

Cheng Kar Shun

and

Li Fung Ying

(Court of First Instance)

(Constitutional and Administrative Law List No 79 of 2009)

Andrew Cheung J

17–20 August, 24 September 2009

Constitutional law — Legislative Council — power of select committee to order applicants to attend committee to give evidence and produce documents — under art.73(10), this power could be exercised by full body of Legislative Council or by its select committee — Basic Law art.73, 73(10) — Legislative Council (Powers and Privileges) Ordinance (Cap.382) s.9(2)

Constitutional law — Basic Law — Legislative Council — language of Basic Law more prescriptive of powers and functions of legislature, rather than descriptive of limits of those powers — Basic Law arts 77, 78

[Basic Law of the Hong Kong Special Administrative Region art.73(1); Legislative Council (Powers and Privileges) Ordinance (Cap.382) s.9(2)]

憲法 — 立法會 — 專責委員會有權命令申請人到該委員會席前作證或出示文件 — 根據《基本法》第73(10)條，可以由立法會全體或其專責委員會行使這項權力 — 《基本法》第73及73(10)條 — 《立法會(權力及特權)條例》(第382章)第9(2)條

憲法 — 《基本法》 — 立法會 — 《基本法》用語着規範立法會權力及功能，而不是敘述地規限該權力 — 《基本法》第77、78條

[《中華人民共和國香港特別行政區基本法》第73(1)條; 《立法會(權力及特權)條例》(第382章)第9(2)條]

Xs were senior executives in a group of companies which included New World China Land Ltd (NWCL); and First Star Development Ltd (First Star), which was the developer of the Hunghom Peninsula PSPS flats. This development led to a dispute between the Government and First Star, resolved in part by the payment of \$864 million for a lease modification to convert the land into a private development. The Permanent Secretary for Housing, Planning and Lands, PS, handled the dispute. PS retired in January 2007. On 1

August 2008, NWCL appointed PS as an executive director and the deputy managing director. On 10 December 2008, the Legislative Council resolved to appoint a Select Committee to inquire into PS's post-service work:

to inquire into the vetting and approval for [PS], to take up post-service work with [NWCL] and other real estate organisations, and whether there was any connection between such work and the major housing or land policies which [PS] had taken part in their formulation or execution and decisions which he had made ... that had given rise to any potential or actual conflict of interest, as well as related matters, and based on the results of the above inquiry, to make recommendations on the policies and arrangements governing post-service work of directorate civil servants and other related matters; and that in the performance of its duties the committee be authorised under s.9(2) of the Legislative Council (Powers and Privileges) Ordinance (Cap.382) to exercise the powers conferred by s.9(1) of that Ordinance.

Section 9 provides for the ordering of witnesses to attend before the Legislative Council or its committees, with s.9(2) providing that this power conferred by s.9(1) "may be exercised by any other committee which is specially authorised by a resolution of the [Legislative] Council to exercise such powers in respect of any matter or question specified in the resolution". The Select Committee determined that the inquiry would consider three areas of study:

(a) the post-service work of [PS] with real estate organisations. This covers the policies and arrangements governing the post-service work of directorate civil servants, the offer of the post-service work by [NWCL] to [PS], the vetting and approval of [PS's] application to take up the offer, and the termination of the employment contract between NWCL and [PS]; (b) major housing or land policies which [PS] had taken part in their formulation or execution and decisions which he had made pursuant to such policies while serving ... These include the disposal of the Hunghom Peninsula PSPS flats, the exercise of discretionary power by [PS] in respect of land and planning matters in the development of Grand Promenade, and other major housing or land policies which [PS] had taken part in their formulation or execution and decisions made pursuant to such policies; and (c) in the course of inquiring into the above areas of study, the Select Committee would examine whether there was any connection between them which had given rise to any potential or actual conflict of interest with [PS's] former government duties, and would make recommendations on these and other related matters.

Xs were summoned to give evidence and produce documents before the Select Committee. The applicants sought judicial review on three grounds. First, that the Select Committee had no power to summon the attendance of witnesses, as this was a power only exercisable by the Legislative Council under art.73 of the Basic Law, and so s.9(2), in particular, of the Ordinance was unconstitutional. Second, the Select Committee acted outside of its remit under the resolution (the *ultra vires* ground). This raised the preliminary question of the jurisdiction of the court over such a matter.

Held, dismissing the application, that:

- (1) On a true construction of art.73(10), it provided the Legislative Council with the power to summon, in exercising its functions as set out in art.73(1)–73(9), persons concerned to testify or to give evidence, when sitting as a full body or functioning through a Select Committee. Therefore, the constitutional challenge against relevant provisions of the Ordinance, notably s.9(2), must fail. (See paras.200–201.)
- (2) Even if it were the case that art.73 only empowered the Legislative Council as a full body to summon witnesses, the Legislative Committee could delegate that power to one of its committees to exercise. The grant of power under the Basic Law to the Legislative Council carried with it all those powers necessary to make effective the exercise of legislative power; necessary, in this context, meant reasonably required. In the present case, the Legislative Council had the requisite power of delegation. In addition, committees were natural extensions of the Legislature, and the Legislature functioned through them (*Birmingham City District Council v O* [1983] 1 AC 578, *Canada (Attorney-General) v MacPhee* (2003) 221 Nfld & PEIR 164, *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 considered). (See paras.209–212.)

The ultra vires ground

- (3) In Hong Kong, the Basic Law was supreme. But subject to that, the Basic Law recognised the Legislative Council to be a sovereign body under that Law, and it had exclusive control over the conduct of its own affairs. Hence, the courts did not, as a rule, interfere with the internal workings of the Legislature. Exceptionally, where questions of whether the Legislative Council, in going about its business, had acted in contravention of the Basic Law arose, the courts had jurisdiction to intervene. But the jurisdiction must be exercised with great restraint, having regard to the different constitutional roles assigned under the Basic Law to different arms of the Government (*Rediffusion (Hong Kong) Ltd v Attorney-General* [1970] HKLR 231, *Prebble v Television*

- New Zealand Ltd* [1995] 1 AC 321, *Egan v Willis* (1998) 195 CLR 424, *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* [2000] 5 LRC 196, *Ah Chong v Legislative Assembly of Western Samoa* [2001] NZAR 418, *Canada (House of Commons) v Vaid* [2005] 1 SCR 667, *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 considered). (See paras.214–220.)
- (4) As for Xs' argument that, regardless of the common law principle on the courts' restrained approach, this matter should be scrutinised under the Ordinance, the task could not be approached in such a blinkered manner. In ascertaining the role intended by the Legislature in enacting the Ordinance, one must look at this common law principle. Hence, the intention of the Ordinance was clearly that so far as possible the matter should be dealt with within the Legislative Council. This was in accordance with the general principle of separation of powers that the Legislature should have control over the conduct of its own affairs and any alleged irregularities in the conduct of parliamentary business. Therefore, and in the circumstances, any dispute between a witness and a Select Committee should be dealt with by the Legislative Council. (See paras.231–232.)
- (5) An application of the present type, concerning a challenge to in-house parliamentary procedures, should only be entertained by the court if, and only if, it was concerned with a clear-cut case of *ultra vires*, or of an abuse or misuse of the power to order attendance of witnesses. Unless what the Select Committee proposed to do in the second round of hearings was plainly outside its terms of reference, any ambiguity or doubt should be resolved by the Legislative Council itself. In the circumstances, the applicants had failed to make out a clear-cut case. (See paras.236, 251–255.)
- (6) The language of the Basic Law is more descriptive of powers and functions than prescriptive of the limits and the nature of those powers. (See para.162.)

Judicial review

This was an application to judicially review orders of a Select Committee of the Legislative Council requiring the applicants to appear before a hearing of that Committee. The facts are set out in the judgment.

[*Editor's note*: For further discussion on the powers and functions of the Legislative Council, see Ramsden and Jones, *Hong Kong*

Basic Law: Annotations and Commentary (2010) pp.129–131 paras.73/1–73/5.]

Ms Dinah Rose QC, Sir John Swaine SC, Mr Kenneth Chow and Ms Rosaline Wong, instructed by Reimer & Partners, for the applicants.

Lord Lester of Herne Hill QC (17–19 August 2009) and Mr Anthony Chan, instructed by Wilkinson & Grist, for the first to sixth and eighth to thirteenth respondents.

Mr Martin Lee SC, Ms Jocelyn Leung and Mr Joseph Lee, instructed by JCC Cheung & Co, for the seventh respondent.

Mr Michael Thomas SC and Mr Jin Pao, instructed by the Department of Justice, for the interested party.

Legislation mentioned in the judgment

Basic Law of the Hong Kong Special Administrative Region arts.2, 4, 5, 8, 17, 18, 19(1), 19(2), 20, 30, 39(1), 39(2), 48, 48(11), 62, 62(6), 66, 67, 68, 69, 70, 71, 72, 73, 73(1), 73(2), 73(3), 73(4), 73(5), 73(6), 73(7), 73(8), 73(9), 73(10), 74, 75, 75(1), 75(2), 76, 77, 78, 79, 80, 158(2), 160, 160(1), Annex II Pt.II

Constitution of Ireland [Ireland] art.40.3.2

Hong Kong Bill of Rights Ordinance (Cap.383) s.8 art.14

International Covenant on Civil and Political Rights art.17

Legal Practitioners Ordinance (Cap.159) ss.11(1)(a), 36(1)(a)

Legislative Council (Powers and Privileges) Ordinance (Cap.382) ss.2(1), 3, 4, 5, 9, 9(1), 9(2), 10, 11, 12, 13, 13(2), 14, 14(1), 14(2), 15, 16, 17, 23, 26

Oaths and Declarations Ordinance (Cap.11) s.4 (repealed)

Parliamentary Oaths Act 1868 [United Kingdom] s.1

Rules of the High Court (Cap.4A, Sub.Leg.) Appendix Form 86

Securities (Insider Dealing) Ordinance (Cap.395) (repealed) s.17

Securities and Futures Ordinance (Cap.571) ss.183(1)(c), 253(1)

Cases cited in the judgment

A v United Kingdom (2003) 36 EHRR 51

Ah Chong v Legislative Assembly of Western Samoa [2001] NZAR 418

Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette [2000] 5 LRC 196

Birmingham City District Council v O [1983] 1 AC 578, [1983] 2 WLR 189, [1983] 1 All ER 497

Canada (Attorney-General) v MacPhee (2003) 221 Nfld & PEIR 164

Canada (House of Commons) v Vaid [2005] 1 SCR 667

Director of Immigration v Chong Fung Yuen (2001) 4 HKCFAR 211, [2001] 2 HKLRD 533

Egan v Willis (1998) 195 CLR 424, [1998] HCA 71
Fayed v United Kingdom (1994) 18 EHRR 393
HKSAR v Lam Kwong Wai (2006) 9 HKCFAR 574, [2006] 3
HKLRD 808
Kielley v Carson (1842) 4 Moo PC 63, 13 ER 225
Koon Wing Yee v Securities and Futures Commission [2009] 3
HKC 164, (2009) 14 HKPLR 276
Leung Kwok Hung v President of Legislative Council [2007] 1
HKLRD 387
Maguire v Ardagh [2002] 1 IR 385
M'Culloch v State of Maryland 17 US 316 (1819)
Ng Ka Ling v Director of Immigration (1999) 2 HKCFAR 4, [1999]
1 HKLRD 315, [1999] 1 HKC 291
Oriental Sharp Ltd v Hong Kong Housing Authority [2007] 1 HKC
509
Oriental Sharp Ltd v Housing Authority [2008] 3 HKLRD 508
Prebble v Television New Zealand Ltd [1995] 1 AC 321, [1994] 3
WLR 970, [1994] 3 All ER 407
Rediffusion (Hong Kong) Ltd v Attorney-General [1970] HKLR
231, [1970] AC 1136, [1970] 2 WLR 1264

Other materials mentioned in the judgment

Bennion on Statutory Interpretation: A Code (5th ed., 2008)
pp.88–89, 889–912
De Smith's Judicial Review (6th ed., 2007) paras.5–139, 5–141
Rules of Procedure of the Legislative Council r.78(2)
Standing Orders of the Legislative Council Nos 4, 5(1), 11, 13(6),
14, 30, 36, 37, 49, 60E, 61(1)

Andrew Cheung J

1. Issues

1. In this application for judicial review, the applicants challenge the power of a select committee of the Legislative Council to order them to attend before it to give evidence and to produce documents. The applicants maintain that the power to order witnesses to give evidence or produce documents before the Legislative Council vests only with the Council (functioning as a full body), but not with its committees; and any such attendance is to be before the Council itself but not its committees. The applicants also contend that, in any event, the Select Committee that this case is concerned with has exceeded its mandate given by a resolution of the Legislative Council to inquire into and report on a subject matter which I will presently turn to, when seeking to order the applicants to attend to give evidence and to produce documents before the committee.

2. The challenge brings into sharp focus the proper interpretation of art.73(10) of the Basic Law and other related provisions, as well as the constitutionality of the relevant provisions contained in Pt.III of the Legislative Council (Powers and Privileges) Ordinance (Cap.382) (the Ordinance). Article 73(10) states that one of the powers and functions of the Legislative Council is to summon, as required when exercising the other powers and functions set out in that article, persons concerned to testify or to give evidence. It does not say whether the power to summon witnesses may be exercised by a committee of the Legislative Council or must be exercised by the Council functioning as a full body. Nor does it say whether such witnesses may only be summoned to testify or to give evidence before the Legislative Council sitting as a full body, or whether they may also be required to do so before a committee of the Council.

3. The relevant provisions in Pt.III of the Ordinance, however, provide expressly that a committee of the Legislative Council may, under prescribed procedure, order witnesses to attend to give evidence or to produce documents before the committee, in addition to the power on the part of the Legislative Council (as a full body) to make a similar order for attendance before the Council itself for such purposes. The Ordinance was enacted in 1985. Thus the question arises as to whether, insofar as the provisions in the Ordinance purport to authorise a committee of the Legislative Council to order witnesses to attend before it to give evidence or to produce documents, they are unconstitutional as from 1 July 1997 when the Basic Law came into effect, in the event that art.73(10) of the Basic Law, on its proper interpretation, only empowers the Legislative Council (as a full body) summoning witnesses to attend to testify or to give evidence before it.

4. Quite apart from this constitutional challenge, and regardless of the constitutionality of the provisions in the Ordinance, the second ground of challenge has arisen in this way: s.9(2) of the Ordinance essentially provides that the power to order attendance of witnesses may be exercised by a select committee of the Legislative Council if it is specially authorised by a resolution of the Council to exercise the power “in respect of any matter or question specified in the resolution”. In other words, the power of a select committee to order attendance of witnesses before it to give evidence or to produce documents is not unlimited. It is restricted to the subject matter of inquiry set out in the resolution of the Legislative Council. This inherent restriction on the power of a select committee gives rise to the argument of the applicants that the Select Committee in the present case has overstepped its boundaries. This is an *ultra vires* argument.

5. This ground of challenge also leads to a third matter of dispute. In order to decide whether the Select Committee has

overstepped its boundaries, one is necessarily involved in the proper interpretation of the resolution of the Legislative Council which sets up the Select Committee and authorises it to exercise the power to order attendance of witnesses. In this regard, the applicants seek leave to argue that the resolution must be construed in such a way as to make it, as it were, “fundamental rights-compatible”.

6. Of no less constitutional importance is another matter that arises out of the second ground of challenge relied on by the applicants, namely, whether the Court has jurisdiction over the *ultra vires* issue at all, and if the answer is in the affirmative, to what extent the Court has such jurisdiction and how it should be exercised. This comes about because the question of *ultra vires* goes to the so-called internal workings of the Legislative Council. This issue brings into focus directly the interface of the exercise of the judicial power of the Hong Kong Special Administrative Region which is vested in the judiciary, and the performance of the powers and functions which the Legislative Council has been endowed with under the Basic Law as the legislature of the Region.

7. For the sake of completeness, it should be pointed out, even at this introductory stage, that this question of jurisdiction does not arise in relation to the first ground, which involves the proper interpretation of art.73(10) of the Basic Law and the examination of the constitutionality of the provisions in the Ordinance. For it is common ground that it is the power and duty of the courts of the Hong Kong Special Administrative Region to interpret on their own the provisions of the Basic Law (which are within the limits of the autonomy of the Region), such power having been delegated by the Standing Committee of the National People’s Congress to the courts pursuant to art.158(2) of the Basic Law. As regards the determination of the constitutionality of the provisions in the Ordinance, that falls within the mandate of the courts, which are vested with the judicial power of the Special Administrative Region, and art.160(1) of the Basic Law requires that a law previously in force in Hong Kong (before 1997) which is later discovered to be in contravention of the Basic Law be amended or cease to have force accordingly.

2. Factual background

8. The background facts giving rise to the present challenge and the important issues it raises may be briefly stated. The first applicant is and was the chairman and managing director of New World China Land Ltd (New World China). The second applicant is and was an executive director of New World China. New World China, a listed company, belongs to the New World group of companies. It is a subsidiary of New World Development Co Ltd (New World

Development), another locally listed company. New World Development controls about 71% of the shareholdings in New World China. New World China is the Mainland flagship of New World Development. Of relevance in the group is another company known as NWS Holdings Ltd (NWS), also a listed subsidiary of New World Development. The first applicant is and was the chairman and executive director of NWS.

9. NWS in turn controls 50% of the shareholdings in a company known as First Star Development Ltd (First Star). First Star is the developer of a property project known as the Hunghom Peninsula Development (the Development). The Development was a project under the Government's Private Sector Participation Scheme (PSPS) for the purposes of assisting qualified local residents to purchase their own homes at subsidised prices. Prior to the introduction of the PSPS, those subsidised flats were built by the Housing Authority under its Home Ownership Scheme (HOS). In about 1978, the HOS was supplemented by the PSPS which was a similar scheme but with the involvement of private sector developers. The idea was to draw on private sector resources and experiences in the construction and sale of flats. Details of how the PSPS worked can be found in an earlier case, *Oriental Sharp Ltd v Hong Kong Housing Authority* [2007] 1 HKC 509; affirmed on appeal: [2008] 3 HKLRD 508.

10. First Star was the private sector developer involved in the Development. It became the lessee of the relevant lot and commenced construction of the flats at the beginning of the year 2000. However, in September 2001, the Government announced a suspension of the sale of HOS/PSPS flats due to the economic conditions then prevailing in Hong Kong. The suspension lapsed in June 2002 but was re-introduced in November the same year. By then, construction of the Development had completed, but due to the moratorium, no units in the Development were sold. Understandably, this gave rise to difficulties on the part of First Star as developer of the project.

11. On 25 July 2003, First Star commenced legal proceedings against the Housing Authority as well as the Secretary for Justice on behalf of the Government, seeking damages. Alongside the legal proceedings, five rounds of mediation involving the opposing camps took place in December 2003. The outcome of the mediation was that the parties agreed on a premium of \$864 million for a proposed lease modification to convert the Development into a private development belonging to First Star, which could then freely sell the units in the Development or otherwise deal with the land as it might prefer. The lease modification was effected in February 2004 upon First Star's payment of the agreed premium to the Government.

12. The outcome of the mediation and the resulting modification of the lease, turning the Development into a private project, did not entirely resolve all disputes between the parties raised in the legal proceedings. From one perspective, the limited agreement reached by the parties was merely an interim step aimed at the disposal of the completed flats and units in the Development, pending the outcome of and without prejudice to the resolution of the issues dividing the parties. Those issues are yet to be determined in the extant court proceedings.

13. The agreement reached by First Star with the Government for the lease modification of the Development for a consideration of \$864 million was not an uncontroversial matter. In fact, the level of premium aroused great public concern, and was indeed the subject of scrutiny and debate on several occasions in the Legislative Council between November 2002 and October 2005. At one stage (December 2004), the Panel on Housing of the Legislative Council passed a motion to recommend the setting up of a select committee to inquire into the Government's "sale" of the Development flats (to First Star), but the panel members changed their mind shortly thereafter and agreed to postpone the discussion of its proposal for appointing the select committee.

14. Mr Leung Chin Man (Mr Leung) is a former senior civil servant who retired from the civil service in January 2007. He was the Permanent Secretary for Housing, Planning and Lands (Housing) and Director of Housing from July 2002 to January 2006. In the course of his service in the Government, he took part in handling the disputes concerning the Development.

15. On 1 August 2008, New World China announced the appointment of Mr Leung as an executive director and the deputy managing director of the company. In accordance with civil service rules, Mr Leung's appointment required, and was given, the prior approval of the Secretary for the Civil Service.

16. The announcement led to a public outcry. In response, the Chief Executive announced that he had requested the Secretary for the Civil Service to investigate into the matter. On 16 August 2008, New World China announced that "with due consideration to the public reaction to his appointment", New World China and Mr Leung had reached an agreement whereby Mr Leung's appointment was terminated with effect from the same day.

17. But this did not prevent members of the newly-elected Fourth Legislative Council taking up the matter, soon after the Legislative Council elections in September 2008. On 17 October 2008, the House Committee of the Legislative Council endorsed a proposal for the appointment of a select committee to inquire into the matter. A sub-committee of the House Committee comprising 23 Legislative Council members was appointed to undertake the

preparatory work. The sub-committee so appointed held three meetings in November 2008 to deliberate on the proposed terms of reference, membership size and procedure for the nomination of members of the select committee, and submitted its report on 21 November 2008. In proposing the terms of reference of the proposed select committee, the sub-committee stressed the need for the select committee to cover as one of its areas of study the incident concerning the disposal of the PSPS flats in the Development. The House Committee endorsed the recommendations of the sub-committee on 21 November 2008.

18. On 10 December 2008, the Legislative Council resolved in a plenary sitting to appoint a select committee to inquire into the post-service work of Mr Leung and related matters (the Select Committee). Importantly for our purposes, the resolution the Council passed to establish the Select Committee also set out its terms of reference and authorised the Select Committee to exercise the power to summon witnesses. It read:

RESOLVED

that this Council appoints a select committee to inquire into the vetting and approval for Mr LEUNG Chin-man, former Permanent Secretary for Housing, Planning and Lands (Housing) and Director of Housing, to take up post-service work with New World China Land Limited and other real estate organizations, and whether there was any connection between such work and the major housing or land policies which Mr LEUNG had taken part in their formulation or execution and decisions which he had made pursuant to such policies while serving as Director of Buildings, Permanent Secretary for Housing, Planning and Lands (Housing) and Director of Housing, that had given rise to any potential or actual conflict of interest, as well as related matters, and based on the results of the above inquiry, to make recommendations on the policies and arrangements governing post-service work of directorate civil servants and other related matters; and that in the performance of its duties the committee be authorized under section 9(2) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) to exercise the powers conferred by section 9(1) of that Ordinance.

19. On 12 December 2008, the House Committee nominated at its meeting the members of the Select Committee. On the same day, in accordance with r.78(2) of the Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region, the President appointed the chairman, deputy chairman and the 10 members of the Select Committee.

20. The Select Committee held its first meeting on 18 December 2008. Based on its terms of reference, the Select Committee decided to divide its inquiry into three major areas of study:

- (a) the post-service work of Mr Leung with real estate organizations. This covers the policies and arrangements governing the post-service work of directorate civil servants, the offer of the post-service work by NWCL [New World China] to Mr Leung, the vetting and approval of Mr Leung's application to take up the offer, and the termination of the employment contract between NWCL and Mr Leung;
- (b) major housing or land policies which Mr Leung had taken part in their formulation or execution and decisions which he had made pursuant to such policies while serving as D of B and as PSH/D of H. These include the disposal of the Hunghom Peninsula PSPS flats, the exercise of discretionary power by Mr Leung in respect of land and planning matters in the development of Grand Promenade, and other major housing or land policies which Mr Leung had taken part in their formulation or execution and decisions made pursuant to such policies; and
- (c) in the course of inquiring into the above areas of study, the LCM Select Committee would examine whether there was any connection between them which had given rise to any potential or actual conflict of interest with Mr Leung's former Government duties, and would make recommendations on these and other related matters.

21. So far as its work plan is concerned, the Select Committee decided to conduct its inquiry in three phases:

- (a) Phase I is for undertaking preparatory work. This would be in the form of internal deliberations and should take about eight weeks. (This phase commenced in mid-December 2008);
- (b) Phase II is for conducting hearings to obtain evidence from witnesses and for deliberating on the evidence obtained. This should take about 22 weeks. (This phase commenced in mid-March 2009); and
- (c) Phase III for holding internal deliberations for preparing and discussing the draft report of the Select Committee. This should take about eight weeks. (This phase was due to commence in August 2009.)

22. The Select Committee scheduled two rounds of hearings, each to focus on one major area of study. It was decided that witnesses would be summoned to attend its hearings according to the order of study, ordered to produce relevant documents, and requested to provide written statements in advance so as to facilitate the taking of evidence from them at the hearings of the Select

Committee. Such advance written statements were to be provided on a voluntary basis, as it is common ground that the power (if any) to order attendance of witnesses to give evidence or to produce documents before a committee does not extend to the provision of a written statement in advance. A consequence of the decision to have two rounds of hearings, each to focus on a particular major area of study, was that a witness might be required to attend before the Select Committee to give evidence or to produce documents on more than one occasion.

23. It is also noteworthy at this juncture that all witnesses to attend before the Select Committee to give evidence or to produce documents were formally ordered to do so by means of summonses issued under the hand of the Clerk to the Legislative Council by direction of the President, regardless of whether they were otherwise willing to attend. This was done in accordance with a practice that had grown for quite some time. Part of the rationale for this practice, according to the evidence, is that a witness so ordered to attend to give evidence or to produce documents before a select committee is entitled to the same rights or privileges as before a court of law, pursuant to s.14(1) of the Ordinance. Thus, for instance, such a witness, having been summoned to give evidence before a select committee, cannot be sued for defamation in court for what he says by way of evidence before the select committee.

24. A total of 14 hearings were held between 17 March 2009 and 19 May 2009, as well as on 4 June 2009, in relation to the first area of study described above. Nineteen witnesses were called, including 10 Government officials and nine non-officials. They included Mr Leung, as well as the two applicants. All of them attended before the Select Committee to give evidence or to produce documents. In particular, the two applicants attended the hearings held on 18 and 30 April 2009 to give evidence and to produce documents and written statements relating to the inquiry.

25. In late May 2009, the Select Committee embarked on its second area of study which focused on the role and participation of Mr Leung in the disposal of the PSPS flats in the Development when he served as the Permanent Secretary for Housing, Planning and Lands (Housing) and Director of Housing. Between 26 May 2009 and 14 July 2009, the Select Committee held five meetings. Another four meetings were scheduled for 15, 20, 22 and 24 July 2009. Apart from Government officials and former Government officials including Mr Leung who were involved in the disposal of the PSPS flats in the Development, the Select Committee also decided to order the two applicants to attend before it again to give evidence and to produce documents, as they were involved, on the side of the developer, in the disposal of the PSPS flats. According

to a letter dated 10 July 2009 written by the Clerk to the Select Committee to the first applicant:

For the purpose of performing its duties under the LegCo resolution, the Select Committee decided to proceed to the next areas of study which involve inquiring into the role and participation of Mr LEUNG Chin-man in the disposal of the Hunghom Peninsula PSPS flats and ascertaining whether there was any potential or real conflict of interest arising from the taking up of post-service work by Mr LEUNG with New World China Land Limited by virtue of his role and participation in the disposal of the above PSPS flats. Pursuant to the said Summons, the Select Committee has notified you vide its letter dated 14 April 2009 to attend another hearing to be held in the Chamber of the Legislative Council Building on 19 May 2009 at 5:00 pm. You were informed in that letter that the hearing on 19 May 2009 would focus on matters relating to the disposal of the Hunghom Peninsula PSPS flats. On account of a re-scheduling of sessions for the taking of evidence from witnesses, the hearing dates were re-scheduled to 23 and 25 June 2009, both at 2:30 pm.

26. The two applicants were notified in writing on 14 April 2009 initially to attend the Select Committee's hearing on 19 May 2009, which was subsequently rescheduled to 23 and 25 June 2009. In response to objections raised by the solicitors of the two applicants and to allow time for them to seek further legal advice, the hearings were rescheduled to 15 July 2009. One of the objections raised was that the summonses were invalid for formal reasons. To avoid argument, fresh summonses were served on the two applicants on 8 and 10 July 2009, notifying them that they had been ordered to attend before the Select Committee on 15 July 2009.

27. On 10 July 2009, the applicants applied for leave to apply for judicial review against the orders of the Select Committee requiring them to appear before it at the hearing scheduled for 15 July 2009 to give evidence and to produce documents. In the Form 86, various grounds were relied on and a number of other matters were raised. After an oral hearing, the Court gave leave for the applicants to apply for judicial review. However, the grounds of the application were limited to the two grounds of challenge described at the outset of this judgment, namely, the power of the Select Committee to make the relevant orders upon a proper interpretation of art.73(10) of the Basic Law and thus the constitutionality of the relevant provisions in the Ordinance; and the question of whether the Select Committee had acted outwith its remit under the resolution which set up the Select Committee by going into the matters which it said it would go into at the

relevant hearing to be attended by the two applicants. See this Court's *ex tempore* judgment given on 14 July 2009.

28. Shortly before the substantive hearing, the applicants gave notice of their intention to apply for leave to argue an additional point and seek a further declaration by way of relief. As described, it concerned the way the resolution of the Legislative Council should be construed by the Court. At the substantive hearing, the Court heard the application for leave to amend the Form 86, as well as substantive arguments on the new ground (on a *de bene esse* basis).

29. The first 12 respondents to these proceedings are the chairman, vice-chairman and the 10 members of the Select Committee. The President of the Legislative Council has also been joined as a co-respondent because the witness summonses served on the two applicants were issued under the hand of the Clerk to the Legislative Council by direction of the President. The Secretary for Justice has been named in the Form 86 as an interested party, and by counsel, the Secretary has participated at the substantive hearing.

3. Legal and other relevant background

30. In order to view the challenges mounted by the applicants in their proper context, it is both necessary and convenient to go into the relevant legal history as well as law and practice at this juncture of the judgment. In the course of so doing, I will also introduce the subject statutory provisions in the Ordinance under challenge and the relevant provisions in the Basic Law.

3.1. Pre-1985 position

31. For over 150 years before 1 July 1997, Hong Kong was a British Crown Colony (reclassified as a British dependent territory in 1983). Its constitution took the form of a Royal Charter of 1843 which authorised, amongst other things, the establishment of the Legislative Council and empowered the Governor (for the time being) with the advice of the Legislative Council to make and enact all such laws and ordinances as may from time to time be required for the peace, order and good government of Hong Kong. The Royal Instructions, issued to the Governor on 6 April 1843, to supplement the Letters Patent in 1843 (which were amended on 14 February 1917) dealt with details of the composition, powers and procedures of the Legislative Council, including its power to make Standing Orders.

32. Although neither the Letters Patent nor the Royal Instructions of 1843 mentioned the establishment of committees under the Legislative Council, the records show that as early as 7 May 1858, with the Governor's consent, the Legislative Council

passed a motion unanimously to set up a select committee for inquiring into certain matters connected with an opium monopoly. Evidence was heard from witnesses who appeared on a voluntary basis before the select committee.

33. The Standing Orders of the Legislative Council, adopted on 12 July 1858, stipulated that the Legislative Council, with the consent of the Governor, could appoint a “special committee” for the purpose of examining the clauses of a proposed ordinance and reporting to the Legislative Council.

34. In 1912, the Standing Orders of the Legislative Council were revised. Standing Order 11 made provision for the appointment of three standing committees, the Financial Committee, the Law Committee and the Public Works Committee. Standing Order 14 made provision for special committees. Standing Order 49 provided that a bill may be referred either to a special committee or to a standing committee at any stage of its progress prior to the third reading.

35. The Standing Orders were substantially revised on 19 December 1929. Standing Order 4 continued to make provision for three standing committees. Standing Order 5(1) provided that any matter before the Council may be referred by the President, or upon a motion duly passed by the Council, to a select committee.

36. The Standing Orders of the Legislative Council of Hong Kong were substantially revised in 1968. Standing Order 13(6) provided that a petition presented before the Legislative Council may be referred to a select committee if at least 10 members support such a reference. Standing Order 61(1) provided that the Council may in each session appoint one or more select committees to consider matters or bills which the Council may refer to the committee. The first select committee appointed under the new Standing Orders of 1968 was appointed pursuant to a resolution of the Legislative Council on 1 December 1971 to inquire into the cost of running English-speaking schools and to make a report to the Council accordingly.

37. In 1985, another select committee was resolved to be formed to inquire into the prosecution and trial of complex commercial crimes.

38. Focusing on the power of the colonial Legislative Council to examine witnesses, the Standing Orders adopted in 1858 made provision, in Standing Orders 36 and 37 in relation to petitions, for the examination of witnesses. The examination of witnesses was, however, confined to matters concerning “private rights” arising from petitions. A similar provision was found in Standing Order 30 of the Standing Orders of the Legislative Council revised in 1929. The procedure related to a petition to be heard on a bill proposed before the Legislative Council on the ground that the petitioner’s

individual rights or interests would be affected by the provisions of the bill. The Standing Order provided for the hearing of the petitioner or his counsel before the Council, or before a committee of the Legislative Council, or before a standing committee or a select committee, at which hearing the petitioner would be entitled to call and examine witnesses on oath or affirmation under prescribed circumstances.

39. Compulsory attendance of witnesses before the Legislative Council was originally provided in the then s.4 of the Oaths and Declarations Ordinance (Cap.11):

The Legislative Council or any committee thereof may administer any oath to a witness examined before the Council or a committee, and for that purpose shall have the same powers, rights and privileges as are possessed or exercisable by the House of Commons of the United Kingdom or any committee for enforcing the attendance of witnesses and punishing persons guilty of contempt.

40. This provision was comparable to s.1 of the Parliamentary Oaths Act 1868. It is debatable whether s.4 simply empowered the Legislative Council (and its committees) to compel witnesses to appear before them for the purposes of giving evidence, but the circumstances under which the Legislative Council and its committees could require witnesses to attend before them to do so was a matter continued to be governed by the relevant Standing Order of the Legislative Council.

3.2. The 1985 Ordinance

41. In any event, the Ordinance came into the picture in 1985, following the signing of the Joint Declaration in the year before. The explanatory memorandum to the relevant Bill stated that it made provision for the powers and privileges of the Legislative Council, its members and officers. It was said to be a piece of codification legislation, codifying the powers and privileges enjoyed by Legislative Council members under the law then applied to Hong Kong as a colony to enable them to discharge their functions properly, without fear or favour, and to uphold the dignity of the Legislature. The Government took the view that the legislation was necessary because, amongst other things, “any inherent powers and privileges derived from the then status of the Legislative Council as a colonial legislature would cease to have effect in Hong Kong” after 1997.

42. It is arguable whether the Ordinance was merely a codification of the pre-existing law or whether it gave the Legislative Council new powers that it had not enjoyed before. It is common ground that the then Legislative Council, being a colonial legislature,

did not possess the many inherent privileges and powers enjoyed by Parliament in the United Kingdom which is of course sovereign and supreme under its unwritten constitution: *Kielley v Carson* (1842) 4 Moo PC 63, 13 ER 225. The enactment of the Ordinance in 1985 was in itself a controversial matter in Hong Kong. All this notwithstanding, there is no suggestion that there was no power on the part of the then Governor, by and with the advice of the Legislative Council, to enact the Ordinance.

43. Part II of the Ordinance provides for the privileges and immunities enjoyed by members of the Legislative Council and various related matters concerning proceedings in the Council or before its committees.

44. Part III deals with the question of taking evidence before the Legislative Council or a committee thereof, which is defined as a standing or select committee or any other committee of the Council, or a sub-committee of any of those committees (s.2(1)).

45. Sections 9–12 in Pt.III provide for the ordering of witnesses to attend before the Legislative Council or its committees to give evidence, notification of witnesses by summons, examination of witnesses on oath and compelling witnesses to attend by warrant:

9. Power to order attendance of witnesses

- (1) The Council or a standing committee thereof may, subject to ss.13 and 14, order any person to attend before the Council or before such committee and to give evidence or to produce any paper, book, record or document in the possession or under the control of such person.
- (2) The powers conferred by sub-s.(1) on a standing committee may be exercised by any other committee which is specially authorized by a resolution of the Council to exercise such powers in respect of any matter or question specified in the resolution.

10. Attendance to be notified by summons

- (1) Where any person is lawfully ordered to attend to give evidence or to produce documents before the Council or a committee, he shall be notified by a summons issued under the hand of the Clerk by direction of the President.
- (2) In every summons issued to any person under sub-s.(1) there shall be stated the name of that person and the time when and the place where he is required to attend and the particular documents (if any) he is required to produce, and the summons shall be served on him either by delivering to him a copy thereof or by leaving a copy thereof at his usual

or last known place of abode in Hong Kong with some adult person.

- (3) A summons issued under this section may be served by an officer of the Council or by a police officer or any public officer.

11. Witnesses may be examined on oath

- (1) The Council or a committee may require that any facts, matters and things relating to the subject of inquiry before the Council or such committee be verified or otherwise ascertained by the oral examination of witnesses, and may cause any such witnesses to be examined upon oath.

...

12. Power to issue warrant to compel attendance

- (1) Where a person to whom a summons is issued under s.10 does not attend before the Council or the committee at the time and place stated therein, the President may, if satisfied that the summons has been duly served or that such person has wilfully avoided service, direct the Clerk to issue a warrant in the prescribed form to apprehend him and bring him, at a time and place stated in the warrant, before the Council or committee, as the case may be.
- (2) Where a warrant is issued under this section, the President may, by ordering an appropriate endorsement on the warrant, direct that the person named in the warrant be brought before a magistrate after arrest and released on entering into such recognizance for his appearance before the Council or committee as may be specified in the endorsement.
- (3) A warrant issued under this section shall be executed by a police officer.
- (4) A magistrate may, when a person is brought before him under sub-s.(2), release that person upon his entering into such recognizance as may be specified in the endorsement on the warrant.

46. Sections 13–16 in Pt.III deal with problems encountered in taking evidence from witnesses and privileges of witnesses:

13. Objection to answer question or produce papers

- (1) Subject to s.14, where any person lawfully ordered to attend to give evidence or to produce any paper, book, record or document before the Council refuses to answer any question

that may be put to him, or to produce any such paper, book, record or document on the ground that the same is of a private nature and does not affect the subject of inquiry, the President may (and shall if such question or the production of such paper, book, record or document is not relevant) excuse the answering of such question or the production of such paper, book, record or document, or may order the answering or production thereof.

- (2) Subject to s.14, where any person lawfully ordered to attend to give evidence or to produce any paper, book, record or document before any committee refuses to answer any question that may be put to him or to produce any such paper, book, record or document on the ground that the same is of a private nature and does not affect the subject of inquiry, the chairman of the committee may report such refusal to the President with the reasons therefor; and the President may (and shall if such question or the production of such paper, book, record or document is not relevant) thereupon excuse the answering of such question or the production of such paper, book, record or document or may order the answering or production thereof.

14. Privileges of witnesses

- (1) Every person lawfully ordered to attend to give evidence or to produce any paper, book, record or document before the Council or a committee shall, subject to s.16, be entitled, in respect of such evidence or the disclosure of any communication or the production of any such paper, book, record or document, to the same right or privilege as before a court of law.
- (2) No person, other than a public officer acting with the consent of the Governor [Chief Executive], shall before the Council or a committee:
- (a) give any evidence; or
 - (b) produce any paper, book, record or document,

relating to the correspondence concerning:

- (i) any naval, military or air force matter or of any other matter relating to the security of Hong Kong; or
- (ii) the responsibilities of Her Majesty's Government in the United Kingdom [the Central People's

Government] otherwise than with respect to the administration of Hong Kong by its Government,

nor shall secondary evidence be received by or produced before the Council or a committee of the contents of any such paper, book, record or document.

15. Determination of questions relating to evidence and production of documents before the Council or committee

Where at any time any question arises in the Council or a committee in regard to:

- (a) the right or power of the Council or a committee to hear, admit or receive oral evidence; or
- (b) the right or power of the Council or a committee to peruse or examine any paper, book, record or document or to order, direct or call upon any person to produce any paper, book, record or document before the Council or committee; or
- (c) the right or privilege of any person (including a member of the Council or committee) to refuse to produce any paper, book, record or document or to lay any paper, book, record or document before the Council or committee,

that question may, subject to this Ordinance and except in so far as express provision is made therein for the determination of that question, be determined in accordance with the usage and practice of the Council which applied prior to the commencement of this Ordinance or applies thereafter by virtue of any resolution of the Council.

16. Limitation on privilege against incrimination of self or spouse

- (1) In any proceedings in the Council or a committee, any person lawfully ordered to attend to give evidence or to produce any paper, book, record or document before the Council or committee shall not, unless excused under s.13, be excused:
 - (a) from answering any relevant question put to that person in the proceedings or producing any such paper, book, record or document; or
 - (b) from complying with any order made in or in connexion with the proceedings,

on the ground that to do so may tend to expose that person, or the wife or husband of that person, to proceedings for an offence or for the recovery of a penalty.

- (2) Subject to sub-s.(3), no statement or admission made by a person:
- (a) in answering a question put to him in any proceedings to which sub-s.(1) applies; or
 - (b) in complying with any order made in any such proceedings,

shall, in proceedings for any offence or for the recovery of any penalty, be admissible in evidence against that person or (unless they married after the making of the statement or admission) against the wife or husband of that person.

- (3) Nothing in sub-s.(2) shall render any statement or admission made by a person as there mentioned inadmissible in evidence against that person in proceedings for an offence under s.32 (which relates to false statements on oath made otherwise than in a judicial proceeding) or s.36 (which relates to false statutory declarations and other false statements without oath) of the Crimes Ordinance (Cap.200).

47. Section 17 in Pt.IV of the Ordinance creates offences of contempt:

Any person who:

- (a) disobeys any lawful order made by the Council or a committee requiring him to attend or produce any papers, books, documents or records before the Council or committee, unless such attendance or production is excused under s.13; or
- (b) refuses to be examined before, or to answer any lawful and relevant question put by, the Council or a committee during the course of any examination, unless such refusal is excused under s.13; or
- (c) creates or joins in any disturbance which interrupts or is likely to interrupt the proceedings of the Council or a committee while the Council or such committee is sitting,

commits an offence and is liable to a fine of \$10,000 and to imprisonment for 12 months, and in the case of a continuing offence to a further fine of \$2,000 for each day on which the offence continues.

48. Section 26 in Pt.V of the Ordinance provides that no prosecution for an offence under the Ordinance shall be instituted except with the consent of the Attorney-General (now the Secretary for Justice).

49. Lastly, s.23 in Pt.V provides that 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 the Ordinance or the Standing Orders (now the Rules of Procedure) of the Council for the time being in force.

50. It is common ground that under the new provisions in the Ordinance, the taking of evidence before the Legislative Council or its committees, including the compelling of witnesses to appear before the Council or its committees for such purposes, is no longer limited to the case of a petition provided in Standing Order 30. Section 4 of the Oaths and Declarations Ordinance was repealed at the same time as the enactment of the Ordinance in 1985.

3.3. The Basic Law

51. In the meantime, the Joint Declaration having been signed in 1984, the drafting of the Basic Law began soon thereafter (in July 1985), shortly before the Ordinance came into effect on 26 July 1985. The drafting process took over four years to complete. The Basic Law was promulgated on 4 April 1990, and was to come into force on 1 July 1997.

52. Article 2 of the Basic Law states that the National People’s Congress authorises the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law.

53. Article 4 provides that the Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Special Administrative Region and of other persons in the Region in accordance with law.

54. Article 5 provides that the socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.

55. Article 8 provides that the laws previously in force in Hong Kong (including the common law and Ordinances) shall be maintained, except for any that contravene the Basic Law.

56. Article 17 vests the Hong Kong Special Administrative Region with legislative power.

57. Article 18 provides that the laws in force in the Hong Kong Special Administrative Region shall be the Basic Law, the laws

previously in force in Hong Kong as provided for in art.8, and the laws enacted by the legislature of the Region.

58. Article 18 should be read together with art.160, which provides that upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region, except for those which the Standing Committee of the National People's Congress declares to be in contravention of the Basic Law. If any laws are later discovered to be in contravention of the Basic Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by the Basic Law.

59. Article 19(1) provides for the independent judicial power of the Hong Kong Special Administrative Region, including that of final adjudication. Article 19(2) stipulates that the local courts shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

60. Article 20 of the Basic Law provides that the Hong Kong Special Administrative Region may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government. This leads to the submission made on behalf of the applicants that there is no residual power to be enjoyed by the Legislative Council.

61. Chapter III of the Basic Law sets out the fundamental rights and duties of the residents of the Hong Kong Special Administrative Region. Article 30 of the Basic Law protects the freedom and privacy of communication of Hong Kong residents. Article 39(1) provides constitutional entrenchment of the provisions of the International Covenant on Civil and Political Rights (ICCPR), which has been adopted in Hong Kong by means of the Hong Kong Bill of Rights under the Hong Kong Bill of Rights Ordinance (Cap.383) enacted in 1991. (Article 14 of the Hong Kong Bill of Rights provides for the right to privacy, honour and reputation. It is based on art.17 of the ICCPR.) Article 39(2) provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law.

62. Chapter IV of the Basic Law deals with the political structure. Section 1 deals with the Chief Executive. Significantly, art.48 sets out the powers and functions that the Chief Executive of the Hong Kong Special Administrative Region may exercise. Article 48(11) provides:

- (11) To decide, in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Council or its committees.

63. Section 2 in Chapter IV deals with the executive authorities.

64. Article 62 sets out the powers and functions of the Government of the Hong Kong Special Administrative Region. Article 62(6) states that one of the powers and functions of the Government is to designate officials “to sit in on the meetings of the Legislative Council and to speak on behalf of the government”.

65. Section 3 in Chapter IV of the Basic Law deals with the Legislature.

66. Article 66 provides that the Legislative Council of the Hong Kong Special Administrative Region shall be the legislature of the Region. Article 67 deals with the composition of the Legislative Council and the qualifications of members of the Council.

67. Article 68 provides for the constitution of the Legislative Council by election.

68. Article 69 deals with the term of office of the Legislative Council, whereas art.70 concerns dissolution of the Council by the Chief Executive and its reconstitution by election.

69. Article 71 provides for the office of the President of the Legislative Council, as well as the election to and the qualifications for the office. Article 72 sets out the powers and functions of the President.

70. The all-important art.73 reads:

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;
- (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;
- (7) To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court;
- (8) To receive and handle complaints from Hong Kong residents;
- (9) If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form

and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision; and

- (10) To summon, as required when exercising the above-mentioned powers and functions, persons concerned to testify or give evidence.

71. Article 73(10) deals with the summoning of persons to testify or to give evidence (ie to provide evidence — 「提供證據」), as required when exercising the powers and functions of the Legislative Council set out in the other sub-paragraphs of art.73.

72. Article 74 deals with the introduction of bills by members of the Legislative Council.

73. Article 75 provides that:

The quorum for the meeting of the Legislative Council of the Hong Kong Special Administrative Region shall be not less than one half of all its members.

The rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law.

74. Article 76 deals with the requirement for bills passed by the Legislative Council to be signed and promulgated by the Chief Executive before taking effect.

75. Articles 77 and 78 provide for immunities of members of the Legislative Council:

Article 77

Members of the Legislative Council of the Hong Kong Special Administrative Region shall be immune from legal action in respect of their statements at meetings of the Council.

Article 78

Members of the Legislative Council of the Hong Kong Special Administrative Region shall not be subjected to arrest when attending or on their way to a meeting of the Council.

76. Article 79, the last article in Section 3, provides for the disqualification of members of the Legislative Council under defined circumstances.

77. Section 4 deals with the judiciary. Amongst other things, art.80 provides that the courts of the Hong Kong Special Administrative Region at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.

3.4. Non-adoption of laws in 1997

78. Pursuant to arts.8 and 160 of the Basic Law, a number of laws were declared by the Standing Committee of the National People's Congress to be in contravention of the Basic Law and therefore were not adopted as laws of the Special Administrative Region upon its establishment on 1 July 2007. The Ordinance was not amongst those laws, and thus continues to be in force in Hong Kong, subject to the present challenge.

3.5. Appointment of committees and ordering attendance of witnesses

79. Despite the enactment of the Ordinance in 1985, the coercive power to compel witnesses to appear before the Legislative Council or its committees was only exercised for the first time in 1994, four years after the promulgation of the Basic Law in 1990.

80. In November as well as December 1985, the Legislative Council resolved on two occasions to appoint a select committee to inquire into certain matters; the Legislative Council did not on either occasion resolve to authorise the select committee to order the attendance of witnesses before it to give evidence or to produce documents.

81. In January 1992, a select committee was formed and it was authorised to order the attendance of witnesses to give evidence or to produce documents. But, as it happened, the select committee did not in the course of its proceedings make any such order.

82. In 1993, Standing Order 60E was added to empower the House Committee of the Legislative Council to establish committees known as panels to monitor and examine policy matters relating to the business of the Legislative Council referred to it. A panel may order any person to attend before it and to give evidence or to produce documents where it has been so authorised under s.9(2) of the Ordinance.

83. In April 1994, the Panel on Security was the first committee to exercise its power given to it by the Legislative Council in a resolution passed in December 1993 to order by summons witnesses to attend before it to give evidence or to produce documents for the purposes of inquiring into the circumstances surrounding the abrupt termination of the employment of the Deputy Director of Operations of the Independent Commission Against Corruption. It ordered the attendance of two witnesses before it to give evidence between April and July 1994.

84. Starting from that occasion, in 1994, 1995 and 1996, and after the establishment of the Special Administrative Region in 1997, in 1998, 2001 and 2003, select committees (and on one occasion, the Panel on Manpower), authorised by resolutions of the Legislative Council to order witnesses to attend before them to give evidence or to produce documents, exercised their powers and ordered the attendance of witnesses accordingly.

85. In 2008, apart from the Select Committee relating to Mr Leung, the Legislative Council also resolved on 12 November 2008 to authorise the Lehman Brothers Minibonds Sub-Committee under s.9(2) of the Ordinance, to exercise the power conferred by s.9(1) of the Ordinance for the purposes of studying issues arising from Lehman Brothers-related minibonds and structured financial products and of making recommendations where necessary. Summonses were issued as a result.

86. To complete this historical survey, it should also be pointed out that in the meantime, the committee system of the Legislative Council continued to evolve. At the time of the enactment of the Ordinance, the Legislative Council had established under its Standing Orders two standing committees, namely, the Finance Committee and the Public Accounts Committee. In 1991, the Committee on Members' Interests, another standing committee, was established. It should be noted that under s.9(1) of the Ordinance, a standing committee may exercise the power to order attendance of witnesses before it, in the same way as the Legislative Council functioning as a full body. It requires no special authorisation to that effect from the Council. The requirement of a special authorisation by resolution provided in s.9(2) only applies to a committee other than a standing committee of the Legislative Council. In other words, it applies to a select committee, a panel and a sub-committee. According to the evidence, the occasions requiring these standing committees to exercise their powers under s.9(1) to order witnesses to attend before them to give evidence or to produce documents were rare. One such occasion was in 2005 when the Public Accounts Committee ordered the attendance of Mr Leung to attend before it to give evidence for the purpose of its consideration of the Director of Audit's Report No 45 concerning the development of a site at Sai Wan Ho.

87. In 1991, an amendment to the Standing Orders of the Legislative Council made provision for select committees to order any person to attend before it and to give evidence or to produce documents where it was so authorised under s.9(2) of the Ordinance. In 1992, an amendment to the Standing Orders established formal Bills Committees to study bills, as well as the House Committee, which may appoint sub-committees for the purpose of assisting itself in the performance of its functions. As mentioned, in 1993, an

amendment to the Standing Orders enabled the establishment of panels.

88. It is noteworthy that the Legislative Council functioning as a full body, as opposed to its committees and panels, has never exercised the power to order witnesses to attend before it to give evidence or to produce documents.

4. First ground of challenge: constitutionality of s.9(2)

4.1. Principles of interpretation of the Basic Law

89. I now turn to the first ground of challenge. It raises a question of interpretation of the Basic Law. The principles governing the interpretation of the Basic Law have been authoritatively laid down by the Court of Final Appeal in the leading cases of *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 and *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211. As was pointed out by the Chief Justice in *Ng Ka Ling v Director of Immigration*, p.28D–I, the Basic Law is an entrenched constitutional instrument to implement the unique principle of “one country, two systems”. It uses ample and general language. It is a “living instrument” intended to meet changing needs and circumstances. The Basic Law states general principles and expresses purposes without condescending to particularity and definition of terms. In interpreting the Basic Law, a purposive approach is to be applied. “Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials.” “The courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.” As to purpose, the Chief Justice pointed out, the purpose of the Basic Law is to establish the Hong Kong Special Administrative Region being an inalienable part of the People’s Republic of China under the principle of “one country, two systems” with a high degree of autonomy in accordance with China’s basic policies regarding Hong Kong as set out and elaborated in the Joint Declaration. As to the language of its text, the Chief Justice observed, “the courts must avoid a literal, technical, narrow or rigid approach”. They must consider the context, which is to be found in the Basic Law itself as well as the relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used.

90. The case of *Director of Immigration v Chong Fung Yuen* gave further guidance on how the task of interpretation is to be

approached. At pp.223H/I–224B, the Court of Final Appeal pointed out that the courts’ role in interpreting the Basic Law is to “construe the language used in a text of the instrument in order to ascertain *the legislative intent as expressed in the language*”. Importantly, “[t]heir task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain *what was meant by the language used* and to give effect to *the legislative intent as expressed in the language*”. The Court explained that it is the text of the enactment which is the law (rather than the intent of the lawmaker on its own) and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen. However, the Court added, the courts do not look at the language of the article in question in isolation. It is considered in the light of its context and purpose. The meaning borne by the language is to be considered in the light of its context and purpose, which is an objective exercise. Whilst the courts must avoid a literal, technical, narrow or rigid approach, “they cannot give the language a meaning which the language cannot bear”.

91. Importantly, *Director of Immigration v Chong Fung Yuen* explained at p.224D–G/H what extrinsic materials the courts may look at in interpreting the Basic Law, in addition to the internal aids to interpretation (namely, the provisions in the Basic Law other than the provisions in question, and the preamble). Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law. They include the Joint Declaration and the Explanations on the Basic Law (Draft) given at the Third Session of the Seventh National People’s Congress on 28 March 1990 shortly before its adoption on 4 April 1990. Besides, and rather importantly for our purposes, the state of domestic legislation at that time and the time of the Joint Declaration may also serve as an aid to interpretation. Because the context and purpose of the Basic Law were established at the time of its enactment in 1990, the extrinsic materials relevant to its interpretation are, generally speaking, pre-enactment materials, that is, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law, although it only came into effect on 1 July 1997.

92. The Court of Final Appeal reminded the courts at p.225A–B that once they conclude that the meaning of the language of the text when construed in the light of its context and purpose is clear, they are bound to give effect to the clear meaning of the language. “The courts will not on the basis of any extrinsic materials depart from that clear meaning and give the language a meaning which the language cannot bear”.

4.2. Counsel's respective arguments

93. I now turn to the parties' respective cases on art.73(10).

94. The applicants' arguments are relatively straightforward. Ms Dinah Rose QC (Sir John Swaine SC, Mr Kenneth Chow and Ms Rosaline Wong with her) argues in a forceful submission that "Legislative Council" in art.73 simply refers to the Legislative Council constituting the legislature of the Hong Kong Special Administrative Region (under art.66), which has a total membership of 60. It does not refer to any committees (or panels) of the Legislative Council. As art.75 provides that the quorum for the meeting of the Legislative Council shall not be less than one half of all its members, the Legislative Council in art.73 can only exercise its powers and functions set out in the 10 subparagraphs therein, including sub-para.(10), in meetings of the Legislative Council with the requisite quorum under art.75. Although counsel has expanded her submission in different ways, essentially her point remains that "Legislative Council" simply means what it says, the full body of the Legislative Council, but not any other combinations of its members — be they called committees, panels or otherwise.

95. Leading counsel's next point in her argument is basically that since the power is vested in the Legislative Council to summon witnesses to testify or to give evidence before it, it may only be exercised by the Council itself. It cannot be exercised by its committees. Counsel submits that there can be no delegation of power by the Legislative Council to its committees. Counsel accepts that this general common law principle is subject to the exception of necessity. However, she contends that necessity in the present context means "absolute necessity". On the evidence, particularly relying on what has been referred to as the Irish experience based on the Irish case of *Maguire v Ardagh* [2002] 1 IR 385 and what happened in Ireland after that decision, a case of necessity or absolute necessity has simply not been made out by her opponents.

96. The respondents as well as the Secretary for Justice adopt the same stance. In a nutshell, they contend that art.73 must be interpreted sensibly and flexibly. The term "Legislative Council" must be construed to include the committees etc of the Legislative Council, where the circumstances require. In any event, whether a body can delegate its power is a matter of interpretation of the relevant instrument. The exception of necessity looks at what is "reasonably required". It does not mean absolute necessity. The experience in Hong Kong, as well as experience in other common law jurisdictions, have amply demonstrated that the power to summon witnesses to appear before committees of the legislature is reasonably required by the legislature/its committees for their proper functioning.

97. The respondents and the Secretary for Justice also rely strongly on the reference to committees of the Legislative Council in art.48(11) as an unmistakable indication that the drafters of the Basic Law intended witnesses — Government officials and civilians alike — to testify or to give evidence before the Legislative Council or, importantly, “its committees”. Article 48(11), it may be recalled, allows the Chief Executive to decide, in the light of security or vital public interests, whether Government officials or other personnel in charge of Government affairs should testify or give evidence before the Legislative Council “or its committees”.

98. The respondents and the Secretary for Justice also refer to arts.77 and 78 of the Basic Law which provide for immunity from legal action in favour of members of the Legislative Council “in respect of their statements at meetings of the Council”, and their immunity from arrest when attending or on the way to “a meeting of the Council” respectively. Lord Lester of Herne Hill QC (Mr Anthony Chan with him) for the respondents (save for the seventh respondent) and Mr Michael Thomas SC (leading Mr Jin Pao) for the Secretary for Justice, have both submitted that the intention of the drafters of the Basic Law must have been to confer such immunities on members of the Legislative Council in relation to all meetings, regardless of whether they are plenary meetings of the Council or meetings of its committees and panels. That illustrates that “Legislative Council”, as used in the Basic Law, must be construed flexibly and sensibly.

99. Ms Rose counters skilfully that art.48(11) precisely highlights the fact that the drafters of the Basic Law were fully aware of the distinction between the Legislative Council and its committees, and when they wished to refer to the committees, they knew how to do it. The absence of a reference to the committees of the Legislative Council in art.73, particularly art.73(10), in sharp contrast to such a reference in art.48(11), demonstrates exactly the intention of the Basic Law to exclude the powers and functions stipulated in art.73 from the Legislative Council’s committees.

100. Ms Rose also refers the Court to the drafting history of both arts.48(11) and 73(10) to reinforce her submission.

101. As regards arts.77 and 78, Ms Rose takes the point that no expanded interpretation of “Legislative Council” in those two articles is required to confer immunities on members of the Legislative Council in relation to meetings other than plenary meetings of the Council. This is because those immunities are already in place by reason of art.19(2), which preserves the restrictions on the courts’ jurisdiction imposed by the legal system and principles previously in force in Hong Kong. As the immunities in question already existed under pre-1997 law, the courts of the Hong Kong Special Administrative Region, after its establishment, simply have

no jurisdiction over Legislative Council members in relation to what they say in meetings of committees or panels of the Legislative Council, nor can anyone arrest them when they are attending or on their way to any of those meetings.

4.3. Interpretation: the primary issue

102. As was observed during counsel's submission, the first issue in the present case is one of interpretation. The question of delegation only comes into play if and only if the question of interpretation is resolved in favour of the applicants' contention.

103. I have already set out the relevant principles of interpretation of the Basic Law enunciated by the Court of Final Appeal in the two leading cases of *Ng Ka Ling v Director of Immigration* and *Director of Immigration v Chong Fung Yuen*. The Basic Law must not be read with a literal, technical, narrow or rigid approach. It must be given a purposive interpretation, which fully takes into account the context and purpose of the relevant provisions. The context and purpose of the relevant provisions, and indeed that of the Basic Law, should be considered in the light of the internal, as well as the external, aids to interpretation already described.

104. Although there are many differences between the Basic Law and the United States Constitution, I find the words of Chief Justice Marshall, said in the course of his judgment in *M'Culloch v State of Maryland* 17 US 316 (1819), a case dealing with the question of whether the US Constitution empowers Congress to incorporate a bank, a very useful reminder of the general nature of a constitutional instrument like the Basic Law:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. (p.407)

4.4. A closer look at art.73

105. It is noteworthy that art.73 is not about meetings of the Legislative Council. It is about the powers and functions of the Legislative Council. Art.73 sets out those powers and functions. It is silent on how those powers and functions are to be exercised by the Legislative Council.

106. Ms Rose's contention is straightforward enough: "Legislative Council" means the full body of the Council. It does not mean any committees of the Council. Thus the power to summon witnesses in art.73(10) may only be exercised by the full body of the Legislative Council. As the full body only functions in meeting, that is to say, in plenary meeting, the quorum for which is governed by art.75, the power to summon witnesses may only be exercised by the Council sitting in plenary session.

107. Yet the immediate problem with counsel's contention lies precisely with its simplicity. Her interpretation of "Legislative Council" as meaning the full body of the Council is as rigid as it is simple. It applies equally to all 10 subparagraphs in art.73. In other words, it means that only the Legislative Council functioning and sitting in plenary session may exercise the various powers and functions set out in art.73(1)–73(10). This is, however, problematic for two reasons. First, it does not square well with the fact that at least as a matter of actual practice, many powers and functions of the Legislative Council were and are exercised not only by the Council as a full body, but also at committee level. Secondly, it raises the question of what then are the powers and functions (if any) under the Basic Law which are exercised by the committees, panels and sub-committees of the Council when they carry out or purport to carry out work as such.

108. It cannot be disputed that at least as a matter of actual practice, many of the powers and functions set out in art.73 were and are exercised to varying extent not only by the Council as a full body, but also at committee level, even putting aside art.73(10) for the time being. Thus for instance, art.73(1) deals with the power and function to enact, amend or repeal laws. The formal enactment, amendment or repeal of laws can only be done by the Legislative Council sitting in plenary session. Indeed Pt.II in Annex II to the Basic Law contains specific provisions on procedures for voting on bills and motions in the Legislative Council.

109. But even in relation to this subject matter, one simply cannot ignore the preparatory work required to be done by the Legislative Council before a law is formally enacted, amended or repealed in a plenary meeting. Thus, for many years, bills were and are first studied by formal Bills Committees (and before that, they were studied by members under the informal structure of the then Office of the Unofficial Members of the Legislative and Executive Councils).

110. Take art.73(2) and 73(3) as further examples. Examination and approval of budgets and approval of taxation and public expenditure are of course to be done by the Legislative Council in a plenary meeting insofar as legislation is required to be passed but

subject to that, the relevant matters are debated and discussed not only by the full Council but also at committee level.

111. Pausing here, it must be remembered that the Basic Law does not create a new legislature out of nowhere. Although it would be simplistic to suggest that the Legislative Council of the Hong Kong Special Administrative Region is simply a continuation of the colonial legislature prior to 1997, the relevant provisions in the Basic Law establishing the new legislature do not intend a complete break from the past, nor is that the contention of any party. Like what was done in colonial days, budgets, taxation and public expenditure have continued to be discussed by the Legislative Council at its committee level as before, although, as I have said, insofar as they require legislation, that must be done in a plenary meeting of the Legislative Council, just as in the colonial days.

112. Turning to art.73(5) and 73(6), concerning raising of questions on the work of the Government and debating on any issue concerning public interests respectively, it is difficult to see why the Legislative Council can only exercise such powers and functions in a plenary meeting. Not only as a matter of history and practice were (and are) such powers and functions exercised both at committee level and in plenary sitting of the Legislative Council, but the nature of such powers and functions also strongly suggests that there must be flexibility in their exercise by the Council. More particularly, as mentioned, art.48(11) deals precisely with the appearance of Government officials and other personnel in charge of Government affairs before the Legislative Council “or its committees” to testify or to give evidence.

113. Similarly, art.73(8) refers to the receipt and handling of complaints from Hong Kong residents. Whether as a matter of the nature of the power or function in question or as a matter of actual practice, such power or function was and is exercised, far more often than not, by committees and groups of members of the Legislative Council, rather than by the Legislative Council functioning as a full body.

114. On the other hand, art.73(9) is, by its nature and wording, a matter that can only be done by the Legislative Council sitting in plenary session, insofar as the passing of the motion charging the Chief Executive with serious breach of law or dereliction of duty is concerned, which shall then be followed by an investigation by an independent investigation committee chaired by the Chief Justice of the Court of Final Appeal. As mentioned, Annex II Pt.II provides for how a motion in the Legislative Council is to be voted on.

115. As regards art.73(10), it is of course true that it does not expressly say that the power to summon witnesses to testify or to give evidence may be exercised by the Legislative Council at the committee level. Yet it is equally significant that art.73(10) does

not expressly say that this cannot be done. Needless to say, the Ordinance, which allows the power to be exercised at committee level, has been around since 1985.

116. All this brings me back to the difficulties faced by Ms Rose's interpretation of art.73. As pointed out above, counsel's interpretation does not square well with the fact that at least as a matter of actual practice, many powers and functions of the Legislative Council were and are exercised not only by the Council as a full body, but also at committee level. Furthermore, it raises the question of what then are the powers and functions (if any) under the Basic Law which are exercised by the committees, panels and sub-committees of the Council when they carry out or purport to carry out work as such. Counsel's attempts to deal with these difficulties have not been entirely satisfactory.

117. In her written submission,¹ Ms Rose boldly suggested that as a matter of law, all the substantive powers and functions set out in art.73(1)–73(10), including the power and function to receive and handle complaints from Hong Kong residents in art.73(8), must be exercised by the Legislative Council (as a full body), sitting in plenary session. Given the nature of the substantive powers and functions and how they have been exercised as described above, I find no attraction in this contention.

118. In any event, the written submission was ambiguous as to the status of committees under the Basic Law, the powers and functions (if any) they exercise when they meet to transact business, or putting it the other way round, whether these committees are themselves *ultra vires* the Basic Law.

119. At the substantive hearing, Ms Rose attempted to answer all this by a complicated argument. She accepted that committees, panels and sub-committees are not *ultra vires* the Basic Law. But she submitted that there is a distinction between so-called “public law powers” and “non-public law powers” of the Legislative Council. The former would include the powers set out in, for instance, art.73(1)–73(3). They are powers that can only be exercised by the Legislative Council sitting in plenary session. For non-public law powers, counsel had in mind things that can be done by ordinary, private citizens, inasmuch as they may be done by Legislative Council members. One example she gave was debating issues concerning public interests. That can be done by legislators in the Legislative Council building. It may also be done by citizens in a park.

120. Building on that distinction, counsel accepted that, in relation to non-public law powers, groups of members of the Legislative Council (in whatever combinations they prefer and by whatever names they wish to call themselves), might gather together

¹ See, for instance, paras.83, 89–90.

to exercise those powers. In doing so, importantly, counsel submitted, they would *not* be exercising the powers and functions given to the Legislative Council (as a body) under art.73. They would simply be exercising the right and liberty of every member of this society, including Legislative Council members alike, to, using the same example, debate amongst themselves issues concerning public interests. Article 73 does not prohibit members of the Legislative Council from doing so. But, and it is an important plank in counsel's argument, when they do so, they are not performing the powers and functions exercisable only by the Legislative Council (as a full body), and therefore cannot resort to the coercive power granted under art.73(10) only to the Legislative Council (as a full body).

121. With great respect, I do not find the argument convincing. The supposed distinction between public law powers and non-public law ones is one without any relevant difference in the present context. The powers and functions given to the Legislative Council — regardless of how they may be exercised — are given to it as the legislature of the Hong Kong Special Administrative Region. Insofar as those powers and functions may be exercised by its members in any particular way (such as in a plenary sitting with the necessary quorum), the members exercise them as the legislature of the Special Administrative Region. They do not do so as mere residents of the Special Administrative Region. Nor can any arbitrary combinations of members of the Legislative Council exercise the powers and functions set out in art.73. Very significantly, art.75(2) specifically provides that the Rules of Procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene the Basic Law. Thus members sitting in a tea room inside the Legislative Council building may discuss whatever they wish to discuss over a cup of tea. But what they do is not an exercise of the powers and functions of the Legislative Council.

122. On the other hand, where a combination of members of the Legislative Council gather together, pursuant to the Rules of Procedure made by the Legislative Council on its own pursuant to art.75(2), as a committee of the Legislative Council, and transact business accordingly, they are not gathering there as ordinary residents of the Special Administrative Region. The powers they exercise and the functions they perform are fundamentally different from that exercised or performed by those sitting on benches in a public park, discussing issues of great public interest amongst themselves. That is where counsel's argument detaches from reality.

123. Again, it must be emphasised that the Basic Law does not create a new legislature out of a vacuum. The committee system had been around for a long time and was still under development

in 1990 when the Basic Law was promulgated. The Basic Law expressly leaves it to the new Legislative Council to make its own Rules of Procedure. Both as a matter of history and development as well as a matter of the nature of the substantive powers and functions to be performed, that at least some of the powers and functions described in art.73(1)–73(9) may be exercised at committee level must have been something fully envisaged by the drafters of the Basic Law.

124. Ms Rose asks rhetorically whether “the Legislative Council” in art.73 can mean one single member of the Legislative Council, so that he or she alone may exercise the powers and functions set out in art.73. This is merely a pseudo *reductio ad absurdum* argument. An answer of “no” to counsel’s rhetorical question does not mean, whether as a matter of logic or interpretation, that the Legislative Council in art.73 must mean the whole Legislative Council, ie its total membership. Counsel’s question simply begs the core issue in this case — how may the powers and functions of the Legislative Council be exercised.

125. As I read it, art.73 is concerned with setting out or describing the powers and functions that the Legislative Council may exercise. It is not primarily concerned with *how* those powers and functions are to be exercised. Nor is it concerned with providing a precise definition of what “Legislative Council” means in the context of exercising its powers and functions.

126. One must therefore look not only at art.73 itself but also elsewhere for guidance on how the powers and functions are meant to be exercised. There are, in my view, several answers. First, the nature and purpose of the powers and functions, which has been briefly touched on.

127. Secondly, one has past history and usage as guidance. Thus, for instance, receiving the policy addresses of the Chief Executive (art.73(4)) has always been done by the Council sitting in plenary session; whereas receiving and handling complaints from residents (art.73(8)) have for a long time been handled by Legislative Council members working in groups under a roster system (known as “the Legislative Council Redress System”).

128. Thirdly and importantly, one has the Rules of Procedure of the Legislative Council made pursuant to art.75(2).

129. Fourthly, one also has other provisions in the Basic Law, such as the quorum requirement in art.75(1), insofar as sitting in plenary session of the Legislative Council is concerned. No Rules of Procedure can override the express provisions in art.75(1). Likewise, Annex II Pt.II, dealing with procedures for voting on bills and motions in the Legislative Council, cannot be contradicted by any Rules of Procedure, nor can it be affected by the nature of the bills or motions, or by what has happened in the colonial days.

130. Finally, how the powers and functions are to be exercised may be governed by legislation, whether passed before or after 1997, so long as it is compatible with the provisions in the Basic Law. Subject to its compatibility with the Basic Law, the Ordinance is such a piece of legislation.

4.5. Other provisions — arts.75, 77, 78, 19(2), 48(11) and 62(6)

131. But first it is necessary to look at more closely other provisions in the Basic Law which have a bearing on the proper interpretation of art.73.

132. Ms Rose seeks to strengthen her interpretation of “Legislative Council” in art.73 by reference to the same term in art.75(1), which provides for the quorum of the (plenary) meeting of the Legislative Council. Given the context, the term in art.75(1) can only mean the full body of the Council.

133. Yet I have already mentioned the counter examples in arts.77 and 78, relating to the immunities enjoyed by members of the Legislative Council. If the Council in these articles is to be read literally as referring to the Legislative Council sitting in plenary session, it would lead, so the counter argument runs, to the absurd result that members of the Legislative Council do not enjoy immunities in relation to meetings of committees of the Legislative Council.

134. I have also described Ms Rose’s argument in reply, relying on art.19(2) of the Basic Law relating to restrictions on the courts’ jurisdiction. She says members of the Legislative Council already enjoy immunities in relation to committee meetings under the pre-1997 law, and such immunities (or restrictions on the courts’ jurisdiction) have been carried over to the post-1997 era.

135. Although superficially attractive, counsel’s argument suffers from three difficulties. First, according to her reading of art.19(2), not only do members still enjoy as before immunities in respect of meetings of committees after the establishment of the Special Administrative Region, they also enjoy similar immunities regarding plenary meetings of the Legislative Council. That being the case, why is there a need to expressly provide for such latter immunities, but not the former, in arts.77 and 78? Ms Rose has sought to meet this criticism by suggesting that arts.77 and 78 are there to provide “comfort”. This naturally leads to a second question, namely, why is comfort only required to be provided in relation to plenary meetings, but not meetings at the committee level, which are much more frequent? Articles 77 and 78, according to counsel’s reading, would become a fairly strange way of providing comfort. Thirdly, it is at least doubtful whether counsel’s interpretation of art.19(2)

is correct: *cf* the interpretation of art.19(2) by the Court of Final Appeal in *Ng Ka Ling v Director of Immigration*, pp.26J–28C.

136. I have already mentioned art.48(11), concerning the attendance of Government officials and others in charge of Government affairs before the Legislative Council “or its committees” to testify or to give evidence and the Chief Executive’s power of veto. I have described the argument mounted against the applicants to the effect that art.48(11) clearly proceeds on the premise that subject to the Chief Executive’s veto, such officials and persons would otherwise be required to testify or to give evidence before the Legislative Council or its committees. I have also outlined Ms Rose’s argument in reply that the reference to “or its committees” in art.48(11) precisely serves to highlight, by way of contrast, the lack of any similar reference in art.73, in support of her interpretation of that article.

137. I note that art.62(6), in setting out the powers and functions of the Government of the Hong Kong Special Administrative Region, states that one of the powers and functions of the Government is to “designate officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government”. In my view, it is quite plain that art.62(6) does not refer only to Government officials’ sitting in on the plenary meetings of the Legislative Council and speaking on behalf of the Government in those meetings, but applies also to their sitting in on the committee meetings of the Council and speaking on behalf of the Government in those committee meetings, where required, as was and is indeed the practice in real life.

138. If this interpretation of art.62(6) be correct, as I consider that it is, it demonstrates how flexible “the Legislative Council” is used in the Basic Law. It also goes a long way towards rebutting Ms Rose’s argument in reply that art.48(11) provides a sharp contrast to art.73. In my view, it is dangerous to treat the Basic Law as if it were a piece of ordinary legislation and use the standard technique of compare-and-contrast to bring out a certain meaning by way of interpretation.

139. This being the case, the point made by the respondents and the Secretary for Justice in relation to art.48(11) remains. Quite plainly, leaving aside for the time being the so-called drafting history of this provision, art.48(11) proceeds on the assumption that subject to the Chief Executive’s veto, Government officials and those in charge of Government affairs are required to testify or to give evidence before the Legislative Council or its committees.

140. During argument, Ms Rose submits that the veto given to the Chief Executive in art.48(11) does not imply that save when the right of veto is exercised, such Government officials and other people in charge of Government affairs are compellable before the

Legislative Council or its committees to testify or to give evidence. She argues that the right of veto is only provided to prevent these officials and people from appearing *voluntarily* before the Legislative Council or its committees to testify or to give evidence.

141. To be fair to counsel, she largely bases this interpretation of hers on the drafting history of art.48(11). But if one were permitted to put aside the drafting history for the time being, and simply to look at art.48(11) as it is, one would conclude that the suggested interpretation is by no means attractive. In my view, almost as a matter of definition, all Government officials must obey the instructions of the Chief Executive in all official matters, including whether to appear before the Legislative Council or its committees to testify or to give evidence on matters relating to their official jobs and responsibilities. It would hardly require the specific provision of a right of veto in the Basic Law to say what is a matter of course. It is almost unthinkable that a Government official would still volunteer to appear before the Legislative Council or its committees to testify or to give evidence on a matter relating to his official duty if that course is opposed by his superior or the Chief Executive.

142. That is precisely why in the respondents' and the Secretary for Justice's interpretation of art.48(11), the article proceeds on the underlying premise that absent the Chief Executive's veto, Government officials are compellable before the Legislative Council or its committees to testify or to give evidence.

143. As a matter of language, "Legislative Council" in art.73 is quite clearly capable of meaning the Legislative Council functioning as a full body or the Council functioning through committees, as the individual context may require, just as the term is capable of such interpretation under arts.62(6), 77 and 78.

4.6. Purpose of the power to summon witnesses

144. So much for these other provisions. I now return to the purpose of the power to summon witnesses to appear before "the Legislative Council" to testify or to give evidence.

145. Article 73(10) is plainly a power ancillary to the other powers and functions set out in art.73. Article 73(10) says so in terms. It says that there is a power to summon witnesses to testify or to give evidence, "as required when exercising the ... powers and functions [set out in art.73(1)–73(9)]".

146. In other words, the answer to the question of how the power to summon witnesses in art.73(10) may be exercised must, to a substantial extent, be dependent on the circumstances under which the powers and functions in art.73(1)–73(9) may be exercised.

It is a power ancillary to and parasitic on those substantive powers and functions.

147. Take art.73(5)–73(6), 73(8) as examples. They relate to raising questions on the work of the Government, debating any issue concerning public interests, and receiving and handling complaints from Hong Kong residents. I have already mentioned that by their very nature, and as a matter of actual practice for a long time, they are matters that may either be dealt with by the Legislative Council functioning as a full body or, much more frequently, by the Council functioning through committees (or other similar devices).

148. That being the case, since the power to summon witnesses is parasitic on and ancillary to the exercising of the substantive powers and functions just described, it is difficult to see why the power to summon witnesses cannot be exercised by the relevant committees. Take the receipt and handling of complaints from Hong Kong residents by a group of designated Legislative Council members as an example. Under Ms Rose's interpretation, this group of legislators may hear witnesses who are willing and prepared to appear before the group to testify or to give evidence. What they cannot do is to summon those who are not willing to do so to appear before them. Only the Legislative Council functioning and sitting as a full body can make the order to attend by means of summons. But not only that — such a summons, when issued, may only compel the unwilling witness to appear before the Legislative Council in a plenary sitting to testify or to give evidence. It cannot compel the witness to appear before the group of designated legislators to do so.

149. It needs little imagination to realise that this is a wholly unrealistic, cumbersome and unnecessary procedure. I have evidence before me as to how substantial the work of the modern legislature of the Hong Kong Special Administrative Region has become, and how heavy the workload of the Council and its members is, whether sitting in plenary session or functioning through committees, panels and sub-committees.

150. In particular, it is difficult to comprehend why, even if a summons is issued by the Legislative Council as a full body, still it cannot require a witness to attend before a committee to testify or to give evidence, but may only require him to appear before the Legislative Council sitting in a plenary meeting to do so. It is hard to see the purpose to be served behind such an arrangement, if it is indeed the arrangement intended under the Basic Law.

151. Ms Rose argues that the power to summon witnesses is a coercive power and therefore must be exercised by the Legislative Council sitting as a full body. It cannot be exercised by any combinations of members of the Legislative Council, which may be

arbitrary and unrepresentative of the composition of the Legislative Council. The argument breaks down immediately when one realises that under her argument, as described, even a summons issued by the Legislative Council sitting as a full body cannot compel a witness to appear before a designated committee to testify or to give evidence. It also overlooks the fact that the Ordinance, the constitutionality of which is challenged on the basis of art.73, actually requires the Legislative Council sitting as a full body to pass a resolution to authorise a select committee to exercise the power to summon witnesses to appear before the select committee to give evidence or to produce documents. It also ignores the fact that in accordance with the Legislative Council's Rules of Procedure, a select committee is formed by the Council sitting as a full body, and its composition and therefore representativeness must, by definition, be such that the Legislative Council, sitting as a full body, is happy with. There is absolutely no question that any two or three legislative members, sitting in a tea room inside the Legislative Council building, may decide to arrogate to themselves the power to summon witnesses to appear before them.

152. The above example, relating to the receipt and handling of complaints, may be multiplied by reference to art.73(5)–73(6). In terms of purpose and utility, it is difficult to see why the power to summon witnesses can in no circumstances be relied upon by a select committee to perform its designated function to raise questions on the work of the Government (art.73(5)), or to debate any issue concerning public interests (art.73(6)), if it has been duly formed by the Legislative Council sitting as a full body to raise the questions or to debate the issue in question.

153. Indeed by parity of reasoning, the same may be said in relation to the exercise of other substantive powers and functions provided in art.73. To the extent that these powers and functions may be exercised by a select committee, it is legitimate to think that the power to summon witnesses may also be exercised by the committee in appropriate circumstances.

154. Furthermore, it must be remembered that the work of a select committee is, by definition, supervised by the Legislative Council functioning and sitting as a full body. If there were any abuse of power, including the power to summon witnesses, one would naturally expect the Legislative Council functioning and sitting as a full body to intervene. Indeed, when one turns to the next issue, this question will be examined in greater detail. For the time being, it suffices to say that so far as the Ordinance is concerned, there are detailed provisions to guard against any possible abuse of the power to summon witnesses.

155. That being the case, it is simply difficult to see why the power to summon witnesses must be reserved to the Legislative Council functioning and sitting as a full body to exercise.

4.7. Context of the provisions

156. Moving to the context of these provisions in the Basic Law, it must be remembered that when the Basic Law was drafted in the second half of the 1980s and eventually promulgated in 1990, the Ordinance had already become law. It expressly and specifically gave both the Legislative Council and its committees the power to summon witnesses under prescribed circumstances. Although it was never exercised until 1994 (by a panel), the power to do so was clearly in the statute book. Furthermore, as mentioned, the enactment of the Ordinance in 1985 was not a matter without controversy, and the power to summon witnesses by the Legislative Council and its committees was not a mere power existing in theory which nobody expected the Legislative Council or its committees to exercise — if it were thought otherwise, it would not have raised so much concern in society in the first place.

157. In short, the power to summon witnesses to appear before the Legislative Council or its committees must be regarded as a pre-existing power of the colonial legislature. The power was defined with great care under the Ordinance, and the Ordinance was not amongst those declared by the Standing Committee of the National People's Congress to be in contravention of the Basic Law pursuant to art.160(1). All this forms an important part of the context.

158. Looking at the contents of the Ordinance in greater detail, one immediately sees that art.48(11), when read in the light of the provisions in the Ordinance, is plainly an attempt by the drafters of the Basic Law to expand the scope of the right of veto given to the Governor/Chief Executive under s.14(2) of the Ordinance. Under s.14(2), the right of veto may only be exercised if the evidence to be given before the Legislative Council or a committee relates to correspondence concerning any naval, military or air force matter or any other matter relating to the security of Hong Kong, or the responsibilities of the British Government otherwise than with respect to the administration of Hong Kong by its Government. On the other hand, art.48(11) now gives the Chief Executive the power to decide, “in the light of security and vital public interests”, whether Government officials or other personnel in charge of Government affairs should testify or give evidence before the Legislative Council or its committees. It is plainly a wider power of veto. Since the Ordinance relates to the giving of evidence either before the Legislative Council or its committees, it is therefore perfectly understandable that when referring to the (expanded) right

of veto, art.48(11) speaks of testifying or giving evidence either before the Legislative Council or its committees as well.

159. In the same vein, ss.3 and 4 of the Ordinance set out immunities to members of the Legislative Council for what they say in the Legislative Council or “proceedings before a committee”, and s.5 provides for freedom from arrest to members whilst going to, attending at or returning from a sitting of the Council “or a committee”.

160. The subjects of these parliamentary immunities are essentially the same as those covered by arts.77 and 78, although for obvious reasons (given the Basic Law is a constitutional document), the wording of arts.77 and 78 are much more economical. In particular, the two articles only refer to “meetings of the Council”, without any reference to meetings of its committees. But when one reads arts.77 and 78 in the context of ss.3, 4 and 5 of the pre-existing Ordinance, the intention to confer the same immunities on Legislative Council members under the Basic Law must be clear beyond argument. In other words, there is absolutely no question of the immunities conferred on members of the Legislative Council in relation to committee meetings of the Legislative Council in ss.3, 4 and 5 of the Ordinance being *ultra vires* the superficially more limited immunities granted to these members under arts.77 and 78.

161. Viewing art.73(10) in the light of the provisions in the Ordinance, it is not difficult to conclude that simply like before, the power to summon witnesses is exercisable not only by the Legislative Council functioning and sitting as a full body, but also by the Council when functioning through its committees. It is true that the Ordinance makes a distinction between the Legislative Council as a whole body and its committees. Such a level of sophistication is to be expected in an ordinance. The same cannot be said in relation to a constitutional document like the Basic Law. One therefore cannot say that because the Basic Law does not draw such a distinction, or does not draw it as clearly as in the Ordinance, all that the Basic Law intends is to give the power to summon witnesses to the Legislative Council sitting as a full body, rather than to any of its committees. As has been pointed out, the Basic Law does not condescend to particularity. It is a constitutional instrument and its wording is therefore large and general. The Ordinance, on the other hand, is a piece of specific legislation and therefore contains many definitions and fine details. The absence of these definitions and details in the constitutional document does not render those provisions only found in the legislation *ultra vires* the constitutional document. Rather, the proper interpretation of the provisions in the constitutional document is informed by the pre-existing provisions in the legislation.

162. As Mr Thomas put it during submission, being a document which is essentially there to deliver political aims and purposes, the language of the Basic Law can be expected to be expressed in terms of general statements of principle, or in broad-brush terms, not condescending to particularity of position, not matching the standards of a parliamentary draftsman, more descriptive of powers and functions than prescriptive of the limits and the nature of those powers. In general terms, what the Basic Law seeks to do is simply to assign the powers to the appropriate bodies because, in that way, the devolution of power settles in the right hands. As counsel described, the Basic Law is here to provide a view of a landscape showing the great outlines. What it is not is an ordinance survey map, precisely laying out the details of the ground.

163. If it had been the intention of the drafters of the Basic Law that the power to summon witnesses may only be exercised by the Legislative Council functioning and sitting as a full body after 1997, one would have expected to see either the non-adoption of the Ordinance (or the relevant parts thereof) by the Standing Committee of the National People's Congress pursuant to art.160(1), or more explicit provisions to that effect in the Basic Law, instead of simply a lack of reference to the committees of the Legislative Council in art.73.

164. For the sake of completeness, I should mention that in the materials presented before the Court, there was a suggestion that the Preparatory Committee set up by the Standing Committee of the National People's Congress in 1996 had found the Ordinance to be inconsistent with the provisions in the Basic Law but eventually decided to recommend its adoption as part of the laws of the Hong Kong Special Administrative Region first, leaving it to the new Legislative Council to make the necessary amendments to the Ordinance. However, it is not clear what provisions in the Ordinance were considered by the Preparatory Committee to be inconsistent with the provisions in the Basic Law. Thus this piece of information is of little use and relevance to the present task of interpretation.

165. Ms Rose submits that art.73(10) confers a coercive power on the Legislative Council to compel witnesses to appear before the Council to testify or to give evidence. Such a coercive power is an infringement of people's fundamental rights and therefore should be reserved to the Legislative Council functioning as a full body. Counsel says that the coercive power is in the nature of judicial power, and should not be lightly regarded as exercisable by a committee of the Legislative Council.

166. It is true that the power to compel witnesses to appear to testify is a coercive power, affecting individuals' fundamental rights. There is also no dispute that the courts possess such a power for the purposes of adjudication of disputes. However, at least in the

Hong Kong context, on many occasions both before and after 1997, such a coercive power has been bestowed on various bodies and tribunals, which do not form part of the judiciary, to enable them to carry out their functions properly. Thus, disciplinary tribunals, such as a solicitors disciplinary tribunal and a barristers disciplinary tribunal, are given powers to compel witnesses to appear in disciplinary proceedings to give evidence: the Legal Practitioners Ordinance (Cap.159) ss.11(1)(a) and 36(1)(a). Likewise tribunals such as the former Insider Dealings Tribunal and the present Market Misconduct Tribunal, had and has respectively the power to compel witnesses to give evidence before them: Securities (Insider Dealing) Ordinance (Cap.395) (repealed) s.17 and Securities and Futures Ordinance (Cap.571) s.253(1). Furthermore, some public authorities, the Securities and Futures Commission is a notable example, also have powers to compel people to attend before them and to give evidence: Securities and Futures Ordinance, s.183(1)(c). A very recent example of the Court of Final Appeal upholding the constitutionality of the relevant provisions in the case of the Securities and Futures Commission can be found in *Koon Wing Yee v Securities and Futures Commission* [2009] 3 HKC 164. All these local examples weaken considerably counsel's argument that the power to compel witnesses to attend and to give evidence is such a draconian power that the Basic Law must be interpreted to mean that it is only bestowed upon the Legislative Council as a full body but not on a committee thereof.

167. It is suggested that the power to summon witnesses on the part of a committee of the Legislative Council is unnecessary because the Commissions of Inquiry Ordinance (Cap.86) enables a commission of inquiry to be established to investigate into matters of public importance in a judicial and impartial manner, with the necessary power to compel witnesses to attend before the commission to give evidence. This argument is of little attraction. First, the existence of a similar mechanism elsewhere to conduct inquiry cannot by itself mean that the Basic Law does not intend to provide the Legislative Council and its committees with a similar power and function. Indeed, even under Ms Rose's argument, the Legislative Council as a full body has been given such a power. Secondly, a commission of inquiry may only be appointed by the Chief Executive in Council, the executive arm of the Government. What is in issue is the investigative power, or more precisely, the extent of the investigative power, of the legislative arm of the Government.

4.8. Drafting history

168. The applicants rely heavily on the drafting history of the relevant provisions in the Basic Law, particularly that in relation to arts.48(11) and 73(10), in an attempt to tip the scales in their favour.

169. Counsel points out that in the first draft of the Basic Law, art.48(11) only referred to testifying or giving evidence before the Legislative Council, with no reference to its committees. Moreover, in the first draft, art.72, the precursor of the present art.73, stopped at sub-para.(9), and did not contain a subparagraph giving the power to summon witnesses to the Legislative Council at all. The power to summon witnesses only appeared in art.72 in the second draft, likewise the reference to the committees of the Legislative Council in art.48(11) was only added in the second draft.

170. Between the two drafts, there were general consultations. At one stage, the drafting committee received proposals to insert in art.72 the express power for the Legislative Council to appoint committees etc and the power on the part of the Council or its committees to summon witnesses. Likewise, a proposal to add “or its committees” was made in relation to art.48(11), which was adopted in the second draft.

171. However, according to the extrinsic materials relating to the drafting process, the drafting committee only adopted the proposal to add the power to summon witnesses in art.72(10), but no mention was made of the committees of the Legislative Council also having such a power. Furthermore, the drafting committee did not adopt the proposal to insert the power for the Legislative Council to appoint committees. The rationale for this was that it was a matter that could be left to the Council to work out by itself in accordance with its Rules of Procedure.

172. Ms Rose makes important submissions from this drafting history. She contends that since art.48(11) was already in the first draft even before there was any power given to the Legislative Council in art.72 to summon witnesses to appear before it, art.48(11) was and is not meant to cater for the summoning of Government officials to appear before the Legislative Council (and *a fortiori*, its committees) to testify or to give evidence. Rather, counsel submits, its true purpose was and is to ensure that the Chief Executive will have the final say in whether his officials will, *voluntarily*, testify or give evidence before the Legislative Council, or (after the second draft), its committees.

173. Counsel further submits that there was a conscious and deliberate decision by the drafting committee to reject the proposal to give to the committees of the Legislative Council, as opposed to the Legislative Council as a full body, the power to summon witnesses. Therefore in adding the new sub-para.(10) to art.72 in the second draft, there was no reference to any committees of the

Legislative Council exercising the power to summon witnesses at all, even though the drafters expressed the view at the same time that formation of committees by the Legislative Council was something to be decided upon by the Council itself through its own Rules of Procedure. In other words, the drafting committee was aware of the possibility of the Legislative Council forming committees, but consciously decided against giving such committees the power to summon witnesses.

174. Before dealing with counsel's substantive arguments based on the drafting history, I should make clear my reservations about the entire approach. There is no doubt that on the good authority of the Court of Final Appeal's decisions, extrinsic materials may be used as an aid to interpretation. They may be looked at to ascertain, if possible, the relevant context and purpose of the provisions under interpretation. For that purpose, extrinsic materials such as the Joint Declaration and the Explanations on the Basic Law (Draft) given at the Seventh National People's Congress on 28 March 1990 shortly before its adoption on 4 April 1990 may be used. Furthermore, the state of domestic legislation at that time and the time of the Joint Declaration may often serve as an aid to the interpretation of the Basic Law. The Court of Final Appeal has also said that pre-enactment materials, that is materials brought into existence prior to or contemporaneous with the enactment of the Basic Law, may also be relevant. But the relevance of all these materials is in terms of ascertaining the context and purpose of the provisions in the Basic Law under interpretation.

175. What is important is to remember firmly that ultimately, the task of interpretation is to construe the language used in the text of the Basic Law in order to ascertain "*the legislative intent as expressed in the language*". The task is *not* to ascertain "the intent of the lawmaker on its own". The court's duty is to ascertain "*what was meant by the language used and to give effect to the legislative intent as expressed in the language*". "It is the text of the enactment which is the law and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen": *Director of Immigration v Chong Fung Yuen*, p.223H/I-J.

176. The reference to the law being certain and ascertainable by the citizen from the language that it uses is important because if the true interpretation of the law can only be ascertained after a lengthy examination and reconstruction of the drafting history as well as the lawmaker's thinking process, it is difficult to see how the law is certain and ascertainable to the citizen.

177. Put another way, there are limits to what one can make out of the drafting history. The use of extrinsic materials as an aid to interpretation is not an exercise in discovering the subjective intent of the drafters of the Basic Law. The subjective intent of the

drafters on its own does not represent or dictate the interpretation of the provisions of the Basic Law. It is the legislative intent of the drafters, as expressed in the language they have chosen to employ, and interpreted in the light of its purpose and context, which determines the interpretation to be adopted. It is an objective exercise. Extrinsic materials, where material, are studied to ascertain the relevant purpose and context of the provisions under interpretation.

178. In any event, whilst this is not a place to go into constitutional theories on the proper approach to interpretation of constitutions, particularly controversies relating to approaching a constitution from the original intent of its framers (originalism) and approaching it as a “living constitution”, it should be noted that the Court of Final Appeal has in the leading case of *Ng Ka Ling v Director of Immigration* referred to the Basic Law as a “living instrument” (p.28D), whilst emphasising in the subsequent case of *Director of Immigration v Chong Fung Yuen* (p.223I) that the task of interpretation is to “ascertain what was meant by the language used” (emphasis added).

179. I will presently turn to the approach of construing the Basic Law as a living instrument.

180. Returning first to the drafting history, I do not think, in any event, that the true intent of the drafters is as clear as Ms Rose has submitted. In relation to art.48(11) in the first draft, although it is quite true that the power to summon witnesses did not feature in art.72 of that draft, yet at least one drafting committee member apparently thought that art.48(11) was a provision designed to enlarge the scope of the Chief Executive’s right of veto provided under s.14(2) of the Ordinance, and quite obviously he or she did not like the new provision. Thus that member’s proposal was to cut down the scope of art.48(11) in the first draft to make it consistent with the scope of the right of veto given under s.14(2) of the Ordinance. The fact that this proposal was never adopted is neither here nor there. The member’s proposal provides a counter example to the assertion by Ms Rose that art.48(11) was there in the first draft for a purpose quite unconnected with the compulsory attendance of Government officials before the Legislative Council or its committees to give evidence, subject to the Governor/Chief Executive’s veto, pursuant to s.9 of the Ordinance.

181. As regards art.72 of the first draft, the absence of an express power to summon witnesses does not necessarily mean that the drafters intended that the Legislative Council shall have no such power. Article 48(11) in the first draft was in fact a counter example to that suggestion.

182. As regards the proposals to amend art.72 by adding specifically the power to establish committees and the power for

the Legislative Council and its committees to summon witnesses, and the eventual insertion only of a power to summon witnesses without any reference to committees, I do not think one can safely arrive at the conclusion that Ms Rose has suggested. The rejection of the proposal to make express provision for the establishment of committees by the Legislative Council was because, at least according to some members, it was a matter that could be covered by the Standing Orders of the Legislature (in other words, by the Rules of Procedure). That being the case, the absence of any reference to committees when adding an express power to summon witnesses in art.72 in the second draft is quite inconclusive as to the true intent of the drafters — it could simply mean that the drafters were leaving it to the Legislative Council to decide, if and when it wanted to establish a committee to perform its powers and functions, whether that committee should also have the power to summon witnesses, a position which is identical to that provided under s.9(2) of the Ordinance. (Under s.9(2), a select committee formed by the Legislative Council may or may not have the power to summon witnesses — a special authorisation resolution is required.)

183. On the other hand, art.48(11) underwent a significant change in the second draft in that there was added an express reference to the Legislative Council's committees. That quite conclusively indicates that first, the drafters were not against the Legislative Council having committees. Secondly, having in the same draft given the Legislative Council the power to summon witnesses, the drafters could not have only thought that art.48(11) in the second draft was merely there to cater for a situation where officials had to be restrained by the Chief Executive from appearing *voluntarily* before the Legislative Council or its committees to give evidence. They must also be taken to have in mind, when amending art.48(11) in the second draft, that the amended art.48(11) would also enable the Chief Executive to prevent his officials from giving evidence before the Legislative Council or its committees under prescribed circumstances even if they were compelled to do so by the Legislative Council pursuant to the newly-added power to summon witnesses under art.72(10) in the second draft. Thirdly, the express and deliberate reference to the committees of the Legislative Council in art.48(11), in the light of the drafting history and in the light of the pre-existing law, strongly suggests that the drafters of the Basic Law intended that if and when the Legislative Council decided to establish committees in accordance with its Rules of Procedure, the power to summon witnesses under art.72(10) could also be exercised by those committees (under prescribed circumstances) to compel Government officials to appear before them to testify or to give evidence, and there was thus the need to expressly extend the scope of the Chief Executive's right of veto

to cover such an eventuality, and thus the amendment to art.48(11) in the second draft.

184. Ms Rose has submitted in her reply submission that the interpretation she has advanced makes it clear that a witness summons will be rarely used, and only when it truly is necessary. It lessens the risk of abuse of the power to summon for political ends. It accords full respect to fundamental rights, and trusts the people of Hong Kong to act in the public interest. On the other hand, she has submitted, the possibility that the Legislative Council as a full body would be prepared in a particular case to summon a witness to appear before it in full session is likely to be a strong incentive to witnesses to cooperate with select committees. There are therefore good and coherent reasons for the choice made by the Basic Law (according to her interpretation).

185. I can see the force of counsel's argument. Yet, there are equally good and coherent reasons for making a different choice under the Basic Law. Indeed, the Legislature has already made such a (different) choice when enacting the Ordinance in 1985. All this begs the question of the proper interpretation of the Basic Law and the true intention of the drafters of the Basic Law (as expressed in the language used). In the voluminous extrinsic materials placed before the Court relating to the drafting history, what is singularly missing is any express, specific criticism of the then existing law (under the Ordinance) in terms of possible abuses of the power to summon for political ends, a lack of full respect for fundamental rights, and the lack of trust of the people of Hong Kong to act in the public interest, or any suggestion that without a power on the part of a select committee to summon witnesses where necessary, the Legislative Council sitting as a full body could fill in the gap in relation to unwilling witnesses. None of the good and coherent reasons for the choice advanced by Ms Rose featured in these extrinsic materials as reasons for the way art.73 was actually drafted.

186. I therefore take the view that to the extent that the drafting history is helpful, it is inconclusive on the matters under discussion; certainly it does not have the effect advanced by Ms Rose on behalf of the applicants, and does not advance their case in the way suggested. I need not repeat myself in relation to the limits or extent to which the drafting history may be useful as an aid to interpretation.

4.9. The Basic Law as a living instrument

187. That leaves the question of interpreting the Basic Law and its provisions as a "living instrument".

188. One important matter to bear in mind is that the Basic Law is meant to operate and function for 50 years. It is a living

instrument and like an Act of Parliament, is to be treated as “always speaking”. *Cf Bennion on Statutory Interpretation: A Code* (5th ed., 2008) pp.889–912 (on interpreting Acts of Parliament). To that extent, it should be given an “updating construction” to the extent that its language can bear.

189. In other words, one is not wholly concerned with what the position was in 1990; what that position was is, of course, relevant in finding out the original intent of the drafters. One should also be alive to what the present circumstances are. For the Basic Law is not only meant to apply to the circumstances prevailing at the time of its promulgation in 1990 or in 1997; but it was also meant to apply, by the original drafters, for 50 years up to 2047.

190. Although back in 1990, the first exercise of the power to summon witnesses was still four years away, we are now in 2009, and the power to summon witnesses has been exercised on many occasions by committees and panels of the Legislative Council. Things have certainly moved on since 1990. Whether politically, economically or socially, Hong Kong is quite different from what it was almost 20 years ago.

191. According to the evidence of the Clerk to the Legislative Council (the second affidavit of Pauline Ng dated 5 August 2009):

13. ... From the way LegCo operates, as shown in the Rules of Procedure and in the previous Standing Orders, examination of witnesses has always been done in committee. The present Rules of Procedure, which are largely modelled on the previous Standing Orders, have maintained a mechanism which has worked effectively over the past century, in which LegCo performs its functions through a committee system. Investigative and deliberative work is done by committees and final decisions are made by the full Council. The Council meets once every week for about ten hours during the nine months when LegCo is in session each year. Some fifty committees work simultaneously throughout the year even when the full Council is not meeting. The power to summon witnesses is used sparingly and only when necessary in the interests of an effective inquiry.
14. In view of the wide public concern and interest in the subject matter of inquiries, it is essential for them to be conducted with expedition, so as to avoid their outcome becoming of academic interest. Speed must not of course be at the expense of fairness to witnesses. The time taken to obtain evidence from witnesses in recent years has ranged from three to twenty months, as shown in the summaries of summonses provided as exhibits in this Affidavit. Deliberation on findings

from the evidence obtained usually takes another two to three months.

15. If inquiries were required to be conducted by a full Council, it would mean that the Council would have to meet for at least two more days each week. That would be destructive of the working of the committee system because the Council requires a quorum of thirty members and all members who take part in the inquiry are expected to follow the proceedings closely. The fifty committees include three standing committees (namely the Finance Committee, Public Accounts Committee, and Committee on Members' Interests), the House Committee, Committee on Rules of Procedure, eighteen Panels which monitor Government policies, sixteen Bills Committees which scrutinize bills, eight ongoing subcommittees to study specific policy areas, and two or three subcommittees to study proposed subsidiary legislation. If the power to summon witnesses could not be delegated to committees, the effective working of LegCo would be very seriously hampered, not only in investigating matters of legitimate public concern, but in scrutinising proposed legislation and calling the executive authorities to account. I am not aware of any legislature elsewhere which is unable to empower its committees to require witnesses to attend with papers to give evidence.

192. No doubt the Clerk's view represents the view of members of the Legislative Council. Ms Rose makes the forensic point that, of course, it is in the interests of the Legislative Council and its members to crave more power (human nature being what it is).

193. The Court would be very slow to impute such an ulterior motive to members of the Legislative Council or the respondents. But counsel's forensic point breaks down immediately when one remembers that the position of the respondents in the present case is fully supported by the Secretary for Justice. Importantly, Mr Thomas, speaking on behalf of the Secretary for Justice at the hearing, has made as one of his first points that the Secretary (no doubt representing the Government) considers that the Legislative Council's claims made in this judicial review are important for the good governance of Hong Kong. He submits that the members of the Select Committee are not just defending their own conduct against the criticisms that have been made of them; they are also properly acting as guardians of public interests in claiming the rights and powers that they need as serving members of the Legislature. The Secretary for Justice agrees with the position of the respondents that it is important that elected legislators should have the powers they need to properly inform themselves upon all those matters that

attract their attention when performing their public duty of monitoring the executive authorities, scrutinising their activities and the Government's use of public resources. Counsel therefore submits that the members are entitled to assert their rights in question and that they are bound to do so if they are to fulfil their responsibilities to the people of Hong Kong and their constitutional role as described in the Basic Law. The Secretary for Justice accepts that the work of the Government and its officers is routinely scrutinised and monitored by the members of the Legislature, not only in the chamber itself but in questions and in debate, and also by the work of the various committees that are set up — Finance Committee, Public Accounts Committee, Bills Committees and so on — vetting the bills, reviewing the accounts, reviewing budgets and funding or, as here, investigating and inquiring into matters through a select committee. Mr Thomas therefore contends that the power to summon witnesses by a select committee is simply required to enable the committees, and the Legislative Council itself, to perform the job.

194. Perhaps the position has been overstated in the evidence that all legislatures in the common law world possess a similar power to summon witnesses at the committee level; as mentioned, Ireland is a notable exception. But that does not detract from the fact that, like many overseas jurisdictions, both the Legislature and the Government in Hong Kong have regarded the power to summon witnesses to appear before the Legislative Council's committees as essential for the proper performance of the constitutional role of the Legislative Council, and ultimately for the good governance of Hong Kong in the 21st century.

195. It is of course true that in many instances, witnesses may be willing to attend before a select committee of the Legislative Council to give evidence or to produce documents. But it must be self-evident that on some other occasions, people may not be so willing to do so. It requires little imagination to think of possible reasons why that is so. In such circumstances, the power to summon an unwilling witness to attend before the select committee to give evidence or to produce documents must be a necessary one in order to enable the committee to fully perform its job. Leaving a blank in the report of the select committee or drawing adverse inferences against those who are unwilling to attend are of course possible alternatives in some circumstances, but they are by no means satisfactory, in terms of the full and complete performance of the select committee's job. For obvious reasons, the idea of having a sort of division of labour between the Legislative Council as a full body and a select committee so that the latter would only hear evidence from those who are willing to appear before it, leaving it to the former to deal with those who are not, is wholly unattractive.

196. The question is therefore not whether all select committees require the power to summon witnesses; obviously, the answer is “no”. Rather, it is whether, if and when a select committee is likely to encounter unwilling witnesses, such a power to summon them to appear before the select committee is necessarily required in order to enable the committee to fully perform its job.

197. On the proper interpretation of the Basic Law as a living instrument that has been designed to speak for 50 years, all these realities cannot be ignored lightly. The Basic Law must be interpreted flexibly to meet the challenge of the time. Expressing it in terms of the original intent of the drafters as expressed in the language they used, this approach must also have been part of the original intent of the drafters of the Basic Law, who knew fully well that what they drafted has to endure for 50 years. The Basic Law’s use of ample and general language bears evidence to that intent.

198. Ultimately, the relevant provisions must be given a purposive interpretation. The advantages of giving a select committee the power to summon witnesses are obvious and hardly require repetition. Criticisms such as the power is a coercive power and an interference with fundamental human rights, the composition of the committee may not be representative enough, the power is susceptible to abuse or misuse, and so on, are more apparent than real. After all, it must be remembered that a select committee is formed by the full body of the Legislative Council in the first place. Whether it is appropriate to give the committee the power to summon witnesses is again a matter to be resolved by the Legislative Council sitting as a full body. Exercise of the power by a select committee, if authorised to do so, is governed by the detailed provisions in the Ordinance, which contains built-in mechanisms for raising objections on the ground that a question is of a private nature and does not affect the subject of inquiry. Furthermore, the work of the select committee, including how it exercises its power to summon witnesses, is always under the supervision of the full body of the Legislative Council. Ultimately, the Legislature is accountable to the people of Hong Kong, whether directly or indirectly. Moreover, the courts also play a supervisory role in appropriate circumstances (see below).

199. It therefore requires a particularly strong case to justify interpreting the Basic Law in such a way as to impose a straitjacket on the Legislative Council as to how it may go about its business, instead of leaving it to the discretion of the Council. When it is constitutional for the Securities and Futures Commission to have a power to compel people to attend before it to give evidence, as has been held by the Court of Final Appeal to be the case, it is difficult to see why a select committee of the Legislative Council cannot have a similar power in order to enable it to duly perform the job

that it has been entrusted with by the full body of the Legislative Council. It is difficult to see how that result would reflect the original intent of the drafters of the Basic Law, nor can one easily discern why in modern-day Hong Kong, the Basic Law should be construed in that way. Certainly, the language of the Basic Law does not compel such a construction.

4.10. Conclusion on interpretation of art.73(10)

200. So for all these reasons, I have come to the firm conclusion that the interpretation of the applicants of art.73(10) must be rejected. On its proper interpretation, art.73(10) provides for the exercise by the Legislative Council, whether sitting as a full body, or, functioning through a select committee in accordance with its Rules of Procedure, the power to summon, as required when exercising the powers and functions set out in art.73(1)–73(9), persons concerned to testify or to give evidence before the full body, or (as the case may be) the committee, of the Legislative Council. The exercise of that power must also be in accordance with the provisions of the Ordinance, which forms part of the laws in force in Hong Kong.

201. For that reason, the constitutional challenge against the relevant provisions in the Ordinance, notably s.9(2) thereof, must fail.

4.11. Power of delegation

202. This makes it quite unnecessary to deal with the question of delegation. This question, as described, would only arise if one were to conclude by way of interpretation that art.73 only empowers the Legislative Council functioning and sitting as a full body to summon witnesses to appear before it to testify or to give evidence. If that were the correct interpretation, the next question to arise would be whether the Legislative Council as a full body could delegate that power to one of its committees to exercise.

203. I will therefore be very brief with this issue, which has become academic. It is accepted by Ms Rose that the prohibition against delegation is simply a rule of construction. There is simply a presumption against delegation. See generally, *De Smith's Judicial Review* (6th ed., 2007) para.5-139 *et seq.* But counsel accepts that the rule is subject to the exception of necessity. She argues that necessity, in the present context, means absolute necessity. Relying on the Irish case of *Maguire v Ardagh*, and what happened subsequently following that decision in Ireland, counsel submits that there simply is no necessity (in her sense) for delegation in favour of committees. In *Maguire v Ardagh*, a man was shot dead by the *gardaí* (police). A joint committee of both Houses of the Irish

Parliament (*Oireachtas*), to which a report from the *Garda* commissioner was referred, purported to establish a sub-committee to inquire into the incident. At issue was whether, constitutionally, the sub-committee had the power to compel witnesses to appear before it. The Irish Supreme Court, by a majority of 5:2, held that the conducting by the sub-committee of an inquiry into the fatal shooting, capable of leading to adverse findings of facts and conclusions (including a finding of unlawful killing) as to the personal culpability of an individual so as to impinge on his good name, was *ultra vires* in that the holding of such an inquiry was not within the inherent power of the Houses of the *Oireachtas*. The case turned on the construction of the Irish Constitution and the inherent or implied powers of the Irish Parliament. As such, I do not find the case to be of particular assistance to the main issue raised in the first ground of challenge, which turns on the proper interpretation of the provisions of our Basic Law, rather than any inherent or implied power.

204. It must be remembered that according to *Maguire v Ardagh*, not only do committees of the *Oireachtas* lack the power to summon witnesses, but even the *Oireachtas* itself does not have such a power. The position in Hong Kong is clearly distinguishable because, regardless of the position of committees, the applicants do accept that the full Legislative Council itself has been given the express power under art.73(10) to summon witnesses. This is an important point of distinction which makes the decision in *Maguire v Ardagh* quite irrelevant to our jurisdiction.

205. Furthermore, a unique feature in the Irish Constitution is the explicit and unusually strong protection given by art.40.3.2 of that Constitution to a person's good name, which has no equivalent in Hong Kong:

The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the ... good name ... of every citizen.

206. *Maguire v Ardagh* is mentioned here in the context of delegation, because Ms Rose has submitted that the Irish case and what happened subsequently in Ireland illustrate at least two points. First, it is not true to say that in a common law jurisdiction, the legislature must necessarily have a power to compel witnesses to appear before it. It can function without such a power, whether express, inherent or implied. Secondly, what has happened after *Maguire v Ardagh* has demonstrated that in Ireland, the Parliament has continued to be able to function without such a power, and has conducted many investigations and inquiries, some of which were highly sensitive, without needing the power to compel witnesses to give evidence.

207. All this is relevant in the context of whether it is necessary (or absolutely necessary) for a power to delegate.

208. I take the view that the Irish experience is of very limited assistance. True it is that it provides a counter example to the position advocated by the respondents and the Secretary for Justice. But these different situations are not mutually exclusive of each other. Obviously, one is not concerned with the position in Ireland; rather, one is dealing with the position in Hong Kong. Regardless of what happened in the past in Hong Kong and whether the evidence has overstated the position elsewhere, there is hard evidence coming straight from the Legislative Council that at least nowadays, it requires the power in question at the committee level for its proper functioning. Importantly, as pointed out before, that position is fully supported by the Government through the Secretary for Justice. It is difficult to see how an isolated example in Ireland can override the hard evidence coming from both the Legislature and the Executive. In matters of this sort, if nothing else, the third arm of the Government, namely, the judiciary, should give due respect, if not defer, to the joint views of the Legislature and the Executive. But, as Lord Lester has emphasised in his submission, the matter goes further than respect and deference. There is evidence, emanating directly from the Legislature, which is fully backed by the Executive, to the effect that the power to summon witnesses is reasonably required at the committee level, and thus a power to delegate is likewise reasonably required.

209. In *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, 609 para.70, the Court of Final Appeal observed that the grant of judicial power under the Basic Law, and, for that matter, the investing of jurisdiction in a court, carry with them all those powers that are necessary to make effective the exercise of judicial power and jurisdiction so granted; “necessary”, in this context, means “reasonably required”. In the comparable situation of the Legislative Council, the express powers and functions given to the Legislative Council must carry with them all those powers that are necessary to make effective the exercise of those powers and functions so granted. There is therefore much force for the argument that “necessary”, in this context, also means “reasonably required”, rather than “absolute necessity” under the strict test advanced on behalf of the applicants.

210. On the basis that the test for a power of delegation is “necessary” meaning “reasonably required”, I take the view that on the evidence of the present case, the Legislative Council has the requisite power of delegation.

211. Mr Thomas has in his submission mentioned another perspective from which one may look at the question of delegation. Counsel submits that one is not here concerned with a true case of

delegation. The Legislative Council is not yielding its power to another separate and distinct entity; by the resolution appointing the Select Committee, the Legislative Council has authorised a number of its own members to act as its committee, and to inquire and report back to the Council itself and not to take a decision as its delegate. The power under s.9 of the Ordinance, counsel submits, is exercised by the committee on behalf of the Legislative Council, not on behalf of the committee itself. The committee derives its existence and authority from the Legislature, and its proceedings are every bit as parliamentary as the Legislature as a whole. Committees are natural extensions of the Legislature, and the Legislature functions through them: see *Canada (Attorney-General) v MacPhee* (2003) 221 Nfld & PEIR 164, paras.29, 41; see also by analogy and in the context of local government: *Birmingham City District Council v O* [1983] 1 AC 578 (“It is an inevitable feature of local government today that there must be delegation of the multifarious functions of a local authority among numerous committees, sub-committees and individual offices. No local authority could function efficiently otherwise”: p.586E–F). See further *Bennion on Statutory Interpretation: A Code*, pp.88–89 (the *Carltona* principle).

212. In any event, I note that in *De Smith's Judicial Review*, cited to me by Ms Rose, one finds this passage (para.5-141):

... the courts will sometimes concede that a public body has an implied power to entrust a group of its own members with authority to investigate, to hear evidence and submissions and to make recommendations in a report, provided that (a) it retains the power of decision in its own hands and receives a report full enough to enable it to comply with its duty to “hear” before deciding, and (b) the context does not indicate that it must perform the entire “adjudicatory” process itself. Determinations by ministers, however, stand in a special class; not only may the hearing be conducted by a person authorised on their behalf, but the decision may be made by an authorised official in the minister’s name.

In footnote 450, it says:

Delegation of purely investigatory or fact-finding functions may therefore be lawfully delegated, eg *R v North Thames RHA Ex p L (An Infant)* [1996] Med LR 385; *R v Hertsmere BC Ex p Woolgar* (1995) 27 HLR 703.

213. In short, I also reject Ms Rose’s argument on delegation. However, given my earlier conclusion on interpretation, I need not rest my decision on the first ground of challenge on delegation.

5. Second ground of challenge: *ultra vires*

5.1. Jurisdiction of the court to intervene in the internal workings of the Legislature: common law position

214. I now turn to the second ground of challenge, namely, that the so-called expanded focus of investigation by the Select Committee is *ultra vires* its terms of reference set out in the resolution, which set up the Select Committee. This raises the preliminary question of the jurisdiction of the court over such a matter.

215. The leading case in Hong Kong prior to 1997 was the Privy Council decision (on appeal from Hong Kong) in *Rediffusion (Hong Kong) Ltd v Attorney-General* [1970] HKLR 231, which was decided according to applicable common law principles in relation to a colonial (non-sovereign) legislature. In that case, the then Hong Kong Government intended to seek from the Secretary of State an order in Council extending the Copyright Act 1956 to Hong Kong. It also intended to introduce into the Legislative Council a draft Bill, containing modifications and additions to the 1956 Act. The Bill, if enacted, would seriously affect the plaintiff's existing rights. Accordingly, the plaintiff issued a writ against the Attorney-General as representative defendant on behalf of the Legislative Council, claiming a declaration that it would not be lawful to pass the Bill, and an injunction to restrain the Council from passing the Bill and presenting it to the Governor for assent. The plaintiff maintained, and the Attorney-General was prepared to accept, for the purpose of the proceedings, that the whole of the Bill, if enacted, would be repugnant to the provisions of an Act of Parliament extending to Hong Kong, and thus void and inoperative.

216. The Privy Council first dealt with the question of jurisdiction of the Hong Kong courts. It noted that the question of jurisdiction cannot be answered by applying to Hong Kong the legal principles which govern the jurisdiction of English courts to interfere in the conduct of proceedings in the fully sovereign Parliament of the United Kingdom. For it is well established that the common law of England which is introduced into a colony does not include the whole of the *lex et consuetudo parliamenti*. Lord Diplock, in giving the majority advice of the Judicial Board (Lord Morris dissenting on a separate point), pointed out that members of a legislative assembly in a colony do not enjoy all the privileges and the immunity from control by the court of justice which are enjoyed by members of Parliament of the United Kingdom, but only such of those privileges and so much of that immunity as are essential to enable them to carry out their functions under the colonial constitution: *Kielley v Carson*. His Lordship concluded that the

courts of Hong Kong had jurisdiction to enter upon the inquiry whether or not it would be unlawful for the Legislative Council to pass the proposed bill, and if they found that it would be unlawful, to decide it in their discretion whether or not to grant the relief by way of declaration and injunction claimed. See pp.245 and 250.

217. After 1997, in *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387, a case concerning the prohibition of members of the Legislative Council from introducing bills to the Legislative Council which have a charging effect under art.74 of the Basic Law, Hartmann J (as he then was) noted that being subordinate to the Basic Law, the Legislative Council must act in accordance with that law. His Lordship pointed out that in the United Kingdom, Parliament is supreme. The courts there are confined to interpreting and applying what Parliament has enacted. Parliament has exclusive control over the conduct of its own affairs. The courts will not permit any challenge to the manner in which Parliament goes about its business. If there are irregularities, that is a matter for Parliament to resolve, not the courts. However, in Hong Kong, the Basic Law is supreme. But subject to that, the Basic Law recognises the Legislative Council to be a sovereign body under that law. In setting Rules of Procedure to govern how it goes about the process of making laws, provided those rules are not in conflict with the Basic Law, the Legislative Council is “answerable to no outside authority”. The learned Judge concluded that so far as jurisdiction is concerned, the courts of the Hong Kong Special Administrative Region do have jurisdiction under the Basic Law to determine, by way of declaratory relief, whether Rules of Procedure enacted by the Legislative Council are consistent with the Basic Law. Yet, it is a jurisdiction which, having regard to the sovereignty of the Legislative Council under the Basic Law, “should only be exercised in a restrictive manner”. See p.390 para.5, p.391 paras.9–10, p.393 para.24, p.394 paras.28, 31.

218. The positions of the courts in common law countries with written constitutions under which the constitutions, not parliaments, are supreme, have also been examined by the Privy Council in *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* [2000] 5 LRC 196. The general principles stated by the Privy Council in that case, rather than the facts, are pertinent for our present purposes. Lord Nicholls, delivering the judgment of the Judicial Board, pointed out that the courts’ recognition of Parliament’s exclusive control over the conduct of its own affairs in the United Kingdom is essential to the smooth workings of a democratic society which espouses the separation of powers between a legislative parliament, an executive government and an independent judiciary; the courts must be ever sensitive to the need to refrain from trespassing, or even appearing to trespass,

upon the province of the legislators. However, in common law countries, his Lordship noted, their written constitutions, not parliaments, are supreme. As a rule, the courts have the right and duty to interpret and apply the written constitutions as the supreme law of the jurisdictions. Moreover, the constitutional principle prevailing in the United Kingdom that Parliament has exclusive control over the conduct of its own affairs must be modified to the extent, “but only to the extent”, necessary to give effect to the supremacy of the constitution. Subject to that important modification, the rationale underlying the constitutional principle remains as applicable in a country having a supreme, written constitution as it is in the United Kingdom where the principle originated. Lord Nicholls therefore considered that this approach points irresistibly to the conclusion that “so far as possible”, the courts should avoid interfering in the legislative process. See pp.207H–209E/F

219. Cases from various other common law jurisdictions have been cited to the Court to illustrate essentially the same principle, although minor variance does appear depending on the contents of the constitutions involved: *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 (Canada); *Egan v Willis* (1998) 195 CLR 424 (Australia); *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (New Zealand) and *Ah Chong v Legislative Assembly of Western Samoa* [2001] NZAR 418 (Western Samoa). But by and large, there is no dispute that in Hong Kong, the same common law principle applies.

220. In other words, the courts of the Hong Kong Special Administrative Region do not, as a rule, interfere with the internal workings of the Legislature. Exceptionally, where questions of whether the Legislative Council, in going about its business, has acted in contravention of the provisions in the Basic Law arise, the courts do have jurisdiction to intervene. But the jurisdiction must be exercised with great restraint, having regard to the different constitutional roles assigned under the Basic Law to different arms of the Government.

5.2. Court’s intervention intended by the Ordinance?

221. In the present case, the second ground of challenge is not about any alleged contravention by the Legislative Council of the provisions in the Basic Law as such. What is in issue is whether the Select Committee, established by the Legislative Council to inquire into the circumstances surrounding the departure of Mr Leung and to make recommendations to the Government regarding approval of post-service employment, has overstepped its terms of reference by summoning the applicants to give evidence before it on matters

that (allegedly) go outside the original scope of inquiry laid down in the resolution. If no summons were issued, the question of *ultra vires* would simply be one to be answered by reference to the scope of the resolution establishing the Select Committee in the first place. That would be a typical matter of internal workings of the Legislative Council, with which the court should not interfere.

222. However, since summonses have been issued to compel the applicants to attend before the Select Committee to give evidence or to produce documents, it brings into play the provisions of the Ordinance and, raises the question of whether the Select Committee has acted *ultra vires* the resolution, and thus s.9(2), in so compelling the applicants to appear before it to give evidence or to produce documents. For it must be remembered that s.9(2) of the Ordinance specifically provides that the power to order any person to attend to give evidence or to produce documents may be exercised by a committee of the Legislative Council which has been specially authorised by a resolution of the Council to exercise the power “in respect of any matter or question *specified in the resolution*”.

223. Thus, the question arises as to whether the Select Committee’s exercise or purported exercise of its power to summon the applicants as witnesses is “in respect of any matter or question specified in the resolution” of the Council.

224. Ms Rose therefore argues that regardless of the general common law principle on the courts’ restrained approach towards interfering with the internal workings of the Legislative Council, one is, on the facts of the present case, only concerned with the Court’s role in scrutinising whether the Select Committee has acted outside its power granted under the Ordinance. Put another way, it is the Ordinance, passed by the Legislature, which gives the Court the role and indeed requires the Court to adjudicate on whether the Select Committee has exercised or purported to exercise its power to order attendance of witnesses “in respect of any matter or question specified in the resolution”. There is therefore no question of exercising any restraint here.

225. In my view, one cannot look at the task which the applicants require this Court to perform in such a blinkered manner. Even according to counsel’s line of reasoning, one is still concerned with the proper interpretation of the Ordinance and the real intent of the Legislature regarding the role of the courts under the statutory scheme established by the Ordinance.

226. There is no doubt that the courts have some role to play under the statutory scheme. As mentioned, in a worst case scenario, where there is criminal prosecution against a witness, the matter will come before the criminal court for adjudication. It is common ground that in such a case, the criminal court seized of trying the

case will have the jurisdiction to go into all essential elements comprising the offence that the witness is charged with. It could involve, depending on the facts, the court going into the lawfulness of the resolution of the Legislative Council which purported to authorise the select committee to exercise the power to order attendance of witnesses in the first place, the workings of the select committee and the purpose for which, for instance, a witness was ordered to attend before it to give evidence.

227. However, that does not answer by itself the other role that the courts of the Hong Kong Special Administrative Region are supposed to play, apart from that in a criminal prosecution. In ascertaining that role as intended by the Legislature in enacting the Ordinance, one must look at the common law background, which is that, in a setting like Hong Kong, the courts do not, as a rule, go into the internal workings of the Legislature, and when, exceptionally, they do, they do so “in a restrictive manner”.

228. The statutory scheme established under the Ordinance bears that legislative intent out quite clearly. Thus s.13 specifically provides for a built-in mechanism to deal with a witness’s objection to answering questions or to producing papers. The statutory ground of objection is that the evidence or document sought is of a private nature and does not affect the subject of inquiry. The objection will go before the chairman of the committee, or through him, to the President of the Legislative Council for decision.

229. Section 15 of the Ordinance, likewise, provides very generally that any question arising in the Legislative Council or a committee in regard to the right or power to hear oral evidence, to peruse or examine documents, or the right of privilege of any person to refuse production of documents, may be determined in accordance with the “usage and practice of the Council” before the enactment of the Ordinance or that which applies thereafter by virtue of any resolution of the Council.

230. The intention is plain that all these matters are to be dealt with, as it were, “in-house”.

231. Whilst the Ordinance stops short of specifying at what stage the public law court may intervene in a dispute between a witness and a select committee/the President of the Legislative Council/the Legislative Council itself as a full body, the intention is clearly that so far as possible, the matter should be dealt with within the Legislative Council.

232. In my view, this is simply in accordance with the general principle of separation of powers, that the legislature should have control over the conduct of its own affairs, and primarily, alleged irregularities in the conduct of parliamentary business are a matter for the legislature, rather than the courts, subject to any overriding provisions in the written constitution.

5.3. *Present case — a global challenge*

233. In those circumstances, one must approach the present challenge of the applicants on the ground of *ultra vires* with great caution. Although the applicants have in their documents filed and submission made referred to many intended questions which the Select Committee would like to ask of them at the resumed hearing,² they do not base their case on the ground that the individual questions are “of a private nature and [do] not affect the subject of inquiry”. For if they were to do so, any objection to those individual questions should be raised with the chairman of the Select Committee pursuant to s.13(2) at the resumed hearing, who could report the objection to the President for decision.

234. Rather, the applicants choose to approach the matter globally. They argue through counsel that the whole purpose of the Select Committee’s requiring the applicants to attend before it for a second time is to inquire into a matter that is wholly outside the scope of inquiry set out in the resolution establishing the Select Committee. The individual questions simply serve as evidence to illustrate that the entire purpose of the Select Committee holding a second round of hearings is *ultra vires* its terms of reference.

235. It is on that basis, and that basis only, that the applicants are able to ask the Court, even at this stage — before any such hearing is held — to declare the orders of the Select Committee requiring them to attend before it to be *ultra vires* and of no effect, for contravening s.9(2) of the Ordinance. If they had based their objection on the validity of the individual questions, they would not have been entitled to challenge the lawfulness of the orders requiring them to attend as witnesses at all. They would have been restricted to the objection procedure stipulated in s.13(2) of the Ordinance.

236. This approach of the applicants, though understandable enough, sets a very high threshold for them to overcome. In my view, one must bear firmly in mind the general common law background and the obvious legislative intent behind the Ordinance that so far as is possible, all controversies between a witness and the Legislative Council or its select committee are to be resolved, as it were, “in-house”. As Lord Lester has submitted, an application of the present type should only be entertained by the court if, and only if, it is concerned with a clear-cut case of *ultra vires*, or of an abuse or misuse of the power to order attendance of witnesses. A plain case of the Select Committee acting outwith its terms of reference under the relevant resolution has to be made out, before the court should entertain such a wholesale attack against an order by the Select Committee to attend as witness.

² A sample of these intended questions can be found in para.226 of Ms Rose’s written submission. They are reproduced in Appendix I to this judgment.

5.4 Applicants' argument

237. This brings me to the factual basis of the applicants' challenge and a belated point raised by Ms Rose on behalf of the applicants, which forms the subject matter of an application to amend made at the substantive hearing.

238. Essentially, the applicants complain that the focus of the new round of hearings of the Select Committee is on the relationship between the work Mr Leung had previously done for the Government and his "taking up" of work for New World China. Ms Rose accepts that it is within the proper scope of inquiry of the Select Committee to look at the relationship, if any, between the past work Mr Leung had done as a civil servant, and the work he was to do in his new employment with New World China. However, it is no business of the Select Committee to inquire into the relationship, if any, between the past work of Mr Leung and his "taking up" of work for New World China. They are wholly different matters. The latter goes outside the terms of reference of the Select Committee.

239. Counsel elaborates in her reply submission that if one inquires into any possible overlap between the work done by Mr Leung for the Government in the past, and the work he was to do for New World China, what one would be looking at is a factual question: was he involved with a particular transaction, and was the work he was to do for New World China related to the same transaction? That is a pure question of fact, the answer to which has already been explored in the first round of hearings. However, counsel submits, once the Select Committee raises the question of Mr Leung's *taking up* the work with New World China, the question that it is addressing is why New World China employed Mr Leung, and that then raises the question, counsel suggests, "was it because there had been some improper relationship at an earlier date?"

240. Counsel submits that that must be the purpose of the Select Committee in requiring the applicants to attend before it a second time, judging from the context of the evidence that has already been given by the applicants and by Mr Leung regarding what Mr Leung has done in the past as a civil servant, and what the intended scope of work would be in the employment of New World China. Counsel argues that what is very clear from the way that the Select Committee has formulated the issue and from the questions that were annexed to the letter notifying the applicants of the new hearing date that the Select Committee is to look at something else. What it is to look at, counsel elaborates, is: why did the Government enter into mediation with First Star; why did the mediation proceed as it did; why was an agreement reached to sell the flats in the Development at the particular price that they were sold; who was

it who advised the Government to sell it at that price; who decided the strategy for the mediation; was there anything improper going on for which there was later a reward given to Mr Leung (by way of his employment with New World China); and so on. Counsel contends that that is quite obviously the focus of the second round of hearings.

241. Counsel concludes that that expanded focus is objectionable for two reasons. First, it goes outside the terms of reference of the resolution, when properly construed. Secondly and even more importantly, it is no business of the Select Committee, or indeed the Legislative Council, to go into whether there was anything improper in New World China's approach to Mr Leung, for that is not a question which relates to the conduct of the Government or the accountability of the Executive to the Legislature. Any such inquiry would in fact go outside the powers and functions of the Legislative Council provided in art.73 of the Basic Law.

5.5. Application to amend — how the resolution should be construed

242. It is in relation to the second point that Ms Rose makes her application for leave to amend. She argues that the resolution of the Legislative Council is not to be construed as directed to an inquiry into the conduct of New World China, or individuals associated with it or its parent company: it is the proper conduct of the Government which is the focus of the inquiry. Put another way, the terms of reference under the resolution ought to be construed as not permitting the Select Committee to inquire into the management of the New World group of companies, contacts in general between the New World group and the Government, and the conduct of litigation and mediation between the New World group and the Government, for the purpose of making findings which could prejudice the fundamental rights or reputations of individuals and undertakings. If it were construed otherwise, the resolution would have been *ultra vires* art.73, or contrary to the principle of the separation of powers in the Basic Law and the obligation in the Basic Law to protect fundamental rights (art.4).

243. Counsel submits that if the resolution is construed in the way she contends, the expanded focus of inquiry of the Select Committee in the second round of hearings must be *ultra vires*.

5.6. Discussion on the facts

244. It is important to go back to the resolution, extracted above, which set up the Select Committee. It may be broken down into three components:

- (1) To inquire into the vetting and approval of Mr Leung's application to take up post-service work with New World China and other real estate organisations;
- (2) To inquire into whether there was any connection between such post-service work with New World China (and other real estate organisations) and the major housing or land policies which Mr Leung had taken part in the formation or execution, and decisions which he had made pursuant to such policies while serving in his various posts in the Government, that had given rise to any potential or actual conflict of interest, as well as related matters; and
- (3) Based on the results of the above inquiry, to make recommendations on the policies and arrangements governing post-service work of directorate civil servants and other related matters.

245. It is also useful to remind oneself what the Select Committee has done in the first round of hearings, and what it has intended to do in the second round. In the first round of hearings, the Select Committee focused on the post-service work of Mr Leung with real estate organisations. It covered the policies and arrangements governing the post-service work of directorate civil servants, the offer of the post-service work by New World China to Mr Leung, the vetting and approval of Mr Leung's application to take up the offer, and the termination of the employment contract between New World China and Mr Leung.

246. In the second round of hearings, the Select Committee has aimed to focus on the role and participation of Mr Leung in the disposal of the Development flats when he served in his relevant posts in the Government. The two applicants were informed that the focus of the hearing which they were required to attend would be on matters relating to their discussion and communication with the Government (including Mr Leung) in respect of cessation of the construction and sale of the HOS and PSPS flats, options for the disposal of the Development flats, negotiation and mediation in the lease modification and premium of the Development and its redevelopment. These matters would be examined in the context of the role and participation of Mr Leung in the disposal of the Development PSPS flats while serving in his relevant posts and whether there was any potential or real conflict of interest arising from the taking up of post-service work by Mr Leung with New World China by virtue of his role and participation in the disposal of the PSPS flats.

247. In my view, leaving aside the question of interpreting the resolution in such a way as to avoid its being *ultra vires* art.73, counsel's submission turns on her interpretation of the resolution

that it only goes to the factual question of whether there is an overlap between the work done for the Government by Mr Leung prior to retirement, and the post-service work he was to do for New World China. She relies on the wording of the resolution itself which, under component (2) identified above, only refers to any possible connection between such post-service work and the work done by Mr Leung in the Government previously. It does not refer to the “taking up” of such post-service work and its possible connection with Mr Leung’s pre-retirement service.

248. In my view, this is a very narrow way of reading the resolution. It should be noted that in component (1) identified above, Mr Leung’s “taking up” of his post-service work with New World China, in the context of vetting and approval, is specifically mentioned. Even under (1), it is legitimate to go into the reason why Mr Leung was offered his job in New World China, in order to properly inquire into the “vetting and approval” of Mr Leung’s application to take up such work.

249. Furthermore, in component (2), the purpose of examining the connection between the post-service work and the pre-retirement service for the Government of Mr Leung is to find out whether the same has given rise to any potential or actual conflict of interest and related matters.

250. It is therefore difficult to see why under component (2), an inquiry into the possible connection between the post-service work and the pre-retirement service must not deal with the possible connection between such pre-retirement service and the taking up of the post-service work. After all, the taking up of such post-service work could also have given rise to a potential or actual conflict of interest, just as the contents of such post-service work might have that effect.

251. In any event, one must bear in mind what I have already said regarding the court’s approach in a dispute of the present nature. Unless what the Select Committee proposes to do in the second round of hearings is plainly outside its terms of reference, any ambiguity or doubt should be resolved by the Legislative Council itself, so far as is possible. Save for a very clear-cut case, the solution to this type of dispute is not to strike down the order requiring the witness to attend. Rather, the proper approach intended under the Ordinance, interpreted in the light of the relevant common law context, must be to require the witness to attend, and let him raise the objection with the select committee, so as to engage the built-in mechanism for resolving such a dispute laid down in ss.13 and 15 of the Ordinance.

252. In any event, if there is any ambiguity in the resolution of the Legislative Council, one may always write, or even complain, to the Legislative Council seeking clarification. It should be

remembered that one of the constitutional functions of the Legislative Council, stipulated in art.73(8) of the Basic Law, is to receive and handle complaints from Hong Kong residents. Certainly, if a witness says that a select committee which has ordered him to attend before it to give evidence or to produce documents has stepped outside its terms of reference, it is a complaint which he should lodge with the Legislative Council. After all, it is the full body of the Legislative Council which has passed the resolution in the first place, and there cannot be a better body than the full body of the Council to determine the proper meaning of its own resolution.

253. In this regard, one must bear in mind that it is always open to the Legislative Council to clarify the meaning of its resolution, or if necessary, to amend the wording of its own resolution, so as to remove any ambiguity or to set out its true intention. It is true that an authorising resolution of the Legislative Council should be drafted with sufficient clarity to enable all concerned to understand reasonably the terms of reference and its boundaries. However, if any ambiguity should arise, *prima facie*, clarification should be sought from the Legislative Council itself.

254. In my view, that must be the proper way, intended under the Ordinance, to go about things in a dispute of the present type. Save in a clear-cut case of *ultra vires*, the courts are simply not intended to be embroiled in the dispute. The fact that, in a worst case scenario, where prosecution has been commenced, a criminal court's involvement in such a dispute cannot be avoided, is no reason for the court sitting in its public law jurisdiction, to allow itself to get entangled in the dispute at the earliest possible moment.

255. Based on the intended questions and what the first round of hearings has covered, put at the lowest, the applicants have simply failed to make out a clear-cut case of *ultra vires*.

5.7. Discussion on the way to interpret the resolution

256. The more fundamental point raised by Ms Rose is this: it is constitutionally objectionable for the Select Committee (and indeed the Legislative Council) to go into any possible connection between Mr Leung's *taking up* of the post-service work and the pre-retirement service that he had rendered to the Government. This is because the only reason for doing so is to find out whether there was anything improper going on for which there was a later reward given to Mr Leung by the New World group of companies (in the form of his post-service employment with New World China). It is not the job and function of the Legislative Council, as opposed to, for instance, the law enforcement agencies and

ultimately the courts, to inquire into and adjudicate upon this sort of matter.

257. I do not accept the submission. First, I do not accept the factual premise on which the submission is made. I do not accept that the purpose, or the only purpose, of the second round of hearings is to find out whether there was anything improper going on for which there was later a reward given to Mr Leung by way of the post-service employment.

258. Certainly, the evidence filed on behalf of the respondents does not at all suggest that that was the purpose of holding the second round of hearings. There could be many possible reasons for New World's wanting to hire Mr Leung after his retirement from the Government. They may or may not have anything to do with his pre-retirement service in the Government. They may or may not have anything to do with any potential or actual conflict of interest. It is within the terms of reference of the Select Committee to look into this matter.

259. That something improper had gone on for which Mr Leung was to be rewarded with his post-service employment with New World China is merely one possible explanation, amongst many others, for his being offered a job with New World China. I do not see why the mere existence of that possibility would render this part of the work of the Select Committee unconstitutional if the resolution is not to be interpreted in the narrow way suggested by counsel.

260. Secondly and in any event, I do not think the underlying principle of counsel's argument is sound. Even if the resolution's intent and purpose were to require the Select Committee to find out if there was anything improper going on for which there was later a reward given to Mr Leung, viewed in the context of the resolution as a whole, I do not accept it would have been *ultra vires* art.73. For the resolution, read as a whole, would still not have been a pure and simple resolution to find out whether anything improper had gone on.

261. In my view, it is plain that the ultimate purpose of the inquiry is for the Select Committee to come up with recommendations on the policies and arrangements governing post-service work of senior civil servants generally. The specific case of Mr Leung is used as a sort of object lesson, from which experience is to be learnt in order to make the recommendations. If (hypothetically), it so happens that Mr Leung's case involved some previous improper conduct, that does not alter the essential nature of the inquiry or the ultimate purpose for holding it. It remains an inquiry to be held for the ultimate purpose of making relevant general recommendations to the Government.

262. Analysed that way, it is difficult to see how such an inquiry would be *ultra vires* the powers and functions of the Legislative Council under art.73. If, in its report, findings were made and conclusions reached which had the incidental effect of prejudicing the reputations of individuals or companies, that, by itself, could not be an objection to the Legislative Council's (or its select committee's) holding the inquiry in the first place. That would only be a hard fact of life.

263. Just as a Legislative Council member may make remarks defamatory of an individual or a corporation in the course of his legislative work in the Legislative Council, for which he is absolutely immune from civil liability, so as to enable him to carry out his work in the Council fearlessly, the Legislative Council or a select committee thereof must also be entitled to go about exercising and performing its powers and functions laid down under art.73 of the Basic Law freely, without fear that in the course of doing so, it may say something that may prejudice the reputations of individuals and undertakings.

264. Under different contexts, *Fayed v United Kingdom* (1994) 18 EHRR 393 and *A v United Kingdom* (2003) 36 EHRR 51 both illustrate that when it comes to fundamental rights that are not absolute, they may be impinged upon, subject to satisfaction of the proportionality test, by a public investigatory body or by members of Parliament when properly discharging their statutory or parliamentary functions in the public interest.

5.8. Conclusion on the second ground of challenge and application to amend

265. For these reasons, the second ground of challenge must also be rejected, and the related application for leave to amend refused on its merits.

6. Outcome

266. The present application for judicial review therefore fails. It is dismissed.

267. I also make an order *nisi* that the costs of these proceedings be paid by the applicants to the respondents (with the exception of the seventh respondent), to be taxed if not agreed, with a certificate for two counsel.

268. *Prima facie*, the unsuccessful applicants are only responsible for one set of costs. The points raised by the seventh respondent could have been raised by the other respondents and the same set of lawyers could have been instructed. The seventh respondent was of course entitled to be represented by counsel and solicitors of his own choice. But he cannot make the applicants responsible for the costs of that choice. As regards his costs, I make an order *nisi* that

save for the costs of his affirmation (which had to be prepared by somebody in any event), the seventh respondent do bear his own costs; the costs of the affirmation be borne by the applicants.

269. The Government is essentially involved in these proceedings because they raise issues concerning not only the Legislative Council but also its relationship with the Government. Government officials, like private citizens, are equally liable to be ordered to attend before the Council and its committees to testify or to give evidence under art.73(10) of the Basic Law and s.9 of the Ordinance. The case also involves the interpretation of art.48(11) which concerns the Chief Executive's power. The question of what may or may not be inquired into by the Legislative Council is also one which is closely related to the work and function of the Government. The participation of the Secretary for Justice in these proceedings has enabled the Court to understand the perspective of the Government on these issues, and, where appropriate, to take into account its position. That being the case, the Secretary for Justice's involvement in the present proceedings is appropriate and necessary, and the applicants should pay to him his costs, with a certificate for two counsel. I so order (by way of an order *nisi*).

270. The foregoing represents my provisional view on costs which has been formed without having the benefit of hearing from counsel. Any application to vary the above costs orders *nisi* must be made within 14 days after this judgment is handed down, failing which the same shall become absolute without further order upon the expiry of the 14-day period.

271. It only remains for me to thank counsel for their assistance.

Reported by Michael Ramsden

Appendix I

1. Views and suggestions, if any, provided to the Government on the cessation policy by the following parties: (a) the developer of the Hunghom Peninsula development and its parent company; and (b) the developer of the Kingsford Terrace development and its parent company.
2. The relationship of the developer of the Hunghom Peninsula development with (a) New World China Land Limited; and New World Development Company Limited and its subsidiaries
- ...
6. The party who initiated the halt of the negotiation with the Government in end March 2003 and alternative options considered by the developer when the negotiation with the Government came to a halt ...
- ...
9. Reasons for the developer to file the Writ of Summons against HA and the Government in July 2003 ...
- ...
11. Details of the mediation with the Government ... including ... (c) details of the premium figures proposed by the developer and the justifications; (d) the party who proposed the premium of \$864 million; and (e) the factors taken into account in making the decision to conclude the mediation with the premium of \$864 million.
12. Reasons for concluding the negotiation with the Government on the lease modification without a settlement of the claim for damages ...
- ...
14. The provisions proposed by the developer for inclusion in or deletion from the modified land lease, including the reasons concerned.
- ...
16. The time (a) when the developer first planned to redevelop the Hunghom Peninsula development ...
17. Reasons for the developer to redevelop the Hunghom Peninsula development.
- ...
19. The relationship of the developer of the Kingsford Terrace development with (a) New World China Land Limited; and (b) New World Development Company Limited and its subsidiaries.
20. The mediation with the Government on the disposal of the Kingsford Terrace development ... (c) details of the

mediation figures proposed by the developer of Kingsford
Terrace ...