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From : Clerk to the Finance Committee

To : Members of the Finance Committee

Finance Committee

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

Further to LC Paper No. FC261/14-15 dated 7 October 2015, I attach a summary of the salient points of the judgment of the Court of First Instance of the High Court on the captioned leave application for judicial review prepared by the Legal Service Division for members' information.

(Ms Anita SIT)
Clerk to the Finance Committee

Encl.

c.c. President, Legislative Council

**Summary of Judgment of Hon Mr Justice AU on
Application for Leave for Judicial Review made by
Hon WONG Yuk-man
HCAL 78/2014**

1. On 8 July 2014, the Applicant, Hon WONG Yuk-man, sought leave to apply for judicial review (leave application) against the decisions of the Chairman of the Finance Committee (FC) made during the meeting of FC on 27 June 2014 when FC was considering the funding approval for the advance site formation and engineering infrastructure works at Kwu Tung new development area and Fanling North new development area (the Funding Proposal). The leave application was heard before Hon Au J in the Court of First Instance (the Court) on 11 June 2015 and the judgment was given on 7 October 2015. The decisions under challenge are –

- (a) the Chairman stopped dealing with any further motions presented by members of FC under paragraph 37A of the Finance Committee Procedure (FCP) (1st Decision)¹; and
- (b) the Chairman's decision to put the Funding Proposal to vote (2nd Decision)².

2. The Applicant's grounds of challenging the 1st Decision are that the Chairman did not have the power under paragraph 37A of FCP to stop dealing with motions presented by members. By doing so, the Chairman had in fact changed FCP on his own. The 1st Decision also infringed the legitimate expectations of FC members to have reasonable time to present motions after the "deadline" for presenting motions had been set³.

3. In relation to the 2nd Decision, the Applicant sought to have it quashed because during the FC's deliberating process that culminated in the 2nd Decision, the FC Chairman has already contravened paragraph 37A of FCP in making the 1st Decision, and the Chairman contravened paragraph 46 of FCP in that he put the Funding Proposal to vote even though many FC members still had questions to ask on the Funding Approval⁴.

¹ Paragraph 14 of the Judgment of the Hon Mr Justice AU dated 7 October 2015 (Judgment).

² Paragraph 18 of the Judgment.

³ Paragraph 23(1) of the Judgment.

⁴ Paragraph 23(2) of the Judgment.

4. The Applicant argued that the common law non-intervention principle confirmed and explained by the Court of Final Appeal (CFA) in *LEUNG Kwok-hung v The President of the Legislative Council*⁵ had been codified and modified by section 23 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382)⁶. According to the Applicant, section 23 of Cap. 382 imposed a statutory duty on the Court to look at whether the exercise of power by LegCo was "lawful", which must include looking at whether LegCo had complied with procedural regularity in exercising its power⁷.

5. Further, the Applicant argued that the non-intervention principle must be reconsidered under the special political and legislative model in Hong Kong and it should not be applied without any qualification⁸.

6. The Court refused the Applicant's leave application. The reasons for the Court's decision are summarized below:

- (a) The Court considered the non-intervention principle confirmed and explained by CFA in *Leung Kwok Hung* (under which the court should not adjudicate matters concerning procedural compliance of the Legislative Council (LegCo) unless there are provisions in the Basic Law requiring the court to do so), and held that the principle should similarly apply to the workings of FC as one of LegCo's standing committees⁹.
- (b) After considering Article 73(1) and 73(3) of the Basic Law¹⁰, the Court held that the Article 73(3) could not displace the non-intervention principle and require the court to look at procedural compliance of LegCo and FC in performing the function to approve taxation and public expenditure¹¹.

⁵ (2014) 17 HKCFAR 689.

⁶ Section 23 provides that "[t]he 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."

⁷ Paragraph 44 of the Judgment.

⁸ Paragraph 54 of the Judgment.

⁹ Paragraphs 34 and 35 of the Judgment.

¹⁰ Article 73 of the Basic Law provides for the powers and functions of the Legislative Council. Article 73(1) empowers the Legislative Council "to enact, amend or repeal laws in accordance with provisions of this Law and legal procedures;" and under Article 73(3), "to approve taxation and public expenditure".

¹¹ Paragraphs 39 to 43 of the Judgment.

- (c) in relation to the Applicant's argument on section 23 of Cap. 382, the Court was of the view that the word "lawful" in section 23 was to ensure the court's jurisdiction to scrutinize LegCo's exercise of its powers to the extent recognized under the non-intervention principle. Therefore, section 23 of Cap. 382 was intended to be read consistently with the common law principle of non-intervention¹².
- (d) In relation to the Applicant's last argument in paragraph 5 above, the Court held that there was no substance in that argument as in *Leung Kwok Hung*, CFA has specifically taken into account the constitutional structure of the Executive, Legislative and the independent Judiciary as laid down by the Basic Law in explaining the non-intervention principle as applied in Hong Kong¹³.
- (e) Alternatively, the Court held that the FC Chairman, who is vested with the power to chair FC meetings under paragraph 13 of FCP, has the power to regulate the process of the FC meetings under FCP, including the power to set limits to and terminate a debate. In coming to this decision, the Court has referred to CFA's decision in *Leung Kwok Hung* and concluded that the meanings of "to chair" under paragraph 13 of FCP and "to preside over meetings" under Article 72(1) of the Basic Law are for practical purposes the same. As the Court was satisfied that the FC Chairman has the power to regulate the process of FC meetings, the Court held that under the non-intervention principle, it was not for the court to determine the occasion on the matter of the exercise of this power¹⁴.

7. The Court makes an order *nisi* that there be no order as to costs (i.e. each party to pay for its own costs)¹⁵. This order will become absolute 14 days from the date of judgment¹⁶ (i.e. on or before 22 October 2015, as 21 October is a public holiday) unless any of the parties applies to vary it by summons. In making the order, the Court recognized that generally, the court should, as a starting position, make no order as to

¹² Paragraphs 44 to 53 of the Judgment.

¹³ Paragraph 55 of the Judgment.

¹⁴ Paragraphs 57 to 64 of the Judgment.

¹⁵ Paragraph 66 of the Judgment.

¹⁶ The deadline for making the application to vary the costs order *nisi* is 21 October 2015.

costs in a contested failed leave application, unless there are good reasons or exceptional circumstances to justify a departure¹⁷. In this case, the Court does not find any such exceptional circumstances or good reasons to justify departure from the usual position, in particular, because this is the first time the court is asked to consider the arguments based on section 23 of Cap. 382.

¹⁷ This is the principle laid down by CFA in *LEUNG Kwok-hung v The President of the Legislative Council* (2014) 17 HKCFAR 841, paragraphs 17(1) to (6).