立法會房屋事務委員會

上訴法庭就房屋委員會所提出的上訴的裁決

目的

關於房屋委員會（下稱「房委會」）就高等法院原訟法庭早前對租住公屋（下稱「公屋」）租金司法覆核作出的裁決所提出的上訴，本文件旨在告知議員上訴法庭的裁決。

背景

2. 2002年，兩名公屋租戶就房委會由2000年起押後檢討公屋租金的決定申請司法覆核。2003年7月11日，高等法院原訟法庭裁定該兩名公屋租戶勝訴。根據高等法院在2003年8月12日頒布的判令，房委會須「立即按《房屋條例》（第283章）第16(1A)條的真正意思及規定，檢討申請人公屋單位所屬類別（或組別）的公屋單位的租金，並作出更改租金的釐定」。房委會就高等法院的裁決提出上訴，並申請在上訴個案審結前暫緩執行法庭判令。高等法院於2003年8月26日批准暫緩執行判令的申請，條件是房委會須承諾檢討有關公屋單位的租金並作出更改租金的釐定。上訴法庭其後在2004年4月21日及22日就上訴進行聆訊。

法庭裁決

3. 2004年11月22日，上訴法庭頒布裁決，裁定房委會上訴得直。判詞副本載於**附件**。扼要來說，上訴法庭裁定《房屋條例》並沒有規定房委會有責任每三年或在某段時間內檢討租金一次。租金與入息比例中位數須在10%或以下這一規定，只有在決定更改租金時才適用。押後租金檢討並不等同更改租金的釐定。

4. 司法覆核申請人有權申請許可向終審法院提出上訴。有關申請必須在上訴法庭作出裁決之日起計28日內向上訴法庭提出。房委會將根據訴訟人是否再提出上訴，考慮其跟進行動。

提交參考

5. 請議員備悉附件所載的上訴法庭裁決。

房屋及規劃地政局
2004 年 11 月

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Annex

附件

CACV 250 & 251/2003

CACV 250/2003

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 250 OF 2003

(ON APPEAL FROM HCAL NO. 198 OF 2002)

BETWEEN

LAM KIN SUM Applicant

and

HONG KONG HOUSING AUTHORITY Respondent

CACV 251/2003

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 251 OF 2003

(ON APPEAL FROM HCAL NO. 174 OF 2002)

BETWEEN

HO CHOI WAN Applicant

and

HONG KONG HOUSING AUTHORITY Respondent

由此

Before : Hon Ma CJHC, Stock & Yeung JJA in Court

Dates of Hearing : 20 & 21 April 2004

Date of Handing Down Judgment : 22 November 2004

J U D G M E N T

Hon Ma CJHC :

1. The present appeal requires the determination of an important question regarding one facet of the Hong Kong Housing Authority's responsibilities towards tenants of public housing estates : - how often are rent reviews (involving rent revisions) required to take place? A number of other questions also arise for determination which I shall in due course identify.

2. The basic complaint of the Applicants in the judicial review proceedings before Chung J (there were two sets of proceedings but they were heard at the same time given the similar issues that arose) was that the Hong Kong Housing Authority ("the Housing Authority") had failed to review rents for over 4 years. This was prejudicial to them since any review (for reasons which I shall elaborate) would inevitably have led to a reduction in the rents they were paying for the public housing units they occupied.

3. In a judgment handed down on 11 July 2003 ("the Judgment"), Chung J determined the judicial review applications in the Applicants'

favour. In a subsequent judgment handed down on 12 August 2003 ("the Second Judgment"), the learned judge determined the precise wording of the relief that should be granted. He ordered as follows : -

> "THE COURT HAVING FOUND that the rents of public housing units have exceeded the statutory ceiling set out in Section 16(1A)(b) of the Housing Ordinance.
>
> AND HAVING ALSO FOUND that at least since 6th January 1999, the Respondent has failed to determine the rents of the class (or batch) of public housing units to which the Applicant's public housing unit is part pursuant to Section 16(1A), Housing Ordinance.
>
> IT IS ORDERED that:
>
> 1. Without prejudice to the Respondent's right to conduct the rent review ordered by the Court in the same manner as the Respondent has adopted in previous rent reviews, the Respondent do and is hereby commanded to forthwith review and determine the variation of rents of the class (or batch) of public housing units to which the Applicant's public housing unit is part, according to the true meaning and effect of Section 16(1A), Housing Ordinance (Cap.283).
>
> 2. …
>
> 3. …"

4. The Respondent in the judicial review proceedings, the Housing Authority, has appealed both decisions of the judge and these are the appeals before us. In these appeals, Mr David Pannick QC, with him Mr William Marshall SC and Mr P Y Lo, appeared for the Housing Authority. Mr Philip Dykes SC and Mr Johannes Chan SC appeared for the Applicants.

5. The statutory provision that falls to be examined in this appeal is section 16 of the Housing Ordinance, Cap.283 ("the Ordinance"),

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although a number of other provisions will also have to be considered as well. Section 16 provides, insofar as is relevant to this appeal, as follows : -

> "**16. Leases of land in estates**
>
> (1) Subject to this Ordinance, the Authority may –
>
> (a) let to any person, for any period, any land in an estate, subject to the payment of such premium, rent or other consideration as the Authority may determine; and
>
> (b) fix the terms, covenants and conditions on which any land in an estate may be let or occupied.
>
> (1A)(a) Any determination of variation of rent after the commencement [Commencement date: 13 March 1998] of the Housing (Amendment) Ordinance 1997 (108 of 1997) by the Authority under subsection (1)(a) in respect of any class (whether determined by the nature of the land or status of the lessee) of land in an estate for residential purposes shall only take effect at least 3 years from the date on which any immediately preceding determination in respect of the same such class of land came into effect.
>
> (b) The rent determined under paragraph (a) in respect of any such class of land shall be of such amount that the median rent to income ratio in respect of all classes of land in all estates let for residential purposes, as determined by the Authority, shall not exceed 10%.
>
> (1B) Subsection (1A) does not apply to land in respect of which the Authority has granted to a person a licence to occupy it or a permit to occupy it.
>
> (1C) Subsection (1A) does not apply to an adjustment in the rent of a tenant where –
>
> (a) the total household income;
>
> (b) the total value of the household assets; or
>
> (c) a combination of paragraphs (a) and (b),

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as determined by the Authority, is -

(i) greater than a threshold established by the Authority for the purposes of an increase in the rent; or

(ii) lesser than a threshold established by the Authority for the purposes of a decrease in the rent.

(1D) For the purposes of subsection (1A)(b), the median rent to income ratio ('the ratio') shall be determined in accordance with a procedure established by the Authority and, without prejudice to the generality of the foregoing, the Authority may establish a procedure involving sampling to determine the incomes to be used for the purpose of calculating the ratio.

(1E) A certificate purporting to be signed by the Director of Housing stating what the median rent to income ratio (as determined in accordance with the procedure established by the Authority) is on a specified date, is conclusive proof of the fact stated therein and shall be admitted in evidence in any proceedings before a court without further proof and shall be presumed, until the contrary is proven, to have been signed by the Director of Housing.

(2) …

(3) …

(4) Without prejudice to the general power mentioned in subsection (1)(a), the Authority may in writing require tenants of lands in an estate to pay different rents based on their total household income or total household income and assets.

(5) For the avoidance of doubt the Authority shall be deemed always to have had the power conferred on it by subsection (4)."

6. Within that section, section 16(1A) in particular requires careful consideration. This important provision, alongside others, was introduced by the Housing (Amendment) Ordinance 1997 (Ordinance No.108 of 1997) which was enacted on 29 June 1997 and brought into effect on 13 March 1998.

7. Before identifying the issues, I first set out the relevant facts.

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Facts

8. Hong Kong has a population of over 7 million people who need to be housed. Land is scarce which has meant that land prices are high. As a consequence, a large group within the population exists requiring affordable accommodation. The Housing Authority was set up in 1973 with the responsibility to build and maintain public housing and implement Hong Kong's housing programme so that accommodation can be provided to persons who would otherwise find it difficult to afford proper housing. Over 30% of the population now live in public housing. There are nearly 200 housing estates managed by the Housing Authority providing a broad range of types of accommodation.

9. The rents chargeable for public housing are assessed by the Housing Authority with affordability being an important factor. This would explain the fact that public housing tenants pay less than half of the assessed market rent of their flats. The average monthly rent payable by tenants is in the region of $1,400.

10. One of the principal means used by the Housing Authority to calculate affordability of rents over the years has been the use of what is known as the median rent-to-income ratio ("MRIR"). This criterion has been used by the Housing Authority since about 1986. I can do no better than to adopt the definition used by the judge for this term in paragraph 6 of the Judgment : -

> "According to the parties, the median ratio is a statistical median compiled on a quarterly basis calculated from the most up-to-date rent

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> and income data. The data were collected from the territory-wide General Household Survey conducted by the Census and Statistics Department. Two stages are involved in the calculation: the first is to find out the rent to income ratios from a sample of households living in public housing, and the second is, after the rent to income ratios have been obtained, to identify the ratio in the middle of the entire spectrum."

11. The evidence served by the Housing Authority shows that in the assessment of public housing rents, while affordability remains an important factor, it is not the only one. The Housing Authority takes into account factors such as general market rents (both public and private) and also its own financial resources. In the latter regard, our attention has been drawn to section 4(4) of the Ordinance : -

> "(4) The policy of the Authority shall be directed to ensuring that the revenue accruing to it from its estates shall be sufficient to meet its recurrent expenditure on its estates."

Its recurrent expenditure includes the construction of buildings to provide public housing and their maintenance.

12. Notwithstanding what has just been said, the Housing Authority has since 1986 used the MRIR to assess the rents payable on public housing estates. Prior to the 1997 amendments to the Ordinance, the Housing Authority adopted two MRIR ceilings for newly built public rental housing estates : -

(1) 15% for units with a minimum space allocation standard of 5.5 square metres internal floor area per person (this MRIR was set in 1986);

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(2) 18.5% for units with a higher space allocation standard of 7 square metres internal floor area per person (this MRIR was set in 1981).

These MRIR figures were substantially lower than the corresponding MRIR figures for private sector rental housing.

13. The critical change made by the 1997 amendments in relation to MRIR is contained in section 16(1A)(b) which refers to a maximum MRIR "in respect of all classes of land" (therefore covering all public housing units) of 10%. This ceiling was, according to the Mr Lee Cert-Quinn (the Chief Manager of the Housing Department), one that was not apparently supported by any empirical study.

14. The calculation of MRIR had all along even prior to the 1997 amendments been the exclusive province of the Housing Authority. This is now confirmed by sections 16(1D) and (1E) of the Ordinance (see paragraph 5 above).

15. As the judge noted in the Judgment, for the 20 years prior to the 1997 amendments, public housing rents had been consistently reviewed and revised every 2 years. It seems reasonably clear from the material identified in paragraph 5 of the judgment that the reviews and revisions always resulted in increases in the rent charged. As the Paper on the "Adoption of 15% and 18.5% MRIR Ceilings for Public Rental Housing" CB(1) 1672/96-97(02) dated 22 May 1997 (prepared for the LegCo Housing Panel) states : -

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> "Rents are set for new estates and <u>increased</u> for existing estates every two years" (emphasis added).

16. Since the Housing (Amendment) Ordinance came into effect in 1998, the following events have occurred regarding the rents in public housing : -

(1) In July 1998, the Rental Housing Committee of the Housing Authority ("the RHC") determined an increase in rent for 209,088 flats in 83 post-1973 estates and 37,386 flats in so-called Harmony blocks in 21 new estates which would, if implemented, have resulted in the overall MRIR for public housing tenants being 9.6%. Although the proposed increases were scheduled to take effect from September 1998, the RHC eventually decided, in view of the economic downturn at the time, to waive these rent increases for a year until 31 August 1999. As a consequence, the 1998 increases did not take effect.

(2) Likewise, increases that were approved for 3,994 flats in Harmony blocks in 3 new estates and 12,476 flats in 4 former Housing Authority's estates proposed to take effect on 1 December 1998 and 1 April 1999 respectively, were also waived. These increases, if effective, would have resulted in the MRIR for all classes of land to be 9.5%.

(3) The various waivers of the rent increases carried out in 1998 and 1999 were subsequently further extended by

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reason of the continuation of the economic downturn in Hong Kong. There were extensions in 2000 and 2001.

(4) Following this trend, in 1999 the RHC also decided to defer rent reviews for a total of 340,609 flats in 128 estates from 1 December 1999 to 1 December 2000.

(5) On 23 October 2001, the RHC resolved to defer again, this time the rent review that was to be carried out on 1 December 2001. This was deferred for a year until December 2002. This affected 83% of the Housing Authority's total stock of domestic properties. In terms of numbers, this affected 532,049 public housing units including those of the two Applicants.

(6) On 31 October 2002, the RHC resolved to defer the rent review due to be held in December 2002 for a year until December 2003. This affected 540,686 public housing units including those of the two Applicants. It is this decision of the Housing Authority (through the RHC) that was the subject-matter of the present applications for judicial review.

(7) At the same time as the decision referred to in paragraph (6) above, the RHC also resolved to enhance the Rental Assistance Scheme for tenants who had short-term financial difficulties due to the economic downturn.

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17. I have gone through the events following the 1997 amendments in some detail as this will be relevant later in dealing with some of the Applicants' arguments. For the time being, it suffices just to note that the effect of all the waivers and deferrals has been that, since the amendments to the Ordinance in 1997, there have been no rent increases.

18. However, the evidence before the Court also shows that for the period from the first quarter of 2000 through the fourth quarter of 2003, the applicable MRIR for public housing tenants has exceeded 10%. In fact, the trend has been to go upwards. In the first quarter of 2000, the MRIR was 9.9%. In the final quarter of 2003, this figure had risen to 14.2%. It is this excess beyond 10% (the figure, it will be recalled, stipulated in section 16(1A)(b) of the Ordinance) about which the Applicants complain.

19. The individual circumstances of the Applicants, Madam Ho Choi Wan and Mr Lam Kin Sum are described in paragraphs 10 and 11 of the Judgment : -

> "10. The applicant in HCAL 174 is a 73-year old lady who has already retired. She is entitled to, and receives, Old Age Allowance of $705 per month. Out of her several children, her youngest son, who works as a lorry driver earning $8,000 monthly, contributes irregularly to her daily expenses. She pays rent of $2,110 per month for her public housing unit. The rent to income ratio in her case is 24.2%. During the hearing, the respondent informed the court that the applicant is entitled to apply for Comprehensive Social Security Assistance from the authorities.
>
> 11. The applicant in HCAL 198 is married and lives with his wife and 3 children all at school age. He works as a security guard and his wife works in a fast food shop. Their total monthly income is about $12,000. The rent to income ratio in his case is 17.6%."

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20. Both Applicants have highlighted their financial difficulties and hardship. On the other hand, the Housing Authority has alleged that if the MRIR of 10% had to be met, this would result in an annual loss of rent to the order of $1.52 billion. It is not necessary to determine the impact of these allegations when looking at the issues in this appeal, which I must now identify.

21. Before doing so, I would just like to refer to one fact which has some relevance. At the time of the amendments to the Ordinance in 1997, in fact for a long period even before then, Hong Kong went through a sustained period of inflation. Subsequent to the amendments, Hong Kong started to experience deflationary times. As the judge said in paragraph 9 of the Judgment : -

> "9. Before turning to the applicants' position, one more matter needs to be mentioned. In the decade or so before 1997, Hong Kong's economy has generally enjoyed a relatively rapid growth, with the result that Hong Kong has a generally inflationary economy. As shown in the documents relating to the 1997 amendment placed before the Legislative Council at the time, inflation must have been an important reason which brought about the 1997 amendment. What has by now become widely known as the 'Asian economic crisis' has changed all that. Since about October 1997 up to now, Hong Kong has faced a more or less consistent trend of deflation. This in turn brought about economic problems such as depreciation in property value, reduction in income level and unemployment. The significance of these matters to the applications will be discussed below."

Thus, at the time the 31 October 2002 decision was made, Hong Kong was undergoing a period of deflation.

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The issues

22. The following issues fall to be determined in this appeal, being essentially those arguments raised by the Applicants before Chung J : -

(1) The decision made on 31 October 2002 constituted a "determination of variation of rent" (under section 16(1A)(a) of the Ordinance), notwithstanding that its effect was merely to freeze the existing rents payable by the Applicants (and others like them) and to defer the rent review that would otherwise have been undertaken in December 2002. If this was correct, it would follow that the Housing Authority was obliged by the terms of section 16(1A)(b) to ensure that the MRIR for all classes of land would not exceed 10%. (**Issue 1 : Was the 31 October 2002 decision a "determination of variation of rent" under section 16(1A)(a)?)**

(2) By reason of section 16(1A), the Housing Authority was under a duty to conduct a review of rent every 3 years. This duty was reinforced by the various statements made by the Housing Authority to the effect that there would be regular reviews of rent for public housing : before the amendments made in 1997, there was to be a review every 2 years; after the amendments, the review was to be once every 3 years. The Housing Authority has failed to carry out this exercise for at least 4 years. (**Issue 2 : The**

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statutory duty on the Housing Authority to conduct a rent review once every 3 years).

(3) Statutory duty aside, the Housing Authority was in any event bound to honour a legitimate expectation that the Applicants had to the effect that rent reviews would be carried out every 3 years. The Housing Authority had, by not reviewing rent for at least 4 years, not honoured this legitimate expectation (**Issue 3 : Legitimate Expectation)**.

(4) The Housing Authority was also obliged to review rent, instead of just deferring it, by reason of section 19 of the Interpretation and General Clauses Ordinance, Cap.1 ("IGCO"). (**Issue 4 : Section 19 of IGCO)**.

(5) The 31 October 2002 decision was unreasonable in that the Housing Authority permitted a state of affairs to continue whereby the MRIR was above the 10% level, instead of reviewing rents to ensure that this level (or below) was attained. The reasonableness test here is that based on the well-known case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223. (**Issue 5 : Was the 31 October 2002 decision *Wednesbury* unreasonable?)**

(6) If the Applicants succeeded in the judicial review applications, they would be entitled to relief in the form of an order of mandamus directing the Housing Authority to

review rents and determine a variation in accordance with section 16(1A) of the Ordinance. (**Issue 6 : Relief)**.

23. The judge determined Issues 2 and 3 in favour of the Applicants. This was enough to enable them to succeed in the judicial review proceedings. Issues 1 and 4 were resolved in favour of the Housing Authority. The determination of Issue 5 was regarded as following from the resolution of Issues 2 and 3. Issue 6 was determined in the Applicants' favour being the relief granted to them.

24. I now deal with these issues in turn.

Issue 1 : Was the 31 October 2002 decision a "determination of variation of rent" under section 16(1A)(a)?

25. The submissions on this issue were made to us by Mr Johannes Chan SC on behalf of the Applicants. It was argued that the 31 October 2002 decision of the Housing Authority to freeze the rent payable by tenants such as the Applicants and to defer a rent review, was a "determination of variation of rent". Reliance was placed on a number of arguments including the following : -

(1) The term "determination of variation" in section 16(1A)(a) of the Ordinance meant only a determination regarding rent. If the draftsman of the provision had meant only a variation, he would simply have said "any variation of rent". At the very least, Mr Chan argued, the term gave rise to ambiguity so that resort could be made to legislative materials.

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(2) Here, he argued, that the legislative passage of this provision showed that the term "determination of variation of rent" was used so as to exclude the application of section 16(1A) from initial determinations of rent, that is, the first determination of rent for a tenant who has just moved into a public housing unit. Any subsequent decision regarding rent, even if it was merely to freeze it, would be a determination of variation. Mr Chan pointed out that in an earlier version of the Bill, the term used had been "determination of rent".

(3) Mr Chan also submitted that if the term "determination of rent" referred only to variations of rent, then the purpose of the provisions in section 16(1A) would be frustrated, where, as in the present case, the Housing Authority maintained the level of existing rents with the result that the MRIR remained above the statutory level of 10%. This level of 10% was obviously the benchmark maximum for affordability and it had to be complied with, not avoided.

26. I regret I cannot agree with these submissions. With respect, I concur with the judge's conclusion and reasoning contained in paragraph 24 of the Judgment : -

> "24. I do not consider the background facts leading to (or indeed the legislative history of) the 1997 amendment of assistance to this part of the applicants' case. After all, the statute to be construed is the 1997 amendment (especially s. 16(1A)(a)) in its enacted form. S. 16(1A)(a) in its present form is not simply about the word

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> 'determination'. Rather, it is concerned with a 'determination of variation of rent'. Once that important difference is recognised, this part of the applicants' case must be rejected."

27. I emphasize the following points : -

(1) However ingenious Mr Chan's submissions were, the one point he could not overcome was the presence of the word "variation". It is difficult to see what other meaning can be given to this term other than to denote an alteration or change to the existing rent. This term admits of no other meaning. If further support were needed for this simple conclusion, the use of the word "adjustment" in section 16(1C) of the Ordinance, with its direct reference back to section 16(1A), is important.

(2) The task of the Court when construing a statute is of course to look for the legislature's intention. This involves, it has to be reiterated, construing the meaning of the actual words found in the statute in the context in which they appear. For a recent affirmation of this basic principle, see the judgment of the Chief Justice in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, at 223H-J : -

> "The courts' role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain *the legislative intent as expressed in the language*. Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain *what was meant by the language used* and to give effect to *the legislative intent as expressed in the language*. It is the text of the enactment which is the law and it is

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> regarded as important both that the law should be certain and that it should be ascertainable by the citizen."

(3) Only when the intention of the legislature is obscure, unclear or ambiguous would it assist to look at legislative materials in relation to the provisions in question : - see *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, at 634C-F where Lord Browne-Wilkinson laid down three conditions before resort could be made to legislative materials : -

(a) The relevant legislative provision had to be ambiguous or obscure or led to an absurdity;

(b) The material relied on consisted of one or more statements made by a minister or other promoter of the Bill together, if necessary, with such other material as might be necessary to understand such statements and their effect; and

(c) The effect of such statement was clear.

These principles have been affirmed in a number of cases, since, among them the House of Lords decision in *Regina v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349.

(4) In my view, none of the three conditions in *Pepper v Hart* is satisfied in the present case.

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(5) As to the point made that by construing "determination of variation" to refer only to variations, this would somehow enable the Housing Authority to thwart the asserted objective of ensuring that the MRIR of 10% is achieved (a theme that runs throughout the Applicants' submissions), I would only remark that the Court's task in dealing with a statutory provision is simply to construe it, using the aids to construction open to it, no more and no less. Primarily, the Court construes the actual words used to determine the legislative intention behind the provision. What is not permissible is for the Court to fill in gaps in the legislation even if the Court is able to decide on the material before it that such a gap exists in the first place. And what the Court certainly cannot do is to arrogate to itself the task of legislating. I am grateful to Mr Pannick in referring us to the decision of the Constitutional Court of South Africa in *State v Zuma and Others* [1995] 1 LRC 145 where at 156B-D, Kentridge AJ said : -

> "While we must always be conscious of the values underlying the Constitution, it is none the less our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.
>
> We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

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(6) This passage, although dealing with the construction of a constitution, applies equally to the construction of statutes. It has also been approved by the Judicial Committee of the Privy Council in *Matadeen and Another v Pointu and Others and Minister of Education and Science and Another* [1999] 1 AC 98, at 108E-G where, also in the context of a constitution but making reference to the construction of commercial documents, Lord Hoffmann said : -

> "Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge A.J. said in giving the judgment of the South African Constitutional Court in *State v. Zuma*, 1995 (4) B.C.L.R. 401, 412: 'If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

(7) Though different in nature, constitutions, statutes and ordinary contracts fall to be construed by the Courts in similar ways. The object of the exercise is to discover the meaning of the words actually used in the instrument. The Court's task is not to act as a legislator. And yet this is exactly what Mr Chan invites us to do. During the course

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> of submissions, he handed up a draft of what he said section 16(1A) really intended to mean. The draft began "Any determination whether to vary rent and if so, any such variation of rent" (emphasis added). The emphasized words were those that contained, according to Mr Chan, the real meaning of that provision. With respect, this merely underlined the fallacy in the argument, and highlighted the true meaning of the section. The Applicants were in effect asking the Court to legislate.

28. For the above reasons, I am of the view that the 31 October 2002 decision was not a determination of variation within the meaning of section 16(1A)(a) of the Ordinance. The requirements of section 16(1A)(b) therefore did not on this particular basis arise. But does any other basis exist? I now turn to the other Issues.

Issue 2 : The statutory duty on the Housing Authority to conduct a rent review once every 3 years

29. Here, the judge concluded that by a combination of the true construction of section 16(1A) and the Housing Authority's previous practice of reviewing rent once every 2 years, a duty arose on the Housing Authority's part to review rents for public housing every 3 years. In circumstances where rents had not been reviewed for 4 years, the Housing Authority were therefore in breach.

30. I shall be dealing in greater detail with the Housing Authority's previous practice of rent reviews later in this judgment under Issue 3 (Legitimate Expectation). For the time being it suffices merely to make

reference to what the judge regarded as evidence of the Housing Authority's previous practice. In the debate in the Legislative Council on 27 June 1997 regarding the proposed amendments to the Ordinance, the Secretary for Housing said this : -

> "under normal circumstances, the rent of public housing is currently reviewed once every two years. As I said during the Second Reading debate, this arrangement has been implemented for more than 20 years and proved effective".

31. Although the judge stated that the existence of the duty was "not in any doubt", he had more difficulty in finding the legal basis for this view. It was in these circumstances that the judge saw the basis as being a combination of section 16(1A) and the Housing Authority's previous practice of biennial rent reviews. In my view, the judge fell into error on this issue and I cannot agree with his conclusions : -

(1) No part of section 16(1A) or indeed any other part of section 16 itself requires the Housing Authority to conduct rent reviews at all, much less on a regular basis.

(2) Instead, what section 16(1A) seeks to do is to set out the limitations to any determination of the Housing Authority varying rents after the commencement of the Housing (Amendment) Ordinance 1997. Where a variation takes place : -

(a) It shall not be effective until at least three years from the date of the last determination of rent. In other words, all determinations of rent are to last at least

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3 years in duration and any variation will accordingly only take effect after at least this time. This perhaps is the only relevance that section 16(1A) has to the regularity of rent reviews, namely, that either they should not take place earlier than 3 years from the last determination of rent, or if they do, they should not be effective until at least this period has elapsed since the previous determination.

(b) The rent payable under any variation must be of such an amount that the MRIR (which is defined and to be determined by reference to sections 16(1D) and 16(1E)) for all classes of land in all public housing estates let for residential purposes, shall not exceed 10%.

(3) While I can accept for present purposes that the reference to 3 years in section16(1A)(a) is related to rent reviews, what cannot be entertained is the idea that somehow a duty arises to the effect that the Housing Authority must conduct a rent review (with the consequences that follow upon a variation) every 3 years. Not only is the section silent on this, such a notion is actually inconsistent with the wording of that subsection. The use of the term "at least 3 years" (emphasis added) suggests that a rent review may not necessarily take place every 3 years at all. A discretion is therefore allowed to the Housing Authority to determine when it would be appropriate to conduct a rent review.

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(4) The judge assumed that section 16(1A) dealt with rent review cycles : - see paragraphs 36, 43 and 47 of the judgment. For the above reasons, this was a wrong analysis. Section 16(1A) of the Ordinance deals with the consequences or limitations of a rent review that results from a variation of rent, not with any rent review cycle at all.

(5) Here, I would repeat those principles governing the interpretation of statutes referred to in paragraph 27 above.

(6) It is clear that the judge felt that it was not enough merely to look at the wording of section 16(1A) itself. The reference to the Housing Authority's previous practice relating to rent reviews is telling. However, this practice cannot conceivably be relevant to the exercise of construing section 16(1A). It certainly cannot add to the legislation nor can it fill in any perceived gaps in it : - see paragraphs 27(5) to (7) above. The relevance of this past practice is in relation to the issue of legitimate expectation only.

32. The judge was influenced by the view he took that the mischief aimed at in section 16(1A) (in other words its object) was the protection of tenants and ensuring that the rent they paid was affordable. Section 16(1A)(b) provides for the MRIR not to exceed 10%, as we have

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seen. I do not quarrel with this view but wish to make the following observations : -

(1) Although section 16(1A)(b) makes a clear reference to the MRIR not exceeding 10%, this reference is contained, deliberately it must be assumed on the part of the legislature, only in the context of variations to rents for public housing. The provision (indeed the whole of the Ordinance) is silent as to when such variations should take place, a point I have already made. It is significant that section 16(1A)(b) does not require the Housing Authority to ensure that all public housing rents should be at such a level that the MRIR would not exceed 10%. Nor, for the reasons stated earlier, does it require the Housing Authority to conduct rent reviews so that this state of affairs is achieved.

(2) Quite why the legislature did not require the Housing Authority to take active steps (by way of rent reviews or otherwise) to ensure that the MRIR for all public housing units would not exceed 10%, is not a matter on which I think this Court can, or perhaps needs to, speculate. However, it is pertinent to note that the 1997 amendments to the Ordinance were passed at a time when Hong Kong was going through an inflationary phase. The judge himself remarked, “the 1997 amendment [to the Ordinance] were obviously enacted with an inflationary economy in mind”. Thus, those limitations contained in

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sections 16(1A)(a) and (b) (see paragraph 31(2) above) were protective measures accorded to tenants with an inflationary economy in mind, but leaving it open to the Housing Authority to decide (as it has done) whether or not to change rents at all. I accept Mr Dykes' point that these provisions in the Ordinance equally apply irrespective of whether Hong Kong is going through a period of inflation or deflation, for section 16 makes no distinction between the two situations. However, the fact that the legislative amendments were passed at a time of inflation may perhaps explain why the legislation appears in the form it does.

Issue 3 : Legitimate Expectation

33. It is first important to identify the relevant legitimate expectation that the Applicants allege they were entitled to enforce. In the Judgment, this is stated to be an expectation that the Housing Authority would regularly review rents for public housing, meaning that the Authority would review rents (prior to the 1997 amendments) every 2 years and (after the amendments) every 3 years. The expectation is put slightly differently by the Applicants, namely, that : -

> "The rent of public housing units will be reviewed every three years (after 1998) and that the rent will be set on the basis of the affordability of tenants, which is translated into a statutorily set ceiling of 10% of the MRIR".

34. Before dealing with the question whether such a legitimate expectation existed, I should just set out some relevant principles.

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35. The Court of Final Appeal has recently in *Ng Siu Tung & Others v Direction of Immigration* (2002) 5 HKCFAR 1 dealt with the principle regarding legitimate expectations : - at 40B-47B. The following statements of principle are relevant in the present appeal : -

(1) Where a legitimate expectation is based on statements or representations made by the relevant authority or official, such must first be clear and unambiguous before they can be enforced : - at 44D-G (paragraphs 103-104).

(2) Where a statement or representation is reasonably susceptible of competing constructions, a rational interpretation of it by the authority concerned will be acceptable; in other words where the construction adopted by the authority is not so aberrant as to be irrational in the *Wednesbury* sense : - at 44G-I (paragraph 104) referring to the judgment of Lord Slynn of Hadley in *Regina v Ministry of Defence, Ex parte Walker* [2000] 1 WLR 806, at 813.

(3) Effect will not be given to a legitimate expectation where the decision-maker is required to exercise his discretion in such a way as to undermine the statutory purpose of the relevant legislation : - at 47E-F (paragraph 112) and 52G-54A referring to the English Court of Appeal decision in *Regina v Secretary of State for Education and Employment Ex parte Begbie* [2000] 1 WLR 1115.

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(4) Where a legitimate expectation is held to exist, the decision-maker will be required to take it into account when he makes his decision. Unless compelling reasons exist, he will be expected to honour the legitimate expectation. See here : - 41D-43G (paragraphs 92-98).

36. In my view, there was no legitimate expectation to the effect either as held by the judge or as submitted by the Applicants in this appeal. It was certainly not clear and unambiguous to this effect : -

(1) In the Judgment, the judge referred only to the statement made by the Secretary for Housing in the Legislative Council debate on the amendments to the Ordinance held on 27 June 1997. I have already set out the relevant passage in paragraph 30 above. The judge was of the view that this speech was clear and unambiguous as to what the Housing Authority's previous practice was, namely, that the Authority would review public housing rents every two years. I am unable to agree with this. The statement made by the Secretary of Housing requires careful analysis : -

(a) First, the Secretary for Housing was not representing (and certainly not clearly or unambiguously) that a rent review would be carried out every 2 years. He was saying that this was a practice that was carried out "under normal circumstances". The circumstances prevailing in Hong Kong at the time of

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these amendments were, as noted above, during a period of inflation.

(b) Secondly, and perhaps more important, what was said by the Secretary for Housing was in the context of a debate over whether amendments should be permitted to the draft legislation (as proposed by some legislators) allowing for triennial rent reviews rather than by biennial ones. The Government's position was that triennial rent reviews were unnecessary. It is clear from the relevant extract from Hansard that the references to rent reviews were in the context only of rent increases : - see the speeches of Mr Lee Wing Tat at 1463 and of Mr Chan Kam Lam at 1463-4. This was certainly the case at an earlier Legislative Council debate held on 11 December 1996 : - see the speech of Mr Leung Yiu Chung in the Hansard extract at 178.

(2) The relevance of this statement made in the context of rent increases is significant because it makes clear just what the representation as to rent reviews actually meant. In my view, the practice of rent reviews every 2 years "under normal circumstances" meant that tenants in public housing would not be subject to rent increases for at least 2 years. This was the effect of the practice of biennial reviews and was the true meaning of the representation that was made thereby to tenants. Of course, this

representation only made sense in inflationary times and that was the factual context in which it was made.

(3) That the reference to reviews every 2 years related to rent increases is also clear from the other material before us. I have already in paragraph 15 above referred to the Paper for the Legislative Council Housing Panel "Adoption of the 15% and 18.5% MRIR Ceilings for Public Rental Housing", in which it is stated that rents for estates were "increased" every 2 years. This, it is to be noted, was one of the documents named in the Applicants' Form 86 Applications as evidencing the legitimate expectation asserted by them.

(4) Similarly, in the Housing Authority's "Memorandum for the Rental Housing Committee Rent Review for Post-1973 Estate" RHC60/98 dated 3 July 1998 (another document relied on by the Applicants), the reference to rent reviews was again in relation only to rent increases. In the Housing Authority's "Memorandum for the Rental Housing Committee Rent Review for Harmony Blocks of New Housing Authority Estates" RHC61/98 (another document relied on by the Applicants), specific reference was made this time to a 3-year rent review cycle relating to rent increases. Paragraph 2 of that Memorandum states : -

> "2. It was formerly the Authority's policy to review domestic rents of public housing estates at an interval of every two years. As a result of the enactment of the Housing (Amendment) Ordinance 1997 which was put

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> into operation on 13 March 1998, rent increases can only take effect three years after the preceding rent adjustment. The rents for these Harmony blocks which were set or last revised in or before 1995 are now due for review with any rent increase to take effect on 1 September 1998." (emphasis added)

This followed the same wording as in the earlier memorandum.

(5) It has to be accepted that in a number of documents, there are indeed references to triennial rent reviews. In addition, the Applicants place reliance on a letter written to one of them dated 31 October 2001 in which reference is made to the review of rents by the Housing Authority every 3 years. However, those statements have to be understood in the context of rent reviews meaning rent increases contained in those documents to which I have referred.

(6) To conclude, at its highest, the material before us does not show that a clear and unambiguous representation was made to the effect submitted by the Applicants or as found by the judge. More realistically, they only show that the only representation made by the Housing Authority was that tenants of public housing would not be subject to possible increases of rent for at least 3 years from the date of the last determination. This, I would add, is precisely the concept that section 16(1A)(a) guarantees.

37. The point made in the last paragraph also paves the way for the argument that in any event, an adherence to a legitimate expectation (even

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assuming it to exist) that the Housing Authority would conduct rent reviews every 3 years would mean that such an inflexible procedure would undermine the statutory requirement in section 16(1A)(a) that any determination of rent should last "at least 3 years" : - see paragraph 31(2)(a) above. This would provide a reason for the suggested legitimate expectation, even if it were established, not to be enforced in the present case : c.f. the principle stated in paragraph 35(3) above.

38. Even if it could be said that the representation made by the Housing Authority (either as held by the judge or as asserted by the Applicants) is a possible construction, the alternative construction referred to in paragraphs 36(2) and (6) above is also (at least) a rational interpretation of it by the Housing Authority. If this be correct, the Housing Authority's decision on 31 October 2002 cannot be impugned : - c.f. the principle set out in paragraph 35(2) above.

39. In view of my conclusion on this aspect, it is not necessary to deal with Mr Pannick's alternative submission that in any event, even if the statements or representations were clear and unambiguous, the Housing Authority was entitled to change its policy. In this respect, he relied on the principles enunciated in *Hughes v Department of Health and Social Security* [1985] AC 776 and *In re Findlay* [1985] AC 318. I should perhaps only say this. As Mr Dykes rightly pointed out, in *Ng Siu Tung* at 41F-I (paragraph 93), while a policy can be changed, the adoption of a new policy by a decision-maker does not relieve him of the duty to take the legitimate expectation fully into account. In the present case, the Housing Authority has at no stage accepted that a legitimate expectation existed. This would perhaps explain just why no evidence was therefore filed in relation to any

change of policy and the question whether, upon such change of policy, the legitimate expectation had been taken into account.

40. Further, it is not necessary either in the circumstances to resolve the question of whether detrimental reliance is a requisite ingredient in the enforcement of legitimate expectations. This aspect was touched upon by the majority in *Ng Siu Tung* : - see 46D-J (paragraphs 109-110) but not resolved. I would also not resolve this difficult aspect in this appeal and would leave it for when the point become necessary to resolve.

41. For the reasons articulated above, I am of the view that there was no legitimate expectation to the effect either as found by the judge or as contended by the Applicants.

Issue 4 : Section 19 of IGCO

42. Section 39(1) of IGCO states : -

> "**39. Exercise of powers**
>
> (1) Where any Ordinance confers any power or imposes any duty, then the power may be exercised and the duty shall be performed from time to time as occasion requires."

43. The duty that Mr Dykes identified was that the Housing Authority had to conduct periodic reviews so as to discharge its responsibility under the Ordinance regarding the rents payable for public housing. Here, he said, the Housing Authority had to "keep an eye" on the MRIR. In support of his submissions, Mr Dykes relied on *Taylor and Others v Munrow (District Auditor)* [1960] 1 WLR 151.

44. I confess having some difficulties in accepting the Applicants' submissions here. True it is that the Ordinance sets out the responsibilities of the Housing Authority. Section 4 sets out the general powers and duties of the Housing Authority while section 16 deals with the Authority's responsibilities in relation to rents for public housing. Mr Pannick, for his part, accepts that the Housing Authority does have a duty to monitor the rental situation and to consider from time to time whether or not to revise rents. However, the evidence quite clearly shows that the Housing Authority has been monitoring the rental situation for public housing estates each year since the 1997 amendments. The various decisions to revise, freeze and waive rents referred to in paragraph 16 above, demonstrates this. The decision made on 31 October 2002 to defer the rent review for a year was made after the RHC had carefully considered many factors. The affirmation of Mr Ng Shui-lai (the Chairman of the RHC) dated 14 February 2003 provides details of this meeting. Further, the Housing Authority set up an ad hoc committee on domestic rent policy in January 2001 to conduct a comprehensive review of the rental situation in Hong Kong.

45. In my view, this is far from the situation that prevailed in *Taylor v Munrow* where the local authority, despite being given the power to fix rents (and therefore according to the Court having the duty to do so), simply did nothing.

46. The Applicants have not challenged the Housing Authority's decision on the basis that it has done nothing. Nor is the challenge based on any assertion that the Housing Authority was refusing to act in the face of actual hardship suffered by tenants of public housing. The challenge has

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really only been on the basis that the RHC has not conducted a rent review in light of the fact that the MRIR has since 2000 exceeded 10%. However, as I have already observed, nothing in the Ordinance requires the Housing Authority to achieve the target of 10%. If this had been its obligation, this would have been expressly stated in the Ordinance. I would only add that if this were indeed the Housing Authority's obligation, the duty on the authority would not merely have been (as the Applicants allege) to conduct a review once every 3 years. Rather, in this situation, regular rent reviews would have to be carried out in order to ensure that the MRIR figure of 10% was not exceeded.

47. When considering the scope of an authority's duties, the first point of reference must be the relevant statute. The Ordinance in the present case does not spell out the Housing Authority's duties in the way suggested by the Applicants. Section 19 of IGCO does not take the matter any further. The judge's conclusions on this aspect were, with respect, entirely correct.

Issue 5 : Was the 31 October 2002 decision *Wednesbury* reasonable?

48. Upon analysis, this ground raises no different arguments than the other grounds relied on by the Applicants to impugn the 31 October 2002 decision and therefore falls away in view of my conclusions of the other issues. This was the way it has been treated by the judge as well.

Issue 6 : Relief

49. This issue concerns the relief that was eventually granted by the judge following a contested hearing. In the Second Judgment, the judge

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rejected the argument that the Housing Authority be given a discretion as to what type of rent review was appropriate, including a discretion to determine that no variation of rent should take place. Instead, the learned judge made it clear that the Housing Authority was actually required to review rents and to vary them in accordance with the requirements of section 16(1A). By this was meant that the rents had to be varied so that the MRIR maximum of 10% was not exceeded.

50. In this appeal, it becomes, strictly speaking, unnecessary in view of my conclusions on the other issues to deal with this issue on relief. However, I ought to deal with it out of completeness. It had been argued by the Housing Authority that the order for relief (see paragraph 3 above) was too widely drawn and ought to have been confined just to the two Applicants. This cut down quite substantially on the objections that had been raised by the Housing Authority in the Court below. In my view, Mr Pannick's arguments have merit. There is no reason for the judge to have granted an order that was in the wide terms that were made. That said, however, even restricting the relief to varying the rent for the two Applicants, applying the criteria in section 16(1A) of the Ordinance, may well involve the same exercise as having to conduct a rent review for the whole class of tenants in public housing units to which the Applicants belong. However, this would have been a matter for the Housing Authority to decide. Nevertheless, as I have said, the issue of relief does not really arise in view of my earlier conclusions.

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Conclusion

51. For the reasons given above, I conclude that the Housing Authority is not under a duty to review rents in public housing estates every 3 years, nor was there a legitimate expectation to this effect. I would therefore allow the appeals and set aside the orders made in each case by Chung J.

52. As to costs, I would make an order nisi that the Housing Authority be entitled to its costs here and below, such costs to be taxed if not agreed and that the Applicants' costs are to be taxed in accordance with the Legal Aid Regulations.

Hon Stock JA :

53. I have had the advantage of reading in draft the judgment of the Chief Judge. I respectfully agree with it and with the orders he proposes to make.

54. The phrase 'determination of variation of rent' is, as a matter of ordinary usage, an odd one to have chosen to express that which I consider to be the obvious intention of the legislature as revealed by the full statutory context. The genesis of the phrase has been explained by the evidence to which we have been taken, namely, that the words 'of variation' were inserted so as to exclude from the operation of section 16(1A) the initial setting of rents for new estates. But in that it is said that we are not entitled to look at that history unless there be ambiguity, the meaning of the words in

context is in any event clear enough, and they do not reasonably bear the meaning for which the respondents contend.

55. Context is vital to statutory interpretation, and the interpretation which the respondents would have this court apply seems to me to offend a proper contextual interpretation. The duty of the Housing Authority is to provide housing and ancillary amenities to such classes of persons as it may, subject to the approval of the Chief Executive, determine (section 4(1)). In order to do so, it needs to acquire property, construct property, manage property, carry out land clearance where necessary, lay out streets, and "to do all such other acts as reasonably necessary for the exercise or performance of all or any of the powers and duties of the Authority under this Ordinance..." (section 4(2)); and by reason of section 4(4) "the policy of the Authority shall be directed to ensuring that the revenue accruing to it from its estates shall be sufficient to meet its recurrent expenditure on its estates." The Authority is also empowered to grant leases on "payment of such rent as the Authority may determine": section 16(1). The countervailing factors with which the Authority has therefore to tackle are complex, and whilst affordability of the housing provided is key, so necessarily is the requirement to maintain the financial viability of the Authority. In this setting, had it been intended that rents for the many estates and many thousands of units for which the Authority is responsible would, come what may, be reviewed every three years, and that there was a responsibility, come what may, to fix rents so that the overall MRIR would not exceed 10%, very clear words would have been required to convey such duties. The fact is that those words are not there; which is perhaps not a matter of surprise for the practical ramifications of such a provision would be alarming: the figures we have seen show that the suggested three year

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cycle would affect different units at different times, so that in some years the number is small, with the possible consequence that in order to satisfy the overall allegedly mandatory 10% mark in times of deflation, some rents – those of a disproportionate few which happen to be the subject of review in a particular year – would have to be reduced to zero, and even then that might not achieve the suggested requirement (see core appeal bundle, pages 108-109). Such a bizarre result could never have been intended. The whole flavour of the section in question, in context, is protective of the tenants against overly frequent increases in rent, and designed to ensure that such increases as are demanded are kept within reasonable bounds. A "determination" in itself is a concept different from a "variation"; and a "waiver of rent" and "deferral of a review" are, as matter of plain language, concepts essentially different from both a determination of rent, and from a variation of rent, and the gloss that the respondents seek to impose on the section does not survive the application of any of the recognized routes of statutory interpretation. In the case of a waiver or of a deferral, there is nothing to 'take effect' as is contemplated by section 16(1A)(a); and the fact that the argument of the respondents was driven to suggest that "each time the HA decided to further defer a rent increase it made a 'determination' that the rent would be *varied by 0%* …." (my emphasis) illustrates the strain to language that is invited by the respondent's case.

56. To found a legitimate expectation, there must be established a representation or practice that, objectively viewed, is clear and unambiguous, the test for which must be contextual. See De Smith, Woolf and Jowell "*Judicial Review of Administrative Action*, 1995, 8-055."

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57. There are at least three different representations that could be suggested to arise from statements or practice in this case: that the Housing Authority would consider periodically whether to review rents; or that rents would not be increased more frequently than once every three years; or that affordability of rents would be reviewed once every three years and that, in consequence of this last exercise, rents would have to be adjusted every three years so that the overall MRIR would not exceed 10%. It is the last of these three that is the representation that is put forward (see paragraph 57 of the Notice of Application in HCAL 198 of 2002; and paragraph 56 of the Notice in HCAL 174 of 2002). Putting aside for the moment the consideration that the facts do not, I think, establish the suggested settled practice after section 16A came in effect, it seems to me obviously difficult for the applicants to show that the representation or practice was the third rather than any of the others. If that is so, then the representation which must found the substantive right is not established as a clear one, for which reason alone this limb of the applicants' case must fail.

Hon Yeung JA :

58. I have the advantage of reading the draft judgment of the Chief Judge of the High Court. I agree with his judgment. I only wish to add the following.

59. Though oddly worded, the meaning of Section 16(1A), introduced by the Housing (Amendment) Ordinance 1997 (the 1997-amendment) is plain and clear.

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60. Instead of compelling the Authority to review rent for public housing units every three years, the 1997-amendment only *permits* the Authority to review rent *at most* once every three years with the further restriction that rent determined in such review *and in such review only* shall not exceed 10% of MRIR (emphasis added).

61. No doubt, as the judge rightly held, that the legislature, by the 1997-amendment, intended to give tenants of public housing units greater protection by controlling the frequency and the extent of rent increases. However, it is important to ascertain the exact nature and scope of such intended protection.

62. Did the legislature intend that rent for public housing units should never exceed 10% of MRIR, otherwise it should be reduced or did it simply intend to confine further rent increases subsequent to the 1997-amendment by restricting the frequency of rent reviews and by limiting the increased rent to the maximum of 10% of MRIR should there be such rent reviews?

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63. The 1997-amendment was introduced after Hong Kong had experienced a prolonged period with double-digit annual increase both in economy and in inflation.

64. If the Authority were allowed more frequent rent reviews (obviously it was in the financial interest of the Authority to do so in the then prevailing economic circumstances if its aim was to generate more rent), tenants of public housing units were likely to be prejudiced as rent was bound to adjust upwards.

65. The judge was right in saying that "…the 1997-amendment was obviously enacted with an inflationary economy in mind. Tenant's protection would be enhanced by a longer rent review cycle…" (para. 46 of the judgment).

66. The judge was also right in concluding that the subsequent deflationary economic condition "was not apparent at the time of the 1997-amendment" (para. 30 of the judgment).

67. If the legislature had anticipated the possibility of the economic depression and deflation in the post 1997-amendment period that had plagued Hong Kong, and had also intended that rent for public housing units

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would not exceed 10% of MRIR even in such economic conditions, the 1997-amendment would not have restricted the frequency of the rent reviews to *not more than once every three years* in its attempt to give greater protection to the tenants (emphasis added).

68. The Authority did have the practice of reviewing rent for public housing units (invariably upwards) every two years in the pre1997-amendment period. However, when such practice was in place, there was no statutory limit that the reviewed rent should not exceed 10% of MRIR. In fact, the then prevailing MRIR ceiling (by means of executive measures) was much higher, at 15% to 18.5%.

69. With the 1997-amendment that restricts the frequency of rent reviews to not more than once every three years and the highest level of the increased rent at 10% of MRIR, the Authority should not be compelled to adhere to the previous practice of having rent review for public housing units once every two or three years.

70. As the biggest landlord (with 178 housing estates consisting of over 600,000 public housing units), the Hong Kong Government, through the Authority, is providing heavily subsidized housing benefit to over one-third of the population in Hong Kong.

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71. The Authority, in line with the declared Government policy, is of course obliged to keep rent of public housing units at affordable levels. On the other hand, the Authority also has the statutory obligation to ensure "that the revenue from its estates shall be sufficient to meet its recurrent expenditure on its estates" (See section 4 of the Housing Ordinance Cap. 283).

72. If the Authority were obliged to have rent review every two or three years in the post 1997-amendment period and were then compelled to lower rent of all public housing units to the 10% MRIR level, it would have suffered an annual rent loss of over $1.5 billion, rendering it impossible to have sufficient revenue to meet the recurrent expenditure without further injection of funds from the Government.

73. On this issue, it is fair to point out that the general population in Hong Kong who do not have the benefit of subsidized Government housing very often have to incur housing expenses in excess of 30% of their incomes. 10% of MRIR is an exceedingly low percentage in terms of rental expenses in Hong Kong.

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74. Limiting rent payable by tenants of public housing units to 10% of MRIR in deflationary economic circumstances means even greater housing benefits to those tenants at the expenses of the general population.

75. It must also be remembered that there are other rent relief measures to assist public housing tenants who genuinely need assistance, such as rent-increase waivers, the Comprehensive Social Security Assistance Scheme, the implementation of Rent Assistance Scheme and the choice of cheaper units. The Government would no doubt take such reasonable steps as may be necessary to ensure that those less privileged members of the society and those in need would be properly looked after.

76. Mr Dykes SC, leading counsel for the Applicants, argues that as soon as the minimum period of three years has expired since the last determination, and if the MRIR exceeds 10%, the Authority has a duty to review rent to bring it down to not more than 10%.

77. Mr Dykes's argument is predicated on the assumption that by the 1997-amendment, the legislature intended that rent for public housing units should never exceed 10% of MRIR and to ensure such (low) level of affordability, the rent payable before the 1997-amendment would have to be adjusted downward.

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78. I do not agree with such argument. In the light of the legislative history and the wording used in s 16(1A), the legislature only intended to limit the post 1997-amendment increased rent (should there be a rent review) to the maximum level of 10% of MRIR. The legislature did not intend to reduce the level of rent payable before the 1997-amendment even if such rent exceeds 10% of MRIR.

79. I also reject the suggestion that s 16(1A) imposes a duty on the Authority to carry out a rent review every three years or at all. S 16(1A) does not allow an interpretation that imposes such a duty on the Authority. The section only restricts the Authority to have more frequent rent reviews than once every three years. It further restricts the Authority, on such review and on such review only, from charging rent for public housing units in excessive of 10% of MRIR.

80. When enacting s 16(1A), the legislature did not envisage the post 1997-amendment deflationary economic circumstances at all, as found by the judge. It was intended to be circumscriptive in its operation rather than liberal or permissive.

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81. In a dissenting judgment in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, Lord Wilberforce made the following comments which have since be widely adopted and followed in other cases :

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The court should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question 'What would Parliament have done in this current case- not being one in contemplation- if the facts had been before it?' attempt themselves to supply the answer, if the answer is not be found in the terms of the Act itself."

82. Similar sentiment was expressed by the Chief Justice in *Director of Immigration v Chong Fung Yuen* [2001] 4 HKCFAR 211, at 233 H-J as referred to in the judgment of the Chief Judge.

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83. Mr Dykes further argues that the Authority has a duty to periodically review rent for public housing units in the discharge of its statutory duties under the Housing Ordinance to ensure affordability and to achieve a balanced budget.

84. I can find no statutory support for such suggestion at all. Quite the contrary, the phrase - "*any determination of variation of rent…shall only take effect at least 3 years from…*" suggests that a rent review may not take place every 3 years or at all.

85. The pre 1997-amendment practice of reviewing rent every two years took place in a highly inflationary economic environment. When such practice was in place, the rent for public housing units was set at the MRIR ceiling of 15% to 18.5%. The 1997-amendment was enacted to protect tenants from more regular reviews, and hence more frequent rent increases.

86. With the 1997-amendment, which came into effect in March 1998, the situation had completely changed. Not only was the inflationary economic environment completely reversed, the frequency of the reviews was restricted to not more than once every three years and the MRIR ceiling was also reduced to a much lower level of 10%.

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87. The Authority must be allowed to adopt a new policy as long as such policy is not in conflict with the statutory provisions and not irrational in the *Wednesbury* sense. After all, housing policy is a very important aspect of the overall Government policy. It affects 30% of the population and has tremendous impact on Government revenues.

88. The Authority must be allowed discretion to implement its housing policy in such a way as to properly meet the changing circumstances of the society.

89. I have considered all the Legislative Council and other materials. I agree with the Chief Judge that there is no promise, representation, practice of policy made, adopted or announced by or on behalf of the Hong Kong Government or the Authority to form any proper foundation of a legitimate expectation that rent for public housing units would be reviewed every three years subsequent to the 1997-amendment.

90. The pre 1997 bi-annual review of rent for public housing units, as known to the tenants was in operation under a very different economic environment in pursuant to the then existing policy.

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91. With the introduction of the 1997-amendment, whatever expectation based on the practice or policy of the Government in the pre 1997-amendment period would be replaced by the only legitimate expectation that the Authority would carry out a new policy that is reasonable and permissible under the 1997-amendment.

92. It is, in my view, not unfair, and certainly not *Wednesbury* unreasonable for the Authority not to have a rent review for public housing units every three years subsequent to the 1997-amendment so that rent for public housing units would be brought to a level lower than that of the pre 1997-amendment period.

93. The fact that rent for public housing units is primarily determined according to the affordability of tenants with the use of MRIR as the criterion does not mean that the affordability level must be set at a level below 10% of MRIR. There is no statutory duty to maintain rent for public housing units at such low level in the absence of any review.

94. Mr Dykes's argument, based on legitimate expectation also fails.

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95. In so far as the judge found that the 1997-amendment obliges the Authority to have a rent review for public housing units every three years and that there is such a legitimate expectation, the judge was in error.

96. The only remaining issue is the one that arises out of the Respondent's notice. The suggestion by Mr Johannes Chan SC, on behalf of the Applicants, is that the decision of the Authority to freeze rent and to deter a rent review made on 31 October 2003 was a "determination of variation of rent".

97. The judge held that the Authority's decision to defer rent review or not to review rent for public housing units did not constitute a "determination of variation of rent" so as to evoke the operation of s 16(1A)(b) requiring the reviewed rent to be under 10% of MRIR.

98. Again, in my view, the wording of s 16(1A)(a) is clear. It refers to a *determination of variation of rent*, instead of *a determination of no variation of rent or a decision to defer a rent review* (emphasis added).

99. If a determination of variation includes a determination not to vary rent or a decision to defer a rent review as suggested by Mr Chan, it does not fit comfortably with the requirement that such determination "shall

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only take effect at least three years from the date on which any immediately preceding determination…came into effect".

100. A determination not to vary rent or a decision to defer a rent review must necessarily take immediate effect and cannot be bound by the three-year requirement.

101. I reject the suggestion that "Any determination of variation of rent" in s 16(1A)(a) includes a determination not to vary rent and/or a decision to defer a rent review.

102. I agree with the conclusion reached by the judge that section 39(1) of the Interpretation and General Clauses Ordinance (Cap.1) does not assist the Applicants either.

103. I would also allow the appeal and make the orders proposed by the Chief Judge.

Hon Ma CJHC :

104. It follows that the appeals are allowed and that in respect of each appeal the orders made by Chung J are set aside. There will be a costs order nisi that the Housing Authority shall have its costs here and below to

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be taxed if not agreed, and that the Applicants' costs shall be taxed in accordance with the Legal Aid Regulations.

(Geoffrey Ma)	(Frank Stock)	(Wally Yeung)
Chief Judge, High Court	Justice of Appeal	Justice of Appeal

Mr Philip Dykes SC & Mr Johannes Chan SC, instructed by Messrs Ho, Tse, Wai & Partners for the Applicants/Respondents

Mr David Pannick QC, Mr William Marshall SC & Mr P Y Lo, instructed by Messrs Simmons & Simmons for the Respondent/Appellant