

IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
MISCELLANEOUS PROCEEDINGS

BETWEEN

(1) LAU CHI FAI

(2) WONG CHI KIN (suing on behalf of himself  
and all other members of the Management  
Committee of Sheng Kung Hui Tsang Siau Tim  
Secondary School)

Plaintiffs

and

(1) THE SECRETARY FOR JUSTICE

(2) THE DIRECTOR OF EDUCATION

Defendants

Before: Keith J.A. (sitting as an additional judge of the Court of First  
Instance) in Court

Date of Hearing: 17th June 1999

Date of Handing Down of Judgment: 25th June 1999

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JUDGMENT

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B Introduction

C There is at present a heated debate in Hong Kong about an area  
D of educational policy. It relates to the retirement of teachers and principals  
E in aided schools. Unless there are exceptional circumstances, the Director  
F of Education wants them to retire when they reach the age of 60. She does  
G not want them to hold up the career paths of new entrants to the teaching  
H profession. However, many teachers and principals wish to continue  
I working after they have reached the age of 60. They believe that they still  
J have much to offer. Many of them are supported by the management  
K committees of their schools. They do not wish to lose teachers and  
L principals with a wealth of experience.

M The courts cannot make any legitimate contribution to this  
N debate. Educational policy is not for them. What is in the best interests  
O of students, the teaching profession and the schools is for the educationalists  
P to decide. The role of the courts is limited to determining any questions of  
Q law arising from the dispute. This case is about such a question. It  
R relates to a principal in an aided secondary school, but since the issue in his  
S case affects principals in other aided secondary schools (and probably  
T principals in aided primary and special schools as well), the case has rightly  
U been described as a test case. The issue is whether such principals have  
V security of tenure until the age of 70, unless there are particular reasons  
relating to them or their schools which would permit their compulsory  
retirement at an earlier age.

S The facts

T Aided schools. Many schools in Hong Kong rely on  
U Government funding. One group of schools, which relies heavily on  
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B financial support from Government, are aided schools. They are run by  
C religious, community or voluntary organisations. The school of which  
D Lau Chi Fai, the 1st Plaintiff, is the principal is the Sheng Kung Hui Tsang  
E Shiu Tim Secondary School ("the School"). It has been an aided school  
F since 1982. The terms and conditions on which it receives financial  
G support from Government are contained in the Code of Aid for Secondary  
H Schools ("the Code"). It is entirely a matter for each secondary school to  
I decide whether or not to accept financial support from Government. But if  
J it chooses to do so, as the School did, it must accept and comply with the  
K terms of the Code.

I The retirement provisions. The Code is divided into sections.  
J So that they will not be confused with sections of an Ordinance, I shall refer  
K to the sections of the Code, albeit inaccurately, as clauses. The Code  
L provides for the retirement of teachers in schools to which the Code applies.  
M Thus, clause 57 of the Code provides:

M "Retirement

- N (a) A teacher shall retire at the end of the school year in which he  
O reaches the age of sixty.  
P (b) Notwithstanding (a), the Director [of Education] may, on the  
Q recommendation of the Management Committee of a school  
R and subject to the submission of a satisfactory medical  
certificate as to fitness, permit a teacher to continue in service  
for a period of one school year after the end of that in which  
he reaches the age of sixty, and for further periods each of one  
school year, up to the end of the school year in which he  
reaches the age of sixty five."

R Indeed, when the school accepted in 1979 the offer of the Director of  
Education ("the Director") to convert to an aided school, it did so on the  
rules and conditions governing the conversion scheme. Rule 1.16  
provided:

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"No teacher or principal aged 60 or above shall remain in the employ of the school when it becomes fully aided, unless prior approval of the Director has been obtained."

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Until last year, no-one questioned the enforceability of clause 57. It was thought to mandate the retirement of all teachers in, and principals of, aided secondary schools at the age of 60.

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The Plaintiffs. Section 42(1) of the Education Ordinance

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(Cap. 279) ("the Ordinance") prohibits a person from teaching in a school unless he or she has been registered as a teacher under the Ordinance or has been issued by the Director with a permit to teach. Mr. Lau qualified as a teacher in 1963 and became registered as a teacher in 1969 under the regime then prevailing. In 1980, he became a teacher at the School, and in 1988

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he became the principal of the School with effect from the previous

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November. While he has been at the School, his employer has been the Management Committee of the School ("the Management Committee").

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The 2nd Plaintiff is a member of the Management Committee, and he sues in a representative capacity.

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Mr. Lau's retirement. Mr. Lau was due to reach the age of 60

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on 25th May 1998. With clause 57 of the Code in mind, the School's Council requested the Director in January 1998 to permit Mr. Lau to

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continue as the principal of the School for the 1998/1999 academic year.

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There was no response to that request for some time. Eventually, on 3rd June 1998, the Director sent a circular to all aided schools, which

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included the following passage:

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"Given the present employment situation and the abundant supply of graduates from Hong Kong Institute of Education and other tertiary institutions, it is no longer necessary to extend or re-employ teachers or school heads beyond the retirement age of 60. The established policy stipulated in the Codes of Aid ... will

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therefore be strictly applied."

Accordingly, on 30th June 1998, the Director notified the School that the request to permit Mr. Lau to continue as the principal of the School for the next academic year was refused. The School protested, and the Director changed her mind. On 13th July 1998, she informed the School that one of the facts which she had taken into account was:

"... the difficulties faced by the school having to go through the recruitment procedures at this stage in seeking a new Head in the coming school year."

However, her letter went on:

"... the School is required to have in place plans for contingencies and staff development. You must also ensure that a successor is in post from the commencement of the 1999/2000 school year."

The current proceedings. In January 1999, the Director issued a further circular which confirmed the policy she had announced the previous June. By then, it was known that there was an argument for saying that, to the extent that clause 57 of the Code applied to principals, it was unenforceable and of no effect. Accordingly, on 9th February 1999, the School simply informed the Director that Mr. Lau would continue in his post as principal of the School, and these proceedings for declaratory relief were commenced by originating summons on 27th February 1999.

The Plaintiffs' case

The Plaintiffs' case can be shortly stated. It is that, on its proper construction, clause 57 of the Code does not apply to a principal of a school. Alternatively, if it is held to apply to a principal of a school, it is unenforceable and of no effect to that extent. The reason why it is unenforceable is because it is inconsistent with the Ordinance which gives security of tenure to a principal of a school until he reaches the age of 70,

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unless there are particular reasons relating to him or his school which would, permit his compulsory retirement at an earlier age. I propose to deal with the latter issue first, because my decision on that issue may help to decide the former issue or make a decision on the former issue unnecessary.

The tenure provisions in the Ordinance for principals

The provision in the Ordinance which provides for the tenure of a principal is section 55. That provides:

- "The principal of a school shall hold office until -
- (a) he ceases to be registered as a teacher, or to be permitted to teach as a permitted teacher in the school;
- (b) he resigns;
- (c) the Director withdraws his approval of the principal under section 56; or
- (d) the Director approves another teacher of the school as the principal under section 57(2)."

Thus, in those cases to which (b), (c) and (d) do not apply, the principal of a school who is a registered teacher is entitled to hold office until he ceases to be registered as a teacher. Section 47 sets out the grounds upon which the Director may cancel the registration of a teacher. Section 47 provides:

- "The Director may cancel the registration of a teacher -
- (a) on any ground specified in section 46 which applies to the teacher, whether or not such ground existed at the time when he was registered as a teacher;
- (b) if it appears to the Director that the teacher is incompetent;
- (c) if the teacher has contravened any provision of this Ordinance;
- (d) if it appears to the Director that the teacher has behaved in any manner which, in the opinion of the Director, constitutes professional misconduct; or
- (e) if it appears to the Director that the teacher has behaved in any manner which, in the opinion of the Director, is prejudicial to the maintenance of good order and discipline in the school in which the teacher teaches."

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B Thus, in those cases to which (b), (c), (d) and (e) do not apply, the principal  
C of a school who is a registered teacher is entitled to hold office until a  
D ground specified in section 46 exists for the cancellation of his registration  
E as a teacher. Section 46 sets out the grounds upon which the Director may  
F refuse to register a teacher. Section 46 provides:

E "The Director may refuse to register an applicant as a teacher if it  
F appears to him that the applicant -

- G (a) is not a fit and proper person to be a teacher;  
H (b) has been convicted of an offence punishable with  
I imprisonment;  
J (c) is a person in respect of whom a permit to teach has  
K previously been cancelled;  
L (d) is medically unfit;  
M (e) does not possess the prescribed qualifications;  
N (f) has attained the age of 70 years; or  
O (g) in making or in connexion with any application -  
P (i) ...  
Q (ii) for registration as a manager or a teacher; or  
R (iii) to employ a person as a permitted teacher in a school,  
S has made any statement or furnished any information which is  
T false in any material particular or by reason of the omission of  
U any material particular."

N Thus, in circumstances to which (a), (b), (c), (d), (e) and (g) do not apply,  
O the principal of a school who is a registered teacher is entitled to hold office  
P until he reaches the age of 70. Accordingly, the effect of the Ordinance is  
Q to underpin the position of school principals by imposing restrictions on the  
R freedom of their employers, the management committees of their schools, to  
S remove them from office.

S In a clear and concise submission, Mr. Geoffrey Ma S.C. for  
T the Defendants did not dispute this analysis of the tenure provisions for  
U principals in the Ordinance. What he argued was that there was no conflict  
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between clause 57 of the Code and the security of tenure provisions in the Ordinance. The argument went like this. It will be recalled that under section 55(c) of the Ordinance a principal's tenure of office can be brought to an end if the Director withdraws her approval for the principal to continue in office. Accordingly, in the light of clause 57 of the Code, the Director must be regarded as having withdrawn her approval for the principal of an aided secondary school continuing to be the principal of the school once he has reached the age of 60, save in those exceptional cases for which the Director gives her approval.

Mr. Ma acknowledged that the grounds on which the Director may withdraw her approval for a principal to continue in office under section 55(c) are limited to the grounds set out in section 56. Section 56 provides:

- "The Director may withdraw his approval of the principal of a school if it appears to the Director that the principal -
- (a) is no longer a fit and proper person to be the principal;
  - (aa) in the case of a school providing nursery or kindergarten education, is not appropriately qualified to be the principal;
  - (b) is not performing the duties of the principal satisfactorily;
  - (c) has ceased to perform the duties of the principal; or
  - (d) is no longer acceptable as such to the majority of the management committee."

Mr. Ma contended that the grounds set out in section 56 upon which the Director can justify the implementation of clause 57 of the Code are those in sections 56(a), 56(c) and 56(d). I can deal shortly with Mr. Ma's reliance on the grounds in sections 56(a) and 56(d). Section 56(a) focuses on the personal attributes of the principal, and section 56(d) focuses on the wishes of the majority of the management committee. In Mr. Lau's case, it is not suggested that his personal attributes are such that he should not continue as



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principal for that reason. Nor is a majority of the Management Committee opposed to his continuing to be the principal of the School. On the contrary : the unchallenged evidence is that he has the support of the Management Committee to continue in post. If that is the position in other aided secondary schools, the Director likewise cannot rely on sections 56(a) and 56(d) in their cases.

The critical question, therefore, is whether the Director can justify the implementation of clause 57 of the Code on the ground that, to use the language of section 56(c), the principal "has ceased to perform the duties of the principal". Mr. Ma contended that, at the age of 60, the principal will have ceased to perform the duties of principal because that is when his contract of employment comes to an end. And why does his contract of employment come to an end at the age of 60? The answer, it is said, is that clause 57 of the Code amounts to an undertaking which the management committee of a school gives to the Director in return for financial support under the Code. That undertaking, so the argument goes, was incorporated into the principal's contract of employment, and required the school to bring his employment to an end, unless the Director permitted an extension beyond the age of 60.

In my judgment, this argument breaks down when one attempts to analyse how the undertaking which the management committee gave to the Director actually became a binding obligation in the principal's contract of employment. The doctrine of privity of contract suggests otherwise. Party A to a contract (i.e. the management committee of the school) is not permitted to break the obligations (i.e. the security of tenure provisions) which it owes to Party B (i.e. the principal) simply because it has agreed

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B with Party C (i.e. the Director) to act in a way (i.e. to remove the principal  
C from office when he reaches the age of 60) which would amount to a breach  
D of those obligations. It would be different if Party B (i.e. the principal) had  
E been a party to the agreement between Party A (i.e. the management  
F committee of the school) and Party C (i.e. the Director), but Mr. Ma does  
G not suggest that the principals of aided secondary schools were themselves  
H parties to the agreement for aid reached between the management  
I committees of their schools and the Director. It follows that the Director  
J cannot justify the implementation of clause 57 of the Code on any of the  
K grounds set out in section 56 of the Ordinance. The consequence of that is  
L that there is a clear conflict between clause 57 of the Code and the security  
M of tenure provisions in the Ordinance.

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K What is the effect of that conflict? The answer is that, to the  
L extent that clause 57 of the Code applies to principals, it cannot be enforced  
M by the Director because to require the management committee of the school  
N to enforce clause 57 would be requiring it to act in breach of its obligation to  
O honour the provisions relating to security of tenure for principals in the  
P Ordinance. In the circumstances, it is unnecessary for me to address the  
Q question whether clause 57 of the Code applies to principals, because it is  
R unenforceable to the extent that it does.

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Conclusion

R For these reasons, the Plaintiffs are entitled to declarations  
S identifying their legal rights. I was not addressed on what declarations  
T might be appropriate. Instead, it was left on the basis that I would make  
U such declarations as I thought were appropriate, leaving it to the parties to  
V apply for a variation of the orders if they wished. The declarations which

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I make, albeit *nisi*, are that:

- (i) section 57 of the Code of Aid for Secondary Schools is unenforceable against principals of aided secondary schools,
- (ii) the 1st Plaintiff is entitled to hold and retain his office as principal of Sheng Kung Hui Tsang Shiu Tim Secondary School until one or more of the circumstances set out in section 55(a)-(d) of the Education Ordinance have arisen,
- (iii) unless it appears to the 2nd Defendant that one or more of the grounds set out in section 56(a)-(d) of the Education Ordinance have been satisfied, the 2nd Defendant is not permitted to withdraw her approval of the 1st Plaintiff as principal of Sheng Kung Hui Tsang Shiu Tim Secondary School.

These declarations reproduce in different language paras. 1, 3 and 4 of the relief sought in the originating summons. I do not at present regard a declaration on the lines of para. 2 as appropriate, because I have not discerned any attempt by the Director to cancel Mr. Lau's registration as a teacher. Nor do I think that declarations on the lines of paras. 5 and 6 are appropriate: they are covered by declarations (i) and (iii) which I have made.

At present, I see no reason why costs should not follow the event, and the order *nisi* I make as to costs is that the Director must pay to the Plaintiffs their costs of and occasioned by the originating summons, to be taxed if not agreed. On that issue, the taxing master should look critically at the large number of documents in the bundles (the vast majority of which were not referred to), the number of counsel instructed by the Plaintiffs on what was, after all, a relatively short (though important) point,

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the need for the Plaintiffs to be represented by different junior counsel, the Plaintiffs' lengthy list of authorities (most of which were not referred to and none of which I regarded as helpful), and the Plaintiffs' skeleton argument which includes a lengthy dissertation on the history of statutory control of education in Hong Kong (which was not referred to at all and which Mr. John Griffiths S.C. for the Plaintiffs accepted did not contribute to the issues which I had to decide).

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The alternative of judicial review

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Finally, I should add that I was at one time concerned as to whether the dispute between the parties should more appropriately be resolved in an application for judicial review. I had in mind the comments made by Litton V.-P. (as he then was) in *Lee Mi Ling v The Attorney-General (No. 2)* (1995) 5 HKPLR 585. I remain of the view

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the Plaintiffs are seeking to assert public law rather than private law rights.

In *R. v East Berkshire Health Authority ex p. Walsh* [1984] 3 WLR 818,

Sir John Donaldson M.R. said at pp. 827G-828B:

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"The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee 'public law' rights and at least making him a potential candidate for administrative law remedies. Alternatively it can require the authority to contract with its employees on specified terms with a view to the employee acquiring 'private law' rights under the terms of the contract of employment. If the authority fails or refuses to thus create 'private law' rights for the employee, the employee will have 'public law' rights to compel compliance, the remedy being mandamus requiring the authorities so to contract or a declaration that the employee has those rights. If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of 'public law' and gives rise to no administrative law remedies."

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B This, I think, was more a case of the legislature underpinning the position of  
C school principals by directly restricting the freedom of management  
D committees to remove them from office (thus giving principals "public law"  
E rights), rather than the legislature requiring management committees to  
F contract with school principals on specified terms with a view to the  
principals acquiring "private law" rights under the terms of their contracts of  
employment.

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H However, it would only have been right to require the Plaintiffs  
I to bring proceedings for judicial review if (a) the current proceedings  
J amount to an abuse of process, or (b) the grounds on which the Director's  
K reliance on clause 57 of the Code is challenged sound only in public law.  
L As for (b), a glance at the arguments developed before me shows that,  
M although it is public law rights which are being asserted, the grounds on  
N which the Director's reliance on clause 57 of the Code has been challenged  
O do not sound only in public law. As for (a), the use of the originating  
P summons procedure would only be an abuse of process if the Defendants  
Q were thereby deprived of the procedural safeguards which Ord. 53 might  
R otherwise have afforded them: the strict time limits for applications for  
S judicial review, and the judicial filtering process which ensures that only  
T arguable cases go to a full hearing. In the present case, the Defendants do  
U not object to the use of the originating summons procedure. They are not  
seeking to rely upon the procedural safeguards which Ord. 53 might  
otherwise have afforded them. As Lord Diplock said in *O'Reilly*  
*v. Mackman* [1983] 2 AC 237 at p. 285E-F:

"... though it may normally be appropriate [to strike out ordinary  
actions when the proceedings should have been begun by judicial  
review] ... there may be exceptions, particularly ... where none of  
the parties objects to the adoption of the procedure by writ or  
originating summons."

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Thus, even though the Plaintiffs may be seeking to assert public law rights, they are not relying on grounds which are exclusively within the domain of public law to do so. Nor in the circumstances is the use of the originating summons procedure an abuse of the court's process. Accordingly, I do not regard the use of the originating summons procedure in this case as inappropriate.

(Brian Keith)  
Justice of Appeal

Mr. John Griffiths S.C., Mr. Gordon Fisher and Mr. Jonathan Acton-Bond, instructed by Messrs. P.C. Woo & Co., for the 1st Plaintiff

Mr John Griffiths S.C., Mr. Paul Tang and Mr. Jonathan Acton-Bond, instructed by Messrs. P.C. Woo & Co., for the 2nd Plaintiff

Mr. Geoffrey Ma S.C. and Mr. Eugene Fung, instructed by the Department of Justice, for the Defendants