

# 立法會

## *Legislative Council*

LC Paper No. LS8/03-04

### **Paper for the Panel on Planning, Lands and Works and Panel on Environmental Affairs**

#### **Examination of the implications of the *Sub Judice* Rule for meeting with deputations on Central Reclamation Phase III or Wanchai Development Phase II**

At the Joint Panel meeting on 13 October 2003, members asked for legal advice on the application of the *sub judice* rule in meeting with deputations to receive views on Wanchai Development Phase II or Central Reclamation Phase III.

#### Background

2. On 8 July 2003, in the application for judicial review by The Society for Protection of the Harbour Limited (SPH), the Court of First Instance quashed the decision of the Town Planning Board (TPB) with regard to the Outline Zoning Plan in connection with Wanchai Development Phase II (WDII) and ordered TPB to reconsider the plan and the objections thereto. TPB decided to appeal against the judgment and by consent of TPB and SPH, the appeal has been scheduled for hearing by the Hong Kong Court of Final Appeal on 9 December 2003.

3. As for Central Reclamation Phase III (CRIII):

- (a) on 6 October 2003, the Court of First Instance dismissed the application for interim injunction and according to the Rules of the High Court (Cap. 4 sub. leg.), an appeal may be lodged on or before 31 October 2003 (i.e. within 14 days from the date on which the order is sealed); and
- (b) leave to apply for judicial review has been granted on 26 September 2003 and the hearing would take place on 9 February 2004.

### Contempt of Court

4. At common law, words spoken or otherwise published, or acts done, outside court which are intended or likely to interfere with or obstruct the fair administration of justice are punishable as criminal contempts of court. Some of the commonest examples of such contempts are :

- (a) publications which are intended or likely to prejudice the fair trial or conduct of criminal or civil proceedings; and
- (b) publications which scandalise, or otherwise lower the authority of, the court.

5. In civil proceedings, publications may also be punishable as a contempt of court if they have the effect of deterring or inhibiting parties in the conduct of their proceedings by prejudicial discussion of the merits or facts of the case before the proceedings have been determined by a court of law. Although there is no clear authority, civil proceedings would appear to be pending until an appeal has been heard or the time within which an appeal may be lodged has expired.

6. It is not necessary that a fair trial or the conduct of the proceedings is actually prejudiced. The test is whether there is a real risk of prejudice. It seems that a risk of prejudice to the administration of justice as a whole will suffice. Contempt of court is unlikely where the risk of prejudice is slight, for example, if the proceedings are to be tried by a judge or heard by an appellate court.

### Legislative Council (Powers and Privileges) Ordinance

7. Section 3 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) provides Members with the freedom of speech and debate in the Council. Such freedom of speech and debate is not liable to be questioned in any court or place outside the Council. Under section 4 of the same ordinance, no civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to the Council or a committee, or by reason of any matter brought by him therein by petition, bill, resolution, motion or otherwise. Although not expressly provided, sections 3 and 4 do not apply to conduct outside of the proceedings of the Council or its committee.

8. Section 8A of the same Ordinance extends the same privileges and immunities in sections 3 and 4 to any public officer designated by the Chief Executive

for the purpose of attending sittings of the Council or any committee, while so designated and attending any such sitting. Members will note that the privileges and immunities do not extend to deputations addressing the committee nor their written submissions.

### Rules of Procedure

9. The Legislative Council has imposed upon itself certain restrictions in relation to contents of speeches in Rule 41(2) of the Rules of Procedure, which provides -

"Reference shall not be made to a case pending in a court of law in such a way as, in the opinion of the President or Chairman, might prejudice that case."

The rule reflects what is commonly known as the *sub judice* rule or convention in legislative assemblies of some other jurisdictions. By Rule 43 of the Rules of Procedure, the above rule applies to proceedings in a committee (which includes a panel) unless the chairman of the committee orders otherwise.

10. The Council has not formulated any further general guidelines beyond what has been expressly provided in the Rules of Procedure. The precise application of the rule is at the discretion of the Chairman of the joint panel meeting, being the person who is to rule on such matters whenever they arise. However, the following principles from the past application of the rule locally and from practices and procedures in other jurisdictions may be helpful :

- (a) references to matters awaiting adjudication in a court of law should be excluded if there is a risk that they might prejudice its adjudication;
- (b) references would include comment on, inquiry into and the making of findings on such matters; and
- (c) matters awaiting adjudication would include matters in respect of which a charge has been laid or proceedings have been initiated by the filing of the appropriate documents;
- (d) prejudice might arise from an element of explicit or implicit prejudgment in the proceedings of the legislature in two possible ways -

- (i) the references might hinder the court in reaching the right conclusion or lead it to reach other than the right conclusion; and
- (ii) whether the court is affected in its conclusion or not, the references might amount to an effective usurpation of the court's judicial functions.

Application of the *sub judice* rule

11. In cases involving an appeal or judicial review by a judge such as the present one, it is rare that a publication will be held to constitute a contempt of court as it is accepted judges are capable of guarding against allowing any prejudicial matter to influence them. Even for jury trials, the court tends to approach the question in practical rather than absolute terms and placed its faith primarily in the efficacy of measures available to overcome any potential unfairness.

12. The principle is demonstrated in the recent case of *HKSAR v Lee Ming Tee & Another [2001] 4 HKCFAR 133*, in which the Hong Kong Court of Final Appeal placed its faith in the jury, properly directed, to secure a fair trial.

13. In the same case, the Hong Kong Court of Final Appeal acknowledged that special care must be taken to counteract the possible effects of prejudicial publicity. Comments made in public on pending proceedings may affect witnesses or the parties themselves in the conduct of their proceedings. Such comments may also be so strong as to amount to a campaign of pressure so great that would reasonably be perceived as intending to exert or having the effect of exerting pressure on a judge.

14. With regard to inviting deputations, *Equal Opportunities Commission v Apple Daily Limited [1998] 1 HKC 260 at 266* would be relevant. In this case, a District Court judge has commented, by way of obiter dictum, that a party who starts and invites the media to report discussions and expressions of opinions on the case, and thus allows the publications of a prejudiced impression to the public may amount to a contempt of court. Members may wish to consider the consequence of inviting deputations to express their views in public meetings while proceedings are pending, discussion at which would very likely be reported by the media.

15. Even if the court might not be affected in its conclusion, members may also need to assess the likelihood of proceedings of the Council amounting to an effective usurpation of the court's judicial functions. Members have requested, and

the Administration has agreed, at the last joint panel meeting to provide transcripts of the hearing for application of interim injunction in connection with CRIII and the affirmations filed with the court. Whilst the transcripts and affirmations would primarily be used for ascertaining what information was given to the Court, it would be advisable to make clear that the exercise was for purposes other than reviewing the court proceedings.

### Conclusion

16. As a matter of law and practice of this Council, there is no absolute restriction against members holding a meeting with deputations to receive their views on the policy issues relating to WDII or CRIII while those court proceedings presently instituted are pending. However, should members decide to hold such a meeting, it would be advisable to consider measures to guard against the likelihood of (a) generating a campaign of pressure so great that would reasonably be perceived as intending to exert or having the effect of exerting pressure on a judge, and (b) the public perceiving such meeting as amounting to an effective usurpation of the court's judicial functions. Such measures may be considered necessary, from the constitutional point of view, in order that the independence of the judiciary would not be undermined and to avoid the interests of the parties to the pending judicial proceedings from being unfairly prejudiced.

17. Such measures may include a warning by the Chairman to all members and deputations present at the start of the joint panel meeting stating clearly the objective of the meeting and the approach to be adopted. Members and deputations could be asked to exercise self-restraint respectively in their questions and responses. In the course of the meeting, the Chairman may also exercise his discretion in preventing references to be made to issues pending adjudication in the appeal or judicial review. This had been the practice when witnesses involved in criminal investigations or judicial proceedings attended before the Select Committee on Building Problems of Public Housing Units.

Prepared by

Legal Service Division  
Legislative Council Secretariat  
28 October 2003