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發文者： 財務委員會秘書

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財務委員會

上訴法庭對於
就司法覆核許可被拒提出的延展上訴期限申請所頒下的判決書
(因應HCAL78/2014提出上訴的HCMP3217/2015)

委員曾收到秘書處於2015年10月7日發出的通告(立法會FC261/14-15號文件)，獲告知高等法院原訟法庭拒絕黃毓民議員就財務委員會在2013-2014年度立法會會期，批准有關"古洞北新發展區及粉嶺北新發展區前期地盤平整和基礎設施工程"的FCR(2014-15)2 —— PWSC(2013-14)38撥款建議提出的申請司法覆核的許可的申請。

2. 黃議員沒有按照高等法院相關的規則所規定，在判決書發出日期起計14天內(即在2015年10月21日或之前)就該份判決書申請上訴。2015年12月3日，黃議員提出申請，延展上訴期限。有關申請以書面形式處理。上訴法庭在2016年1月22日就黃議員的申請頒下判決書，駁回黃議員的申請。現謹隨文附上該份判決書(只備英文本)。法律事務部現正擬備判決書的摘要，並會在備妥後送交委員參閱。

財務委員會秘書

(羅英偉代行)

連附件

副本致：立法會主席

HCMP 3217/2015

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

MISCELLANEOUS PROCEEDINGS NO. 3217 OF 2015

(ON AN INTENDED APPEAL FROM HCAL NO. 78 OF 2014)

BETWEEN

WONG YUK MAN	Applicant
and	
NG LEUNG SING	1st Putative Respondent
TOMMY CHEUNG YU YAN	2nd Putative Respondent

Before: Hon Cheung CJHC and Lam VP in Court

Date of Judgment: 22 January 2016

JUDGMENT

Hon Lam VP (giving the Judgment of the Court):

1. On 7 October 2015, Au J refused to grant leave to the applicant to apply for judicial review challenging two decisions of the 1st putative respondent as chairman of the Finance Committee ["the FC"] of the Legislative Council ["LegCo"] in June 2014. The background leading to the decisions in question is set out by the learned judge in his judgment. We shall not repeat the same. Those were decisions made in the context of the FC's approval of a funding proposal by the

government regarding works at Kwu Tung new development area and Fanling North new development area. The first decision was a decision by the 1st putative respondent to stop dealing with further motions presented by members of the FC, including the applicant, after several days of filibustering. The second decision was his decision to put the funding proposal to vote despite some members complained that they were not allowed to put forward further questions before voting.

2. As the judge noted in his judgment, the funding proposal had been implemented after the approval and the applicant accepted that it would not be feasible to seek to quash the approval. However, the applicant contended that the issues raised in his intended application for judicial review had general importance. Though he did not explicitly say so, the judge apparently accepted that the issues raised had general importance and he proceeded to deal with them on the merits. Having considered the submissions before him, including submissions from counsel for the putative respondents, he concluded that the applicant's proposed grounds of judicial review were not reasonably arguable. He therefore refused leave.

3. The applicant did not lodge any appeal within the 14 day limit set by Order 53 Rule 3(4). The appeal period in this case, as provided under that rule, expired on 21 October 2015.

4. On 3 December 2015, the applicant applied for extension of time to appeal. In his affidavit of 16 November 2015 (filed on 3 December 2015), the applicant explained that he had mistaken about the time limit for appeal notwithstanding that he had been reminded by a

letter of 8 October 2015[1] from the court of the relevant appeal period. He said his secretary only filed the letter upon its receipt. He asked the court to grant an extension to him in light of the great importance of the legal issues involved, particularly as the Court of Appeal has not previously considered the effect of section 23 of the Legislative Council (Powers and Privileges) Ordinance Cap 382 ["LCPPO"].

5. Directions were given for the processing of the application on papers. The applicant and counsel for the putative respondents filed written submissions accordingly. The putative respondents opposed the application.

6. The relevant approach in the determination of an application for extension of time to appeal has been succinctly summarized by Kwan JA in *Lee Chick Choi v Best Spirits Co Ltd* HCMP 371 of 2015, 21 May 2015 at paragraph 19:

> " The legal principles regarding an application to extend time for an appeal are well established. In the exercise of its discretion, the court will take into account the length of the delay, the reasons for the delay, the chances of the appeal succeeding if an extension of time is granted, and the degree of prejudice to the other party if the application is granted. Where the delay is substantial and not wholly excusable, the applicant must show a real prospect of success on the merits, not merely a reasonable prospect of success."

7. The same general approach (based on *Secretary for Justice v Hong Kong & Yaumati Ferry Co Ltd* [2001] 1 HKC 125) was applied in an appeal against refusal of leave to apply for judicial review: see *Chee Fei Ming v Director of Food and Environmental Hygiene* [2015] 4 HKC 134.

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[1] In his written submissions filed on 15 December 2015, the applicant said the letter was received on 5 November 2015.

8. The delay in the present case is substantial. We paid due regard to the explanation offered by the applicant. Despite that, we cannot accept the delay as excusable. This being the case, there is a higher threshold in terms of the merits: the applicant need to show a real prospect of success. We are of the view the court should bear in mind that in judicial review applications, an applicant has a duty to proceed with promptitude. That duty applies not only to the application for leave to apply at first instance, it also applies to an appeal arising from the outcome of such leave application and an appeal against a substantive determination.

9. Mr Chan did not suggest the putative respondents to have suffered any significant prejudice out of the delay. We shall proceed on that basis. However, as said in *Chee Fei Ming v Director of Food and Environmental Hygiene*, supra, the absence of prejudice does not exonerate an applicant from meeting the relevant threshold in terms of merits.

10. Turning thus to the merits of the intended appeal, which we consider as the most important factor in the present application, we shall examine it by reference to the proposed grounds of appeal attached to the summons of 3 December 2015. By and large, the applicant repeated his submissions before the judge and contended that the judge was wrong in rejecting them.

11. His grounds 1 to 3 refer to the judge's application of the non-intervention principle discussed by the Court of Final Appeal in *Leung Kwok Hung v President of the Legislative Council* (2014) 17 HKCFAR 689 to the present case. He submitted that there are material

differences in the exercise of the power by the President of the Legislative Council in that context and the exercise of the power of the chairman of the FC.

12. In our judgment, though the power of the President is to be exercised in a different context from that of the chairman of the FC (and with different rules governing the relevant proceedings), the judge was clearly right in holding that the principles discussed in *Leung Kwok Hung* are equally applicable.

13. One must start from the analysis as to the constitutional relationship between the judiciary and the legislature as provided in the Basic Law ["BL"]. The Court of Final Appeal analysed it by reference to the common law doctrine of separation of powers and found that the doctrine was reinforced by provisions in the BL, see paragraphs 26 to 28 of *Leung Kwok Hung*. For our purposes, we would highlight the explanation of the non-intervention principle at paragraph 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 ... 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."

14. The Court of Final Appeal continued to explain the public policy behind such principle at paragraphs 29 to 31. At the same time, the Court also propounded on the constitutional judicial role of the courts in determining whether the legislature or a particular office holder in the

legislature acted within its or his power under the constitution. At paragraph 32, the Court said:

> " ... 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."

15. After referring to art.73(1) BL, the Court came back to this theme at paragraph 39. Having discussed some overseas authorities on the same topic, the Court commented at the last sentence in paragraph 40:

> " It followed that the area for court review is 'only at the initial jurisdictional level."

16. The conclusion at paragraph 43 is important in the present context:

> " Accordingly, our conclusion on this point was that, although art 73(1) does not make compliance with the Rules essential to the validity of the enactment of a law by LegCo and that it is for LegCo itself to determine its own procedures and how they will be applied, the courts will exercise jurisdiction to determine the existence of a power, privilege or immunity of LegCo. We also arrived at the conclusion that the courts will exercise jurisdiction to determine the existence of a power, privilege or immunity of the President of LegCo. We arrived at this conclusion in the light, not only of art 73(1), but also of the provisions of art 72 of the BL and the important powers and functions which it confers on the President, particularly the power to 'preside over meetings'. The courts, however, will not exercise jurisdiction to determine the occasion or the manner of exercise of any such powers, privileges or immunities either by LegCo or the President."

17. On the power of the President to set limits to and terminate a debate, the Court's conclusion at paragraph 46 is also germane for our purposes:

> " Be this as it may, it is clear that the President has power to set limits to and terminate a debate. The existence of the power is inherent in, or incidental to, the power granted by art 72(1) to the President to preside over meetings, quite apart from rule 92. The rules of procedure for which provision is made by art 75, as far as they relate to the President and his powers and functions, are necessarily subject to the provisions of art 72 setting out his powers and functions. It is not for this Court to consider whether or not the power was properly exercised. Nor is it for us to determine whether the President's decision constituted an unauthorized making of a rule of procedure, although, in passing, we observe that the argument had nothing to commend it. ..."

18. With a proper understanding as to the reasoning behind the principle of non-intervention, the inescapable conclusion must be that it is equally applicable to the function of the FC which, as the judge explained at paragraph 11 of his judgment, is a committee of the LegCo entrusted with the specified functions under the Public Finance Ordinance, including the approval of funding proposals. That function is in substance a facet of the function of LegCo prescribed under art 73(3) BL. The overriding considerations governing the relationship between the courts and the LegCo, dictated by their respective constitutional roles as discussed in *Leung Kwok Hung* must be equally applicable to an intended review by the courts on the business of the FC.

19. There is no provision in the BL regarding the FC or the chairman of the FC. The FC is established under the Rules of Procedures of the LegCo ["the LegCo Rules"] and the office of its chairman is also created by those rules. Paragraph 71(13) of the LegCo Rules provides that the FC shall, subject to the LegCo Rules, determine its own practice and procedure. And the Finance Committee Procedure ["the FCP"] was adopted by the FC accordingly. Paragraph 13 of the FCP provides that the Chairman shall chair the committee meetings.

20. The LegCo Rules and the FCP were made by the LegCo and the FCP as internal rules of procedure. As the judge observed at paragraph 59 of his judgment, the power to make the LegCo Rules and the delegation of function to the FC pursuant to those rules, including the power of the chairman of the FC, are recognised under art 75 BL.

21. Though the power of the chairman to chair the FC meeting is derived from the FCP instead of a provision in the BL, given that the function of the FC is part of the function of the LegCo, the extent of the court's role of review in respect of the exercise of the power by the chairman is equally circumscribed by the non-intervention principle.

22. By reason of the principle of non-intervention, the role of the courts in review on the facts of the present case is confined to the determination of the existence of a power, privilege or immunity of the FC chairman.

23. We do not see any material difference in terms of the power incidental to a person chairing or presiding over a meeting between the office of the President and the office of the FC chairman. In our judgment, what were said at paragraphs 43 and 46 in *Leung Kwok Hung* are applicable, mutatis mutandis, to the power of the FC chairman in ensuring the proper and orderly conduct of proceedings in the FC. There is no doubt that the 1st putative respondent does have the power to put an end to the debate and to put the proposal to vote. Whether his exercise of that power conforms to the other rules of internal procedure (under the FCP or otherwise) is not a matter for the courts.

24. For these reasons, Grounds 1 to 3 cannot meet the threshold of having a real prospect of success.

25. By his ground 4, the applicant sought to argue that the doctrine of separation of powers has no application in Hong Kong. We do not see any basis for such a claim. Irrespective of what had been said by others by way of political statements (which has no place in the judicial process), in our courts we only apply the law. As a matter of law, the Court of Final Appeal has explained the relationship between the courts and the LegCo in *Leung Kwok Hung,* if we may say so with respect, with admirable clarity and cogency. The applicant has not put forward any meaningful legal argument to the contrary.

26. Ground 5 of the applicant is based on Section 23 of the LCPPO. The judge had carefully considered the arguments in that respect at paragraphs 44 to 53 of his judgment. We respectfully agree with the analysis of the judge. It is clear from the legislative history that the enactment of Section 23 was not intended to abrogate the common law principle of non-intervention. Further, as explained by the Court of Final Appeal, the courts still have a role in reviewing the constitutionality of the proceedings in the LegCo (and that would include proceedings in the FC) though the scope of review is circumscribed to pay regard to the constitutional relationship between the courts and the LegCo. Hence, there is no inconsistency between the reference to "the lawful exercise of any power" in Section 23 and the principle of non-intervention.

27. Another way of looking at the matter is this: due to the different constitutional roles of the courts and the legislature, and the public policy as explained in *Leung Kwok Hung*, the courts would leave political issues to be resolved by political process. For this purpose, the internal conduct of the proceedings of the LegCo, including the

proceedings of the FC should be regarded as political disputes in respect of which it is not the business of the courts to intervene.

28. For these reasons, we are of the clear view that grounds 4 and 5 also do not enjoy any real prospect of success.

29. Though the issues raised are of some importance, we are able to find the answers to them, and the answers are tolerably clear upon a proper reading of the judgment of the Court of Final Appeal in *Leung Kwok Hung*.

30. In the circumstances, we shall not grant an extension of time to the applicant and his summons of 3 December 2015 is dismissed.

31. The putative respondents ask for costs of the summons. According to *Leung Kwok Hung v President of the Legislative Council (No 2)* (2014) 17 HKCFAR 841, the normal costs rule of costs follow event should be the starting point in respect of costs in the intermediate appeal level. This court may make a different costs order if it is an appeal brought on public interest. However, it is necessary for an applicant to show that proceedings were brought to seek guidance on a point of general public importance for the benefit of the community as a whole and he stood to obtain no personal private gain from the outcome. His case must also have a real prospect of success.

32. Since we have come to the conclusion that the applicant's case does not have a real prospect of success, he cannot come within the public interest exception. Nor do we see any other reason why the normal costs rule should not apply in the present case.

33. We therefore order the applicant to pay the costs of the putative respondents. Having considered the statement of costs of the putative respondents, we fix the costs at $70,000.

(Andrew Cheung)
Chief Judge of the High Court

(M H Lam)
Vice President

The applicant acting in person

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