kind unless the Basic Law, properly construed, requires the court to interfere. The non-intervention principle is developed based on the long entrenched position in common law that the court long recognizes the "exclusive authority of the legislature in managing its own internal process in the conduct of its business, in particular its legislative process", as well as a matter of public policy. Ma CJ explained these at paragraphs 28 - 32 as follows:

> "28. In construing and applying the provisions of the BL, it is necessary not only to apply common law principles of interpretation but also principles, doctrines, concepts and understandings which are embedded in the common law. They include the doctrine of the separation of powers and, within it, the established relationship between the legislature and the courts. *This relationship includes the principle that the courts will recognise the exclusive authority of the legislature in managing its own internal processes in the conduct of its business, in particular its legislative processes. The corollary is the proposition that the courts will not intervene to rule on the regularity or irregularity of the internal processes of the legislature but will leave it to determine exclusively for itself matters of this kind ('the non-intervention principle').*
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> 29. *The strength of this proposition rests not only on principle and authority but also on public policy*. In Hong Kong, LegCo has as its primary responsibility its law-making function. It also has vested in it other important powers and functions under art 73, for example:

> ‘(2) To examine and approve budgets introduced by the government;
>
> (3) To approve taxation and public expenditure;
>
> (4) To receive and debate the policy addresses of the Chief Executive;
>
> (5) To raise questions on the work of the government;
>
> (6) To debate any issue concerning public interests;’

30. The important responsibilities of LegCo, notably its law-making function, require, as with other legislatures, that it should be left to manage and resolve its own internal affairs, free from intervention by the courts and from the possible disruption, delays and uncertainties which could result from such intervention. *Freedom from these problems is both desirable and necessary in the interests of the orderly, efficient and fair disposition of LegCo's business*.

31. The adoption of the principle of non-intervention by the courts will reduce, if not eliminate, the prospect of pre-enactment challenge to proceedings in LegCo. It will also reduce, if not eliminate, post-enactment challenges to the validity of laws made by LegCo based on irregularity in its proceedings, unless such an irregularity amounts to non-compliance with a requirement on which the validity of a law depends.

32. In this respect it is important to recognise that the principle of non-intervention is necessarily subject to constitutional requirements. The provisions of a written constitution may make the validity of a law depend upon any fact, event or circumstance they identify, and if one so identified is a proceeding in, or compliance with, a procedure in the legislature the courts must take it under its cognizance in order to determine whether the supposed law is a valid law. In Australia, *Cormack v Cope* was such a case. There s 57 of the Australian Constitution provided a means of resolving a deadlock between the two Houses of Parliament culminating in a joint sitting of the two Houses to deliberate and vote upon a proposed law. But the section prescribed a procedure to be followed and compliance with that procedure was a condition of the validity of the proposed law when enacted." (*emphasis* added)

32. Second, as to the question of whether certain provisions in the Basic Law, properly construed, require the court to so intervene in the legislative process in particular circumstances, given the non-intervention principle, the court would generally lean against an interpretation of a constitutional provision that makes compliance with procedural irregularity in the law-making processes of a legislature a condition of the validity of an enacted law. See paragraphs 33 - 35 of *Leung Kwok Hung*, *supra*.

33. Third, notwithstanding the non-intervention principle, in the case of a written constitution which confers law-making powers and functions on the legislature, the court will determine whether the legislature has a particular power, privilege or immunity, but it will not exercise the jurisdiction to determine the occasion on the manner of the exercise of any such power, privilege or immunity. See *Leung Kwok Hung*, *supra*, paragraphs 39 - 43.

34. As I mentioned above, the applicant's proposed grounds of judicial review in the present case principally attack the Decisions on the basis that the FC Chairman had not complied with paragraphs 37A and 46 of the FCP.

35. However, given the non-intervention principle, it is clear that the court should not adjudicate matters concerning procedural compliance of the LegCo (which principle should similarly apply to the workings of the FC as one of LegCo's standing committees) unless there are any provisions in the Basic Law which require the court to do so.

36. The applicant argues that there are a number of reasons why the court should however intervene in the present case notwithstanding the non-intervention principle.

37. First, it is contended that Article 73(3) of the Basic Law requires the court to look at procedural compliance of the FC in approving public expenditure.

38. With respect, I do not think it is arguable that Article 73(3) requires the court to look into whether the FC Chairman has acted in compliance with the procedural rules.

39. In *Leung Kwok Hung*, one of the questions that the court was concerned with was whether Article 73(1) of the Basic Law requires that the validity of the law passed by LegCo be subject to LegCo's compliance with the LegCo Rules. Article 73(1) stipulates that:

> "The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:
>
> (1) To enact, amend or repeal laws *in accordance with* the provisions of this Law and *legal procedures*;
>
> …" (*emphasis* added)

40. Although accepting that the LegCo Rules fall within the meaning of "legal procedures" under this article, the Court of Final Appeal unanimously held that, on a proper construction, this constitutional provision does not make compliance with the LegCo Rules essential to the validity of the enactment of a law by LegCo. The court therefore concluded that Article 73(1) does not displace the principle of

non-intervention and require the court to adjudicate matters concerning procedural compliance by LegCo. See *Leung Kwok Hung*, *supra*, at paragraphs 34 - 38.

41. In the present case, Article 73(3) of the Basic Law reads:

> "The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:
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> …
>
> (3) To approve taxation and public expenditure;"

42. Unlike Article 73(1) of the Basic Law, Article 73(3) does not even stipulate that the LegCo's function to approve public expenditure has to be carried out "in accordance with … legal procedures". Given that even Article 73(1) has been held *not* to be a provision requiring the court to inquire into procedural compliance of the LegCo in the passing of any laws, it is *a fortiori* that Article 73(3) could not displace the non-intervention principle and require the court to look at procedural compliance of LegCo and the FC in performing the function to approve taxation and public expenditure.

43. I therefore do no think the applicant's contentions based on Article 73(3) of the Basic Law are arguable.

44. Second, the applicant contends that the common law non-intervention principle has been codified *and modified* by section 23 of the Legislative Council (Powers and Privileges) Ordinance (Cap 382) ("LCPPO"). It is argued that this provision imposes a statutory duty on

the court to look at whether the exercise of power by LegCo is "lawful", which must include looking at whether LegCo has complied with procedural regularity in exercising its power. The applicant says this therefore engages the court to determine (upon challenge) whether the FC (being a standing committee of LegCo) had lawfully exercised its power to approve the Funding Proposal when it was in breach of its own procedures in failing to comply with paragraphs 37A and 46 of the FCP. The applicant submits that as this statutory provision has not been considered by the courts in *Leung Kwok Hung* and other cases in applying the non-intervention principle, those decisions do not stand in the way of the applicant's contentions. He further submits that this construction is supported by the literal meaning of section 23 and the legislative intent as reflected in certain *Hansard* passages. In the premises, says the applicant, the court should give leave to allow this contention to be considered properly.

45. The applicant's arguments can be further elaborated as follows.

46. Section 23 of the LCPPO provides as follows:

> "*The Council, the President or any officer of the Council* shall not be subject to the jurisdiction of any court in respect of the *lawful exercise* of any power conferred on or vested in the Council, the President or such officer by or under this Ordinance or the Rules of Procedure." (*emphasis* added)

47. The proposed section 23 was initially introduced in 1985 without the word "lawful". However, concerns and debate were then raised by members of the LegCo (reflecting also the concerns raised in

the society) that the section in its original form (ie, without the reference to the word "lawful") would give LegCo, the President and the LegCo's officers unlimited and unchecked power and privilege and place them "above the law". In response, the Government amended the proposed section 23 to its present form with the insertion of the word "lawful" before the word "exercise", and it was only then the present section 23 was passed.

48. The applicant therefore submits that, given the above, section 23 is intended not only to codify the law but also narrow down the scope of the non-intervention principle to require the court to look at whether LegCo or the President has exercised its power *lawfully*, which includes the scrutiny of whether there are any procedural irregularities in the exercise of a power. He says the following passages in the *Hansard* relating to the introduction of the proposed amended section 23 (which was referred to as section 24 of the bill) support his contentions:

(1) Mr Swaine as a member of the LegCo said this in the debate:[8]

"…

> Clause 24 of the Bill [ie, section 23 of LCPPO] has been one of the most controversial and has led to the comment that it places the Legislative Council above the law. In the United Kingdom, where the legislature is sovereign, the doctrine of the separation of powers applies in its full vigour, and it has been held by the highest judicial authority that Parliament is truly master of its own house, and is not subject to control by the courts. This unlimited immunity has never, however, applied in Hong Kong. Because the Legislative Council is not a sovereign body, the immunity which it possesses from judicial enquiry is limited, and this is founded on the doctrine that only those powers and privileges are to be implied which are

[8] *Hansard*, 12 June 1985 at pp 1225 - 1226.

necessary for the proper exercise of the functions of the legislative body. That principle was repeated only as recently in 1970 in a leading case in the Privy Council.

*As the underlying principle of the Bill is to declare and codify the law, and not to effect any substantial change, clause 24 in its original form was open to objection as going beyond that mandate.* Accordingly, the Administration has agreed that an amendment will be made at the committee stage which will exclude the jurisdiction of the court only in respect of the *lawful*, I repeat *lawful*, exercise of the powers conferred by the Bill or Standing Orders. *This amendment will leave intact the Court's power of enquiry* as to (i) whether the power in question exists and (ii) whether the exercise of that power is lawful. *This dichotomy is familiar to lawyers and preserves the Court's power of enquiry by the well established procedure of judicial review*.

I am satisfied, Sir, that with the amendment a fair balance will be struck between ensuring sufficient freedom of action for the Legislative Council so that it will not be hamstrung in the exercise of its powers, and the preservation of the citizen's right of access to the courts to check the abuse of power." (*my emphasis*)

(2) The Chief Secretary in reply on behalf of the Government to questions raised in LegCo:[9]

"*… there is nothing in clause 24 that would prevent a person challenging in courts an unlawful exercise of powers. Indeed the most fundamental question that could be asked whether any such power which the Council or its President or officers purported to exercise under the Bill was indeed so conferred by the Bill. It is plain on a fair reading of clause 24 that questions of that sort are not excluded from the purview of the courts, subject only to clauses 3 and 4. But once it is clear that what was done was done in exercise of a power conferred by the Bill or by the Standing Orders, clause 24 would operate to prevent the courts giving any kind of directions or guidelines or laying down rules purporting to regulate the way in which the power should or should not be used. This is the sole purpose and effect of the clause.*

I cannot therefore support the suggestion that clause 24 be deleted from the Bill. However the Administration accepts that the intention behind clause 24 may not have been adequately expressed in the Bill as published. And

[9] *Hansard*, 12 June 1985 at p 1234.

> amendment to the tabled will make it clear that this clause deals with the 'lawful', the 'lawful' exercise of any power conferred under the Ordinance [or] the Standing Orders of the Council. The insertion of the word 'lawful' has some significance in law because it opens the exercise of powers to judicial review and if the courts decided that these powers had not been exercised lawfully the immunities conferred by this clause would not apply…" (*my emphasis*)

49. With respect, I am unable to agree with the applicant's submissions.

50. In my view, even reading together with those parts of the *Hansard* as relied on by the applicant, I do not think it was the intention of the Government to codify *and restrict* the common law principle of non-intervention principle by section 23 of the LCPPO.

51. Quite to the contrary, I think these passages (in particular those parts as italicised above) show that the provision in its amended form was introduced to allay the concerns that the originally proposed section 23 could be regarded as placing LegCo and the President above the law and oust the court's jurisdiction to scrutinise LegCo's exercise of power to the extent as long recognised under the common law principle. The insertion of the word "lawful" was thus to ensure that the court's jurisdiction as understood under the non-intervention principle was affirmed. Section 23 was therefore intended to be read consistently with this common law principle. This was made clear by the Chief Secretary in what he said in his reply speech just before the passage relied on by the applicant as quoted above:[10]

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[10] See LegCo transcript for 12 June 1985 at pp 1233 - 4.

> "Clause 24 has been denounced on the ground that it excludes the jurisdiction of the Courts in relation to the manner in which the Council, its President and its officers exercise powers conferred by the Bill or the Standing Orders, conferred by the Bill or the Standing Orders. I do not think the true meaning and effect of clause 24 is quite so far reaching as its critics have alleged.
>
> *The relationship between the legislature and the courts on the one hand, and the executive on the other, is finely balanced. It has been the tradition in common law jurisdictions that neither the executive nor the legislature should enter upon the sphere of responsibility of the judiciary. The judiciary likewise does not enact legislation. This is sometimes referred to as the doctrine of separation of powers. I do not intend to dwell on the scope of the doctrine except to remind Members that it is not a new principle of constitutional law, and it is certainly not the subject of the provisions of this Bill. Nor do I need to remind Members that section II, Annex I of the Joint Declaration on the future of Hong Kong states quite clearly that the laws previously enforced in Hong Kong, that is to say, the common law and other laws shall be maintained.*
>
> *The bill does not purport to alter the constitution.* On the contrary it is well within the authority and powers of this Council to debate such a Bill. As with any other legislature, no court can question the laws made by this Council in accordance with its constitutional powers; in the same way it must retain power over its own affairs and proceedings." (*my emphasis*)

52. It is therefore clear to me that it is *not* the legislative intention of section 23 to restrict or limit the scope of the non-intervention principle. Quite to the contrary, section 23 is to affirm the non-intervention principle. As such, this provision should be construe consistently with this principle as explained in *Leung Kwok Hung*.

53. I therefore do not think the applicant's contentions based on section 23 of the LCPPO are reasonably arguable.

54. Finally, the applicant also submits that the common law principle of non-intervention as understood previously must be reconsidered under the special political and legislative model in Hong Kong, and it should not be applied without any qualification.

55. There is nothing in this argument. As I emphasised above, in *Leung Kwok Hung*, the Court of Final Appeal has specifically taken into account the constitutional structure of the Executive, Legislature and the independent Judiciary as laid down by the Basic Law in explaining the non-intervention principle *as applied in Hong Kong*.

56. For all the above reasons, there is nothing to displace the application of the non-intervention principle in the present case. The court would not entertain applicant's proposed challenge based on the complaint that the 1st putative respondent had failed to comply with paragraphs 37A and 46[11] of the FCP. Leave to apply for judicial review must therefore be refused.

57. Further or alternatively, insofar as necessary, I would also agree with Mr Chan that the FC Chairman has power to end the filibuster in regulating the process of the FC meeting.

58. As observed by the Court of Final Appeal in *Leung Kwok Hung*, at paragraph 38, Article 75 of the Basic Law provides that the rules

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[11] It is only fair for me to also point out that Mr Chan has taken me to various parts of the transcripts of the proceedings of the FC on the date of the vote to demonstrate that the 1st putative respondent had in fact asked repeatedly whether members had any further questions before putting the Funding Proposal to vote. It is therefore also part of Mr Chan's case that there was in any event no breach of paragraph 46 of the FCP. I do not need to consider this given that I have decided that the non-intervention principle applies.

of procedure of LegCo shall be made by LegCo "on its own" and that the LegCo Rules was made pursuant to this article.

59. The FC is set up under paragraph 71(1) of the LegCo Rules as one of the LegCo's subcommittees. Under paragraph 71(13) of the LegCo Rules, the FC shall, subject to the LegCo Rules, determine its practice and procedure. Pursuant to this paragraph of the LegCo Rules, the FC passed the FCP as the FC's governing rules and procedures. In the circumstances, the FCP are lawfully made under the LegCo Rules, which in turn are lawfully made under Article 75 of the Basic Law.

60. Under paragraph 13 of the FCP, the Chairman shall "*chair*" the committee meetings.

61. In this respect, it is noted that the Court of Final Appeal in *Leung Kwok Hung* concluded at paragraphs 43 and 45 that the President has power to set limits to and terminate a debate which is inherent in, or incidental to, the power granted by Article 72(1) of the Basic Law to the President to "*preside over meetings*".

62. In my view, the meanings of "to chair" meetings, and "to preside over meetings" are for all practical purposes the same. This is particularly so as they both have the same Chinese version as "主持會議". In the premises, applying the Court of Final Appeal's analysis as to the power to "preside" meetings, I agree with Mr Chan that the FC Chairman similarly has the power to control and regulate the process of the FC, including the power to put an end to filibuster debates by the FC

members, being a power inherent or incidental to the power to "chair" meetings.

63. Once it is satisfied (as I do now) that the FC Chairman has the power to regulate the process of the FC meetings under the FCP, including the power to set limits to and terminate a debate, under the non-intervention principle, it is not for the court to determine the occasion on the manner of the exercise of this power. See: *Leung Kwok Hung*, *supra*, at paragraphs 43 and 46.

64. For these alternative or additional reasons, the court also should not entertain the applicant's challenge in this proposed judicial review, which is mounted on the basis of essentially challenging the Chairman's ending of the debate by refusing as a matter of procedure to allow further motions to be put forward by the applicant (and some other members).

*D. CONCLUSION*

65. I do not think any of the applicant's proposed grounds of judicial review are reasonably arguable. I would refuse this leave application.

66. As to costs, it is now well established that as a starting position, the court should make no order as to costs in a contested failed leave application, unless there are good reasons or exceptional circumstances to justify a departure. I do not think there are any such exceptional circumstances or good reasons to justify departure from the

usual position in the present case. In particular, this is apparently the first time the court is asked to consider the arguments based on section 23 of the LCPPO, although at the end I do not think they are reasonably arguable. I would therefore make an order *nisi* that there be no order as to costs in this leave application.[12] Unless any of the parties applies to vary it by summons, this order shall become absolute 14 days from today.

67. Lastly, I thank the applicant and Mr Chan for their assistance in this matter.

(Thomas Au)
Judge of the Court of First Instance
High Court

The applicant appeared in person

Mr Anthony Chan, instructed by Lo & Lo, for the 1st and 2nd putative respondents

[12] *Cf*: *Leung Kwok Hung v The President of the Legislative Council (No 2)* (2014) 17 HKCFAR 841, paragraphs 17(1) - (6) and 22, *per* Ribeiro PJ.