HCAL 188/2002

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO.188 OF 2002

BETWEEN

MICHAEL REID SCOTT — Applicant

and

THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION — Respondent

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Before : Hon Hartmann J in Court
Dates of Hearing : 7-9 October 2003
Date of Handing Down Judgment : 7 November 2003

J U D G M E N T

Introduction

1. The applicant in this matter is a public officer; that is, an employee of the Hong Kong Government. He is employed on civil service terms of appointment at a civil service rank. The applicant was appointed before 1 July 1997. He is therefore one of a diminishing group

of officers whose service has spanned the change of sovereignty and the coming into force of our primary document of constitution, the Basic Law.

2. On 19 July 2002, the Public Officers Pay Adjustment Ordinance, Cap.574 ('the Ordinance') was promulgated. In terms of the Ordinance, with effect from a future date; namely, 1 October 2002, the pay of the great majority of public officers was reduced. 'Pay' is defined in s.2 of the statute as including 'salary, wages, a consultancy fee, a training allowance and an honorarium'. Directorate officers and those in the upper salary band of the various civil service pay scales had their pay reduced by 4.42%, those in the middle salary band by 1.64% and those in the lower salary band by 1.58%.

3. The Ordinance applies generally to public servants. However, it does make provision for limited exceptions. To this end, s.3 of the Ordinance states :

> "This Ordinance does not apply to—
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> (*a*) the pay of a public officer who is remunerated on a salary, being a starting salary, that is not linked to the annual civil service pay adjustment;
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> (*b*) the pay or allowances of a judicial officer—
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> (i) holding a judicial officer—
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> (A) specified in Schedule 1 to the Judicial Officers Recommendation Commission Ordinance (Cap.92); or
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> (B) known as Senior Deputy Registrar, High Court; or
>
> (ii) appointed by the Chief Justice."

4. While the Ordinance brings about a reduction in the pay of public officers and to that end varies the terms of their contracts of

employment, it constitutes, as Mr Fok SC, leading counsel for the respondent, expressed it, a 'one-off' exercise. It does not — other than in respect of this *single* reduction of pay — alter the contractual arrangements between the Government; that is, the Executive, and its employees. To this end, s.9 of the Ordinance reads :

> " The adjustments made by this Ordinance to the pay, and the amounts of any allowances, payable to public officers do not prohibit or affect any adjustment to the pay or the amounts of any allowances payable to public officers made after 1 October 2002."

5. Pursuant to the Ordinance, the applicant's salary was reduced and, in so far as a variation of the terms and conditions of his contract of employment was required, that requirement was met by the provisions of s.10 of the Ordinance which reads :

> " The contracts of employment of public officers are varied so as to expressly authorize the adjustments to pay and the amounts of the allowances made by this Ordinance."

6. In light of the reduction in his salary and the adverse variation of his terms of employment, in November 2002 the applicant filed an application for leave to apply for judicial review seeking a declaration that the Ordinance was inconsistent with various articles of the Basic Law. It may be said that the applicant's challenge springs fundamentally from art.11, para.2 of the Basic Law; namely, that—

> " No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law."

7. The applicant was not alone in seeking to challenge the constitutional validity of the Ordinance by way of judicial review

proceedings. At or about the time that he filed his notice of application, four other notices of application were filed. All the applications for leave were granted.

8. Directions hearings were held to seek the most efficient and cost-effective management of the combined litigation. In the result, two of the applications for judicial review came for hearing in May 2003. It was agreed, and so directed, that the future of the three remaining applications — of which the applicant's was one — would be determined after judgment had been given by myself in respect of the applications heard in May 2003. My judgment in respect of the applications heard in May 2003 was handed down on 10 June 2003. In that judgment ('the June judgment'), I dismissed both applications, holding, on the basis of the challenges made, that the Ordinance was not inconsistent with the Basic Law.

9. Following the June judgment, two of the remaining applications were withdrawn. The present applicant, however, proceeded with his application. This judgment, of course, is in respect only of his application and is determined on the basis of the challenges mounted by him. However, as much of the relevant background to the applicant's challenges are shared with the earlier challenges determined in the June judgment, I have in this judgment, when appropriate, made extensive references to the June judgment.

A consideration of how the Ordinance came into law

10. In the June judgment, I described the relevant background concerning the promulgation of the Ordinance in terms which I consider equally appropriate to explain the background to the present challenge. In the earlier judgment, I said :

> "1. In the latter months of 1997 a financial crisis swept through the economies of South East Asia. That crisis, profound in its ramifications for Hong Kong, has been followed by other economic difficulties, local and global, which, to a greater or lesser degree, have left scars on the *corpus* of Hong Kong's previously bourgeoning prosperity. In the result, in economic circumstances marked by rising unemployment and by deflation rather than inflation, the Government of the Hong Kong Special Administrative Region has had to look to measures to address what it has recognised has become a 'structural problem' facing the Territory's public finances, one which has resulted in persistent fiscal deficits.
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> 2. On 6 March 2002, in his budget speech to the Legislative Council, the Financial Secretary spoke of the economic difficulties facing Hong Kong and commented : 'I am fully aware that, due to the externally-oriented nature of the Hong Kong economy and our linked-exchange-rate system, keeping public finances sustainable is of paramount importance.' Budgetary prudence is a constitutional obligation. In this regard, art.107 of the Basic Law states :
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> > ' The Hong Kong Special Administrative Region shall follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.'
>
> 3. In his budget speech, noting that 'personnel-related' expenses accounted for 70% of government operating expenditure, the Financial Secretary proposed a cut in the pay of public officers. Such officers are described in s.3 of the Interpretation and General Clauses Ordinance, Cap.1, as those 'holding an office of emolument under the Government, whether such office be permanent or temporary'. While for planning purposes he assumed a cut of 4.75%, he said that 'the existing mechanism' for determining levels of civil service pay would be employed. In this regard, he said : "Under the existing mechanism, the Government will consider, among other things,

the results of the private sector pay trend survey and its own budgetary position before deciding on an annual civil service pay adjustment. We will continue to adopt this mechanism and make a final decision after the outcome of this year's survey is known in May." The Financial Secretary informed the Legislative Council that any decision on a pay cut for public officers would need to 'go through the legislative process' before it could be implemented; in short, that a governing statute would need to be enacted.

4. When the employment of almost all public officers; that is, civil servants, is determined by contracts entered into in private law, it may be asked why it was considered necessary to seek legislation in order to affect a variation of those contracts? Material aspects of the reasoning are stated by the Secretary for the Civil Service in a speech made to the Legislative Council on 5 June 2002 when he moved the Second Reading of the bill containing the intended legislation. He said :

> 'Our main reason for seeking to implement the pay reduction by legislation is that the contractual employment arrangements between the Government and the vast majority of serving civil servants do not contain an express provision authorizing the Government to reduce pay.'

The Secretary expanded on this by saying :

> 'Specifically speaking, the employment arrangements for a civil servant are, at present, governed by the provisions set out in a letter of appointment and the Memorandum on Conditions of Service (MOCS) attached to the letter. While the standard MOCS applicable to civil servants provide that the Government reserves the right to alter any of the officer's terms of appointment and conditions of service should the Government consider this to be necessary, the employment contracts of most serving civil servants, except for a very small number of officers recruited since June 2000, do not contain any express provision authorizing pay reduction by the Government. *The legal advice we obtained is that on the basis of decided cases, the courts are unlikely to accept that this general power of variation could apply to such a fundamental term as the salary. It is possible that the Government would face legal challenges if it relies solely on this provision to implement the decision on a civil service pay reduction.*' [my emphasis]

He continued :

> 'Any civil servant can challenge the Government's decision in court. As matter of fact, some staff unions have already stated that they are considering to sue the Government for breach of contract by reducing civil service pay. Should the court decide in a single case that there is inadequate legal basis for the Government to reduce civil service pay, we would not be able to implement the decision on a pay reduction this year. In such an eventuality, the good governance of the Government and the stability of the civil service would be seriously affected. Thus legislation is the only way to implement with certainty the decision on a civil service pay reduction.'

5. On 28 May 2002, the Government — the Executive, as I shall call it, art.59 of the Basic Law stating that the Government of the Hong Kong Special Administrative Region shall be its executive authorities — came to the view that it had exhaustively employed the existing mechanism for determining civil service pay. Pursuant to this, the Chief Executive in Council resolved that civil service pay should be reduced by the following percentages : 4.42% for the directorate and upper salary band, 1.64% for the middle salary band and 1.58% for the lower salary band. He further resolved that the reductions should, if possible, be implemented by legislation.

6. Three days later, on 31 May 2002, the Public Officers Pay Adjustment Bill was gazetted, being introduced into the Legislative Council for its first and second readings on 5 June 2002. After due consideration, including scrutiny by a bills committee, the legislation was enacted on 11 July 2002. After signature by the Chief Executive, it was promulgated in the Gazette on 19 July and came into operation that same day ..."

A summary of the challenges made by the applicant

11. In his notice of application for leave to apply for judicial review, the applicant stated ten grounds of challenge; namely :

(1) "The Ordinance and the pay reduction are inconsistent with Article 6 (protection of private ownership of property) and 105 (protection of right of individuals to the acquisition, use,

disposal and inheritance of their property and their right to compensation for lawful deprivation of their property) of the Basic Law".

(2) "The Ordinance and the pay reduction are inconsistent with Article 11 of the Basic Law" [the article to which I have referred in para.6 *supra*].

(3) "The Ordinance and the pay reduction are inconsistent with Article 25 of the Basic Law. ... the pay reduction ... amounts to discriminatory *de facto* taxation ..."

(4) "The Ordinance and the pay reduction are inconsistent with Article 39 of the Basic Law" in that they "impose discriminatory *de facto* taxation ... inconsistent with Article 26 of the ICCPR" and "are inconsistent with Article 25(c) of the ICCPR".

(5) "The Ordinance and the pay reduction are inconsistent with Article 100 of the Basic Law".

(6) "The Ordinance and the pay reduction are inconsistent with Article 102 of the Basic Law".

(7) "The Ordinance and the pay reduction are inconsistent with Article 103 of the Basic Law".

(8) "The Ordinance and the pay reduction are inconsistent with Article 160 of the Basic Law".

(9) "The failure of the government to honour the constitutionally-incorporated representation to previously serving public servants was an abuse of power contrary to ... the requirement to take a legitimate expectation into account".

(10) "The Ordinance and the pay reduction are also inconsistent with the presumption against retrospectivity since they

diminish existing contractual and constitutionally-protected conditions and benefits".

The challenge in respect of art.100

12. In his notice of application for leave to apply for judicial review, the applicant described as his 'central proposition' his assertion that the Ordinance is inconsistent with art.100 of the Basic Law. During the course of the hearing it became evident that this was indeed the applicant's core contention from which much else flowed.

13. Art.100 is set in Chapter IV of the Basic Law, that chapter bearing the heading 'Political Structure'. Specifically, art.100 appears in section 6 of Chapter IV, the section being headed 'Public Servants'. Art.100 reads :

> " Public servants serving in all Hong Kong government departments, including the police department, before the establishment of the Hong Kong Special Administrative Region, may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before."

14. The applicant contended that the Ordinance also offends two other articles appearing in the same section; namely, art.102 and 103. Art.102 reads :

> " The Government of the Hong Kong Special Administrative Region shall pay to public servants who retire or who leave the service in compliance with regulations, including those who have retired or who have left the service in compliance with regulations before the establishment of the Hong Kong Special Administrative Region, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less

favourable than before, irrespective of their nationality or place of residence."

Art.103 reads :

" The appointment and promotion of public servants shall be on the basis of their qualifications, experience and ability. Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained, except for any provisions for privileged treatment of foreign nationals."

15. The applicant, who argued his own case, said that it was unusual for protections of this kind to be written in a constitution. Patently, he said, the three articles were placed into the Basic Law to encourage public officers to remain in service after the change of sovereignty, to maintain their loyalty and to ensure the continuance of a high state of morale. I accept that must be correct.

16. Art.103, said the applicant, may be read in a purposive but more general sense. Art.103 looks to the continuance of Hong Kong's previous 'system' of public service 'recruitment, employment, assessment, discipline, training and management', all of which must be subject to continual adaption. But arts.100 and 102, he said, constitute specific, concrete promises.

17. The applicant went further, saying that arts.100, 102 and 103 are the embodiment of a substantive legitimate expectation held by public officers resulting from undertakings and assurances given to them by senior members of the Executive prior to the change of sovereignty and by the wording of the Joint Declaration itself. In this regard the applicant

made reference to the letter of 27 September 1984 written by the then Chief Secretary, Philip Haddon-Cave, to all public officers, the relevant part of that letter reading :

> " Representatives of the British and Chinese Governments have now initialed a draft agreement which enshrines arrangements for the administration of Hong Kong when the territory becomes a Special Administrative Region (SAR) of China in 1997. The importance of the role of the public service in ensuring the future stability and prosperity of Hong Kong is recognised in the arrangements for the public service set out in Section IV of Annex I to the Joint Declaration, a copy of which is attached.
>
> 2. As head of the Hong Kong public service, I am writing to you to explain how the post-1997 arrangements will affect you as a member of the public service.
>
> 3. First, Section IV of Annex I provides that all members of the Hong Kong public service in 1997 will be able to continue to serve with the SAR Government. They will be able to continue their careers without interruption. Security of employment beyond 1997 is, therefore, provided for.
>
> *4. Secondly, Section IV provides that future employment with the SAR Government will be on terms no less favourable than before. That is to say, terms of employment will not be changed to the disadvantage of serving officers.*
>
> 5. Thirdly, Section IV provides that, after 1997, existing systems relating to the management of the public service will continue. After 1997 all members of the public service will be responsible to the SAR Government. Appointments and promotions will be based on qualifications, experience and ability as at present. Matters such as recruitment, discipline, training and management of the public service will continue to be dealt with in accordance with existing principles and practices."
>
> [my emphasis]

The applicant placed considerable emphasis on paragraph 4 of this letter. Indeed, it constituted the first citation in his submissions. The emphasis, as I understood it, was placed especially on the Chief Secretary's second sentence in that paragraph that 'terms of employment will not be changed to the disadvantage of serving officers'. Any change of terms of service,

said the applicant, which disadvantaged officers would therefore be inconsistent with the clear promise given. But, as I read it, the Chief Secretary's second sentence in that paragraph was a qualification of the first sentence. Hence the phrase — 'that is to say' — which commences the second sentence. In my view, therefore, in terms of the letter any 'disadvantage' must be read according to whether or not it renders terms of service 'less favourable than before'.

18. In looking to the creation of a legitimate expectation and its true meaning and intent, the applicant further made reference to the explanatory notes in the Joint Declaration of 19 December 1984, more particularly to paragraphs 17 and 18—

> " 17. This section of the Annex provides for the continuation in Hong Kong of an impartial, stable and effective public service. This is an essential factor in ensuring Hong Kong's future stability and prosperity.
>
> 18. Under the provisions of this section of the Annex serving officers will be able to continue in employment with Hong Kong SAR Government on terms and conditions, including pay and pensions, no less favourable than before 1 July 1997.. Special commissions dealing with pay and conditions of service will be retained. In addition, appointments and promotions will be made on the recommendations of a public service commission and on the basis of qualifications, experience and ability."

19. I do not contest the fact that the material to which I have referred may have created a legitimate expectation. But the question, it seems to me, even on the basis of the applicant's submissions, is not a relevant one. I say this because the applicant himself accepted that arts.100, 102 and 103 are the constitutional 'embodiment' of that

legitimate expectation. As such, it is necessary only to look to the 'embodiment' itself; namely, the three articles.

20. As I have indicated, the true meaning of art.100 lay at the heart of the applicant's various challenges. What then, according to the applicant, is its true meaning?

21. By using direct mathematical comparison, the Ordinance has not of course reduced the level of pay of public officers to below the level enjoyed by them immediately prior to the change of sovereignty. In that sense, the Ordinance does not render the pay of public officers 'less favourable than before'. The applicant's challenge, however, was not founded on a direct correlation of figures but on what he submitted was an adverse variation of the terms of contract of employment of public officers. In his notice of application for leave to apply for judicial review ('his notice of application'), he stated his submission in the following terms :

> "In any given case, the question whether Article 100 has been contravened is to be determined objectively by comparing the relevant conditions of service of previously serving public servants as altered by the government on or from 1 July 1997 with those conditions of service as they were on 30 June 1997. *There being no condition of service authorising or effecting a pay reduction in the employment contracts of previously serving public servants before 1 July 1997, the Ordinance and the pay reduction have altered to be less favourable than before the conditions of service related to pay of previously serving public servants and therefore contravene ... art.100 of the Basic Law.* Further, since pay is at one and the same both a monetary amount, a fundamental condition of service, and governed by conditions of service, an Ordinance or an administrative action which reduces the pay levels of previously serving public servants by *any* amount is unconstitutional." [my emphasis]

22. The applicant's challenge was extended to the contention that, even if in law prior to the change of sovereignty it had been permissible to vary the terms of employment of public officers to their disadvantage, art.100 now prohibits that. The logical extension of that contention is that, while any public officer appointed before 1 July 1997 remains in service, it is constitutionally impermissible for there to be any disadvantageous variation of the fundamental terms of his contract of employment. In this regard, the applicant said the following in the course of his submissions :

> " The plain language of art.100 operates *to pre-empt the pre-existing potential for changing the conditions of service of previously serving officers* to be less favourable than they were before 1 July1997. The Respondent's contention to the effect that no less favourable before means that serving public servants can be treated as unfavourably as before is a travesty of the plain language and clear purpose of art.100." [my emphasis]

23. The applicant accepted that, in practical terms, this placed public officers able to benefit from art.100 in a more favourable position than they would have been prior to the change of sovereignty but that, he said, was the natural consequence of the constitutional guarantee contained in the article.

24. I am unable to accept this interpretation of art.100. Although in his submissions the applicant spoke to principles of constitutional law, it seems to me that he nevertheless sought to interpret art.100 as if it was a term of contract. Art.100, however, is an article of constitution and must be read as such.

25. In the June judgment, I considered the principles applicable to the interpretation of the Basic Law :

"60. ... The seminal statement on the interpretation of the Basic Law is to be found in the CFA judgment of *Ng Ka Ling and Others v. Director of Immigration* [1999] 1 HKC 291. In that judgment (at 325), the Chief Justice commented :

> 'We must begin by recognizing and appreciating the character of the document. The Basic Law is an entrenched constitutional instrument to implement the unique principle of 'one country, two systems'. *As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances.*'
> [my emphasis]

Mr Dykes [leading counsel for certain of the applicants], of course, recognised that the Basic Law is 'a living instrument' and, in respect of the terms and conditions of employment of public officers, does not act to shut out all change.

61. In interpreting the Basic Law, the Chief Justice spoke of the need for adopting a purposive approach :

> 'It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. 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. So, in ascertaining the true meaning of the instrument, 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 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. The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration.'

62. It follows from these observations that the Basic Law is not to be given a narrow interpretation :

> 'As to the language of its text, *the courts must avoid a literal, technical, narrow or rigid approach*. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as 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.' " [my emphasis]

26. In the June judgment I also made reference to the principles enunciated by the Court of Final Appeal in *Director of Immigration v. Chong Fung Yuen* [2001] 2 HKLRD 533 at 546. For purposes of this judgment, I believe the relevant citation is more extensive. It is to the following effect :

> " The courts' role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain *the legislative intent as expressed in the language*. Their 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*. 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 is should be ascertainable by the citizen.
>
> The courts do not look at the language of the article in question in isolation. The language is considered in the light of its context and purpose. See *Ng Ka Ling* at pp.28-29. The exercise of interpretation requires the courts to identify the meaning borne by the language when considered in the light of its context and purpose. This 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. As was observed in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 at p.329E, a case on constitutional interpretation: 'Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language'.
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> As the Court held in *Ng Ka Ling* (at p.29A-C), the courts should give a generous interpretation to the provisions in Chapter III that contain constitutional guarantees of freedoms

> that lie at the heart of Hong Kong's separate system. However, when interpreting the provisions that define the categories of permanent residents, the courts should simply consider the language in the light of any ascertainable purpose and the context."

27. How then, as an objective exercise, in the context of the article's context and purpose, do I identify the meaning borne by the language of art.100? In my judgment, the meaning of the language is to be identified in the following manner :

(i) The word 'before' in the phrase 'no less favourable than before' refers to before the change of sovereignty; that is, before 1 July 1997.

(ii) The use of the phrase 'no less favourable than before' implies that there will from time to time be changes to 'pay, allowances, benefits and conditions of service' : I will call them 'terms of service'. Those who drafted art.100 have not said that terms of service will remain 'unchanged'. It is manifest, in my view, that the language of the phrase anticipates change. Considering that art.100 is intended to endure for almost the entire working life of certain public officers, a prohibition against any change would not only, in respect of the civil service at large, be stultifying, it would almost certainly work an injustice on the officers concerned. As Barnett J observed in *AECS v. Secretary for the Civil Service* (unreported) HCAL No.9/1998 :

> "Whatever else may have been the intention, I am confident that Article 100 is not intended to inhibit the introduction of new measures for the good governance of Hong Kong."

(iii) The fact of change is therefore implicit in the phrase 'no less favourable than before'. As to the nature of such change,

there is nothing in the plain meaning of the phrase to suggest that it may only enhance the terms of service of public officers. That being so, it is implicit that change may therefore be to the disadvantage of public officers.

(iv) But if change is to their disadvantage there is a defined limit to that change and the limit is this; namely, that it may not so reduce their terms of service that they are less favourable than those enjoyed before 1 July 1997. That is the constitutional guarantee that is given. It is no greater than that, no less than that.

(v) How then is it to be judged whether such change does or does not result in terms of service being less favourable than those enjoyed before 1 July 1997? In my view, it may only be judged by an objective assessment of the *result* of such change. If, despite such change, the terms of service are in substance no less favourable than before the change of sovereignty, then such change is permissible.

28. It is on the basis of this interpretation that I made the following observations in the June judgment (para.87) :

> " While, in considering whether art.100 has been offended, it may perhaps be necessary to look to specific figures relating to matters of pay, allowances and benefits, I do not see that art.100, as an article of constitution, is itself worded in such rigid terms as to direct that pay, allowances and benefits may not for any reason, in terms of specific figures, fall below those bestowed on 30 June 1997. If such an inflexible interpretation was to be applied then, purely by way of illustration, it may be said that the Executive, even with the consent of public officers, would be prohibited from raising pay as a *quid pro quo* for doing away with some moribund allowance or benefit."

On the basis of the example given in that citation, the *result* in substance would not render the terms of service less favourable than before.

29. In respect of art.100, the Ordinance brings about a reduction in the pay of public officers but that reduction, it is accepted, does not result in the pay itself being less than that received on 30 June 1997; that is, immediately before the change of sovereignty. As to pay therefore in substance the Ordinance is not inconsistent with art.100. As to any adverse variation of the terms of employment of public officers, the variation put in place by the Ordinance does not constitute a variation that leaves public officers in a position where the Executive can unilaterally reduce their pay at any time in the future by relying on the wording of that variation alone. The variation relates to the single reduction only and does not, other than in that respect, alter the terms of the employment contracts of public officers. Accordingly, any further variation will require further legislation with the checks, balances and scrutiny inherent in the legislative process. That being the case, I do not see how it can be said that in substance the result of the variation renders the terms of employment of public officers 'less favourable than before'.

30. In any event, as I found in the June judgment, prior to the transfer of sovereignty the use of legislation had been ruled to be a lawful means by which the contracts of employment of public officers may be unilaterally varied even in respect of such fundamental matters as pay. The authority in point is *Lam Yuk Ming and Others v. Attorney General* [1980] HKLR 815, a decision of the Court of Appeal. That being the case, the variation put in place by the Ordinance has not in substance

placed public officers in a less favourable position than they were in prior to the change of sovereignty.

31. In respect of *Lam Yuk Ming*, in the June judgment I made the following observations :

> "76. The facts of the case may be summarised as follows. In 1979, a number of public officers embarked on a 'work to rule'. They were suspended from duty without pay. The action against them was taken pursuant to certain Civil Service Regulations. A declaration was sought by the officers that the Regulations did not form part of their contracts of employment and that the administration was in breach of those contracts by suspending their pay.
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> 77. The Court of Appeal acknowledged that the Crown had power to legislate for public officers. As to the nature of that power, it was said—
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> > ' Hong Kong is, in constitutional terms, a 'ceded territory' within which the Crown, by virtue of its prerogative, enjoys full legislative authority, subject to any act of Parliament which may extend to the territory. See *Campbell v. Hall* (1774) 20 St. Tr.239.
> >
> > The Crown's legislative power may be exercised by Order in Council, Letters Patent or Proclamation. All such instruments form part of the law of the territory to which they are directed.'
>
> 78. The Court of Appeal held that, as asserted by the officers, there *were* contracts between the Crown and its servants and that their terms 'should be, and are, mutually enforceable'. It held further that the contracts contained by incorporation the Civil Service Regulations. But the public officers who had been suspended had all been employed by the Crown prior to the coming into force of the Regulations which were used to bring about their suspension without pay. As Roberts CJ stated the issue :
>
> > ' The Crown, therefore, has to show that it was entitled to vary the contract of service of serving public officers unilaterally, by introducing a form of summary suspension from office without pay which had not existed before.'

79. The Chief Justice determined the question in the following manner :

> " The trial judge observed that he found it difficult to view as part of a true contract provisions which can be changed at will by one party alone. Thus stated, we agree with him. In this instance, however, the contract itself contains, *as one of its express terms*, a right in one of the parties to vary any of its conditions. So the public officer, when accepting the offer made to him, does so in the knowledge that any of its terms can be varied by the Crown, without his agreement, whether to his benefit or to his detriment.
>
> It is not unusual for contracts to contain some terms which can be altered at the option of one party only, for example, many leases allow for an increase of rent at the option of the landlord alone. There is thus no objection in principle to a provision in a contract whereby one party can alter some of its conditions without agreement, so long as this overriding provision was within the terms of the main contract which he entered. With hesitation, we conclude that that principle is applicable also when any term is capable of unilateral variation, and that such a clause does not destroy the contractual relationship between the Crown and public officers, however vulnerable the latter may be as a result.'

80. In giving the rationale for this determination the Chief Justice said :

> ' We must recognize also the practical difficulties of reaching any other conclusion. If, as we have found, there is a contract between the Crown and its servants, and the overriding provision for unilateral variation were held to be inoperative, the Crown would be obliged to secure the agreement of each public officer to every change to Government Regulations, however minute.' "

32. For the sake of completeness, it should be said that, to my understanding, it was not disputed that the contracts of all public officers contain clauses allowing for unilateral variation.

33. One of the texts referred to by the applicant was a publication of the Law Press, China, *Introduction to the Basic Law of the Hong Kong*

Special Administrative Region, compiled by a number of Mainland academies. In respect of art.100, the following is said (at page 434) :

> " The provision that pay and allowances of public servants who will remain in employment shall be 'no less favourable than before' should be construed as no less favourable than the standards prescribed by the previous Hong Kong laws."

If, as the applicant submitted, this is the test to be applied then it seems to me that the standards prescribed by the previous laws of Hong Kong, as determined in *Lam Yuk Ming*, allowed for the unilateral variation of the contracts of employment of civil servants in respect of such matters as pay by means of legislation.

34. The applicant sought to argue that *Lam Yuk Ming* was somehow not applicable. But whatever the criticisms that may be made of it by the applicant, whatever the special facts of that case and whatever the special concerns of the court at that time, it is apparent that up until the change of sovereignty it remained good law, its *ratio* being of general application and not restricted to the specific facts of the case. That being so, if before 1 July 1997, on the authority of *Lam Yuk Ming*, the contracts of employment of public officers were in law subject to unilateral change by way of legislation in respect of matters relating to pay, I do not see how the use of legislation for the same purpose after that date can be said to render the 'conditions of service' of public officers 'less favourable than before'. Those conditions are no better protected than before but are no more vunerable either.

35. The applicant submitted that art.100 now prohibits the sort of unilateral change considered in *Lam Yuk Ming*. I disagree. Art.100 does not place public officers in a better position in respect of their terms

of service than they enjoyed prior to the change of sovereignty, it offers a constitutional guarantee only that they will be in a no worse position; that is, a no less favourable position. In this regard, I refer again to the observations of Barnett J in *AECS v. Secretary for the Civil Service (supra)*; namely, that art.100 is intended :

> "... to ensure continuity of employment so that no public servant *suffers* as a consequence of the transition itself."
> [my emphasis]

Art 102

36. In his notice of application, the applicant stated his submission in respect of art.102 in the following terms :

> "In contravention of Article 102, the Ordinance and the pay reduction have *the consequential effect* of reducing the pensionable emoluments of those public officers who, in the ordinary course, would have reached an incremental pay point at a higher rate of remuneration but for the pay reduction. The Applicant is so affected." [my emphasis]

37. In the June judgment, I dealt with essentially the same submissions. Nothing was placed before me by the applicant in the present case to result in any change to the determination I made in that earlier judgment. I can do no better, therefore, than repeat the bulk of my earlier determination :

> "97. In respect of increments, the 'knock on' effect of the Ordinance on pension entitlements is, as I understand the applicants' submissions, to the following effect. An officer due to receive an increment may, because of the pay reductions brought about by the enactment of the Ordinance, discover that the increment which he receives puts him on a salary that is less than he was receiving before the reduction. He has not therefore been able to attain a higher pensionable emolument despite the fact that he has been awarded an increment. An

example put forward by Mr Dykes illustrates the point. An officer on point 37 of the Master Pay Scale was earning $57,745 before the pay reduction. The reduction, however, has reduced his salary to $55,195. That officer, on receiving his increment *after* the pay reduction, will move up to point 38 on the Master Pay Scale which now pays $57,730. The increment has given the officer more money in his pocket : he has moved from $55,195 to $57,730, an increase of $2,535. However, the increment has *not* increased his pension emolument and thereby the level of his future pension entitlement That is because, before the pay reduction he was earning $57,745, a sum $15 greater than he is now receiving.

98. But, accepting that the result propounded by Mr Dykes (a result supported on affirmation by certain identified officers) is correct, does this *of itself* result in the enactment of the Ordinance offending art.102? I think not. My reasons may be stated in the following way :

(a) The Ordinance does not vary the stated terms and conditions of public service pension schemes. It does not therefore vary the established mechanism (contained in the terms and conditions) for calculating the level at which public officers are paid their pensions.

(b) Public officers, therefore, remain entitled to receive their pensions calculated according to the *highest* salary earned by them during the course of their pensionable service. In that regard, their pensions are assessed on terms no less favourable than before the transfer of sovereignty.

(c) The terms and conditions, while they encompass *the fact* of the highest salary earned by public officers so that pension levels may be computed, are not concerned with how salary levels were achieved. That is not a matter relevant to those terms and conditions. It is instead a matter relevant to the lawfulness of the pay awarded to the officers during their service.

(d) If officers have lawfully had their pay reduced during the course of their service then any 'knock on' effect on their future pension entitlements will itself be lawful.

99. In my judgment, therefore, the Ordinance, which does not in any way vary the terms and conditions of public service pensions, does not *of itself* offend art.102. It is only if the Ordinance, which reduces the pay of serving officers, is found to

be inconsistent with other articles of the Basic Law, or of the Law itself, and is quashed that there will in consequence be a benefit for some officers in respect of the level of their future pension entitlements. But that is a matter of practical consequence only, it does not speak to the Ordinance offending art.102."

Art.103

38. In his notice of application, the applicant contended that the pay reduction effected by the Ordinance was a departure from the previous 'system' of recruitment, employment, assessment, discipline, training and management for the public service and thereby offended art.103. In the June judgment, I found that the Ordinance did not constitute such a departure. Again, I can do no better than repeat what was said in the earlier judgment, the applicant having put forward no argument to persuade me that my earlier determination was incorrect :

> "70. ... I believe that the critical word in art.103 is the word 'system'—
>
> > 'Hong Kong's previous *system* of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained ...' [my emphasis]
>
> A system is defined by the fact that it consists of parts, those separate parts co-ordinating to make the whole. Some of those separate parts may change, they may be modified or replaced, but the system, seen as such, may continue as before. Whether it does continue or is materially changed so that it becomes another system is, of course, determined by the degree of internal change.
>
> 71. Looking to the ample and general language of art.103, I am satisfied that, in respect of pay, the word 'system' incorporates not only its contractual characteristic but also in respect of annual pay adjustments the mechanism employed over an extended period of time to determine the rate of those adjustments.

72. While historically, using the existing mechanism, there may not have been any pay reduction, that, as I have indicated, was due to the kind winds that directed the ship of Hong Kong's prosperity and could not give rise to the implication that in more stormy times an adjustment by way of a reduction would not be possible.

73. In the present case, the pay reductions imposed by the Ordinance have not been calculated by some method entirely removed from the existing mechanism. To the contrary, the reductions have been calculated by employing the existing mechanism in an entirely orthodox manner. The *exact* percentages thrown up by this orthodox use of the existing mechanism have been placed in the Ordinance. To that extent, therefore, the Ordinance directly maintains a material part of the previous system.

74. As to the characteristic of contract, in my judgment the Ordinance does not so modify that characteristic as to subvert and thereby change the essential nature of the system itself. Contracts of service remain an integral part of the system of the employment of public officers. The Ordinance does not permanently alter the terms and conditions of those contracts. To repeat what Mr Fok emphasised, the Ordinance is a 'one-off exercise'. All that it achieves is an adjustment of civil service pay for one specific year in direct accordance with a long-established mechanism for calculating that adjustment and does so in order to ensure that the adjustment is of general application.

75. I turn now to the matter of legislation. The applicants' contention, as I understand it, is that the introduction of legislation to effect the pay reduction has nullified the contractual rights of public servants and has thereby materially changed the previous system of employment. The legislation of course has been only of limited effect in varying contractual rights. It has made a variation in respect of one pay adjustment only. It has no deeper effect. I doubt whether legislation *per se*, which gives effect by way of general application to what in the past has been achieved by concensus, is so profound as to constitute a change to the previous system. But, if I am wrong in that regard, it appears to me that in any event the use of legislation has, prior to the transfer of sovereignty, been ruled to be a lawful means by which civil service contracts of employment may be unilaterally varied. The authority in point is *Lam Yuk Ming and Others v. Attorney General* ..."
[Concerning the analysis of this authority, see para.31 *supra*]

The reference to art.160

39. Art.160 is the final article in the Basic Law, appearing under the heading of 'Supplementary Provisions'. It reads :

> " 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 this Law. If any laws are later discovered to be in contravention of this Law, they shall be amend or cease to have force in accordance with the procedure as prescribed by this Law.
>
> Documents, certificates, *contracts*, and rights and obligations *valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region*, provided that they do not contravene this Law." [my emphasis]

40. As I understood the applicant's submissions in respect of this article, they were to the effect that its provisions 'reinforce' the protection afforded by art.100 to the conditions of service of public officers who were appointed to service before the change of sovereignty. In short, he sought to rely on the wording of art.160 to bolster; that is, to add strength to his central contention that the Ordinance offends art.100.

41. In his submissions, the applicant made reference to *HKSAR v. Ma Wai Kwan, David and Others* [1997] 1 HKLRD 761 to support his contention that art.160 must be read in the light of the rest of the Basic Law and cannot be construed as having a meaning which is inconsistent with other articles. Chan CJHC (as he then was) in *Ma Wai Kwan* gave a clear and entirely uncontentious statement of principle of interpretation to that exact effect.

42. In considering the meaning of art.100 in accordance with the principles that I have stated, I have, of course, looked to that meaning in the context of the Basic Law as a whole including art.160. In my judgment, art.160 complements the plain meaning of art.100 as I have found it to be. It does not contradict it.

43. It was at all times the applicant's contention that the Basic Law — the central focus being on art.100 — has given not merely constitutional protection to the rights and obligations of public officers as they were at the change of sovereignty but has in a real way added to those protections. That I cannot accept. Nor do I find that art.160 advances the applicant's arguments in this regard.

44. In *Ma Wai Kwan*, Chan CJHC said the following in respect of the Basic Law as a whole :

> "In my view, the intention of the Basic Law is clear. There is to be no change in our laws and legal system (except those which contravene the Basic Law). These are the very fabric of our society. *Continuity is the key to stability.* Any disruption will be disastrous. Even one moment of legal vacuum may lead to chaos. Everything relating to the laws and the legal system, except those provisions which contravene the Basic Law, has to continue to be in force. The existing system must already be in place on 1 July 1997. That must be the intention of the Basic Law." [my emphasis]

45. Absent specific wording to the contrary, and I do not find it in art.100 or 160, continuity implies a continuance of the position as it was before. I do not see how it can imply increased rights for one constitutionally identified entity (public servants) at the expense of another constitutionally identified entity (the Executive). In the June judgment,

I said the following in respect of art.160 which, in my view, is of equal application in the present matter :

> "130. In my view, art.160, in so far as it relates to contractual rights and obligations, provides that in all respects as they were before the transfer of sovereignty so those contractual rights and obligations remain afterwards : as they were protected before so they remain protected afterwards. The purpose is to effect a seamless transfer, as if there was no transfer at all. That being so, if contractual rights and obligations were lawfully variable before the transfer of sovereignty so, in my view, they must remain lawfully variable afterwards provided only that there is no contravention of the Basic Law.
>
> 131. For reasons given earlier in the judgment, I am satisfied that prior to the transfer of sovereignty the Executive had the power to vary the contracts of civil servants as a class by means of legislation, that power including the power to vary such fundamental contractual conditions as those related to pay. If that power, lawfully exercised, existed before the transfer of sovereignty so, lawfully exercised, it must remain after its transfer."

46. By way of postscript, it should be recorded that in the course of his submissions the applicant cited a number of United States authorities as to the meaning and effect of Art.1, para.10, clause 1 of the US Constitution which provides that 'No State shall ... pass any ... law impairing the obligation of contracts'. That wording is very different from the wording of arts.100 and 160, imposing very different restrictions to those imposed in our articles. I did not find that reference to the United States authorities advanced the applicant's contentions.

Legitimate expectation

47. In his notice of application, the applicant said the following in respect of the issue of legitimate expectation :

> " ... the representation given to previously serving public servants that their conditions of service (including pay and

> pension) would be no less favourable than before is clear and unambiguous under both the Joint Declaration and Articles 100 and 102 of the Basic Law. It was a representation which not only was expressly given in an international treaty but also was specifically incorporated constitutionally. Therefore, although the government and the Legislative Council did not themselves give that representation, they were and are bound by it.
>
> ... previously serving public servants were, and are, clearly *entitled* to expect – as a matter of principle or law – that the government, in the formulation of its economic and fiscal policies, will give effect to the legitimate expectation of previously serving public servants arising from the representation incorporated in the Joint Declaration and the Basic Law that their conditions of service would be no less favourable than before 1 July 1997.
>
> The failure of the government to honour the constitutionally-incorporated representation to previously serving public servants was an abuse of power ..."

48. As I have said earlier in this judgment (para.19 *supra*), I do not consider the argument of legitimate expectation to be relevant. The applicant himself has said that the legitimate expectation of public officers was 'incorporated' into the Basic Law in arts.100 and 102. That being the case, it is necessary only to look to the plain meaning of those articles for they state the nature and extent of any legitimate expectation.

Retrospectivity

49. In his notice of application, the applicant stated his submissions under this heading in the following terms :

> "The Ordinance and the pay reduction are also inconsistent with the presumption against retrospectivity since they diminish existing contractual and constitutionally-protected conditions and benefits. If not of the same substantive effect as the doctrine of legitimate expectation, it is an established principle that laws introduced for the first time ought 'to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing laws' (*Phillips v Eyre* (1870) LR 6 QB1). The Ordinance and the pay reduction are

> inherently unfair and detrimental since, for example, many public servants may have made unchangeable financial plans and commitments based on the pay levels applying before 1 October 2002. Furthermore, public servants are under a duty to 'not allow themselves to get into a position where any debts they may have become unmanageable' and a breach of that duty can have consequences for 'their postings, welfare needs or continued employment'."

50. Retrospectivity, of course, as the applicant accepted, is an interpretative presumption only. As such it cannot displace the plain meaning of an article of our primary document of constitution.

51. But does the Ordinance act retrospectively in the manner suggested by the applicant? It does not reduce pay already earned. I repeat what was said in the June judgment :

> "138. It is sufficient, I believe, to observe again that the Ordinance has no retrospective effect. It does not seek to claw back a portion of salaries already earned. It looks only to a reduction of future pay; by definition, to pay not yet earned and therefore not yet acquired as property."

52. As to existing contractual rights, I have found that these were lawfully subject to variation at the change of sovereignty by means of legislation. If that vunerability prevailed in law at the change of sovereignty, I do not see that its continuance after the change of sovereignty can be said to diminish such rights, not unless the Ordinance brings about a result which in substance renders the 'pay, allowances, benefits and conditions of service' less favourable than before : a result which I am satisfied has not been demonstrated.

The economic context

53. In the course of his submissions, the applicant made a sustained attack on the Executive's professed reasons for successfully steering the Ordinance through the legislative process; namely, the economic troubles then confronting Hong Kong to which I alluded in the opening paragraphs of the June judgment and which I have cited in this judgment : para.9 *supra*. According to the applicant, the Executive's assertions as to those economic difficulties constituted the reason why it professed to be entitled to 'override' the protections afforded to public officers under the Basic Law. In this regard, in his written submissions the applicant said that in the hearing which gave rise to the June judgment —

> " ... the Respondent's assertions about the deficit were held to override, among other grounds of challenge, the specific constitutional protection given in plain language by art.100 of the Basic Law to public servants serving before the establishment of the HKSAR."

54. But has the Executive conceded that the Ordinance overrides the protections afforded to public officers under art.100? I have never at any stage of this or the earlier proceedings understood that to be the case. To the contrary, I have at all times understood the Executive to contend that the Ordinance, brought into law by means of the legislative process, in all ways complies with the Basic Law. That being the case, to my understanding, the Executive has never propounded the argument that, if the Ordinance is found to be inconsistent with any article of the Basic Law, such inconsistency is excused by the economic imperatives that confronted both the Executive and the Legislative Council at the material time.

55. In both this and the June judgment, I have determined that the Ordinance does not offend art.100. That being the case, it has not been necessary for me to consider whether, in constitutional terms, if the Ordinance is inconsistent with art.100, it is nevertheless justified on economic grounds.

56. In the course of his submissions, the applicant asked the court to consider a large body of what can best be described as opinion evidence (newspaper articles, academic writings and the like) to attempt to demonstrate two facts; first, that Hong Kong's public finances were at all material times sufficiently robust to obviate the need for a reduction in the pay of public officers and, second, that any temporary financial difficulties were as a result of the Government's own ineptitude in the management of its financial resources.

57. As I understood it, the central purpose of attempting to demonstrate these two facts was to show that there could be no economic justification for passing into legislation a statute which offended the Basic Law, particularly art.100. But the applicant did not rest with that single proposition. In his written submissions, he advanced his argument to the following effect :

> " Unarguably, the Respondent's alleged structural deficit problem is mainly self-created. Unarguably, it is unreasonable and unjust to penalise public servants for the Respondent's self-created problem by reducing their pay. Unarguably, there are reasonable alternative means of solving the problem, including restoration of the Respondent's consciously foregone sources of revenue and the introduction of a provenly stabler and more equitable source of revenue such as a sales tax. The evidence [of economic opinions] is, therefore, also relevant to the questions of public perceptions of inequality and good

governance which were crucial to the dismissal of the applications in [the June judgment]."

58. As to the proposition that there could be no economic justification for the Ordinance, as I have said earlier, economic justification was never argued by the respondent in this or the earlier hearing as somehow rendering lawful an apparent breach of the Basic Law nor has the compatability of the Ordinance with the Basic Law been determined by me on the basis of economic justification. As to the proposition that the evidence of economic opinions goes to the questions of 'public perceptions of inequality and good governance which were crucial to the dismissal of the applications' in the June judgment, while the June judgment must of course speak for itself, I fail to see how such contended 'public perceptions' can, on any ordinary reading of the June judgment, have gone to the root questions of constitutional consistency or how, on the basis of the applicant's own defined challenges to the constitutional legitimacy of the Ordinance, those perceptions can have any real bearing. As the applicant himself said in his notice of application : 'It is axiomatic that it is outside the role or capacity of the courts to assess the merits of competing economic or financial policy arguments'.

59. What I have termed 'the economic context' was of course incorporated into the June judgment, particularly with reference to art.107 of the Basic Law which reads :

" The Hong Kong Special Administrative Region shall follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product."

However, mention of this article was made within two limited contexts. The first mention was made in paragraph 2 of the June judgment in qualifying the words of the Financial Secretary contained in his budget speech :

> "On 6 March 2002, in his budget speech to the Legislative Council, the Financial Secretary spoke of the economic difficulties facing Hong Kong and commented : "I am fully aware that, due to the externally-oriented nature of the Hong Kong economy and our linked-exchange-rate system, keeping public finances sustainable is of paramount importance." Budgetary prudence is a constitutional obligation ..."

The second mention was made in respect of arguments to the effect that the Ordinance offended art.35 of the Basic Law by denying public officers the right to seek redress in respect of their reductions of pay through the courts. In considering that issue, I looked not to the political or fiscal wisdom of the Ordinance but to whether the statute pursued a legitimate aim and whether a reasonable relationship of proportionality existed between the means employed and that aim. In so doing, I observed in respect of art.107 that it—

> " ... directs Hong Kong to a particular course. It employs forceful language : the Government shall 'strive' to achieve a fiscal balance. That being the case, it speaks for itself that the Ordinance, as one instrument in a set of co-ordinated measures aimed at keeping public finances sustainable, must have a legitimate aim."

60. The applicant clearly felt very strongly that the Executive had no good economic grounds for taking such steps as were necessary to seek the passing into law of the Ordinance. During the course of his submissions, he went so far as to say that the Executive, in what he considered to be the mismanagement of public finances, had breached

art.107. But he made no formal challenge of that kind in his notice of application.

61. I repeat that it is not for this Court to attempt to assess the merits of competing economic or financial policy arguments. It is not for this Court to pronounce on whether the Executive was wise to promote the Ordinance and for the legislature to bring it into law. The single question is whether the Ordinance is or is not consistent with the Basic Law. In my view, therefore, the applicant's far-ranging submissions on economic issues were essentially misplaced.

62. By way of a postscript, I feel obliged to record the fact that I was not assisted by having the applicant present to me numerous newspaper articles criticising the Government's financial policies in respect of such projects as Disneyland. In this regard, I can do no better than employ the words of Godfrey J (as he then was) in *Jademan (Holdings) Ltd v. Francis Leung Pak-to and Others* [1989] 2 HKLR 151 when he said :

> " He [the plaintiff] makes reference to a number of newspaper reports concerning the matters with which the court is now concerned. I must protest at this. The court is not in the least concerned with what newspaper reporters say about events at which they claim to have been present. Whether at a trial or an interlocutory hearing, such material should find no place whatever. The exhibition of newspaper cuttings is not evidence. It is not of the slightest assistance to the court. I pay no attention to these reports."

The challenge in respect of art.6 and art.105

63. Art.6, which appears in Chapter I of the Basic Law, that chapter bearing the heading 'General Principles', declares that—

> " The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law."

64. Art.105, which appears in Chapter V, that chapter bearing the heading 'Economy', states that—

> " The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.
>
> Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.
>
> The ownership of enterprises and the investments from outside the Region shall be protected by law."

65. These two articles, said the applicant, protect individuals against the expropriation (without compensation) of their contractual rights and benefits, such rights and benefits being properly described as 'property'. The benefits due under a contract of employment, he submitted, such as an entitlement to pay, are choses in action and therefore 'property' within the meaning of arts.6 and 105.

66. The applicant contended that so long as an employment relationship continues then the right to remuneration continues and that right is an *existing* not a *future* property right. As authority for this proposition, he cited *Creswell v. Inland Revenue* [1984] ICR 508, a first instance decision of the Chancery Division, the headnote reading :

> " That it was a basic principle that an employee was paid for the work he performed; that where an employee refused to perform the duties that he was contractually bound to perform, the employer was entitled to withhold payment; that, since the

> revenue's requirement that the plaintiffs should perform their duties in accordance with the new methods was within the terms and conditions of the plaintiffs' employment and the revenue had not prevented the plaintiffs from carrying out their contractual obligations operating the new techniques, the plaintiffs had not been suspended and the revenue was entitled to withhold payment."

67. I do not read *Creswell*, however, as relating to *future* pay. Clearly, in my view, it is concerned with the issue of concurrent responsibilities. If work is done in accordance with the terms of employment then pay is due. As Walton J said :

> " ..., Mr. Millett rested his case on the very simple ground that, so far as an employer and an employee are concerned, the promises of pay and work are mutually dependent. No work (or, at any rate, readiness to perform whatever work it is the employee ought to be willing to perform if physically able to do so)—no pay. This is such an obvious principle, founded on the simplest consideration of what the plaintiff would have to prove in any action for recovery of pay in respect of any period where he was deliberately absent from work of his own accord, that direct authority is slight—slight, but sufficient."

In short, as I understand *Creswell*, it refers to pay currently due and therefore to an existing property right.

68. In advancing his submissions, the applicant also placed reliance on *Wells v. Newfoundland* (1999) 177 DLR (4^{th}) 73, a decision of the Supreme Court of Canada. In paragraph 1 of its judgment, the court succinctly summarised the issue and its decision in respect of that issue, Major J stating :

> " This appeal deals with the position of the Crown and its senior civil servants who hold tenured appointments subject to good behaviour. Are such office-holders owed compensation in the event that their positions are eliminated by legislation? There is no dispute that Parliament and the provincial

> legislatures have the authority to structure the public service as they see fit, and to eliminate or alter positions in the process. But can it escape the financial consequences for doing so without explicitly extinguishing the rights they have abrogated? I conclude that they cannot."

69. But what must be taken into account when considering the relevance, if any, of *Wells* in respect of the applicant's contention that the Ordinance is inconsistent with arts.6 and 105 of the Basic Law is that no Charter arguments of any kind were advanced in that case. It was therefore decided on the bases of contract and administrative law not according to constitutional principles. On those bases, however, the court held that—

> " ... there is no question that the Government of Newfoundland had the authority to restructure or eliminate the Board. There is a crucial distinction, however, between the Crown legislatively avoiding a contract and altogether escaping the legal consequences of doing so. While the legislature may have the extraordinary power of passing a law to specifically deny compensation to an aggrieved individual with whom it has broken an agreement, clear and explicit statutory language would be required to extinguish *existing* rights previously conferred on that party." [my emphasis]

70. The essential question of course is whether contracts of employment of public officers constitute 'property' in terms of arts.6 and 105. I did not find it necessary to determine the issue in the June judgment but, as the matter has been revisited, it must now be determined.

71. Art.105 protects the right of individuals to the 'acquisition, use, disposal and inheritance of property' and to their right to compensation for lawful deprivation of that property. The word 'property' has not been defined but is qualified by the fact that its

'acquisition, use, disposal and inheritance' is protected. Those qualifications, in my view, constitute an aid in interpreting the meaning and extent of 'property' as it is used in the article.

72. If 'property' within the meaning of art.105 may be acquired, used and disposed of, including disposal by way of inheritance, then it must surely be capable of being brought into possession and being transferred out of possession. In short, it must in most cases have two features : it must be capable of being possessed and of being transferred. I have qualified those attributes with the phrase 'in most cases' because I accept of course that in common law the word 'property' is of very wide import and when used in a document of constitution demands wide and purposive interpretation. I have also made the qualification because my purpose in this judgment is to consider only the limited question of whether contracts of employment of public officers constitute 'property' within the meaning of art.105.

73. The right to acquire property, to use it; that is, to enjoy its exclusive control, and to transfer it is an integral feature of the capitalist system, a system protected by art.5 of the Basic Law. Art.5 appears in Chapter I of the Basic Law together with art.6 and reads :

> " The socialist system and policies shall be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years."

74. While, although not free of difficulties, I accept as arguable the contention that a public officer's contract of employment, as a bundle of rights and obligations, is capable of possession by that public officer,

I do not see that it is in any manner capable of being transferred by him; that is, of being assigned. In this regard, the following is said in *Halsbury's Law of England*, 4th Ed. Reissue, Vol.6, at para.84 :

> " Where a contract involves personal skill or confidence, such as a contract between an author and publisher that the one shall write and the other publish a book, it is not assignable, and this principle extends to cases where the ability of one party to a contract to conduct his business and make it pay and so to be able to pay the other party is the subject matter of personal confidence."

75. Manifestly, the contracts of employment of public officers are dependent upon a mutual 'personal confidence'. A public officer may not transfer his rights under the contract to a third party, he certainly may not dispose of his rights and obligations by way of inheritance. In my judgment, this inability to transfer rights and obligations is in the present case conclusive. If there are alienable interests that flow from a public officer's contract of employment, such as pay and other emoluments, they are only alienable *after* they have been earned in terms of the contract by the officer and after they have therefore become his property. But the contract itself is not an alienable interest.

76. In my view, therefore, viewed in the round, I am unable to see how contracts of employment of public officers can be 'property' within the meaning of either art.6 or art.105. The contracts are not property, they are an expression of a personal relationship, one between employee and employer, a relationship subject to such fundamental restrictions as the ability to bring about the unilateral termination of that relationship with no compensation other than in terms of the applicable contracts themselves.

77. But if I am wrong in this regard, I am satisfied that art.6 and art.105 protect only *existing* property rights and that the property in issue in this matter; namely, the amount of pay reduced by the Ordinance, is not, in terms of that legislation, an existing property right. In the June judgment, in respect of this issue, I said the following :

> "137. Mr Fok has argued that a public officer's contract of service does not constitute 'property' within the meaning of art.105. However, I find no need to resolve that issue.
>
> 138. It is sufficient, I believe, to observe again that the Ordinance has no retrospective effect. It does not seek to claw back a portion of salaries already earned. It looks only to a reduction of future pay; by definition, to pay not yet earned and therefore not yet acquired as property.
>
> 139. For the reasons given in this judgment, I am satisfied that public officers have no constitutional right to continue to be paid the salary that they were being paid before the Ordinance came into effect; that is, before 1 October 2002. If they have no right to the continuance of that earlier salary as a minimum salary it follows that they have no property (in the form and amount of their pay reduction) protected by art.105."

78. Pay earned for work done is a debt due. The right to receive future pay may, however, be lawfully subject to variation. I have found that pay for public officers has at all material times been subject to variation, if necessary by way of legislation. Read in context, therefore, I do not see how arts.6 and 105 can protect as 'property' the pay of public officers not yet earned when that anticipated pay may be subject to lawful variation, a variation contemplated by arts.100 and 103 of the Basic Law which deal directly with the constitutional protections afforded to public officers in respect of their pay.

79. In my judgment, arts.6 and 105 extend their protection to existing rights in property, not to anticipated rights, rights still uncertain as

to their delineation. In short, they do not extend their protection to what in effect is no more than an expectation.

80. This brings me finally to the matter of 'deprivation' for, as I understand it, the applicant contends that the Ordinance has brought about the deprivation of his property; namely, his pay, while denying him the right to compensation guaranteed by art.105.

81. Deprivation, in its ordinary sense, means the action of dispossessing or divesting; the word 'divesting' itself meaning to strip or rid of possessions, rights or attributes. The word therefore looks to an extinction rather than a restriction or limitation. That certainly appears to be the interpretative approach adopted by the European Court of Human Rights in respect of Art.1 of the First Protocol of the European Convention, that article reading :

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be *deprived* of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." [my emphasis]

82. The authors Clayton and Tomlinson in their work, *The Law of Human Rights*, Oxford University Press, make the following observations as to the manner in which the European Court has approached the concept of deprivation contained in art.1 of the First Protocol (page 1308) :

> "The primary criterion for establishing a deprivation of property is the *extinction* of all of the legal rights of the owner by

> operation of the law or the exercise of a legal power to the same effect. However, not every such extinction will constitute a deprivation since the Court has treated some seizures of property as an aspect of control of use of property rather than as deprivations. Furthermore, there will also be a deprivation of property if its owner is deprived of all meaningful use of it.
>
> ...
>
> In the absence of a formal extinction of legal rights, the Court has been cautious in finding that interference might nevertheless amount to 'deprivation' in fact. Such a '*de facto* deprivation' can only be established where there has been a substantial interference with the enjoyment of possessions, contrary to law, without a formal divesting of the owner of title. Such circumstances will arise only rarely ..."

83. In looking to whether there has been a *de facto* deprivation, the underlying realities must be taken into account. That has been the approach of the European Court. In *Sporrong and Lonnroth v. Sweden* (1982) 5 E.H.R.R. 35 (para.63) the Court said :

> "In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearance and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are 'practical and effective', it has to be ascertained whether that situation amounted to a *de facto* expropriation, as was argued by the applicants."

84. In light of the underlying realities, has the Ordinance brought about a *de facto* deprivation of the property of public officers; namely, their pay and their rights to pay in terms of their contracts of employment? In my opinion, it has not. Pay has been reduced, yes, but only by the percentages stated in para.2 *supra*; that is, by 4.42% for upper band officers, 1.64% for those in the middle band and 1.58% for those in the lower band. Importantly, in my view, these reductions have been calculated by exact adherence to a long-established mechanism for

assessing the changing pay levels of public servants. In this regard, I made the following observation in the June judgment :

> "57. In my opinion, what must be noted — as Mr Fok, for the respondent, has emphasised — is that the Executive has sought legislation to reduce civil service pay not in order to meet a 'target figure' which had been unilaterally calculated as being fiscally prudent and which, in relation to the existing mechanism for adjusting pay, was entirely arbitrary but instead to reduce that pay entirely in accordance with the existing mechanism and with principles long accepted by both the Executive and the representatives of the civil service, one of those principles, indeed a founding principle, being the need for a 'broad comparability' between private and public sector pay."

85. Accordingly, while I accept that pay has been limited and rights under contract restricted, I fail entirely to see how it can be said that there has been such a substantial interference with either the pay of public officers or their rights in respect of pay in their contracts of employment as to constitute a 'deprivation' of their property in terms of art.105.

The challenge in respect of arts.25 and 39 : the issue of de facto discriminatory taxation

86. The applicant contended that the effect of the Ordinance is to impose a form of *de facto* taxation. That taxation, he said, is discriminatory in that it discriminates only against public officers as a single class of tax payers and even in respect of public officers discriminates in favour of a limited group of those officers; namely judicial officers and judges. In his notice of application, the applicant summarised his contention in the following terms :

> " Since public servants are remunerated from the general revenue, the pay reduction contributes directly to the general revenue and amounts to discriminatory *de facto* taxation that is not imposed on other classes of income taxpayers, including

judicial officers who are exempted under section 3(b) of the Ordinance ..."

87. The applicant submitted that this imposition of *de facto* discriminatory taxation offends art.25 of the Basic Law and art.39.

88. Art.25 guarantees that 'all Hong Kong residents shall be equal before the law'. Art.39 gives constitutional status to certain international agreements, among them the International Covenant on Civil and Political Rights ('the ICCPR'). The ICCPR is incorporated into Hong Kong law by means of the Hong Kong Bill of Rights. Art.22 of the Bill of Rights declares that :

> " All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status."

89. The applicant also made reference to art.21(c) of the Bill of Rights which states that :

> " Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions—
>
> (*a*) ...
>
> (*b*) ...
>
> (*c*) to have access, on general terms of equality, to public service in Hong Kong.
>
> [The distinctions mentioned in art.1(1) are distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.]"

90. Before looking to any possible issue of discrimination, the fundamental question is whether the Ordinance does in fact create a form of *de facto* taxation. In support of his submissions, the applicant made reference to two cases determined by the Supreme Court of the United States, *Evans v. Gore* 253 US 245(1920) and *United States v. Hatter* 532 US 557(2001). Both cases concerned art.3 of the United States Constitution which guarantees that federal judges' remuneration shall 'not be diminished during their continuance in office'. In the earlier case of *Evan v. Gore*, the Supreme Court held that income tax levied on judges and other citizens constituted an indirect diminution of the remuneration of judges and offended art.3. In the later case, the Supreme Court held that, although art.3 prohibits taxation that singles out judges for specially unfavourable treatment, it does not forbid Congress from enacting laws which impose a non-discriminatory tax upon them and other citizens. On the basis of these two authorities, the applicant submitted that, as income tax amounts to an indirect diminution of remuneration, it follows that a diminution of remuneration which benefits the public purse amounts to indirect taxation.

91. I do not agree. In my view, that submission constitutes a form of syllogism. While it speaks for itself that a tax may be employed as a device to reduce an otherwise constitutionally protected level of remuneration, I fail to see how it can be said that it must therefore follow that a reduction in remuneration which happens to benefit the public purse must be a form of indirect taxation.

92. I am satisfied that the reduction in pay effected by the Ordinance does not constitute a form of indirect taxation. The

relationship contemplated by the Ordinance is one of Government as employer and public officers as employees. The fact that the reduction in salary, because of the identity of the employer, benefits the public purse is purely incidental and cannot go to identifying the true nature of the meaning and intent of the Ordinance. In my view, the applicant's submissions in respect of art.25 are fundamentally misconceived.

93. During the course of his submissions, it appeared to me that the applicant's reliance on art.21(c) of the Bill of Rights was restricted to the issue of *de facto* discriminatory taxation and was not authority upon which he sought to argue independently that the Ordinance offended art.21(c) because it did not afford equal treatment to all public servants, judicial officers and judges receiving favourably discriminatory treatment. If, however, he was mounting an independent argument, I am of the view that there is no substance in that argument.

94. Access to the public service in Hong Kong is on 'general terms of equality'. In *R v. Man Wai Keung* (No.2) (1992) 2 HKPLR 164, the Court of Appeal per Bokhary J (as he then was) observed that—

> "Clearly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment. And any departure therefrom must be justified. To justify such a departure it must be shown: one, that sensible and fair-minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need."

95. In my judgment, the fundamental requirement in any society governed by the rule of law to ensure the independence of the judiciary was quite manifestly the reason why the Ordinance exempts judicial officers and judges from the pay reduction. Protection of judicial remuneration is given expression in numerous common law jurisdictions in constitutional or statute form as a means of ensuring judicial independence. That being so, the Ordinance, in departing from literal equality, did so, in my view, for a legitimate purpose and, in the absence of evidence to the contrary, must be held to have done so in a way that meets the three tests propounded in *Man Wai Keung*.

Conclusion

96. For the reasons given in the body of this judgment, I am satisfied that the application for judicial review must be dismissed.

97. As to costs, the applicant has earlier in the proceedings filed extensive written submissions as to why, even if unsuccessful in this matter, he should not in any way be penalised in costs. Accordingly, if the respondent seeks costs, then the matter should be set down for hearing so that oral submissions may be made.

(M.J. Hartmann)
Judge of the Court of First Instance,
High Court

Applicant, in person, present

Mr Joseph Fok, SC leading Mr Daniel Wan, instructed by Messrs Wilkinson & Grist, for the Respondent