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CB(1)1258/03-04(01)

HCAL 102/2003

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO.102 OF 2003

BETWEEN

SOCIETY FOR PROTECTION OF
THE HARBOUR LTD

Applicant

and

CHIEF EXECUTIVE IN COUNCIL

1st Respondent

SECRETARY FOR HOUSING,
PLANNING & LANDS

2nd Respondent

SECRETARY FOR ENVIRONMENT,
TRANSPORT & WORKS

3rd Respondent

Before : Hon Hartmann J in Court

Dates of Hearing : 9-16 February 2004

Date of Handing Down Judgment : 9 March 2004

J U D G M E N T

Introduction

1. In these proceedings, the applicant applies by way of judicial review to quash as unlawful certain decisions made by the respondents in

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the latter part of 2003, the final decision being made by the first respondent, the Chief Executive in Council, on 2 December 2003. The decisions were made in connection with an approved plan known as the Central District (Extension) Outline Zoning Plan No.S/H24/6 ('the Central OZP') and works which are now being carried out under that plan to reclaim some 18 hectares of Hong Kong's harbour.

2. In terms of the decisions challenged, the respondents refused a request made by the applicant to cease or suspend the reclamation works and to refer the Central OZP, at least in so far as it incorporates reclamation of the harbour, to the Town Planning Board ('the Board') for fresh consideration pursuant to s.12 of the Town Planning Ordinance, Cap.131.

3. The applicant is a limited liability company incorporated in 1998 for the purpose of ensuring that the Harbour Ordinance is honoured not in its breach but in its practical observance. The primary object of the applicant is therefore to take all steps necessary, including legal action, to protect and preserve Victoria Harbour from what it considers to be unlawful reclamation work and other encroachments which threaten the harbour's integrity.

4. The applicant has played a leading role in seeking to prevent excessive and/or unlawful reclamation of the harbour, more especially in recent years along the northern foreshore of Hong Kong Island. Its endeavours on behalf of the community have resulted in a material reduction of proposed reclamation works and, importantly, in bringing about a definitive interpretation by the Court of Final Appeal of s.3 of the

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Harbour Ordinance : a profoundly important guide for Government and the public alike.

5. The applicant's case is founded on the contention that, in so far as it makes provision for reclaiming land from the harbour, the Central OZP was prepared and thereafter approved by the Chief Executive in Council on the basis of a fundamental error of law, that error vitiating the lawfulness of the plan. That being the case, so it is argued, only a fresh consideration of the plan by the Board, following the procedures laid down in the Town Planning Ordinance, including public consultation, and the presentation of a new or amended plan to the Chief Executive in Council for his approval, is capable of restoring the legal validity of the plan.

6. The error of law vitiating the lawfulness of the Central OZP, at least in so far as it incorporates reclamation of the harbour, has been identified by the applicant as a misinterpretation and misapplication of s.3 of the Protection of the Harbour Ordinance, Cap.531 ('the Harbour Ordinance') which enshrines the harbour as a special public asset and a natural heritage of Hong Kong people. The Harbour Ordinance came into force on 30 June 1997. It is a succinct and in many ways unique piece of legislation. It contains just four sections, s.3 of which states :

" (1) The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour.

(2) All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them."

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7. As I have indicated, the present proceedings focus on reclamation works presently being carried out as part of the Central OZP. These works are situated along the northern foreshore of Hong Kong Island in the area which fronts Central. The works — known as the Central Reclamation Phase III engineering works ('the CR III works') — are strategically sited. First, they are sited at or near a point where Victoria Harbour is at its narrowest. Second, they are sited in what many would describe as the heart of the city, by which I mean is financial, commercial, retail and tourist heart.

8. It is not disputed that the Board, the statutory body responsible in terms of the Town Planning Ordinance for preparing the Central OZP, did prepare that plan on the basis of a misinterpretation and misapplication of s.3 of the Harbour Ordinance. That has been held to be so in a judgment of this court given by Chu J and handed down on 8 July 2003 : *Society for Protection of the Harbour Limited v. Town Planning Board* [2003] 2 HKLRD 787.

9. Chu J's judgment, holding that the Board did not apply the correct approach in interpreting the constraints imposed by s.3, was, in fact, given in respect of another plan; namely, the draft Wan Chai North District Outline Zoning Plan No.S/H25/1. That draft plan was prepared after the Board had prepared the draft Central OZP and had had that plan approved by the Chief Executive in Council. It is accepted, however, that the approach adopted by the Board in its preparation of the draft Wan Chai North District OZP ('the draft Wan Chai OZP') had earlier been adopted by it in preparing the Central OZP.

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10. Chu J's judgment that the Board adopted the wrong approach in respect of the constraints imposed by s.3 has since been confirmed, although on different principles, by the judgment of the Court of Final Appeal in the same matter (FACV No.14/2003). That judgment, however, was handed down on 9 January 2004, more than a month *after* the last of the decisions challenged by the applicant in these proceedings.

11. Following Chu J's judgment, the applicant communicated with the respondents asking them to review their positions. In particular, it sought to obtain the consent of the 1st respondent, the Chief Executive in Council, to either revoke the Central OZP or to remit it to the Board in terms of s.12 of the Town Planning Ordinance with all reclamation work being stopped until a new or amended plan could be approved. As I have said, the Chief Executive in Council declined to do so.

12. In terms of s.12 of the Town Planning Ordinance, the Chief Executive in Council does have a discretion whether to revoke a plan or refer it to the Board for review. S.12, in so far as it is relevant in these proceedings, reads as follows :

- “ (1) The Chief Executive in Council may—
- (a) revoke in whole or in part any approved plan; or
 - (b) refer any approved plan to the Board for—
 - (i) replacement by a new plan, or
 - (ii) amendment.

(2) ...

(3) Upon any reference under subsection (1)(b), a new plan in replacement of the plan referred or any amendment to the plan referred, as the case may be, shall be prepared, exhibited, considered, submitted, approved and deposited in accordance with the foregoing provisions of this Ordinance in like manner as the plan it replaces or amends ...”

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13. Ms Theresa Cheng SC, leading counsel for the respondents, has said that, being aware that the Board had prepared the Central OZP on the basis of a misinterpretation and misapplication of s.3 of the Harbour Ordinance, the Chief Executive in Council obtained advice whether the plan nevertheless met the more rigorous constraints imposed by a correct interpretation of s.3. In light of the advice received, and having regard to all relevant factors — including the continuing obligation to look to the preservation of the harbour — the Chief Executive in Council, in the exercise of the discretion given to him pursuant to s.12 of the Town Planning Ordinance, determined on 2 December 2003 that the reclamation being effected by the CR III works *did* meet the requirements of s.3 and was therefore lawful. Accordingly, he exercised his discretion not to revoke the Central OZP itself or to remit it to the Board for review. In the result, work has continued to effect reclamation in terms of the plan.

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14. On behalf of the respondents, Ms Cheng has contended that this decision by the Chief Executive in Council not only lay within his powers given to him by the Town Planning Ordinance but was a rational decision in that it was a decision open to a reasonable decision-maker. The applicant, however, has sought to make the case that that decision was not in accordance with the Town Planning Ordinance and was therefore made *ultra vires*. Or, if found to be within the powers of the Chief Executive in Council, the decision was not, in light of all the circumstances, especially the *continuing* duty to preserve the harbour, a decision open to a reasonable decision-maker.

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15. It is to be emphasised that in these proceedings the applicant has *not* sought to obtain an order of certiorari quashing the Central OZP itself.

16. That being said, when the hearing commenced before me, counsel for the applicant did seek to argue, as I understood it, that, when Chu J's judgment was handed down in July 2003, it rendered the reclamation works and through those works the Central OZP '*ultra vires* and a nullity', there being no degrees of nullity. However, by the time final submissions were made, it was no longer contended that Chu J's judgment had rendered the Central OZP a nullity and therefore, as from July 2003, of no force or effect for any purpose. As I understood it, it was by then accepted that Sir John Donaldson M.R. in *R v. Panel on Take-Overs and Mergers, ex parte Datafin Plc & Others* [1987] 1 QB 815, at 840, had reflected the true position in law when he said :

" I think that it is important that all who are concerned ... should have well in mind a very special feature of public law decisions, ... namely that however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction. Furthermore, the court has an ultimate discretion whether to set them aside and may refuse to do so in the public interest, notwithstanding that it holds and declares the decision to have been made *ultra vires* ..."

17. The authors of *de Smith, Woolf and Jowell, Judicial Review of Administrative Action*, 5th ed. para.5-048 express the position today in the following terms :

" Decisions are ... presumed lawful unless and until a court of competent jurisdiction declares them unlawful. There is good reason for this: the public must be entitled to rely upon the validity of official decisions and individuals should not take the law into their own hands. These reasons are built into the

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procedures of the application for judicial review, which requires for example an application to quash a decision to be brought within a limited time. A decision not challenged within that time, whether or not it would have been declared unlawful if challenged, and whether or not unlawful for jurisdictional error, retains legal effect. So does a decision found to be unlawful but where a remedy is, in the court's discretion, withheld."

18. Following the words of Sir John Donaldson in *ex parte Datafin*, what has been emphasised by Ms Cheng, for the respondents, is that the present reclamation works; that is, the CR III works, are being carried out pursuant to an authorisation lawfully made by the Chief Executive in Council in terms of s.8 of the Foreshore and Sea-bed (Reclamations) Ordinance, Cap.127, that authorisation having been made as long ago as 18 December 2001 and gazetted on 11 January 2002. That authorisation is integral to the Central OZP which was itself lawfully approved by the Chief Executive in Council in terms of s.9 of the Town Planning Ordinance, Cap.131, as long ago as 17 December 2002, that approval being gazetted on 27 December 2002.

19. On behalf of the respondents, it has also been emphasised that, when the Central OZP was in the course of preparation, the applicant lodged an objection to the extent of the reclamation work then envisaged. That objection resulted in a very material reduction in the area of reclamation contained in the final draft plan of the Central OZP put before the Chief Executive in Council for approval : a reduction from 38 to some 20 hectares. The applicant, said Ms Cheng, still having reservations as to the extent of reclamation contained in the final draft, had the opportunity at that time to object to the lawfulness of the draft Central OZP; that is, before it went before the Chief Executive in Council in late

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2002. It made an informed decision not to take that opportunity. In the result, the approved plan has been relied upon and acted upon for almost a year before the institution of the present proceedings.

20. In light of these matters, the applicant has not sought by direct means to obtain an order quashing the OZP itself. If it had attempted to do so it would have faced profound difficulties in respect of the issue of delay. Instead, in these proceedings — as its primary and decisive challenge — the applicant has looked to far more recent administrative action; namely, the decision (or decisions) made by the Chief Executive in Council in the latter part of 2003 in terms of s.12 of the Town Planning Ordinance not to revoke the approved Central OZP or to remit it to the Board for review.

21. By the end of the proceedings before me, it was apparent that two core questions had arisen out of the applicant's challenge. They may be described as follows :

(i) Was the Chief Executive in Council entitled in law, in terms of the Town Planning Ordinance, to review the CR III works himself, making the decision as to whether, as they stood, they met the constraints (as interpreted by Chu J) of s.3 of the Harbour Ordinance or was he obliged, either by way of revocation or referral, to remit the matter back to the Board for a full review in terms of the Town Planning Ordinance? In short, was he acting *intra* or *ultra vires*?

(ii) If the Chief Executive in Council was acting *intra vires*, was the decision made by him a decision open to a reasonable decision-maker or was it, in all the circumstances, especially

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the continuing need to look to the preservation of the harbour,
a decision that was not open to a reasonable decision-maker?

22. On the basis that question (i) or, failing that, question (ii), are
determined in its favour, the applicant, in its amended papers, has sought
the following primary remedy; namely that—

“An Order of Certiorari be granted to remove into the High
Court and quash the decision of the Chief Executive in Council
dated 24 September 2003 and/or 2 December 2003 refusing to
revoke the Approved Central District (Extension) Outline Zoning
Plan No. S/H24/6, or to refer the said Plan to the Town Planning
Board for reconsideration.”

23. In so far as it may be necessary, the applicant has also sought
the granting of the following order of certiorari; namely—

“ ... to remove into the High Court and quash the decisions of
the Secretary for Housing, Planning, and Lands and the Secretary
for Environment, Transport and Works (both dated 24 September
2003) with regard to the continued implementation of Approved
Central District (Extension) Outline Zoning Plan No. S/H24/6
insofar as reclamation of the Harbour is concerned.”

24. The applicant has in addition sought the following declaration;
namely—

“ ... that the Approved Central District (Extension) Outline
Zoning Plan No. S/H24/6 having been prepared and approved on
the basis of a fundamental error of law, namely,
a misinterpretation and misapplication of Section 3 of the
Harbour Ordinance should, on a proper interpretation of the
Town Planning Ordinance, be reviewed by the Town Planning
Board.”

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25. Finally, to secure a suspension or cessation of the present reclamation, the applicant has sought injunctive relief on the basis that, pending a review by the Board—

“ ... all steps, proceedings and actions directly or indirectly taken and/or to be taken by the 1st, 2nd and 3rd Respondents and their subordinates agents and servants with regard to the continued implementation of the Approved Central District (Extension) Outline Zoning Plan No. S/H24/6 insofar as the reclamation of the Harbour is concerned, be stayed.”

The Central OZP : part of a broader strategy

26. The Central OZP and the reclamation works which form part of it do not stand in isolation. The evidence shows that they were approved by the Chief Executive in Council as part of a broad strategy for the development of Hong Kong and, in respect of Hong Kong Island itself, for the provision along its northern shore of road and rail facilities and other forms of infrastructure.

27. In his affirmation of 2 October 2003, Mr Cheung Tai Yan of the Territory Development Department, the project manager of the CR III works, spoke of the history of this development strategy in the following terms :

“ The need for reclamation has been established in a strategic planning study entitled ‘Study on Harbour Reclamation and Urban Growth’ undertaken between March 1982 and October 1983. The study recommended reclamation to be carried out at several parts of the Harbour to provide land to meet the growth requirements of Hong Kong. These recommendations formed part of the basis of the Territory Development Strategy. In September 1991, the Executive Council endorsed the Metropolitan Selected Strategy, which recommended various reclamation projects in the Harbour areas. These were later confirmed in the Territorial Development Strategy Review 1996.

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In 1987, TDD [Territory Development Department] commissioned an independent consultant to conduct the Central and Wan Chai Reclamation Feasibility Study ('First Feasibility Study') to determine the engineering feasibility of reclamation. This was completed in September 1989. The First Feasibility Study proposed a Recommended Outline Development Plan to guide the development of the reclamation area. It also proposed reclamation to be carried out in five phases."

28. The 'First Feasibility Study', as Mr Cheung has described it, was, of course, completed almost a decade before the Harbour Ordinance came into force. By the time the Ordinance came into force, three of the five phases recommended in terms of that study had been completed or were close to completion. The three phases are :

- (i) The Central Reclamation Phase I which *inter alia* accommodated the Hong Kong Station for the Airport Railway. This was completed in 1998;
- (ii) The Central Reclamation Phase II which resulted in the reclamation of the Tamar Basin. This was completed in September 1997, and
- (iii) The Wan Chai Reclamation Phase I which allowed for the extension into the harbour of the Hong Kong Convention and Exhibition Centre. This was completed in July 1997.

29. That leaves just two phases of reclamation still to be completed. The first of these remaining phases is the reclamation (some 18 hectares in extent) being carried out in terms of the CR III works. This work, as I have indicated, is in its early stages. The second remaining phase, known as the Wan Chai Reclamation Phase II, is, as I understand it, integral to the draft Wan Chai OZP which, in terms of the judgments of Chu J (and now the Court of Final Appeal), has been

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remitted to the Board so that that it may be prepared in accordance with the correct interpretation of s.3 of the Harbour Ordinance.

30. In its preparation of the Central OZP, the Board recommended the present extent of reclamation on the basis that it was required to contain three major infrastructural projects. These projects may be described as follows :

- (i) The Central-Wan Chai Bypass which will link up the Rumsey Street Flyover on the western side of Central and the Island Eastern Corridor on the eastern side of Wan Chai so that 'through traffic' may be diverted around Central.
- (ii) The Road P2 Network which will enhance traffic flow to and from Exchange Square, the Airport Railway Station, the two International Finance Centre buildings and the ferry piers, these structures having already been built.
- (iii) The over-run tunnel on the Airport Express and Tung Chung Railway lines which will enhance capacity for the airport railway without incurring any safety risk.

31. Government planners, in various affirmations presented in evidence, have spoken of the overriding public need for these three projects. In his first affirmation Mr Cheung Tai Yan said that the CR III works will make provision for a 'vital conduit for essential road, rail and other infrastructure' and will also allow the construction of a 'vibrant waterfront' along the foreshore of Central of 'international standard and design'. That waterfront, according to plans placed into evidence, is to contain a sweeping promenade built over the by-pass tunnel.

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32. It is apparent that the two remaining phases of reclamation work are planned as extensions of each other. They are therefore entirely complementary, the one being of very reduced value without the other. This is because the proposed reclamation in Central and in Wan Chai will provide for the Central-Wan Chai Bypass which, as I have indicated, is intended to divert traffic around the Central business district (and Wan Chai) as opposed to channeling traffic through it.

The view of the applicant concerning reclamation work along the Central waterfront

33. When the Central OZP was in the course of preparation, those representing the applicant did not — at that time — object in principle to the construction of the Central-Wan Chai Bypass. Some degree of reclamation was therefore accepted at that time by the applicant and by Government planners as being necessary. Indeed, at the time when the Central OZP was in the course of preparation the applicant had a plan prepared which showed how the bypass could be contained within what it considered to be a minimum amount of reclamation.

34. However, in light of the judgment of Chu J and the judgment now handed down by the Court of Final Appeal, the applicant contends that the Central OZP has been shown to be a 'flawed plan' and thereby the CR III works similarly flawed. This makes it imperative that all concerned 'go back to the drawing board'. In this regard, in her affidavit sworn on 2 February 2004, Ms Christine Loh said :

“ The Respondents have a duty to ensure that they individually as well as the Government's duty is properly discharged (*sic*) not by some non-transparent, internal review process but by a transparent one, which can only be done if [the

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Central reclamation] is referred back to the Town Planning Board. The Society believes there is no substitute for [the extent, if any, of reclamation] to go through a proper review under the Town Planning Ordinance because it is only under this statute that the public has a right to make submissions.

The Society sincerely believes that the proper course of action is for the Respondents to immediately order the stop of all works relating to [the reclamation] and refer the flawed Central OZP back to the Town Planning Board for review and amendment according to the 'overriding public need' test prescribed by the Court of Final Appeal judgment."

35. Expressed in broad conceptual terms, it is the applicant's case, as I understand it, that s.3 of the Harbour Ordinance, as it is now interpreted by our courts, obliges the respondents to set aside what has been determined on an inherently flawed basis and, in order to comply with s.3, to consider all options that may avoid the need for reclamation. These options, by way of example, would include methods of traffic control that do not require reclamation in order to build new roads and tunnels.

36. The applicant has also laid emphasis on the fact that, as the draft Wan Chai OZP has now, in terms of both Chu J's judgment and the judgment of the Court of Final Appeal, been referred back to the Board for fresh consideration, it would, in terms of public administration, be 'illogical' for the Chief Executive in Council not to refer the Central OZP itself back to the Board. This is because, as I have earlier indicated, in terms of harbour reclamation, both schemes are complementary, the one being an extension of the other. In this regard, Ms Loh made the following observations in her affidavit :

" If the CR III works were now allowed to proceed, then the Town Planning Board's hands will be tied and it will be unable to carry out a genuine and proper reconsideration of the

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Wan Chai reclamation which could not be what the Court of Final Appeal intended or what the public would expect. Indeed, the consequence of allowing the CR III works to proceed would be to make the Court of Final Appeal judgment nugatory.

Since the CR III works and the Wan Chai reclamation are really two parts of one plan with the proposed Central Wan Chai Bypass running from Central through Wanchai to Causeway Bay, there is no reason to rush through with CR III works at this moment in time. Indeed, it is illogical for the Respondents to insist that the CR III works must proceed now since the Central Wan Chai Bypass would be redundant or too wide if the Wanchai-Causeway part of the highway is not built or if the Town Planning Board decides that 4 lanes will be sufficient instead of the present six lanes. Unless and until the Town Planning Board re-approves the Wan Chai reclamation with the existing Central Wan Chai Bypass the present need claimed by the Respondents in proceeding with CR III works is not demonstrated."

Is this court concerned with the 'merits' of viable alternatives?

37. A good deal of evidence has been filed in these proceedings concerning the merits of reclamation work. Evidence filed by the applicant is to the effect that reclamation along the Central (and Wan Chai) foreshore does not constitute a compelling and overriding public need, there being a number of viable alternatives. Evidence filed by the respondent is to the opposite effect.

38. But, as I made clear during the course of the hearing, it is not the function of this court to decide the merits. Judges are not appointed to administer Hong Kong. The Basic Law recognises the separation of powers. Boundaries, therefore, exist between the executive, the legislature and the judiciary and it is, I believe, imperative that in cases of this kind which excite public interest the courts must be careful not to overstep those boundaries.

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39. The evidence that has been filed, however, is not, in my view, completely lacking in relevance. It does go to show that there are two conflicting schools of opinion, both reasonably and passionately held, and, on their face, both deserving of recognition. But, to repeat what I have said above, the degree to which one school of thought may be preferred above the other is not a matter for this court. It is a matter for those in whom the law has vested the relevant responsibility.

One or two decisions by the Chief Executive in Council?

40. When these proceedings were commenced in September 2003, the applicant identified only one decision of the chief Executive in Council as being the subject of its application; namely, a decision conveyed to it in terms of a letter dated 24 September 2003. That letter came from the Department of Justice. It made reference to earlier letters from the applicant to the three respondents in the present proceedings and purported to speak for all of those respondents. In part, the letter read as follows :

"I have been instructed to inform you as follows:

- (1) ... the Director of Territory Development, in consultation with his consultants, the Transport Department and the Highways Department, has initiated a review of Central Reclamation Phase III to ascertain if it meets the three tests set out in the Judgment. *The Government is satisfied that the reclamation works currently underway are in compliance with the three tests, and are hence lawful.* We therefore deny your allegation that the Central Reclamation Phase III is in contravention of section 3 of the Protection of the Harbour Ordinance, Cap 531.
- (2) In light of the above, the Government does not agree that an undertaking as requested should be given. In any event, we are of the view that the balance of convenience militates against the granting of an injunction in the present circumstances of this case."

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41. Counsel for the respondents, Ms Cheng, has contended that this letter did not make reference to a 'decision' made by the Chief Executive in Council (or the other respondents) but simply stated a 'view' held at that time. There was therefore, at the time when the applicant issued its proceedings, no administrative decisions capable of review.

42. However, the issue of whether the letter of 24 September 2003 did or did not speak of a 'decision' by the respondents fell away when, during the course of the hearing, I granted leave to the applicant to amend its papers to include a decision made by the Chief Executive in Council on 2 December 2003.

43. During the course of the hearing, it was accepted that the lawfulness of the decision (I will use the singular) of the Chief Executive in Council would determine this matter, the decisions of the other respondents being subservient to that decision and essentially consequential upon it.

Government's review of the CR III works

44. Evidence that a decision had been made by the Chief Executive in Council on 2 December 2003 was contained in an affirmation of Mr Cheung Tai Yan affirmed on 3 December 2003. In that affirmation, Mr Cheung said that, after the handing down of Chu J's judgment in July 2003, the Government had initiated a review of the CR III works to ascertain whether they met the constraints imposed by that judgment. Mr Cheung said that an engineering review had been conducted by various departments of Government in consultation with outside consultants.

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Results of that review had been submitted to an independent expert, Professor Y.S. Li, Chair Professor of Coastal and Environmental Engineering and Head of the Civil and Structural Engineering Department of the Hong Kong Polytechnic University. Professor Li had concluded that the report 'has convincingly demonstrated that the CR III reclamation can comply with the three tests laid down in [Chu J's] judgment'.

45. Mr Cheung went on to say the following :

" The report has also been submitted to the 1st Respondent [the Chief Executive in Council] for his consideration. On 2 December 2003, the Chief Executive in Council, having reviewed the report and deliberated upon it, decided that there was no need to revoke the Central District (Extension) Outline Zoning Plan No.S/H24/6 or to refer it to the Town Planning Board for reconsideration under section 12 of the Town Planning Ordinance."

46. More details of this decision were contained in the third affirmation of Mr Chan Pun Chung, Deputy Director of the Planning Department, who said :

" In relation to the Chief Executive in Council's decision of 2 December 2003 not to revoke the Central OZP or to refer it to the Board under section 12 of the Town Planning Ordinance, I am advised by Mr Bosco Fung, Director of Planning, and verily believe that *in deciding whether the reclamation under CR III was justified in accordance with the 3 tests propounded by Madam Justice Chu in her judgment of 8 July 2003*, the Chief Executive in Council took into account all relevant circumstances existing at the time including, *inter alia*, the transport, contractual, financial, economic, environmental and sustainability implications. The Review Report of November 2003 and Professor Li's views endorsing that report were only two of the many matters taken into account by the Chief Executive in Council on 2 December 2003."

[my emphasis]

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47. It will be seen from Mr Chan's affirmation that the decision made by the Chief Executive in Council on 2 December 2003 was a decision focused not on the Central OZP as a whole (which incorporates some 20 hectares of reclamation) but on whether the reclamation involved in the CR III works (some 18 hectares) complies with Chu J's judgment.

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The relevant judgment

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48. When an administrative decision is challenged in judicial review proceedings, that challenge must be based on material that was before the decision-maker or available to him at the time the decision was made. In the present case, at all material times, the law as to the proper interpretation of s.3 in the Harbour Ordinance was contained in the judgment of Chu J. As I perceive it, therefore, the lawfulness of the decisions challenged in these proceedings must be viewed within the context of Chu J's judgment and not within the context of the judgment handed down on 9 January 2004 by the Court of Final Appeal.

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An academic challenge in light of a fresh review?

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49. During the course of the hearing Ms Cheng, for the respondents, said that, in light of the determinative judgment of the Court of Final Appeal, Government was now conducting a fresh review to ascertain whether the CR III works complied with the test laid down in that judgment and the Chief Executive in Council was expected to make a new decision in terms of s.12 of the Town Planning Ordinance. Ms Cheng submitted that in the circumstances the applicant's proceedings, founded on decisions made by the respondents prior to the Court of Final Appeal's judgment, was rendered academic.

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50. For my part, I reject the suggestion that the applicant's present challenge has been rendered academic. No indication was given during the hearing as to when this fresh review will be completed and the results placed back before the Chief Executive in Council. In the meantime, the decision made by the Chief Executive in Council in the latter part of 2003 not to suspend the CR III works means that reclamation works are continuing and land is being claimed from the waters of the harbour. There is, therefore, a real issue at stake in the applicant's present application and this judgment is sought to resolve that issue not merely to act as an advisory opinion as to possible future conduct.

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An examination of Chu J's judgment

51. The present application, as I have said, must be considered within the context of Chu J's judgment.

52. Chu J's judgment determined that the approach to s.3 of the Harbour Ordinance adopted by the Board was inadequate. The approach adopted by the Board had been to the following effect; namely, that the statutory presumption contained in s.3 created a compulsory material consideration — it was a consideration, therefore, that had to be taken into account — but it was taken into account by carrying out a weighing exercise in order to decide whether the public benefit of reclamation would outweigh the need to preserve the harbour.

53. In her judgment, Chu J held that a correct interpretation of s.3 was more rigorous than a matter simply of weighing material considerations. Three tests were set. There had to be (a) a compelling,

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overriding and present public need which clearly outweighed the public need to protect the harbour. That need had to be demonstrated by showing on the basis of clear, cogent and objective evidence that (b) there was no viable alternative and (c) that any reclamation was the minimum necessary.

54. While Chu J held that the Board's interpretation of s.3 was inadequate, she did accept that, on a more general basis, in a 'statement of intent on reclamation' the Board had expressed itself in terms which went beyond a mere balancing or weighing exercise. That statement, as cited in Chu J's judgment (para.63), was to the following effect :

"The Harbour is to be protected and preserved as a special public asset and a natural heritage of the people of Hong Kong. Reclamation in the Harbour should only be carried out to meet essential community needs and public aspirations. It has to be environmentally acceptable and compatible with the principle of sustainable development and the principle of presumption against reclamation in the Harbour."

55. Chu J did not appear to have dismissed this statement as being wholly misguided. As to the principle of 'sustainable development' contain within that statement of intent, Chu J said (para.87) that such development requires that—

"... development must meet the needs of the present without compromising the ability of future generations to meet their own needs. It follows that any attempt to deplete what may be regarded as a natural heritage, has to be justified by *compelling overriding public need*. The Board's approach towards reclamation and the presumption under s.3 of the Harbour Ordinance, seen in this light, is clearly inadequate."
[my emphasis]

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56. Compelling and overriding public need would, of course, exclude reclamation for purposes of building facilities that were merely desirable or simply good to have.

The role of the Chief Executive in Council

57. The powers and responsibilities of the Chief Executive in Council exercised pursuant to the Town Planning Ordinance lie at the heart of this application. To understand the nature and extent of those powers and responsibilities, something must therefore be said of the Town Planning Ordinance itself :

(i) The purpose of the Ordinance is stated in the following terms; namely, to-

“promote the health, safety, convenience and general welfare of the community by making provision for the systematic preparation and approval of plans for the lay-out of areas of Hong Kong as well as for the types of building suitable for erection therein and for the preparation and approval of plans for areas within which permission is required for development.”

(ii) Under s.3 of the Ordinance, the Board is given the duty of preparing draft plans for the lay-out of such areas as the Chief Executive may direct. The Board may therefore only act on the originating instructions of the Chief Executive. In so far as it is relevant, s.3 is to the following effect :

“ (1) With a view to the promotion of the health, safety, convenience and general welfare of the community, the Board shall undertake the systematic preparation of—

(a) draft plans for the lay-out of such areas of Hong Kong as the Chief Executive may direct, as well as for the types of building suitable for erection therein; and

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(b) draft development permission area plans of such areas of Hong Kong as the Chief Executive may direct."

(iii) The physical task of preparing plans and sketches — if I may so express it — is invariably delegated to the administrative arms of Government. In this regard reg.2 of the Town Planning Regulations states :

" The Chairman of the Board may require the Director of Planning to prepare any plan or sketch under the direction of the Board which in the Chairman's opinion is required for the carrying out of the duties of the Board in relation to any area which is subject to a direction of the Chief Executive under section 3."

(iv) The Ordinance makes specific provisions for public involvement in the preparation of draft plans. In this regard, s.5 of the Ordinance provides that draft plans prepared under the direction of the Board must be exhibited for public inspection for a period of two months. In terms of ss.6(1) and (2), any person affected by a draft plan that has been exhibited may send to the Board within a prescribed period of time a detailed statement of his objections and any proposals for amendment. The Board is given the power pursuant to ss.6(3) to (5) to give preliminary consideration to any such objections and to propose amendments to the draft plan to meet them. After being notified by the Board of any proposed amendments, the objector may withdraw his objections.

(v) In terms of s.6(6), where the Board does not propose amendments to a draft plan or any objections are not withdrawn, the Board must consider the objections at a meeting. The objector must be given reasonable notice of

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the meeting and be invited to attend if he wishes in order to be heard.

(vi) Where the Board makes an amendment to meet an objection and the amendment appears to the Board to affect any land, other than that of the objector, the Board is required in terms of s.6(7) to give notice of the amendment. Objections to that amendment may be made and considered at a meeting of the Board.

(vii) After all objections have been considered, the Board is obliged in terms of s.8 of the Ordinance to submit a draft plan to the Chief Executive in Council for approval. In this regard s.8 read :

“ After consideration of all objections, the Board shall submit the draft plan, with or without amendments, to the Chief Executive in Council for approval, and shall submit therewith—

(a) a schedule of the objections (if any) made under section 6 and not withdrawn;

(b) a schedule of the amendments (if any) made by the Board with a view to meeting such objections.”

(viii) It will be seen that, in terms of s.8, it is not only the draft plan which is submitted to the Chief Executive in Council for approval. The plan must be accompanied by a schedule of objections and any amendments made. A bare schedule, of course, is of little value and I am informed that the schedule submitted is one that contains all necessary details of objections and amendments.

(ix) Upon receipt of a draft plan, the powers of the Chief Executive are defined in s.9(1) of the Ordinance. That section (in so far as it is relevant) reads :

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“ Upon submission of a draft plan the Chief Executive in Council may—

(a) approve it;

(b) refuse to approve it;

(c) refer it to the Board for further consideration and amendment.”

(x) It is to be noted that, in terms of s.9(2), the Chief Executive in Council may approve a draft plan notwithstanding that any requirements of the Ordinance have not been complied with.

(xi) Once a plan has been approved, it is known as an ‘approved plan’ and must be exhibited for public inspection. In terms of s.13 of the Ordinance, all public officers and public bodies are obliged to use the approved plan as guidance in the exercise of their powers.

(xii) In terms of s.14 of the Ordinance, the power to make relevant regulations is vested in the Chief Executive in Council.

(xiii) Approved plans, of course, are not set in stone. In terms of s.12 of the Ordinance, the Chief Executive in Council is given the power to revoke an approved plan, either in whole or in part, or to refer it to the Board for replacement or amendment. S.12 has already been cited but, in looking to the Ordinance as a whole, it bears citing a second time :

“ (1) The Chief Executive in Council may—

(a) revoke in whole or in part any approved plan; or

(b) refer any approved plan to the Board for—

(i) replacement by a new plan, or

(ii) amendment.

(2) ...

(3) Upon any reference under subsection (1)(b), a new plan in replacement of the plan referred or any amendment to the plan referred, as the case may be, shall be prepared, exhibited, considered, submitted, approved and deposited in

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accordance with the foregoing provisions of this Ordinance
in like manner as the plan it replaces or amends ...”

58. During the course of the hearing it was said that, in terms of the Town Planning Ordinance, the legislature had seen fit to make the Chief Executive in Council ‘the fountainhead’ of planning matters, the source from which planning powers spring and are returned. That, I believe, must be so. The Chief Executive in Council instructs the Board to prepare a plan; he may approve or reject recommendations placed before him by the Board even if it is shown that not all the requirements of the Ordinance (which I take to be procedural requirements) have been met. The power to revoke an approved plan or to seek its amendment rests entirely with him.

59. On behalf of the applicant, however, Mr Mok sought to emphasise that the Ordinance distinguishes between the ‘executive powers’ given to the Chief Executive in Council and the ‘planning powers’ given to the Board. The Chief Executive in Council, he said, may be given the power to direct that a plan be prepared but he is given no power to prepare it. He may be given the power to approve or not approve a draft plan or to return it for reconsideration to the Board but he is not given the power to reconsider it himself and to make any amendments that he deems proper. Similarly, and of direct relevance in these proceedings, the Chief Executive in Council may be given the power in terms of s.12 of the Ordinance to revoke an approved plan in whole or in part or to refer it to the Board for replacement or amendment but is not given the power himself to go through the process of deciding how best to replace it or amend it. In short, it is for the Board to make detailed planning decisions

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A while it is for the Chief Executive in Council to determine whether those
B detailed planning decisions are acceptable or not. As I understood his
C argument, Mr Mok submitted that the Ordinance did not therefore permit
D the Chief Executive in Council to make planning decisions as such but
E only executive decisions concerning planning decisions.

F 60. While I agree that the Ordinance does not give the power to
G the Chief Executive in Council to go about the business of preparing draft
H plans or modifying approved plans, I do not agree that the Ordinance
I prohibits the Chief Executive in Council from making what Mr Mok has
J described as 'planning decisions'. To the contrary, I am satisfied that the
K Ordinance obliges the Chief Executive in Council to make planning
L decisions, often of a detailed nature, in a variety of circumstances.

M 61. In *Kwan Kong Company Limited v. Town Planning Board*
N [1996] 2 HKLR 363, at 373 and 374, Litton VP (as he then was) held that
O the Board, in terms of the powers given to it in the Ordinance, conducts an
P administrative consultative process designed to enable it to take into
Q account all shapes of opinion before forming a view as to the final form of
R its recommendations to be made to the Chief Executive in Council. But it
S is the Chief Executive in Council, not the Board, who must determine the
T 'final form' of the plan. In this regard, Litton VP cited with approval
U observations made in an earlier first instance judgment in which it had
V been said that---

"The Board's decision is decisive on the question whether the draft plan should go to the [Chief Executive] amended or unamended but it is not decisive of the question of the final form of the OZP. That decision which does determine rights is for the [Chief Executive in Council]."

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62. It must be remembered that, when a draft plan is submitted by the Board in terms of s.8 of the Ordinance, that draft must be accompanied by schedules detailing objections made to the Board during the course of its preparation of the draft plan and any amendments that have been made by the Board. There can only be one purpose for the obligation to submit these schedules. It is to enable the Chief Executive in Council to consider the draft plan in substance. Unless he considers the draft plan in substance how can he decide whether it should be approved, not approved or returned for reconsideration and, if returned for consideration, returned in what respect?

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63. Similarly, in my view, when the Chief Executive in Council exercises his powers pursuant to s.12 of the Ordinance to consider revoking an approved plan in whole or in part or referring the plan to the Board for replacement or amendment he is again under a duty to consider the substance of all relevant matters that are, or should be, placed before him. How else can he properly decide whether, for example, to revoke a plan in full or only in part and, if in part, which part?

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64. What must be remembered is that, in fulfilling his duties in terms of the Town Planning Ordinance, the Chief Executive in Council looks not only to the collective knowledge, experience and expertise of those persons who sit on the Council with him but also to those public officers who are best positioned to advise him. That the Chief Executive in Council lawfully fulfils his duties in this manner has long been recognised by the courts. In *Bushell v. Secretary of State for the Environment* [1981] AC 75, at 95, Lord Diplock said :

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“ To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament’s intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is political head. *The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister’s own knowledge, his own expertise.*” [my emphasis]

65. The principle stated by Lord Diplock in *Bushell* has equal application in Hong Kong. In *Kaisilk Development Ltd v. Secretary for Planning, Environment and Lands* (unreported) HCAL 148/1999, Cheung J (as he then was) said :

“ Hong Kong does not have the ministerial system of government. However, in my view the Secretary is clearly entitled to rely on the collective knowledge, experience and expertise of the government officials serving directly or indirectly under his Bureau.”

Was the Chief Executive in Council acting ultra vires when he decided not to remit the Central OZP to the Board?

66. It is the applicant’s contention that in the present case, having regard to the three tests laid down by Chu J in her judgment, it was not open to the Chief Executive in Council to determine whether the Central OZP met those tests without usurping the powers given to the Board. The applicant has put it this way. The three tests may only be considered and determined by taking into account a range of policy studies and choices. But undertaking that exercise is the essence of the duty imposed on the

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Board in terms of the Town Planning Ordinance, a duty which is to be discharged by allowing for full public participation. It is the applicant's contention that, upon a proper construction of the Town Planning Ordinance, the legislative intent is clear in cases of this kind. When a plan has been prepared on the basis of a fundamental error of law and thereby vitiated, that plan must be remitted to the Board so that the Board may, in accordance with the statute, take the necessary steps to rectify the error.

67. The applicant's contention, of course, begs the question of whether, in light of Chu J's judgment, the lawfulness of the Central OZP has in fact been vitiated. It is the case for the respondents that, even if the 'administrative consultative process' adopted by the Board was marred by a material error of approach in respect of s.3 of the Harbour Ordinance, the resulting plan, lawfully approved and acted upon, may nevertheless accord with a correct interpretation of that section. Whether it does or does not is a question of fact. The determination of that question may require a 'planning decision', as Mr Mok described it, but it is a decision which the Chief Executive has the exclusive jurisdiction to make.

68. In my judgment, the respondents' case in this regard must be correct. Put simply, the Board may adopt a wrong approach in law but nevertheless create a draft plan which, after it has been approved, is demonstrated nevertheless to accord with a correct approach. It was, I think, Ms Cheng who said during the course of submissions that there may be a right road and a wrong road but both may reach the same desired destination. In looking to administrative decisions, that seems to me to be an apt analogy.

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69. I can read nothing in the Ordinance to the effect that an error of law of the kind demonstrated in Chu J's judgment must by that fact alone vitiate an administrative plan prepared and approved under that Ordinance. In respect of an approved plan such as the Central OZP — and I restrict myself to the matter only of approved plans, not those in preparation — what is to be considered is the plan itself. Does it, as it stands, accord with the correct approach? If it does then, as it stands, it accords with law.

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70. In my judgment, in determining that the Central OZP, in so far as it incorporates reclamation of the harbour, does accord with the principles stated in Chu J's judgment, the Chief Executive in Council was not going through a process of deciding how best to replace or amend the plan and was not usurping the powers of the Board. He was doing no more than exercising his discretion in terms of s.12 of the Ordinance to determine whether the plan did or did not require revocation or amendment.

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71. I am therefore satisfied that the Chief Executive in Council did have the power in terms of s.12 of the Town Planning Ordinance to make the decision he did. He was not acting *ultra vires*.

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72. That leaves one question; namely, whether the decision of the Chief Executive in Council was an unreasonable decision as that is understood in administrative law.

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The issue of 'reasonableness' : an outline of the challenge

73. It is the applicant's case that the decision of the Chief Executive in Council not to remit the Central OZP to the Board was a decision that was not open to a reasonable decision-maker. It is said that in the present case, having regard to all the circumstances, the Chief Executive in Council did not act within the bounds of his discretion. As I understand it, this challenge to the reasonableness of the Chief Executive's decision rests on three bases :

- (i) It is said that the Chief Executive in Council did not and indeed could not have taken proper account of Chu J's three tests or, to express it in more familiar public law terms, he neglected to take into account those matters which he ought to have taken into account.
- (ii) It is said that once it is accepted that the Central OZP, in so far as it incorporates reclamation, was prepared by the Board on the basis of a fundamental misinterpretation of the law, and once it is accepted that the Chief Executive in Council himself had to make his decision within the law; that is, by adhering to Chu J's three tests, then the Chief Executive in Council, if he was to act reasonably, had no option but to refer the plan to the Board for reconsideration because, as Mr Mok, in his closing submissions expressed it, the nature of Chu J's three tests is such that the Chief Executive in Council was simply not in a position to apply those tests without undertaking a planning exercise of his own.
- (iii) Finally, it is said that the Chief Executive in Council was unable to lawfully determine whether the Central OZP complied with Chu J's three tests without first taking into

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consideration the recommendations of the Board. In coming to his decision without obtaining the recommendations of the Board, the Chief Executive in Council thereby refused or neglected to take into account a matter which he was obliged to take into account.

The level of scrutiny to be adopted by this court

74. Before turning to these challenges, it is first necessary to consider the applicant's assertion that, given the unique legal status of the harbour, this court should adopt a more intensive standard of review, one that is commensurate with the legislative intent to ensure the integrity of the harbour.

75. The classic test adopted in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 does not incorporate this principle of intensity of review. It was said in *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 WLR 840 that in the *Wednesbury* model the court makes no judgment of its own as to the relative weight to be attached to this or that factor taken into account in the decision making process; it is concerned only to see that everything relevant and nothing irrelevant has been considered and that a rational mind has been brought to bear by the decision-maker.

76. Today, however, when fundamental human rights are involved, it is recognised that the classic *Wednesbury* test is not appropriate. This has been described in the following terms by

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Lord Woolf MR in *R v. Lord Saville of Newdigate, ex parte A* [2000] 1
WLR 1855, 1867, para.37 :

“ What is important to note is that when a fundamental right such as the right to life is engaged, the options available to the reasonable decision-maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by Sir Thomas Bingham MR in *R v Ministry of Defence, Ex P Smith* [1996] QB 517 which is not in issue.”

77. The greater the degree of interference with a fundamental right, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the public law sense.

78. It is plain that the Harbour Ordinance does not enshrine a fundamental human right, even if that right is restricted to Hong Kong people. Nevertheless in *Chu J's* judgment the enshrined status of the harbour as a natural heritage of all Hong Kong people was underscored. Its preservation, it was said, was therefore to be afforded a high propriety; the presumption against reclamation being a strong presumption. As *Chu J* put it (page 803, para.53) :

“ ... in order to give recognition to the presumption, it must be shown that there are material considerations justifying a departure from the requirement to protect and preserve the Harbour. To displace the public interest requiring protection and preservation of the Harbour, the decision-maker has to be persuaded that there is another public interest so overwhelming as to override the duty to protect and preserve.”

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79. In the circumstances, having regard to the unique legal status of the harbour, and the *continuing* duty, a duty of exacting measure, placed on public officials to look to its preservation, I am satisfied that, in reviewing the lawfulness of the decision of the Chief Executive in Council, something more rigorous than the standard *Wednesbury* test is required although, in my judgment, the level of anxious scrutiny that must be applied when there is a substantial interference with a fundamental human right would be to set the test too high.

A failure to consider relevant matters

80. I turn now to consider the first basis of challenge; namely, that the Chief Executive in Council failed to take into account matters which he ought to have taken into account in considering whether the three tests stated by *Chu J* in her judgment were met by the Central OZP.

81. In this regard, the applicant has contended that it was not sufficient for the Chief Executive in Council, in light of *Chu J*'s judgment, to obtain only an engineering report. What was at issue was a planning matter and accordingly a planning report should have been obtained. Without a planning report, the Chief Executive in Council was deprived of relevant advisory material. I am unable to accept this proposition. My reasons include the following :

- (i) It must first be understood that determination of policy concerning how best to resolve transport difficulties is a matter for the Chief Executive in Council. It is not therefore for the Board to look to such matters as road taxes or tolls. In this regard, I can do no better than cite from the

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third affirmation of Mr Chan Pun Chung (made on 12 February 2004) in which he said :

“ The Board has no power to make policies on behalf of the Government. Rather, it acts on policies made by the Government. One of the points of contention brought up by the Applicant in this judicial review is that the approved OZP should be referred to the Board to consider if there were reasonable alternatives to solving the traffic problem such as demand management measures (e.g. traffic management policy such as Electronic Road Pricing (ERP) and variations to cross-harbour toll charges), in lieu of the Bypass. These are transport policy issues which lie outside the purview of the Board. The Board could not take on CE in C’s role in making policy decisions. *The Board could only discharge its statutory plan-preparation function within the strategic planning policy framework set by the Government.*”
[my emphasis]

This assertion by Mr Chan has not been disputed.

- (ii) As I have said earlier in this judgment, the reclamation incorporated into the Central OZP is but part of a much broader strategy developed over a period of years by Government for the purpose in part — indeed, in material part — of meeting Hong Kong’s transport problems. In the circumstances, in light of the evidence given, it must be accepted that, when he made his decision under challenge, the Chief Executive in Council would have had before him material relevant to the development of this strategy, including material relevant to the viability of policies (taxation, tolls and the like) that would avoid the need for reclamation. That being so, it must be accepted, I believe, that the Chief Executive in Council would have had before him material relevant to the question of planning alternatives and would have been able to look to the critical question of such alternatives in the light of that material. May it have been preferable to obtain a new planning report? Yes,

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perhaps. Did the failure to do so, even on a test of heightened scrutiny, render the Chief Executive in Council's decision unreasonable? I cannot bring myself to that finding.

(iii) In my view, the central issue facing the Chief Executive in Council was whether, if it was determined that the construction of the infrastructure projects constituted a compelling, overriding and present public need necessitating reclamation, whether the minimum amount of reclamation was in fact being effected in terms of the CR III works. This quite patently, in my view, required an engineering report. The evidence shows that a comprehensive report was obtained, that report being commented upon by an independent expert. That expert observed that the reclamation works were capable of meeting the constraints of Chu J's judgment. During the hearing, the observations of the independent expert were criticised for speaking of capability only and not being conclusive. But, of course, it was for the Chief Executive in Council to make the decision whether the reclamation works did meet the constraints of Chu J's judgment, that was not a decision for the independent expert.

82. As to the engineering report itself, it has been criticised by the applicant as being inadequate. The inadequacy, it has been said, lies in the fact that the report relates only to the physical extent of the reclamation to be made under the CR III works, some 18 hectares in extent, and does not take into account the physical extent of the total reclamation incorporated into the Central OZP, a further area of some two hectares. That being the case, so it is contended, the Chief Executive in Council was

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unable to determine whether all and each part of the reclamation incorporated into the Central OZP accorded with the constraints of Chu J's judgment. Again, I must reject that proposition. My reasons include the following :

- (i) The Chief Executive in Council did not go beyond the physical parameters of engineering report. He looked only to whether the reclamation being effected in terms of the CR III works (some 18 hectares) was justified in accordance with Chu J's judgment.
- (ii) The area of some two hectares *not* included in the CR III works, although included in the Central OZP, lies at the eastern end of what is proposed to be reclaimed. It is the area which meets the western boundary of the draft Wan Chai OZP. For engineering reasons, the work of reclaiming that portion will be carried out when, and if, any reclamation work is authorised pursuant to an approved plan for Wan Chai. The nature and extent of these two hectares, therefore, will depend very much on the nature and extent of any reclamation approved in terms of the Wan Chai plan and the Chief Executive in Council will be able to turn his attention to that area within the context of any reclamation sought to be approved under the Wan Chai plan.
- (iii) Nor can it be said that the failure to include the two hectares was an oversight. All land reclaimed from the sea must be authorised in terms of the Foreshore and Sea-Bed (Reclamations) Ordinance. At this time, the only area within the Central OZP which has been authorised for reclamation in terms of that Ordinance is the area of 18 hectares which falls within the boundaries of the CR III works.

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83. During the course of the hearing, Mr Mok, for the applicant, made mention of a press release issued by the Board on 9 January 2004 and relied upon it as indicating the clearly rational approach. That press release welcomed the handing down by the Court of Final Appeal of its judgment clarifying the legal principles behind the Harbour Ordinance. In that press release the Board said the following :

“ The board has ... also asked the Government to carry out a comprehensive planning and engineering review with a view to drawing up a minimum reclamation option for Wan Chai North that would comply with the law as soon as possible. The board will reconsider the draft OZP and the objections after the completion of the review,” the spokesman added.”

84. Of course, this press release was issued after the decisions which have been challenged in these proceedings. In addition, it concerns the draft Wan Chai OZP, a plan which has been returned to the Board for fresh consideration and preparation. It is understandable that in such circumstances the Board would seek a comprehensive planning and engineering review. But it does not follow, in my opinion, that what the Board considers necessary in its preparation of a *draft* plan must thereby be required by the Chief Executive in Council when exercising his discretion under s.12 of the Town Planning Ordinance in respect of an *approved* plan.

85. I turn now to the second and third challenges, those of a more general nature. As I have said, it is the applicant's case that, once it was accepted that the Central OZP had been prepared on the basis of a material misinterpretation and misapplication of the Harbour Ordinance, then, having regard to the continuing duty imposed by s.3 of the Harbour Ordinance, the Chief Executive in Council had no reasonable option open

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to him other than to remit the plan to the Board. He therefore acted outside of the bounds of his discretion by failing to remit the plan to the Board or, in looking to the reverse side of the coin, did so by failing, before any decision was made to proceed with the reclamation, to obtain the Board's detailed recommendation prepared in accordance with the provisions of the Town Planning Ordinance.

86. I confess that, employing the heightened scrutiny that I have spoken of earlier, I have not found this an easy issue to determine. It has been argued with considerable force on behalf of the applicant that the error of law committed by the Board in its preparation of the Central OZP constituted a misunderstanding of the Harbour Ordinance which goes to the 'very essence of the protection and preservation of Victoria Harbour'. The applicant has argued that, given the enshrined status of the harbour, the paramount consideration must be that it is in the public interest for the proper decision-maker; that is, the Board, to apply the correct legal principles in the fresh preparation of a plan. This, it has been argued, is in accordance with good administration and, of fundamental importance, adheres to the clear purpose of both the Harbour Ordinance and the Town Planning Ordinance.

87. In my judgment, however, having found that the Chief Executive in Council did have jurisdiction to make the decisions under challenge, it must follow that it was a matter for him to determine whether the error of law committed by the Board in its preparation of the Central OZP so vitiated the integrity of the plan that it could no longer stand and had to be remitted to the Board. An error of law in reaching an administrative decision may vitiate that decision or it may not. As I have

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said earlier, it must in each instance be a question of fact and degree. The Chief Executive in Council came to the decision that the reclamation contained within the CR III works was lawful in that, despite an error of approach by the Board, it nevertheless met the constraints of Chu J's judgment.

88. That then leads to the question whether, even if it was believed that the CR III works complied with Chu J's judgment, in light of the legislative purpose evident in the Town Planning Ordinance and in adherence to the principles of good administration, the Chief Executive in Council was nevertheless bound to remit the plan to the Board.

89. That issue, of course, takes into account a broad range of administrative and policy matters. If, for example, the Central OZP had only just been approved then, having regarded to the unique legal states of the harbour and to the continuing duty of protection imposed upon him by s.3 of the Harbour Ordinance, the Chief Executive in Council, as a reasonable decision-maker, may have been bound to direct that the plan be remitted to the Board. But in the present case time has passed and it has long been recognised that in planning matters time is invariably of importance and indeed good administration, far from surrendering to delay, should seek to avoid it. By way of illustration, in the case of *R v. Newbury District Council ex parte Chieveley Parish Council* [1999] P.L.C.R. 51 67, Pill LJ said :

"It is important to good administration that, once granted, a permission should not readily be invalidated. As confirmed in the House of Lords, s.31(6) recognises that there is an interest in good administration independent of hardship, or prejudice to the rights of third parties. The court is entitled to look at the interest in good administration independently of those other

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... matters. It is important that citizens know where they stand and how they can order their affairs in the light of the relevant decision ..."

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90. Of their nature, planning decisions, once made, invariably affect third parties. It speaks for itself that an urban plan of considerable extent, such as the Central OZP, once approved, will have a bearing on all manner of commercial decisions. Is property to be purchased or sold? Is a business to be opened or, if already opened, is it to be moved to another location? In the present case, it is clear on the evidence that the Chief Executive in Council took into account the fact that, aside from Government itself, at least one other party; namely, the consortium carrying out the reclamation works, would be affected. This, of course, ultimately is a matter of financial prejudice. But that is not to denigrate it. These issues, in my view, are integral to the determination of the difficult question of whether, to meet the ends of good administration, a plan lawfully passed, and believed still to be lawful, should nevertheless be suspended.

91. It was argued by the applicant that the Government rushed to concluded contracts for the CR III works and therefore has only itself to blame for any financial ramifications. I do not intend to attempt to resolve that contentious issue. The executive cannot always bow to the pressure of threatened litigation and it is always a question of policy whether an approved plan should be fulfilled without delay or whether delay is prudent.

92. In looking to the question of good administration, in my judgment, it cannot be said to be entirely irrelevant that, when the Central

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OZP was in the course of preparation, the applicant at that time had conceded, in principle at least, that some reclamation was necessary to house the Central-Wan Chai Bypass and road works. That concession, said Ms Cheng, was known and would have been before the Chief Executive in Council when he made the decision now challenged.

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93. What then of the applicant's contention that the CR III works and any proposed Wan Chai OZP reclamation will, for all practical purposes, be an extension of each other and in the circumstances it would be entirely illogical, to the extent of being unreasonable, to proceed with the CR III works when the nature and extent of the Wan Chai OZP reclamation works, if any, remain an unknown quantity? The argument has been made that the only option open to a reasonable decision-maker must be to allow the Board to determine both matters. It is argued by the applicants that, in refusing to remit the Central OZP to the Board for fresh consideration along with the draft Wan Chai OZP, the Chief Executive in Council has attempted to confront the Board with a *fait accompli* in respect of reclamation works carried out along the northern foreshore of Hong Kong Island. That itself, it is said, runs contrary to the spirit and intent of both the Harbour Ordinance and the Town Planning Ordinance.

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94. The Central OZP and the draft Wan Chai OZP, however, are not mirrors of each other. While complementary they are also separate. Wan Chai, for example, in its original form, allowed a large amount of reclamation for a park. By contrast, as a result of the objections made by the applicant, when the Central OZP was in the course of preparation its area of reclamation was reduced by almost fifty percent.

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95. Importantly, when he made his decision under challenge, the Chief Executive in Council had before him evidence which he could accept or reject that the reclamation contained in the CR III works was sufficiently minimal to meet the constraints of Chu J's judgment.

96. In addition, as Mr Chan Pun Chung has affirmed, it is not for the Board to make transport policy decisions; for example, that there should be no by-pass at all and instead should be a form of taxation imposed on vehicles going through Central and Wan Chai. The Board must discharge its duties within the strategic framework set by Government.

97. What has been put before me is in essence a broad jurisprudential argument that in the present case the Chief Executive in Council was obliged in order to adhere to the spirit and purpose of both the Harbour Ordinance and the Town Planning Ordinance to remit the Central OZP to the Board and that, without the Board's participation, the plan could not stand in law. I regret I am not persuaded by this almost philosophical argument. As I have said earlier, our law makers have given to the Chief Executive in Council clear executive jurisdiction in respect of town planning matters.

98. It may well have been preferable for the Chief Executive in Council to remit the plan, at least regarding the extent of reclamation. But, as I have emphasised elsewhere in this judgment, this is in essence a question which goes to the merits. I have no jurisdiction to determine whether the Chief Executive in Council was right or wrong in his decision.

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I am restricted to determining, even with the employment of heightened scrutiny, the single issue of whether he was acting lawfully.

99. In the circumstances, while this has not been the easiest matter to resolve, I am unable to say that the Chief Executive in Council in this case stepped outside of the borders of his executive discretion.

The second and third respondents

100. As to the decisions of the second and third respondents, these have been essentially dependent upon the decisions made by the Chief Executive in Council. In declining to quash his decisions, it follows that I am not prepared to quash decisions made by the second and third respondents.

Conclusion

101. For the reasons given in the body of this judgment, this applicant for judicial review must be refused.

102. As to costs, I will hear from the parties.

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

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Mr Johannes Chan, SC leading Mr Y.C. Mok and Mr Jin Pao,
instructed by Winston Chu & Co., for the Applicant

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Ms Teresa Cheng, SC leading Mr Nicholas Cooney, instructed by
Department of Justice, for the 1st, 2nd and 3rd Respondents

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