

FACV000014/2003

FACV 14/2003

Town Planning Board v. Society for the Protection of the Harbour Limited

Summary of the judgment

given by the Chief Justice

*as the unanimous judgment of the Court of Final Appeal*

This summary is prepared by the Judiciary.

It is not part of the judgment and has no legal effect.

1. The harbour is and has throughout the history of Hong Kong been a central part of its identity. The Protection of the Harbour Ordinance, Cap. 531 ("the Ordinance") is a unique piece of legislation. It was enacted to protect and preserve the harbour by establishing a presumption against reclamation. The essential question concerns its proper interpretation.

*The Ordinance*

2. Section 3 provides:

"(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."

*The decisions challenged*

3. The Society for the Protection of the Harbour Limited ("the Society") challenged the decisions of the Town Planning Board ("the Board") made on 6 December 2002 and 14 February 2003 with regard to Draft Wan Chai North Outline Zoning Plan No. S/H25/1 ("the draft plan"). It covers an area of about 76.54 hectares in Wan Chai North, including about 26 hectares of proposed reclamation.

4. The land to be formed by the proposed reclamation would serve the following purposes:

- (1) The provision of roads, namely a trunk road (which would be part of a strategic through road starting from the Rumsey Street Flyover and joining up with the existing Island Eastern Corridor) and a road complex designated as Road P2.
- (2) The provision of a waterfront promenade.
- (3) The elimination of "dead corners" in the harbour and the provision of a culvert for improving water quality.
- (4) The provision of a harbour park.
- (5) The reprovisioning of various facilities.

5. On 6 December 2002 and 14 February 2003, the Board decided (a) to make limited amendments to the draft plan to meet some objections; (b) not to amend the draft plan to meet other objections; and (c) to submit the draft plan as amended to the Chief Executive in Council for approval. The amendments made did not affect the extent of the proposed reclamation.

*The Board's approach*

6. In making the decisions in question, the Board adopted the following approach to the interpretation of the Ordinance on the basis of the advice of Queen's Counsel in London ("the Board's approach"):

- (1) The decision-maker must have regard to all relevant considerations. The statutory presumption creates a compulsory material consideration to which he must pay due regard.
- (2) He is required to undertake a weighing exercise for the purpose of deciding whether the public benefits of the proposed reclamation would outweigh the need to preserve the harbour. If so, the presumption would be rebutted.

7. The Society's judicial review challenge succeeded before Chu J. She held that the Board had misinterpreted the Ordinance.

8. Subsequent to the judgment, the Board announced that the harbour park proposal would be removed from the draft plan.

*The question*

9. The question is whether the Board's approach to the interpretation of the Ordinance was correct in law. If not, it would have erred in law and its decisions must be quashed.

*The approach to interpretation*

10. The interpretation of statutes is an essential part of the judicial function and is ultimately a matter for the courts. The function of the courts is to ascertain the intention of the legislature as expressed in the legislation. A purposive approach should be adopted. The courts should adopt an interpretation which is consistent with and gives effect to the legislative purpose.

*The legislative purpose*

11. The legislative purpose is referred to in the preamble to the Ordinance and is spelt out in s.3(1) itself. The preamble states that the purpose is "to protect and preserve the harbour by establishing a presumption against reclamation in the harbour". As stated in the explanatory memorandum to the bill, the legislative purpose is "to ensure that [the harbour] will be protected against excessive reclamation".

12. With limited land resources, reclamation was for many decades used as a convenient source of land supply. It must be appreciated that, by the time the Ordinance was enacted in 1997, nearly half of the harbour had been reclaimed and extensive further areas in the harbour were planned for reclamation. In view of this, the need to protect and preserve what remains of the harbour was all the more important and compelling.

*The statutory principle of protection and preservation of the harbour*

13. Section 3(1) establishes a statutory principle recognising the harbour as a special public asset and a natural heritage of Hong Kong people and prescribing that it is to be protected and preserved. This principle was enacted in general terms.

14. The harbour is at the heart of the metropolis both physically and metaphorically. The statute characterises this in the most distinctive terms. It is recognised not merely as a public asset but as a "special" one. It is further acknowledged to be a natural heritage. "Natural" in that it is part of nature. A "heritage" in that it is inherited as a legacy from previous generations and is to be transmitted from generation to generation. It is declared to belong to Hong Kong people. It is a community asset to be enjoyed by the people of Hong Kong. The legislature was giving legal recognition to its unique character.

15. It is because of its unique character that the harbour must be protected and preserved.

16. It is manifest that in enacting the statutory principle, the legislature was giving legal recognition to the great public need to protect and preserve the harbour having regard to its unique character. The principle is expressed in clear and unequivocal language and the legislative intent is to establish it as a strong and vigorous one. By prescribing such a principle, the legislature has accorded to the harbour a unique legal status.

*The statutory presumption against reclamation*

17. Having established the principle, s. 3(1) provides that "for that purpose, there shall be a presumption against reclamation in the harbour".

18. Reclamation would result in permanent destruction and irreversible loss of what should be protected and preserved under the statutory principle. The statutory presumption was therefore enacted to implement the principle of protection and preservation. Its legal effect is not to impose an absolute bar against any reclamation. It is capable of being rebutted.

*The statutory duty*

19. Section 3(2) provides that all public officers and public bodies "shall have regard to the principle stated in s. 3(1) for guidance in the exercise of any powers vested in them". Its effect is to impose on them the statutory duty, not only to have regard to the principle of protection and preservation, but also to have regard to the presumption against reclamation in exercising their powers.

*Rebutting the statutory presumption*

20. The presumption is rebuttable and can be displaced. The critical question is: as a matter of statutory interpretation, what should be regarded as sufficient to rebut it?

21. The statutory presumption was expressly enacted for the purpose of implementing the explicit principle of protection and preservation of the harbour and must be interpreted so as to implement that principle.

22. Having regard to the strong and vigorous statutory principle of protection and preservation, it would plainly be wrong to interpret the presumption against reclamation merely as a compulsory material consideration to which the decision-maker must pay due regard in undertaking a weighing exercise for the purpose of deciding whether the public benefits of the proposed reclamation would outweigh the need to preserve the harbour. This was essentially the Board's approach and it must be rejected.

*Overriding public need*

23. In order to implement the strong and vigorous statutory principle of protection and preservation, the presumption must be interpreted in such a way that it can only be rebutted by establishing an overriding public need for reclamation ("the overriding public need test"). The statute, in conferring on the harbour a unique legal status, recognises the strong public need to protect and preserve it. The statute envisages that irreversible loss to the extent of the reclamation would only be justified where there is a much stronger public need to override the statutory principle of protection and preservation.

24. Public needs would of course be community needs. They would include the economic, environmental and social needs of the community.

25. A need should only be regarded as overriding if it is a compelling and present need.

26. A compelling and present need goes far beyond something which is "nice to have", desirable, preferable or beneficial. But on the other hand, it would be going much too far to describe it as something in the nature of the last resort, or something which the public cannot do without.

27. Where there is a reasonable alternative to reclamation, an overriding need for reclamation would not be made out. All circumstances should be considered, including the economic, environmental and social implications of each alternative. The cost as well as the time and delay involved would be relevant. The extent of the proposed reclamation should not go beyond the minimum of that which is required by the overriding need.

28. The overriding public need test should be regarded as a single test and is a demanding one.

*Cogent and convincing material*

29. To enable a public officer or body to be satisfied that the overriding public need test has been met, the materials in the case in question must be cogent and convincing.

*The burden*

30. The burden on those seeking to rebut the presumption is a heavy one. This is commensurate with what is at stake: the irreversible loss to the extent of the reclamation of a special asset and a natural heritage belonging to the people of Hong Kong.

*The Board erred in law*

31. On the true interpretation of the Ordinance, the presumption against reclamation could only be rebutted by establishing an overriding public need for reclamation. The Board, in failing to adopt such an interpretation, erred in law. It follows that the decisions in question must be quashed and that the matter must be remitted to the Board for reconsideration in accordance with law.

32. The Board of course acted in good faith, as has been acknowledged by the Society. The Board had obtained leading counsel's advice and went about its task in a conscientious manner. The dispute turned on the correct interpretation of the Ordinance. It was envisaged at the time of its enactment that litigation on this matter was likely to ensue.

33. It should be noted that the position of the Society is that it accepts that the proposed roads, being essential infrastructure, may satisfy the overriding public need test for rebutting the presumption. Further, the Society does not as a matter of principle object to the provision of a promenade along the waterfront but maintains that the extent of the proposed reclamation for this purpose is excessive. The promenade is regarded by the Board to be necessary for the better presentation of the harbour to the public.

*Timing of judicial review challenge*

34. The present judicial review challenge was instituted promptly within two weeks of the Board's decision on 14 February 2003. But it should be emphasised that there must not be any undue delay in applying for judicial review. It is of obvious importance that the earliest opportunity for any challenge to a reclamation proposal should be promptly taken. If not, the courts have the discretion to refuse relief.

*Result*

35. Accordingly, the appeal is dismissed.