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From : Clerk to the Finance Committee

To : Members of the Finance Committee

Finance Committee

**Judgment of the Court of Appeal on
the application for extension of time to appeal against refusal for leave
for judicial review (HCMP3217/2015 on appeal from HCAL 78/2014)**

Further to LC Paper No. FC98/15-16 dated 25 January 2016, I attach a summary of the salient points of the captioned judgment of the Court of Appeal on Hon WONG Yuk-man's application for extension of time to appeal against refusal for leave prepared by the Legal Service Division for members' information.

2. Upon the refusal of granting an extension of time to appeal, Mr WONG may further seek leave of the Court of Appeal or the Appeal Committee of the Court of Final Appeal ("CFA") to appeal to CFA on the ground that the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to CFA for decision. The application for leave must be made within 28 days of the judgment to be appealed from (i.e. on or before 26 February 2016).

(Derek LO)
for Clerk to the Finance Committee

Encl.
c.c. President, Legislative Council

Summary of the Court of Appeal's Judgment on HCMP 3217/2015 (on appeal from HCAL 78/2014)

Background

Members may recall that Hon WONG Yuk-man had applied to the Court of First Instance (the CFI) for leave to apply for judicial review¹ (leave application) challenging the decisions of the Chairman of the Finance Committee (FC) made at the FC meeting on 27 June 2014 in the context of the FC's approval of 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"². CFI handed down its judgment on 7 October 2015 dismissing Mr WONG's leave application. The appeal period expired on 21 October 2015.

2. On 3 December 2015, Mr WONG applied to the Court of Appeal (CA) for extension of time to appeal. CA directed that Mr WONG's application should be proceeded on paper. CA handed down its judgment in relation to Mr WONG's application on 22 January 2016.

Court of Appeal's judgment

3. CA refused to grant an extension of time for Mr WONG to appeal and his summons of 3 December 2015 was dismissed. The reasons for CA's decision are summarized as follows:

- (a) According to the legal principles established by case law, in considering an application to extend time for an appeal, 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.

¹ HCAL 78/2014.

² The Chairman's decisions under challenged are the decisions to (i) stop dealing with any further motions presented by members of FC under paragraph 37A of the FC Procedure; and (ii) despite the protest of certain members, put the funding proposal to vote.

- (b) In the present case, CA considered that Mr WONG's delay in lodging an appeal is substantial and not excusable. CA stated that in judicial review applications, an applicant has a duty to proceed with promptitude. This 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.
- (c) Regarding the merits of Mr WONG's intended appeal which CA considered as the most important factor in the present application, CA has examined Mr WONG's proposed grounds of appeal which are basically the same as his submissions made to CFI in his leave application. CA rejected those grounds as they did not have any real prospect of success for the following reasons:
 - (i) The non-intervention principle governing the relationship between the courts and the Legislative Council (LegCo) confirmed by the Court of Final Appeal (CFA) in *Leung Kwok Hung v The President of the Legislative Council* (2014) 17 HKCFAR 689 is equally applicable to the function of FC which is a committee of LegCo entrusted with the specified functions under the Public Finance Ordinance (Cap. 2) including the approval of funding proposals.
 - (ii) FC is established under the Rules of Procedure of LegCo (RoP) which are made by LegCo under Article 75 of the Basic Law and FC is empowered under the RoP to determine its own practice and procedure. Paragraph 13 of the Finance Committee Procedure (FCP) provides that the Chairman shall chair the committee meetings. Though the power of the FC Chairman to chair meeting is derived from FCP instead of a provision in the Basic Law, given that the function of FC is part of the function of 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. Applying this principle to the present case, CA decided that the role of the courts should be confined to the determination of the existence of a power, privilege or immunity of the FC Chairman.

- (iii) There is no material difference in terms of the power incidental to a person chairing or presiding over a meeting between the office of the President of LegCo and the office of the FC Chairman. Applying the CFA's judgment in *Leung Kwok Hung*, CA held that the FC Chairman does have the power to put an end to the debate and to put the proposal to vote in ensuring the proper and orderly conduct of the FC proceedings. Whether the Chairman's exercise of that power conforms to the other rules of internal procedure (under FCP or otherwise) is not a matter for the courts.
- (iv) Regarding Mr WONG's argument that the doctrine of separation of powers has no application in Hong Kong, CA did not see any basis for such a claim because as a matter of law, CFA has clearly and cogently explained the relationship between the courts and LegCo in *Leung Kwok Hung* and Mr WONG has not put forward any meaningful legal argument to the contrary.
- (v) In relation to Mr WONG's argument that section 23 of the Legislative Council (Powers and Privileged) Ordinance (Cap. 382) imposes a statutory duty on the courts to look at whether the exercise of power by LegCo is lawful, including whether LegCo had complied with procedural regularity in exercising its power, CA held that the enactment of section 23 with reference to the legislative history was not intended to abrogate the common law principle of non-intervention. Further, given that the courts still have a role in reviewing the constitutionality of the proceedings in LegCo (and that would include proceedings in FC) though the scope of review is circumscribed to pay regard to the constitutional relationship between the courts and LegCo, there is no inconsistency between the reference to "the lawful exercise of any power" in section 23 of Cap. 382 and the principle of non-intervention. CA considered that the internal conduct of LegCo proceedings, including the proceedings of FC should be regarded as political disputes in respect of which it is not the business of the courts to intervene.

4. In respect of the costs of the application, CA ordered Mr WONG to pay the costs which are fixed at \$70,000.

Prepared by

Legal Service Division
Legislative Council Secretariat
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