CACV 176/2013

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO. 176 OF 2013

(ON APPEAL FROM HCAL NO. 49 OF 2012)

BETWEEN

LEUNG HON WAI (梁翰偉)	Applicant
and	
DIRECTOR OF ENVIRONMENTAL PROTECTION	1st Respondent
TOWN PLANNING BOARD	2nd Respondent

Before: Hon Lam VP, Kwan JA and McWalters JA in Court

Dates of Hearing: 4 and 5 June 2014

Date of Judgment: 2 September 2014

J U D G M E N T

Hon Lam VP and Hon Kwan JA:

1. This is an appeal against the judgment of Au J on 26 July 2013 dismissing the applicant's application for judicial review. It relates to the project to construct and operate the Integrated Waste Management Facilities ("IWMF") at a site at Shek Kwu Chau ("SKC"), an island to the west of Cheung Chau and the south of Lantau Island. The IWMF, commonly known as the municipal wastes incinerator, is a

"designated project" under Schedule 2 of the Environmental Impact Assessment Ordinance, Cap 499 ("EIAO") and is subject to the environmental impact assessment process thereunder.

2. The applicant seeks to challenge three decisions in the judicial review. The first is the decision of the 1st respondent, the Director of Environmental Protection ("the Director"), dated 17 January 2012 to approve with conditions an Environmental Impact Assessment Report ("EIA report") for the project, pursuant to section 8(3) of EIAO ("1st Decision"). The second is the decision of the Director dated 19 January 2012 to grant an environmental permit ("EP") to operate and construct the project with conditions, pursuant to section 10(3) of EIAO ("2nd Decision"). The third is the decision of the Town Planning Board on 17 January 2012 not to uphold the opposing representations and to submit the draft SKC Outline Zoning Plan No S/I-SKC/1 to the Chief Executive in Council, pursuant to section 8(1) of the Town Planning Ordinance, Cap 131 ("3rd Decision").

3. The applicant is a resident of Cheung Chau and is directly affected by the above decisions.

4. A total of eight grounds for judicial review were advanced before Au J, with sub-issues for some. The judge rejected each of them in a detailed and comprehensive judgment of 82 pages. Only three grounds are the subject of renewed challenge in this appeal. Furthermore, in light of the fact that the draft SKC Outline Zoning Plan was approved by the Chief Executive in Council on 13 March 2012, rendering moot the challenge to the reasons for the 3rd Decision, the

applicant has not pursued the challenge to the 3rd Decision and his appeal against the Town Planning Board, the 2nd respondent herein.

5. Before going to the grounds in this appeal, we will set out the relevant background matters and statutory provisions, taken largely from the judgment below. All references to statutory provisions are to EIAO, unless stated otherwise.

The background and the EIA process

6. Under section 5(1)(a), a person who is planning a "designated project" ("project proponent") shall apply to the Director for an EIA study brief ("SB"). In this instance, the Environmental Protection Department ("EPD") is the project proponent, as appeared from §2.3.1 of the project profile ("PP") and the relevant application forms. The Director is the head of the EPD. This is relevant to one of the grounds of challenge in this appeal.

7. On 31 March 2008, the EPD submitted an application to the Director for an SB for the project. As required by section 5(2)(b), the EPD submitted with the application a PP that should comply with the technical memorandum ("TM"). The purpose of a PP, as stated in §2.1.1(a) of the TM, is to enable the Director to determine the scope of the environmental issues associated with a designated project which shall be addressed in the EIA study, together with the technical and procedural requirements that the EIA study shall meet.

8. Under section 16(1), the Secretary for the Environment ("the Secretary") may issue technical memorandums setting out principles, procedures, guidelines, requirements and criteria for, inter alia, the

technical content of a PP, the technical content of an SB or EIA report, deciding whether a designated project is environmentally acceptable, deciding whether an EIA report meets the requirements of the SB, and the issue of an EP. Under section 16(4), the Director shall be guided by all applicable technical memorandums when deciding on matters under sections 5, 6, 8, 10, 12, 13 and 14. Up to the present, there has been only one TM issued by the Secretary. It is provided in section 16(12) that a TM is not subsidiary legislation.

9. The application for SB for the project was duly advertised pursuant to section 5(2)(c). The EPD received 19 public comments on the PP. On 14 May 2008, the Director issued the SB to the EPD pursuant to section 5(7).

10. Under section 6(1), the project proponent shall prepare an EIA report in accordance with (a) the requirements of the SB; and (b) the TM applicable to the assessment. Under sections 6(3) and (4), after receipt of an EIA report, the Director shall decide whether it has met the requirements of the SB and TM and once he decides it has met these requirements, the Director shall advise the project proponent (a) when to exhibit the report for public inspection; and (b) whether the report shall be submitted to the Advisory Council on the Environment ("ACE"). ACE is an advisory body consisting of representatives from well-established environmental groups, members from various professional disciplines and respectable community personalities appointed by the Chief Executive.

11. The importance of a decision under section 6(3) that an EIA report meets the requirements of the SB and TM was explained by the

Court of Final Appeal in *Shiu Wing Steel Ltd v Director of Environmental Protection & Airport Authority (No 2)* (2006) 9 HKCFAR 478 at §19:

> "Approval is a pivotal point in the process. Approval of an EIA report, and the consequential placement by the Director of the EIA report on the register, fixes the entirety of the information which an applicant provides relating to the construction of a project, the applicant's assessment of the impact of the project on the environment and the measures which the applicant proposes to take for the protection of the environment. These issues are the issues prescribed by a TM and an SB and they are issues which the Director is bound to regard in determining whether to grant an environmental permit for the project. The critical step which brings information and proposals on these issues into the s10 process is the decision to approve the EIA report under s 8(3). As s 6(3) makes clear the legislative intention that an EIA report must meet the requirements of a SB and TM, it would be contrary to the Director's duty to approve a report that did not meet the requirements of the applicable SB and TM. ... As the decision under s 8(3) can be made only after the period of public exhibition of the report and only after consideration of any comments submitted by the public or by the ACE, a decision to approve an EIA report must be the final decision that the report meets the requirements of the applicable SB and TM. A final decision under s 8(3) that an EIA report be approved subsumes the earlier decision under s 6(3) that the report meets the requirements of the SB and TM."

12. An EIA report was first submitted for the approval of the Director in January 2011. On 9 February 2011, the Director gave section 6 approval that the report was considered suitable for public inspection. It was exhibited for public inspection for a month from 17 February 2011. 314 public comments were received.

13. On 21 March 2011, a subcommittee of ACE discussed that EIA report at a meeting and resolved to recommend it to ACE for endorsement with conditions. ACE duly resolved to accept the recommendations of the sub-committee on 11 April 2011.

14. On 11 May 2011, the EPD withdrew the application for approval of that EIA report in light of the decision of the Court of First Instance in *Chu Yee Wah v Director of Environmental Protection* on 18 April 2011 ([2011] 3 HKC 227). After the appeal of the Director was allowed by the Court of Appeal on 27 September 2011 ([2011] 5 HKLRD 469), the EPD submitted a revised EIA report on 24 October 2011 with minor updating for approval under section 6.

15. The Director gave approval under section 6 on 10 November 2011 that the revised EIA report was suitable for public inspection and the EIA report was exhibited for a month for the public to comment. 268 sets of written comments were received from the public.

16. The sub-committee of ACE met on 5 December 2011 and resolved to recommend the EIA report as revised to ACE for endorsement with conditions. ACE resolved to accept the recommendation on 30 December 2011.

17. Under section 8(3), within 30 days of the expiry of the public inspection or the receipt of comments from ACE or the receipt of further information from the applicant, whichever is later, the Director shall approve, approve with conditions or reject an EIA report.

18. On 17 January 2012, the Director approved the revised EIA report with conditions.

19. Based on the approval of the EIA report, the project proponent is required to apply to the Director for an EP under section 10(1), as it is only with the grant of an EP that the project proponent can proceed to construct and operate the designated project.

20. On 19 January 2012, the Director issued to herself the EP in respect of the project.

21. The applicant filed his application for leave to judicial review on 18 April 2012.

The issues in this appeal and how they should be approached

22. Three issues are raised in this appeal:

(1) whether the off-site mitigation measures proposed in §§7b.8.4.1 to 7b.8.4.8 of the EIA report to mitigate the significant ecological impact on Finless Porpoises through the loss of their habitat in the coastal and marine waters at SKC met the requirements of the relevant parts of Annex 16 of the TM;

(2) whether the EIA report failed to comply with the requirements for health impact assessment in the TM and the SB; and

(3) whether the Director has power to approve the EIA report prepared and submitted on her behalf, and grant the EP to herself.

23. Put shortly, the contention in issues 1 and 2 is that the 1st and 2nd Decisions were unlawfully made as the EIA report was not made in compliance with various provisions or requirements in the PP, TM and SB, alternatively the decisions were in any event plainly unreasonable. The contention in issue 3 is that as a matter of construction of EIAO, the legislative intent as expressed in the language is that the Director herself

cannot be an applicant in the EIA process. In this regard, it is pertinent to note that the applicant does not pursue on appeal these contentions that the judge ruled against him, namely, that there is breach of natural justice where the Director acted both as the applicant for and the grantor of the approval of the EIA report and the EP, or that the 1st and 2nd Decisions must be tainted by apparent bias for that same reason.

24. In respect of issues 1 and 2, the court must find the meaning of the relevant provisions of the PP, TM and SB and the procedure they prescribed to determine the scope of the Director's power to approve the EIA report and grant the EP. In interpreting these instruments created under the authority of EIAO, the court would bear in mind the purpose of EIAO, which, as the long title of the Ordinance states, is "to provide for assessing the impact on the environment of certain projects and proposals, for protecting the environment and for incidental matters".

25. The general observations made by Au J in §§27 to 30 of his judgment are pertinent to the consideration of issues 1 and 2. We agree with his observations and set them out below as they would inform the approach to be adopted:

> "27. First, it is not disputed that an environmental impact assessment report shall meet the requirements of the TM and the SB (s 6(1) of the Ordinance). Whether the report does meet these requirements is a question of law for the court when the Director's decision made under s 8(3) of the Ordinance is being judicially reviewed. The court should find the meaning of the TM and the relevant study brief and the procedure they prescribe in order to determine the scope of the Director's power to approve the relevant report: *Shiu Wing Steel Ltd v Director of Environmental Protection*, at paragraphs 23, 26-28.
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> 28. Second, the question as to whether the relevant report meets the requirements of the TM and the relevant study brief is to be determined *objectively*. It is a question of construction, although the TM and the study brief are to be construed *not* as

> legislative instruments but as they would be understood by an expert risk assessor and should be read in a "*down-to-earth way*". Technical evidence may be needed to show that a report meets or does not meet the requirements so determined: *Shiu Wing*, supra, paragraphs 23, 29-30.
>
> 29. Third, the TM is a document which applies generally to all designated projects, while a study brief is project-specific. The study brief sets the agenda for the rest of the process: *Chu Yee Wah v Director of Environmental Protection* [2011] 5 HKLRD (CA) 469, at paragraph 31 *per* Tang VP, adopting the observations of Fok JA's judgment at first instance: [2011] 3 HKC 227 at paragraphs 46 and 47. I further agree with the submissions of Mr Mok SC that, as a matter of construction, the general requirements of the relevant provisions in the TM should be informed of and prescribed by what have been set out at corresponding provisions of the SB (if any), which is made specifically for the project.
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> 30. Fourth, although it is a matter of construction for the court to decide what is required by the TM and the SB, it is often a question of professional judgment what information is required to be contained in the relevant EIA report to enable the Director to perform her duties. Unless the judgment is *Wednesbury* unreasonable, the court will not interfere: *Chu Yee Wah*, supra, at paragraph 84."

26. The last of the observations made by Au J emphasised that the court in this application for judicial review is concerned primarily with the procedure to be followed in the EIA process, not the merits, unless it is a case of *Wednesbury* unreasonableness. As Lord Hoffmann said in *Belize Alliance of Conservation Non-Government Organisations v Department of the Environment* [2004] Env LR 38,761 at p. 767 (a decision of the Privy Council, quoted in *Shiu Wing Steel* at §24), when noting that a common feature of the legislation covering environmental control was the distinction made between the procedure to be followed and the merits of the decision:

> "The former is laid down by statute and is binding upon the decision-making authority. The latter is entirely within the competence of that authority ..."

Issue 1: whether the off-site mitigation measures met the requirements of the relevant parts of Annex 16 of the TM

27. This issue is concerned with the ecological assessment concerning Finless Porpoises, a species which enjoys a protection status. The waters between SKC and Soko Islands, a group of islands to the west of SKC, are a 'hotspot' for them. The project at SKC would cover approximately 10 ha of reclaimed land and would involve construction of breakwater, cofferdam and berth at SKC. During the construction phase, the dredging, reclamation and filling works for site formation and submarine cable laying would have the potential to cause considerable impact on the marine water quality, thereby affecting the nearby marine ecology and such impact would need to be evaluated with appropriate measures identified and implemented (PP, §§4.2.9 and 4.2.15).

28. The EIA report confirmed that Finless Porpoises would be seriously affected by the project, both during the construction phase and the operation phase. To minimise the loss of the Finless Porpoise habitat, the primary design of the seawall and breakwater has been revised from 50 ha to 31 ha. This area of 31 ha would become permanently inaccessible to Finless Porpoises. The potential impact on Finless Porpoises due to the permanent loss of 31 ha of habitat is considered to be high (EIA report, §7b.6.3.3).

29. After exhausting possible avoidance, minimisation and on-site mitigation measures (which will be mentioned in more detail), off-site mitigation measures are called for. The proposed off-site mitigation measure is to designate a marine park of approximately 700 ha in the waters between Soko Islands and SKC, following the statutory

process stipulated in the Marine Parks Ordinance, Cap 476 ("MPO"). This is dealt with in §§7b.8.4.1 to 7b.8.4.8 of the EIA report and it is necessary to set out these paragraphs in full as they are the subject of the applicant's challenge:

> "7b.8.4.1 Loss of 31 ha of marine habitat would be permanently resulted from the reclamation and breakwater construction at the southwestern waters of Shek Kwu Chau. The proposed works area is of high ecological value, as it is identified as an important habitat for Finless Porpoise; hence high level of adverse impact is predicted. As minimisation measures are exhausted, compensatory measure is therefore required.
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> 7b.8.4.2 According to the Finless Porpoise data recorded between 2004 and 2009 (AFCD, 2010c), the waters between Shek Kwu Chau and Soko Islands is the nearest area to the proposed Project that has high sighting concentration of Finless Porpoise than the rest of the nearby waters. In addition, the extent of Finless Porpoise habitat is the most continuous and connected to other nearby important habitats of marine mammals, i.e. Soko Islands, which has records of both Finless Porpoise and Chinese White Dolphin.
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> 7b.8.4.3 The Project Proponent has made a firm commitment ***to seek to designate*** a marine park of approximately 700 ha in the waters between Soko Islands and Shek Kwu Chau, in accordance with the statutory process stipulated in the Marine Parks Ordinance, as a compensation measure for the habitat loss arising from the construction of the IWMF at an artificial island near SKC.
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> 7b.8.4.4 The firm commitment ***to seek to designate*** the marine park, where incompatible activities would be regulated and proper management regime imposed in accordance with the Marine Parks Ordinance, would significantly help conserve Finless Porpoise, and hence serve as an effective compensation measure for the permanent loss of Finless Porpoise habitat arising from the project. The Project Proponent shall ***seek to complete the designation by 2018*** to tie in with the operation of the IWMF at the artificial island near SKC.
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> 7b.8.4.5 A further study should be carried out to review relevant previous studies and collate available information on the ecological characters of the proposed area for marine park designation; and review available survey data for Finless Porpoise, water quality, fisheries, marine traffic and planned development projects in the vicinity. Based on the findings,

> ecological profiles of the proposed area for marine park designation should be established, and the extent and location of the proposed marine park be determined. The adequacy of enhancement measures should also be reviewed.
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> 7b.8.4.6 In addition, a management plan for the proposed marine park should be proposed, covering information on the responsible departments for operation and management (O&M) of the marine park, as well as the O&M duties of each of the departments involved. Consultation with relevant government departments and stakeholders should be conducted under the study. The study should be submitted to Director of Environmental Protection (DEP) for approval before the commencement of construction works.
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> 7b.8.4.7 The Project Proponent should provide assistance to AFCD during the process of the marine park designation.
>
> 7b.8.4.8 The firm commitment to designate the waters between Soko Islands and Shek Kwu Chau as a marine park, where the control and management of the marine park would be in accordance with the Marine Parks Ordinance, is considered to be adequate to effectively mitigate the permanent loss of important habitat of Finless Porpoise to acceptable level." (emphasis supplied)

30. The complaint of the applicant is that the off-site measures proposed in the above paragraphs do not meet the requirements of the relevant parts of Annex 16 of the TM, and the SB provides at §3.7.5.1 that that "the Applicant [for the project] shall follow the criteria and guidelines for evaluating and assessing ecological impact as stated in Annexes 8 and 16 of the TM respectively". We set out below the relevant parts of Annex 16 before we go to the arguments advanced by Ms Gladys Li, SC[1] for the applicant:

> "5.4.2 All mitigation measures recommended ***shall be feasible to implement*** within the context of Hong Kong. The effectiveness of the proposed mitigation measures shall be carefully evaluated and the significance of any residual impacts after implementing them shall be clearly stated.
>
> ...

[1] With Mr Valentine Yim and Mr Hectar Pun

5.4.5 The need for and the type and scope of the off-site ecological mitigation measures to be adopted for a particular project shall be determined according to the following guidelines:

(a) all possible design measures and all practicable on-site ecological mitigation measures shall be fully investigated in the EIA study and exhausted to minimise the loss or the damage caused by the project to the ecological habitats or species;

(b) with the on-site ecological mitigation measures in place, the residual impacts on ecological habitats or species shall be defined, quantified and evaluated according to the methods and criteria laid down in this annex and Annex 8. Before off-site ecological mitigation measures are to be adopted, the EIA study needs to confirm that it is necessary to mitigate the residual ecological impacts based on ecological considerations set out in this Annex and Annex 8, and that such residual impacts arise from the Project in question;

(c) if the residual ecological impacts require mitigation and all practicable on-site ecological mitigation measures have been exhausted, off-site ecological mitigation measures shall be provided;

(d) the off-site mitigation measures shall be on a ***'like for like' basis, to the extent that this is practicable***. That is to say, any compensatory measures to be adopted for mitigating the residual ecological impacts must be directly related to the habitats or species to be protected. Either the same kind of species or habitats of the same size shall be compensated, or the project proponent shall demonstrate that the same kind of ecological function and capacity can be achieved through the measures to compensate for the ecological impacts. For example, the loss of a natural woodland shall be compensated by the replanting of native trees to form a woodland of a similar size where possible;

(e) the off-site ecological mitigation measures shall only be implemented within the boundaries of Hong Kong, and ***must be technically feasible and practicable***;

(f) the extent of such mitigation measures shall be limited to what is necessary to mitigate the residual ecological impacts arising from the project; and

(g) any proposed off-site mitigation measures shall not require further EIA study for their implementation. Their feasibility, constraints, reliability, design and method of construction, time scale, monitoring, management and maintenance shall be confirmed during the EIA study." (emphasis supplied)

31. In approaching this question of construction, Miss Li placed particular emphasis on the objectives and contents of an EIA report as stipulated in the TM at §4.2.1, which may include the following:

> "(d) to identify and quantify any potential losses or damage to flora, fauna and natural habitats;
>
> ...
>
> (h) to identify, predict and evaluate the residual (i.e. after practicable mitigation) environmental impacts and the cumulative effects expected to arise during the construction, operation (or decommissioning) phases of the project(s) in relation to the sensitive receivers and potential affected uses;
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> (i) to identify, assess and specify methods, measures and standards, to be included in the detailed design, construction, operation (or decommissioning) of the project(s) which are necessary to mitigate these residual environmental impacts and cumulative effects and reduce them to acceptable levels;
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> (j) to design and specify the environmental monitoring and audit requirements; and
>
> (k) to identify any additional studies necessary to implement the mitigation measures or monitoring and proposals recommended in the EIA report."

32. Similar provisions regarding the objectives of an EIA study are found in the SB at §§2.1(vii), (viii), (xvi), (xvii) and (xviii). The SB makes specific requirements as regards the assessment of impacts on Finless Porpoises in §3.7.5.5.

33. Further, it is provided in §4.2.2 of the TM that the contents of an EIA report "shall fully meet the purposes and objectives set out in the [SB] issued by the Director, and shall adequately address all the issues set out in the [SB]." See also the SB, §3.1. And as stated in §4.4.2 of the TM, the quality of the EIA report shall be reviewed having regard to the guidelines in, inter alia, Annex 20 to the TM. One of the pertinent questions to ask in respect of mitigating measures is §6.5 in

Annex 20: "Is it clear to what extent the mitigation methods will be effective?"

34. Miss Li advanced three broad grounds to say that the off-site measures proposed in §§7b.8.4.1 to 7b.8.4.8 of the EIA report do not meet the requirements of the relevant parts of Annex 16 of the TM, properly construed.

35. First, a firm commitment "to seek to designate" a marine park (§§7b.8.4.3 and 7b.8.4.4), which is subject to the study process stipulated in the MPO, is far too uncertain. This is not a matter of semantics but of substance. To *seek* the designation without any assurance of this is not the same thing as the provision or establishment of a marine park with all the protections available being put in place. The judge failed to understand or fully understand the fundamental difference between *seeking* the designation and the actual establishment of a marine park.

36. Sections 7 to 14 of the MPO provide for various steps that need to be complied with and the objections that can be made by any person aggrieved by the proposal to designate a marine park before there can be such a successful designation. Under section 7(1) of MPO, the Country and Marine Parks Authority (being the Director of Agriculture, Fisheries and Conservation ("DAFC") as defined in section 3(2) of MPO) shall, at the direction of the Chief Executive in Council, prepare draft maps showing the proposed marine park. The Authority would need to consult the Country and Marine Parks Board on the preparation of the draft map (section 7(4)). The draft map would then be publicised and made available for public inspection for 60 days from the date of

publication of the gazetted notice (section 8). Any person aggrieved by a draft map may within the 60-day period send to the Authority a written statement of his objection (section 12(1)). The objection with the Authority's written representation would then be submitted to the Board, which would hold a hearing and decide whether to reject the objection in whole or in part, or direct the Authority to make amendments to the draft map to meet such objection in whole or in part (sections 12(3) to (6)).

37. As upon a successful designation there would be stringent prohibition or restriction of activities within a marine park (sections 19 and 20 of MPO), it is reasonable to expect there may well be objections from aggrieved stakeholders such as fishermen and shipping companies, see Marine Parks and Marine Reserves Regulation sections 3, 7, 10, 11, 15B and 16(1).

38. Ms Li submitted that the outcome of the statutory process under the MPO is uncertain. There is no guarantee the designation can be carried out, and nothing to ensure that the designation shall be of a particular design. There is just a general proposal to have a marine park with no defined location or area. This uncertainty meant that the effectiveness of the mitigation measure could not be evaluated by the Director at the point the EIA report was submitted for approval. It cannot be said that the proposed off-site mitigation measure has met the requirements in §§5.4.5(c), (d), (e) and (g) of Annex 16 of the TM.

39. Second, it is stated in §7b.8.4.5 of the EIA report that a "further study" is to be carried out to review relevant previous studies and collate available information on the ecological characters of the proposed area for marine park designation, and based on the findings, "ecological

profiles of the proposed area for marine park designation should be established, and the extent and location of the proposed marine park be determined."

40. In light of this, it was submitted that it cannot be said that the feasibility of the proposed off-site measure has been confirmed during the EIA study and this does not meet the requirements in §§5.4.2 and 5.4.5(g) of Annex 16 of the TM. The first-mentioned provision requires that the "effectiveness" of the proposed mitigation measure shall be "carefully evaluated and the significance of any residual impacts after implementing them shall be clearly stated". The other provision stipulates that any proposed off-site mitigation measure "shall not require further EIA study" for their implementation and "their feasibility, constraints, reliability, design and method of construction, time scale, monitoring, management and maintenance shall be confirmed *during* the EIA study."

41. Third, it is stated in §7b.8.4.4 of the EIA report that the project proponent shall "seek to complete the designation by 2018 to tie in with the operation of the IWMF". This is also reflected in condition 2.8 of the EP which provides that at least one month before the commencement of construction of the project, copies of "the detailed design" of the marine park shall be submitted to the Director for approval, that the relevant stakeholders including the fishery sector and the DAFC shall be consulted in preparing the detailed design, and that the designation of the marine park "shall immediately follow the completion of construction works of the Project".

42. Ms Li submitted it would be far too late to complete the designation of the marine park to tie in with the operation of the IWMF in

2018, as it was envisaged in the PP that marine ecology would be affected during the construction phase and confirmed in the EIA report that Finless Porpoise would be seriously affected, both during the construction phase and the operation phase, with the loss of 31 ha of habitat which would become permanent on completion of the project. See Table 7b.54 in the EIA report on the "Overall Impact Evaluation at Shek Kwu Chau: Coastal/Marine Waters". It was contended that designation of a marine park with proper details of its size and location should be in place before the commencement of construction.

43. The alternative argument of the applicant was that the Director's acceptance of the proposed off-site mitigation measure was *Wednesbury* unreasonable as the relevant parts of the EIA report clearly failed to comply with the requirements in the PP, TM and SB. In short, it was contended that the Director was plainly unreasonable to have approved an EIA report that was attended with such vagueness and uncertainty.

44. The first two grounds were raised in the arguments before the judge and dealt with by him in the judgment at §§39 to 59. The third ground was raised only in Ms Li's oral submissions before us.

45. We will deal with the first two grounds together. On these two grounds, we are in agreement with the judge they should be rejected for the reasons he gave.

46. In construing the PP, TM and SB, it is important to bear in mind that they are not legislative but technical instruments, to be understood as an expert risk assessor would understand them, and they should be read in a "down-to-earth way".

47. In this regard, it is right to emphasise the deliberate choice of the following words and phrases in Annex 16 of the TM, as submitted by Mr Johnny Mok, SC[2] for the Director:

(1) under the guiding principle for ecological assessment, off-site mitigation measures should be "adequate": §3.1(a);

(2) all mitigation measures recommended "shall be feasible to implement within the context of Hong Kong"[3]: §5.4.2;

(3) the off-site mitigation measures shall be on a " "like for like" basis, to the extent this is practicable"[4], and must be directly related to the habitats or species to be protected: §5.4.5(d);

(4) the off-site ecological mitigation measures must be "technically feasible and practicable"[5]: §5.4.5(e); and

(5) the proposed off-site mitigation measures shall not require further EIA study for their implementation, and their "feasibility[6], constraints, reliability, design and method of construction, time scale, monitoring, management and maintenance" shall be confirmed during the EIA study: §5.4.5(g).

48. We are inclined to agree with Mr Mok that the deliberate choice of words such as "feasible" and "practicable" would tend to

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[2] With Ms Eva Sit

[3] In Chinese "在香港的範圍內須實際可行"

[4] In Chinese "須盡可能以「同類彌償同類」為原則"

[5] In Chinese "必須在技術上切實可行"

[6] In Chinese "可行性"

suggest that implementation of the proposed off-site mitigation measure would not be required at the stage when the EIA report is submitted for approval. These words do not connote certainty. The judge is correct to construe these words at §53 of the judgment as meaning that the proposed off-site mitigation measure is "reasonably possible to be practically implemented". We agree with his conclusion at §54 of the judgment that the proposed off-site mitigation measure by way of a commitment to designate a marine park of about 700 ha in the waters between Soko Islands and SKC, subject to the completion of the statutory process of the MPO, is one that is "reasonably possible to be practically implemented".

49. The practicability and feasibility of this proposed off-site mitigation measure can be demonstrated both factually and legally.

50. On a factual level, the Director has consulted with the DAFC on ecological assessment, as she is required to do under §9.1 of the TM, and has secured the support of the DAFC, as evidenced by the memo of the latter dated 31 October 2011 in which it was stated that the DAFC considered the EIA report has met the requirements of the TM and SB, subject only to comments that are "minor and largely textual". The DAFC is the Country and Marine Parks Authority and is responsible for making recommendations to the Chief Executive in Council for the designation of areas as marine parks as provided in section 4(a) of MPO. The DAFC prepares the draft map of the proposed marine park at the direction of the Chief Executive in Council (section 7(1) of MPO).

51. As for the legal process under the MPO, possible objections under section 12 would not render the designation not feasible. Quite

apart from the fact that the DAFC supports the designation, the Country and Marine Parks Board can only reject the objection in whole or in part, or direct the DAFC to make amendments to the draft map to meet the objection in whole or in part (section 12(6) of MPO). Further, the interests of aggrieved stakeholders such as fishermen and shipping companies can be provided for as the DAFC thinks appropriate by granting permits and licences on such terms and conditions as he thinks fit (section 22(1) of MPO, sections 17(2) and (3) of Marine Parks and Marine Reserves Regulation).

52. The judge came to the view that the proposed off-site mitigation measure in the EIA report has met the requirements in Annex 16 of the TM regarding its feasibility, practicality and effectiveness, for similar reasons given in his judgment at §50. We agree with his reasons.

53. The "further study" mentioned in §7b.8.4.5 of the EIA report is plainly not a further EIA study, but is one for determining the detailed design plan of the marine park, including the precise boundaries and location, and providing information on the deployment of artificial reefs, release of fish fry, the management plan and the construction programme. See §7b.8.4.6 of the EIA report, condition 2.8(ii) of the EP, and the judgment at §56. As Au J has held in §57 of his judgment, the further studies "do not affect the confirmation of the proposed measures' feasibility, constraints, reliability, design and method of construction, time scale, monitoring, management and maintenance already provided in the EIA Report, but are only to provide for the fine tuning for implementing the measures".

54. We turn to consider the third of the grounds advanced by Ms Li, which was not argued below.

55. Mr Mok's answer is that the proposed designation of a marine park as an off-site compensation measure is but the last in a progressive set of measures for the mitigation of adverse environmental impacts arising from the construction and operation of the project. So one should not just focus on the proposed designation of marine park in §7b.8.4 of the EIA report, but the earlier parts of the report in §7b.8 under the heading of "Mitigation of Adverse Environmental Impacts" should be read as a whole, bearing in mind that according to Annex 16 of the TM, which sets out the guiding principles for ecological assessment, §5.4.1 provides that the general policy for mitigating impacts on important habitats and wildlife, in the order of priority, are (a) avoidance, (b) minimising, and (c) compensation.

56. The measures of avoidance are set out in §7b.8.2 and those of minimisation in §7b.8.3. Minimisation measures during the construction phase include the careful phasing of construction works (§7b.8.3.1 to §7b.8.3.5), low impact construction methods (§7b.8.3.6 to §7b.8.3.9), adoption of silt curtains (§7b.8.3.10 to §7b.8.3.11), limitation on dredging rate (§7b.8.3.12), good site practice for water quality control (§7b.8.3.13 to §7b.8.3.14), and proper transportation and disposal of dredged materials at designated areas (§7b.8.3.15). This is followed by a section headed "Specific measures to minimise disturbance on Finless Porpoise", and these measures include reducing the habitat loss from 50 ha to 31 ha, avoidance of peak season for Finless Porpoise occurrence (§7b.8.3.17 to §7b.8.3.18), opting for quieter construction methods and plants (§7b.8.3.19), monitored exclusion zones (§7b.8.3.20 to §7b.8.3.22),

marine mammal watching plan (§7b.8.3.23), small openings at silt curtains (§7b.8.3.24), adoption of regular travel route (§7b.8.3.25 to §7b.8.3.26), vessel speed limit (§7b.8.3.27 to §7b.8.3.29) and training of staff (§7b.8.30).

57. It is after a detailed section of a raft of measures for avoidance and minimisation, and some with specific reference to Finless Porpoise, that the report deals with measures of compensation in §7b.8.4, the first of which is the designation of marine park. This compensation measure is to be introduced not before the construction phase is to start but at the completion of construction and before the commencement of the operation phase (§7b.8.4.4). This is not an oversight of the relevant requirements in the PP, TM or SB but a considered assessment of the feasibility, practicality and effectiveness of all the mitigation measures. Not to implement the proposed compensation measure prior to the commencement of the construction phase is entirely a matter for the professional judgment of the Director. Whether the mitigation measures would be regarded as effective nonetheless is not within the purview of this judicial review. We do not find this exercise of professional judgment *Wednesbury* unreasonable.

58. We reject all the applicant's arguments on issue 1.

Issue 2: whether the EIA report failed to comply with the requirements for health impact assessment in the TM and SB

59. The requirements for health impact assessment in the SB are in §3.7.8. It is necessary to set this out in full:

"3.7.8 Health Impact

3.7.8.1 A health risk assessment shall be conducted to assess the potential health impact associated with construction and operation of the Project. Particular attention should be paid to assess aerial emissions from the IWMF, biogas from the sorting and recycling plant, fugitive emissions during transportation, storage and handling of the waste and ash; and ***any other potential accidental events***.

3.7.8.2 The health risk assessment shall include the following key steps:

(i) a systematic identification of the risks from the handling, storage, transport and disposal (including accidental or disastrous release) of solid and liquid wastes that may contain Toxic Pollutants including POPs[7], especially dioxin and dioxin-like substances as incineration by-products;

(ii) an assessment of the likelihood and consequences of exposure to aerial emissions and solid and liquid wastes that may contain Toxic Pollutants including POPs, especially dioxin and dioxin-like substances;

(iii) an identification of means by which the risks could be further reduced; and

(iv) recommendation of all reasonably practicable measures to reduce risks during the operation of the Project.

3.7.8.3 The health risk assessment shall be based on established practices in countries around the world. A literature search shall be carried out to determine the best approach for the risk assessment, including any codes of practices, guidelines etc. applied locally in Hong Kong and elsewhere in the world. The approach shall be agreed by the Director prior to the commencement of assessment. For toxic air pollutants, the review list shall follow the criteria in Section 1.1(d) in Annex 4 of the TM.

3.7.8.4 The environmental health risk assessment on Toxic Pollutants including POPs especially dioxins and dioxin-like substances, shall include all pathways by which the Toxic Pollutants including POPs may enter the human body, including inhalation, direct dermal contact as well as consumption of food and water which may be contaminated by the Toxic Pollutants including POPs emitted from IWMF and all relevant existing, committed and planned sources.

3.7.8.5 It is also necessary to perform a quantitative environmental health risk assessment for the risk of exposure to

[7] Persistent Organic Pollutants

> and the potential impacts from the release of Toxic Pollutants including POPs, especially dioxins and dioxin-like substances, from the operation of the Projects. The assessment shall also include risk of exposure to and the potential impacts from release of Toxic Pollutants including POPs through stack emissions, as well as the handling, storage, transport and disposal of any solid or liquid wastes that may contain Toxic Pollutants including POPs during the operation of the Project. Any mitigation measures recommended should be aimed to minimize the environmental health risks from the release of Toxic Pollutants including POPs during operation of the Project." (emphasis supplied)

60. The contention of the applicant in issue 2 was that the EIA report does not comply with the requirements for health impact assessment in that it failed to properly particularise the "other potential accidental events" mentioned in §3.7.8.1 of the SB and failed to properly assess the likelihood and consequences of the "other potential accidental events". Alternatively, it was submitted that these parts of the assessment in the EIA report are *Wednesbury* unreasonable.

61. It would be convenient to set out first that part of the EIA report that is the subject of challenge:

> "**9b.5 Health Impacts Associated with other Potential Accidental Events**
>
> 9b.5.1.1 The IWMF will be designed and operated as a modern facility. The operator must also be well trained to avoid any accidental events. The possible accidental events associated with health impacts and their corresponding preventive measures are listed in **Table 9b.10**.
>
> **Table 9b.10 Potential Accidental Events and Preventive Measures**

Risks	Preventive Measures
Aerial emissions (emission discharge exceed the discharge limit)	➢ Use of best available techniques in emission stack design, implement continuous and regular emission monitoring

Risks	Preventive Measures
Transportation, storage and handling	➢ Implement good waste/ash transportation, storage and handling practices (see **Section 9.4**) ➢ Plan transport routes to avoid highly populated / sensitive areas ➢ Develop procedures for and deploy as necessary emergency response including spill response for accidents involving transport vehicles ➢ Enforce strict driver skill standards and implement driver / navigator and road / marine safety behaviour training
Chemical spillage and leakage	➢ Implement proper chemicals and chemical wastes handling and storage procedures ➢ Develop and implement spill prevention and response plan including provision of spill response equipment and trained personnel
Employee health and safety	➢ Implement industry best practice with reference to international standards and guidelines

9b.5.1.2 To further avoid or minimize the potential health impacts associated with other potential accidental events, an emergency response plan should be developed and properly implemented for the IWMF. It should be noted that the emergency response plan should be specific to the final design and operation of the IWMF. With the implementation of the preventive measures outlined in **Table 9b.10** above and an effective emergency response plan for the IWMF, the health impacts associated with any potential accidental events could be minimized if not avoided."

62. Before we turn to the arguments raised in this appeal, we summarise the propositions and conclusions the judge arrived at in construing the requirements in the SB and the relevant parts of the EIA report:

(1) Under §3.7.8.1 of the SB, when carrying out the health risk assessment of potential health impact associated with the construction and operation of the project, special attention is to be paid to the four subject matters identified, namely, (a) aerial emissions from the IWMF, (b) biogas from the sorting and recycling plant, (c) fugitive emissions during transportation, storage and handling waste and ash, and (d) any other potential accidental events. It does not mean that the health risk assessment is only about these four subject matters. It is only that special attention should be paid to them when carrying out the assessment[8].

(2) Given that "any other potential accidental events" is separately identified as a subject matter, insofar as the other three subject matters are concerned, the assessment is focused on their ordinary and normal course of events and operations[9].

(3) In carrying out the entire health risk assessment of the construction and operation phases of the project, the four key steps in §3.7.8.2 should be considered. The four key steps in §3.7.8.2 are not necessarily applicable to all or any of the four subject matters in §3.7.8.1. All they require in the exercise of the health risk assessment is that the four key steps would only need to be undertaken insofar as they are applicable vis-à-vis those four subject matters[10].

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[8] The judgment, §77(1) and (2)

[9] The judgment, §77(3)

[10] The judgment, §§78 to 80

(4) Step (ii) of §3.7.8.2 (an assessment of the likelihood and consequences of exposure to aerial emissions and solid and liquid wastes that may contain Toxic Pollutants) cannot be realistically and meaningfully carried out vis-à-vis the subject matter of "other potential accidental events", as it would necessarily require the identification of what are the specific potential accidents that would lead to those "potential accidental events". This is practically almost impossible to be carried out, given (a) the almost infinite numbers of the types and variations of accidents that may happen in both the construction and operation phases, and (b) thus, the also almost infinite numbers of computations or variations of the "likelihood" and "consequence" of exposure to toxic aerial emissions and wastes that may raise under each of these potential specific accidents. Step (ii) of §3.7.8.2 is therefore not applicable to the subject matter of "other potential accidental events"[11].

(5) It is not a requirement of the SB to set out every potential accident that may lead to the accidental events so identified. The subject matter of "other potential accidental events" refers to the generic types of events that may arise accidentally and pose a risk on health, such as accidental aerial emission or chemical spillage. It does not require the project proponent to identify in the EIA report precisely what are the likely specific accidents that may lead to these

[11] The judgment, §82

events, as it is unrealistic and impracticable, and thus objectively cannot be the intention of the draftsman[12].

(6) The judge therefore rejected the complaint that the EIA report has not complied with §3.7.8.2(ii) of the SB in relation to the health risk assessment of "other potential accidental events"[13].

(7) Table 9b.10 in the EIA report, read properly with §§9b.5.1.1 and 9b.5.1.2, does identify the "other potential accidental events" by reference to the four items stated in that table. As stated therein, the events arising from potential accidents that would have an impact on health are aerial emissions and chemical spillage and leakage. These events may arise in accidents associated with the stack design, transportation, storage and handling of wastes and ash (which the table also refers to details under section 9.4) and the operation process of the IWMF by the staff and employees. The proposed preventive measures in relation to these phases and stages concerning the construction and operation of the IWMF are also set out. Thus understood, this section of the EIA report has as a whole identified the potential accidental events and satisfied the requirement under §3.7.8.1 of the SB in relation to "other potential accidental events"[14].

(8) For the same reasons, the EIA report has in compliance with §3.7.8.2(i) of the SB "systematically identified" the risks

[12] The judgment, §84

[13] The judgment, §83

[14] The judgment, §§85 to 89

from "the handling, storage, transport and disposal of solid and liquid wastes" of those accidental events. In particular, these risks have also been identified in the EIA report: (a) for "handling" and "storage" at §§9b.4.3.2, 9b.4.4.2, (b) for "transport" at §§9b.4.3.1, 9b.4.4.1, (c) for "chemical spillage and leakage" at §§6b.6.2.3, 6b.6.3.2 and 6b.9.1.3, and (d) for "disposal" at §§9b.5.1.1, 9b.5.1.2 and 9b.6.1.5[15].

(9) Given the above conclusions, there is no question that the Director's decisions are *Wednesbury* unreasonable in these respects[16].

63. Ms Li submitted that the judge's construction of §§3.7.8.1 and 3.7.8.2 of the SB was flawed for these reasons.

64. First, she drew attention to the PP at §§4.3.5, 4.3.6 and 4.3.9 in which the project proponent has identified, other than (a) aerial emissions and dispersions from the project's stack, (b) fugitive emissions during transportation, storage and handling of waste and ash, (c) biogas that might be continuously produced in the sorting and recycling plant, "*potential accidental events* such as fire in the waste storage pit, explosion in the furnace, inadvertent receipt of hazardous or clinical wastes, and potential failure of the air pollution control system".

65. Ms Li made the point that the wording of "any other potential accidental events" in §3.7.8.1 of the SB tracked the phrase "potential accidental events" in §4.3.5 of the PP. She contended that the judge should have construed the requirements which had to be met as set

[15] The judgment, §90

[16] The judgment, §91

out in §§3.7.8.1 and 3.7.8.2 of the SB with regard to "other potential accidental events" against the background of §§4.3.5, 4.3.6 and 4.3.9 of the PP. Even if it is unrealistic and impracticable to identify in the EIA report precisely what are the likely specific accidents that may lead to those accidental events and to assess the likelihood and consequences of all such events, as held by the judge, the proper construction of the relevant requirements of the SB against the background of the PP should require *at least* the study of the health impact of "other potential accidental events" so identified as examples in the PP, such as "fire in the waste storage pit, explosion in the furnace, inadvertent receipt of hazardous or clinical wastes, and potential failure of the air pollution control system".

66. This is a new argument not raised before the judge. No reliance was placed by the applicant on the PP in respect of this issue in the court below.

67. Second, in §5.4 of Annex 20 of the TM, the question to be asked in reviewing the EIA report is that if any of the types of impact in §5.3 (being air and climate, water and soils, noise, landscape, ecology, historic and cultural heritage, land use, impacts on people and communities, impacts on agriculture and fisheries activities) are not of concern in relation to the project and its location, whether this is "clearly stated" in the information in the EIA report. Ms Li submitted that nowhere in the EIA report is it clearly stated that the "potential accidental events" identified in the PP were not of concern in relation to the project and its location.

68. Further, in §5.8 of Annex 20 of the TM, this question is posed: "If the nature of the project is such that *accidents* are possible which might cause severe damage within the surrounding environment, has an assessment of the probability and likely consequences of such *events* been carried out and the main findings reported?" Ms Li contended that there is no such information in the EIA report as would satisfy §5.8 of Annex 20, notwithstanding that these "potential accidental events" were identified in the PP. Table 9b.10 in the EIA report lists just one accidental event, namely, chemical spillage and leakage, with no analysis and no health risk assessment. Given the sparse information, the Director could not have been satisfied that the EIA report has complied with the requirements for health impact assessment in the TM and the SB, and her decisions to approve the EIA report and to grant the EP were *Wednesbury* unreasonable.

69. We are not persuaded by Ms Li's submissions. We are in agreement with the judge on his approach and analysis and the construction he adopted as summarised earlier.

70. As for the examples of "potential accidental events" mentioned in §4.3.5 of the PP, as pointed out by Mr Mok, under section 6(1) of EIAO, a project proponent is required to comply with the SB and the TM, not the PP. See also *Chu Yee Wah v Director of Environmental Protection*, *supra* at §§31, 80 to 82. The PP is to provide information to enable the Director to determine the scope of the environmental issues associated with a designated project for the purpose of compiling the SB (§2.1.1(a) of the TM and Annex 1). The contents of the PP do not necessarily translate into requirements in the SB, which is compiled after consultation with the public and ACE (sections 5(6) and

(7)(b) of EIAO). As an example, Mr Mok pointed out that in §4.3.10 of the PP, the project proponent proposed a hazard (not health) assessment for biogas generation and storage and an overall quantitative health risk assessment, but neither became part of the requirements in the SB and only a limited quantitative risk assessment is required in respect of toxic pollutants, see the SB at §3.7.8.5.

71. We agree with Mr Mok that the project proponent's ability to give examples in the description of "potential accidental events" in the PP should not be equated with it being required under the SB to carry out a separate health risk assessment in respect of each of those examples.

72. We also agree with Mr Mok that §§5.4 and 5.8 in Annex 20 of the TM cannot assist the applicant, as Annex 20, which provides guidance on reviewing an EIA report, is only engaged where the SB does contain a requirement and an EIA report has been produced in compliance or purported compliance with it. It cannot be used to read into the SB a requirement that is not there.

73. For the above reasons, we reject the contentions of the applicant in issue 2.

Issue 3: whether the Director has power to approve the EIA report prepared and submitted on her behalf, and grant the EP to herself

74. We turn to the submissions advanced by Mr Pun on behalf of the applicant that the Director cannot approve a report from her department and she cannot issue a permit to herself under EIAO.

75. As mentioned earlier, whilst there were other arguments advanced at the court below which challenged the decisions of the Director on the ground of apparent bias or breach of natural justice, these arguments are not repeated before us. In his judgment of 26 July 2013, Au J explained at §176 at some length the functional segregation in the EPD in terms of the team administering the EIA process and the team preparing the EIA report for the IWMF. In this appeal, Mr Pun confines his submissions to the question of the proper construction of EIAO.

76. When we invited Mr Pun at the hearing to identify the parts of the Ordinance which he would ask the court to construe to exclude any reference to the Director, he initially referred to the expression "a person" in sections 5 and 10.

77. The court drew his attention to section 9 and asked him whether it was his case that section 9 is not applicable to the Director. If section 9 is not applicable to the Director, the implication is that projects proposed by the Director would not be subject to the EIAO regime. That is prima facie against the legislative intent since section 3(1) provides that EIAO shall bind the Government. Further, when EIAO was first enacted in 1998, Schedule 2 already listed as item G.3 "An incinerator with an installed capacity of more than 50 tonnes per day" as a designated project which would be subject to the requirements on EIA under Part II of EIAO. Schedule 2 also listed landfill for waste (item G.1) and refuse transfer station (item G.2) which had been projects managed by the Director as designated projects.

78. Mr Pun adjusted his position when we resumed hearing on the second day of the appeal. He corrected himself and said he would

ask the court to construe the expression "the applicant" and "an applicant" in sections 5 to 10 to exclude the Director. He accepted that "a person" in section 9 could include the Director though he submitted that it is not necessary to decide that question in this appeal.

79. Moreover, he submitted that "an applicant" in section 5(2) carries a different meaning from "a person" under section 5(1). Thus, even if the Director comes within the meaning of "a person", it does not follow that she comes within the meaning of "an applicant" under sections 5 to 10.

80. The main theme of Mr Pun's submission was that as the Director is the regulator under EIAO it would be absurd and contrary to common sense for the Director herself to be an applicant as a person regulated. To support this contention, Mr Pun cited instances of "anomalies" under the EIAO scheme at different stages of an application by the Director:

At the application stage,

(a) The Director as an applicant is required by section 6(2) to deliver a EIA Report to the Director for approval and pay the prescribed fee;

(b) If the Director rejects the EIA Report, she shall give herself as the applicant the reasons for rejection pursuant to section 8(2);

(c) Under section 10(3), the Director shall advise herself as the applicant within 30 days of the grant or refusal of an EP;

(d) Under section 17(1), the Director as applicant may appeal to the Appeal Board if she is aggrieved by her own decision.

At the appeal stage,

(e) The Director would be both the appellant and the respondent, see section 2 of the Environmental Impact Assessment (Appeal Board) Regulation ("the Appeal Regulations") Cap 499A;

(f) The title of the appeal would be "the Director v the Director";

(g) The Director as appellant is required to serve a notice of appeal on the Director as respondent under section 4(1) of the Appeal Regulations;

(h) Section 14 of the Appeal Regulations in respect of the failure to serve notice will not be applicable;

(i) There will be two different teams of legal representation for the Director, one team as appellant and one team as respondent;

(j) Section 13 of the Appeal Regulations on the failure of a party attending the hearing will not be applicable;

(k) Costs awarded by the Appeal Board would not be capable of enforcement.

At the enforcement stage,

(l) The Director must supervise herself as to the compliance with the conditions in an EP;

(m) The Director may issue a cessation order against herself as project proponent under section 24;

(n) The Director may recover the costs of the remedial works from herself as EP holder under section 25.

81. Counsel placed reliance on the presumption that 'absurd' result was not intended as set out in *Bennion on Statutory Interpretation* 6th Edn, Section 312. In this connection, Lord Millett said in *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20,

> "The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it ..."

82. Mr Pun further referred us to two overseas authorities to support his proposition that it would be absurd for the Director to grant an EP to herself: *Pollock v Minister of Transport* [1974] SCR 749; *The State of Maharashtra v Indian Medical Association* (2002) 1 SCC 589.

83. On behalf of the Director, Mr Mok submitted that Mr Pun was factually incorrect to refer to the Director as the applicant in respect of the IWMF. Counsel took us to the relevant applications in which the EPD was the applicant. These include the application for EP dated 24 October 2011 which was signed by the Acting Principal

Environmental Protection Officer (Infrastructure Planning) on behalf of the EPD.

84. However, as pointed out by Mr Pun, the EP was issued to the Director. At §23 of the 3rd Affidavit of Tse Chin Wan, the Assistant Director (Environmental Assessment) of the EPD, it was explained that the EP was so issued because the Director was the head of EPD.

85. There is no definition of "person" in EIAO. But there is a definition in section 3 of the Interpretation and General Clauses Ordinance, Cap 1. In the Cap 1 definition, "person" includes any public body and any body of persons, corporate or unincorporated. And there is also a definition for "public body" in Cap 1. It includes, amongst others, any department of the Government.

86. These definitions shall apply for the purposes of construing EIAO unless contrary intention appears from the context of EIAO, see section 2 of Cap 1. Given the clear indication at section 3 of EIAO that this ordinance shall be applicable to the Government and public officers, we do not see any reason why the definitions in Cap 1 on these expressions should not be applicable in respect of an application submitted by a Government department.

87. Thus, a person includes a Government department. Is there anything in the context of the EIAO which indicates that the EPD cannot be an applicant? With reference to section 43 of Cap 1, Mr Pun submitted that the EPD only exercised its power on behalf of the Director, as such an application by the EPD should be treated on the same footing as an application by the Director.

88. We are not sure whether section 43 is relevant for present purposes since Mr Pun did not explain whether the power or duty to submit (as opposed to approve) applications in relation to the IWMF is conferred or imposed by an ordinance. Be that as it may, we shall proceed on the assumption that an application by the EPD should be considered on the same footing as an application by the Director in view of the fact that the Director is the head of the EPD and the EP was granted to the Director in response to an application by the EPD.

89. Mr Pun referred us to some authorities on the court's approach to statutory interpretation. There is no disagreement between the parties in this respect. For our purposes, it is sufficient to remind ourselves of the judgment of Li CJ in *Town Planning Board v Society for the Protection of the Harbour Ltd* (2004) 7 HKCFAR 1 at §28 and 29,

> "28. ... In interpreting a statute, the function of the courts is to ascertain the intention of the legislature as expressed in the legislation. The statute must be considered as a whole. Any statutory provision must be understood in its context taken in its widest sense ...
>
> 29. A purposive approach should be adopted. In construing a statute, the courts should adopt an interpretation which is consistent with and gives effect to the legislative purpose. An interpretation which is inconsistent with and does not serve that purpose should be avoided..."

90. Further, in *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568, the Chief Justice said at §12 to 13,

> "12. The modern approach is to adopt a purposive interpretation. The statutory language is construed, having regard to its context and purpose. Words are given their natural and ordinary meaning unless the context or purpose points to a different meaning. Context and purpose are considered when interpreting the words used and not only when an ambiguity may be thought to arise ...

> 13. The context of a statutory provision should be taken in its widest sense and certainly includes the other provisions of the statute and the existing state of the law ..."

91. The long title of EIAO set out the objectives of the Ordinance as follows,

> "An Ordinance to provide for assessing the impact on the environment of certain projects and proposals, for protecting the environment and for incident matters."

92. In *Shiu Wing Steel*, the Court of Final Appeal said at §7,

> "The purpose of the EIAO as declared in its long title is 'to provide for assessing the impact on the environment of certain projects and proposals, for protecting the environment and for incident matters' and this purpose so declared governs the interpretation of the EIAO ..."

93. As mentioned earlier, it is clear from section 3 as well as the designated projects in Schedule 2 that the legislature intended to apply the EIAO regime to Government projects as well as non-Government projects.

94. And it is also clear from Schedule 2 that waste disposal facilities like landfills and refuse transfer stations managed by the Director are within the scope of EIAO. Mr Pun has not put forward any sound reason why new waste disposal facilities should not be subject to EIA.

95. In our judgment, the rationale for subjecting projects with potentially significant environmental impact to the EIA regime is as applicable to projects proposed by the Director as projects proposed by other Government departments. Mr Pun implicitly recognised this when he accepted that section 9 is applicable to the Director.

96. The EIA regime under Part II of the EIAO consists of various stages. Though the Director plays the role of the decision maker in terms of the approval of EIA report and the issue of EP, it is also a process in which other stakeholders participate actively and the Director's power is circumscribed. Further, the process is highly transparent with full opportunity for interested parties (including members of the public concerned about environmental issues) to put forward their comments. The decisions of the Director can be challenged on their merits by an independent appeal procedure and also on their legality by court proceedings.

97. First, under section 4, it is the Secretary for the Environment who may add or remove projects from the lists of designated projects. It is also the Secretary who issued the TM under section 16 which, amongst other things, set out principles, guidelines, requirements and criteria for the technical contents of the key components of an EIA exercise: the PP, the SB and the EIA report. It also sets out the criteria for deciding whether an EIA report meets the requirements of a SB. The TM, which was in place and gazetted before the EIAO came into operation, is a substantial document with 22 Annexes setting out the relevant guidelines and criteria at great length. The TM is subject to negative vetting by the Legislative Council and the latter can repeal it under section 16(6).

98. Second, after an applicant has submitted a PP to the Director, it would be advertised in accordance with section 5(2)(c). The Director would also need to inform the ACE (which, as mentioned at the beginning of this judgment, is an advisory body made up of representatives from different interested sectors). Under section 5(6),

the ACE and any members of the public may comment on a PP and the Director is obliged to consider such comments in drawing up the SB.

99. Third, after the submission of an EIA report, the Director shall decide under section 6(3) if the report meets the requirements of the SB. This is not the approval of the report. The Director is required to consider public comments and also comments from the ACE before she decides whether to approve the same, see sections 7 and 8.

100. Fourth, an applicant may appeal to the Appeal Board under section 17 if he is aggrieved by a decision of the Director. The Appeal Board is chaired by a chairman (who by section 18(3) must be a person who is qualified for appointment as a District Judge) with panel members (who by section 19(5) cannot be a public officers), all of them are independent from the EPD.

101. EIAO seeks to achieve the objective of protecting our environment by subjecting designated projects to this statutory process. The decisions of the Director are part of the process but she does not have a freehand in coming to her decisions. As the Court of Final Appeal observed in *Shiu Wing Steel* at §23 to 30, the legality of the process (including the correct interpretation of TM, SB and EIA report) can be tested in court. We only need to refer to §29 where it is said,

> "It is not a question whether the Director acted reasonably in attributing a given meaning to the TM and SB. The question the Director had to answer under s 6(3) had to be answered objectively. Equally, the condition on which the EIA report could have been lawfully approved had to be objectively determined. The lawfulness of the approval was not dependent on the Director's opinion if that opinion was objectively in error. ... And, as the limits of the Director's power are a matter of law, it is for the Court to determine the meaning and scope of those requirements."

102. Mr Pun's argument of absurdity can thus be tested by asking this question: is it absurd to expect a project proposed by the Director to undergo the same statutory process for the protection of the environment?

103. Having regard to the context of the statutory scheme as a whole and the overall objective of protecting the environment, we cannot say that it would be absurd to subject a project proposed by the Director to the EIA process. Given the transparency of the process, the outsider's participation built into the statutory scheme and the availability of judicial review to test the legality of the relevant decisions, we do not think the fact that the Director is the decision-maker renders the process meaningless. The present case provides a good illustration as to how the statutory process can provide a platform for some issues pertinent to EIA to be tested in court.

104. For the application stage in the process, it is too simplistic to refer to the Director as the regulator. In our view, it is more accurate to describe the Director as the public officer responsible for overseeing the proper functioning of the EIA process having regard to the policy laid down in the TM. With proper appreciation of the whole statutory process, we do not think the features at the application stage identified by Mr Pun are so repugnant to common sense that they render the application of the EIA process to a project proposed by the EPD fundamentally absurd or unthinkable.

105. It would be a rare occasion where a government proponent deems it appropriate to appeal against the decisions of the Director in the EIA process. Perhaps rarer still in cases where EPD is the project proponent. In any event, we do not think the features identified by

Mr Pun would seriously undermine the applicability of the appeal mechanism to such cases and thereby rendering the appeal process to be unworkable. The Appeal Board should be concerned with substance rather than form.

106. As far as enforcement is concerned, it is simply unrealistic to suggest that the Director would not respect her own decisions in the EIA process so that enforcement measures will need to be taken.

107. Mr Pun submitted that instead of the Director, the Director of Food and Environmental Hygiene should be the proponent of the IWMF. With respect, there is absolutely nothing in the whole of EIAO or its legislative context to suggest that this was the legislative intent in enacting the ordinance.

108. As for the two cases cited by Mr Pun: *Pollock v Minister of Transport* and *The State of Maharashtra v Indian Medical Association*, we do not derive much assistance from them. The relevant context is wholly different and the decisions in those cases bear no resemblance to the kind of process we are discussing. To extrapolate from those decisions a general proposition without regard to context is inconsistent with the proper approach to statutory construction identified by Chief Justice Li mentioned at §89 and 90 above.

109. The flaw in Mr Pun's use of these authorities is demonstrated by counsel's selective reliance on the judgment in *The State of Maharashtra v Indian Medical Association.* In that case, the court held that State Government was not required to submit an application under section 64 of the Maharashtra University of Health Sciences Act

1998 for permission from itself to establish a Government run medical college. Mr Pun relied on part of the dicta at §5 of the judgment,

> "The State Government being the authority to accord approval for setting up a medical college within the State cannot apply to itself for grant of approval when it proposes to establish a new medical college within the State."

110. But that paragraph continued as follows,

> "Its decision to set up a government run medical college tantamounts to an approval or permission as contemplated under Section 64 of the Act ..."

111. Thus, if one were to follow that part of the reasoning and directly adopt it in the present case, the Director would not need an EP for project proposed by the EPD. Not surprisingly, Mr Pun disavowed any contention to that effect.

112. The real basis of the decision is to be found in the latter part of §5 of that judgment,

> "The expression 'management' occurring in Section 64 shows that it refers to a private management other than the State Government when it seeks permission of the State Government to open a new medical college within the State."

113. In the subsequent paragraphs, there were discussions on the expression "management" in the context of the statutory scheme in question.

114. Thus, everything depends on context and it is unhelpful and a misuse of authorities to cite isolated passages in a judgment without proper comparison of the contextual backgrounds.

115. In respect of the distinction drawn by Mr Pun between "a person" and "an applicant" in EIAO, we do not accept this to be a valid point. The two expressions first appeared in sections 5(1) and (2),

> "(1) A person who is planning a designated project shall apply to the Director-
>
> (a) for an environmental impact assessment study brief to proceed with an environmental impact assessment study for the project; or
>
> (b) if the requirements of subsection (9), (10) or (11) are relevant, for approval to apply directly for an environmental permit.
>
> (2) The applicant shall-
>
> (a) submit the application in the form approved by the Director;
>
> (b) submit a project profile that complies with the technical memorandum;
>
> (c) advertise in the form the Director may require the availability of the project profile on the day following the lodging of the project profile with the Director in a Chinese language daily newspaper and an English language daily newspaper, each of which circulate generally in Hong Kong; and
>
> (d) pay the prescribed application fee."

116. Construing the section as a whole, "the applicant" (note the use of the definite article) in subsection (2) must refer to the "person" who made an application to the Director pursuant to the obligation imposed under subsection (1). Reading the ordinance in context, the reference to "an applicant" in the later sections must bear the same meaning. If the Director can come within the meaning of "a person" (as accepted by Mr Pun), when the EPD makes an application on her behalf, she becomes an applicant for the purpose of EIAO.

117. Putting aside the features identified by Mr Pun to be objectionable (which are more or less of a formalistic nature), the real concern should be whether the Director could act, or appear to act, as a judge in her own cause. However, these were grounds canvassed before the judge who, for the reasons set out in his judgment, rejected the same. Mr Pun did not feel able to challenge these aspects of the judge's decision.

118. Mr Pun is correct in pointing out that there is no evidence to suggest that the functional segregation of the EIA section from the other sections in the EPD was considered by the Legislative Council when EIAO was debated. However, as Chief Justice Li observed in *HKSAR v Cheung Kwun Yin*, the relevant context of a piece of legislation includes the pre-existing state of the law. That would include the common law position. The rule of natural justice which prohibits a person to be a judge in his or her own cause and the rule against apparent bias have always been part of the common law. Those rules are sufficient to address the substantive concern mentioned at §117. But for the implementation of measures to ensure strict functional segregation, the Director's decisions on an application by the EPD would be liable to be set aside for the breach of those common law rules. Therefore, it was not necessary for the legislature to add onto those rules an exclusion of EPD applications from the scope of the EIA regime.

119. For these reasons, we reject Mr Pun's submissions on the third ground.

Disposition

120. We shall dismiss the appeal and order the applicant to pay the costs of the respondents, such costs are to be taxed if not agreed, with certificate for two counsel. The applicant's own costs are to be taxed in accordance with the Legal Aid Regulations.

Hon McWalters JA:

121. I have read in draft the joint judgment of Lam VP and Kwan JA and whilst I agree with their reasoning and conclusions in respect of Issues 1 and 2, I do not agree with their reasoning and conclusion in respect of Issue 3. I shall explain why.

122. Issue 3 is an issue of construction. For me, the issue of construction is whether the legislature, in enacting the EIAO, intended that the EPD could be "a person" or "an applicant" under the Ordinance, ie could it be a project proponent?

123. I am in agreement that the Ordinance clearly binds the government and that should the government ever be a project proponent it would be subject to its provisions. I agree that there is nothing in the Ordinance which would prevent the government from being a project proponent and that it could be one through one of its departments.

124. As I have said, for me, the question is whether the legislature intended to exclude the Director and his Department, the EPD, from ever being a project proponent.

125. In answering this question the law mandates that the court ascertains the intention of the legislature as expressed in the Ordinance as

a whole. This task is achieved by adopting a purposive approach to construing the Ordinance. By adopting such an approach the court will be guided to a construction of the legislation which is consistent with and gives effect to its legislative purpose.

126. A purposive approach to construction requires that statutory language is construed having regard to its context and purpose. Care must be taken to ensure that regard is had to context and purpose in the first instance and they are not relegated "into second place, to be consulted after a "natural and ordinary meaning" has been identified".[17] This is particularly important in the present case given the breadth that the words the legislature has chosen to employ might normally be expected to have.

127. In considering the context the court does not focus just on the particular section in which the word or phrase being construed appears. Context is to be understood in a much wider sense and includes the other provisions of the statute and the existing state of the law.

128. The first step, therefore, is to identify the legislative purpose. The purpose of the EIAO as set out in its long title has been quoted in the judgment of Lam VP and Kwan JA. This purpose is, in essence, the protection of the environment through an environmental impact assessment process. Implicit in the enactment of this legislation is a recognition that there is a public interest in protecting the environment.

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[17] *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45 at page 75, paragraph 76.

129. Having identified the legislative purpose regard must then be had to the means by which this purpose is be achieved. This not only provides a truer and more complete understanding of the legislative purpose but it is also an important part of the overall context and consequently must also be a matter to which the court has regard in interpreting the EIAO's provisions. The means by which the legislative purpose is to be achieved is to require those wishing to pursue particular projects to go through an environmental impact assessment process *that is presided over and enforced by the Director*. As important as the process is, it is not possible to divorce it from the crucial role of the Director in ensuring that the process is properly carried out so that it fulfils its very important role of protecting the environment. In a very real sense the Director, in presiding over this process, acts as guardian of the environment.

130. This process is set out in the judgment of Lam VP and Kwan JA and I shall not repeat it. I agree with them that the legislation shows that the Director is not alone in this process and that there are other stakeholders, from the Secretary for the Environment to the Advisory Council on the Environment, who participate in the process. However, I do not see that the involvement of these other parties or bodies in any way diminishes the key role of the Director as the regulator of the process and enforcer of the Ordinance and, as such, guardian of the particular public interest which the Ordinance was enacted to protect. His regulatory role is evident from the decisions that he makes that are subject to appeal as set out in section 17(1) (i)-(viii) of the Ordinance and his enforcement role is evident from the provisions of Part VII of the Ordinance.

131. This brings me to how the Director is expected to perform his role. Although not independent of government the Director must have been expected to perform his EIAO duties in an independent way in the sense that he was also expected to apply and enforce the environmental impact assessment process equally against government, when it is a project proponent, as against any private sector project proponent.

132. It is also significant that the Director is not required to balance the public interest entrusted to him by the Ordinance with the wider public interest. The responsibility for doing this is specifically provided for by the Ordinance when it empowers the Chief Executive in Council to, *in the public interest*, exempt a particular project from the provisions of the EIAO.[18] The fact that the only public interest that the Director is required to protect is the public interest in protecting the environment, lends emphasis, in my view, to the independence of his role in presiding over the environmental impact assessment process and in enforcing the provisions of the EIAO.

133. That the Director is expected to perform his roles of regulator and enforcer in an independent way, advancing the particular public interest which the Ordinance entrusts to him, is, in my view, an important element in the approach to construing the Ordinance.

134. The importance of this aspect of his role is reflected in the comments of Ms C Loh when speaking in Legco after the deliberations of the Bills Committee on the Second Reading of the Bill.[19] After referring

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[18] See section 30 of the EIAO.

[19] Ms Loh was Deputy Chairman of the Bills Committee.

to the fact that in applying the environmental standards set out in the T M the Director and his officers "will inevitably enjoy a considerable margin of discretion", Ms Loh said that she was nevertheless "confident generally that their professionalism, along with their genuine commitment to improving environmental quality, will incline them in the right direction most of the time". But, she said:

> "Nevertheless, I remain concerned about the difficult task of self-regulation that the Bill imposes on the Administration. In the case of many important projects, such as large-scale public housing, reclamations or other infrastructural projects, the project proponent sitting across the table from the Director of the Environmental Protection Department (EPD) will be another senior government officer representing some other aspect of the public interest. We know there will be internal conflicts within the Administration over how stringently to apply the Bill in such cases."

135. Although I mention these comments of Ms Loh, which I should point out were referred to us by the respondent, I do not rely on them for the purpose of construing the Ordinance. I do not rely on them because the point they make is self-evident from the very scheme created by the legislation; I do, however, draw comfort from them for they positively emphasize the importance of the independence of the Director in performing his duties.

136. However, the comments of Ms Loh are also important in a negative way, for in ventilating a concern at the ability of the Director to perform his role independently of and uninfluenced by his government colleagues when they are project proponents, she notably fails to mention the role of the Director when he himself is a project proponent. It seems to me to be inconceivable that with such a concern present in her mind Ms Loh would have contemplated that the Director, in implementing the legislation and advancing the particular public interest underlying it,

would himself be a project proponent advancing another public interest that might be in conflict with his EIAO public interest.

137. A similar failure is also evident in the speech by the Bills proponent in his Second Reading Speech. If it was intended that the Director and/or his Department would be a project proponent it would be expected that this would have been mentioned at some stage. None of the extrinsic materials contain a reference to this particular aspect of his pre-EIAO position continuing post-enactment of the EIAO.

138. It is my view that standing back and looking at the EIAO as a whole and having regard to the Ordinance's legislative purpose, the important public interest that purpose is designed to protect and the importance of the Director performing his regulatory and enforcement duties in an independent way as a means of achieving that purpose, it would be contradictory and illogical for the Director to himself be a project proponent.

139. That is not to say that the legislature could not enact a scheme of which the Director was regulator and enforcer and also participant as a project proponent, but, in my view, that would be a different scheme from that laid down by the EIAO. One would expect that the dual, apparently contradictory, roles of the Director in such a scheme would be something for which specific provision was made. That has not been done.

140. There is nothing within the EIAO that would suggest that it was ever contemplated by the legislature that the Director would participate as a project proponent in a scheme designed to protect a particular public interest over which he presides as regulator and enforcer.

In coming to this view I take into account all the matters advanced by the appellant which point to the Director not being a project proponent. These have been discussed by Lam VP and Kwan JA at paragraph 80.

141. However, that is looking at the EIAO in isolation and focusing on identifying its purpose without regard to context and that is contrary to a purposive approach which, as I have said, requires that regard be had to contextual matters such as the existing state of the law. The contextual matters on which the respondent relies can be found in the various materials that have been placed before us from which the respondent has advanced a number of arguments. It was submitted that these materials showed that:

(i) prior to the enactment of the EIAO the EPD operated a purely administrative environmental impact assessment process which had no force of law and this undermined its effectiveness;

(ii) prior to the enactment of the EIAO the Director and the EPD were, in effect, what would post-EIAO be regarded as a project proponent; ie they participated in a project which was subject to the administrative based environmental impact assessment process; see the Waste Disposal Ordinance, Cap 354 which defines "waste disposal authority" as the Director of Environmental Protection;

(iii) the EIAO was intended to provide the existing environmental impact assessment process with the force of law and that was all it was intended to do; and

(iv) post the enactment of the EIAO the Director and the EPD continued to regard themselves as project proponents for the purpose of the EIAO and to this end created within the EPD a functional division of responsibilities.[20]

142. Although the respondent adopts the position that he does not need to rely on these materials in order to construe the Ordinance in the way he propounds, he nevertheless says that these materials, by placing the Ordinance in context, support such a construction.

143. All of these arguments essentially resolve themselves to one only; namely that it is a legitimate tool of construction to identify the problem the legislation was enacted to address and construe it against that background or within that context. That is not a proposition with which I disagree. Indeed, in *Town Planning Board v Society for the Protection of the Harbour Ltd* (2004) 7 HKCFAR 1 Li CJ said at page 14, paragraph 29:

> "The mischief rule is an early example of the purposive approach to statutory interpretation. ... In Hong Kong, the purposive approach (including the mischief rule) has been reflected in s. 19 of the Interpretation and General Clauses Ordinance. ..."

Putting it another way, it is now well recognized that the existing state of the law is part of the context to which regard should be had in construing the Ordinance purposively.

144. There is no question the policy issue the legislation was intended to address was the lack of any compulsive bite to a purely

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[20] The IWMF would appear to be the first project post-enactment of the EIAO in which the EPD is the project proponent.

administrative based environmental impact assessment regime. In his Second Reading Speech on the Bill, the Deputy Secretary for Planning, Environment and Lands, as proponent of the Bill, said:

> "Members will recall that the Bill provides a statutory framework *modelled on the existing administrative arrangements* for the conduct of EIAO and serves two main purposes. The first purpose is to require the proper evaluations at the earliest possible stage, of the environmental impacts of development projects. The second purpose is to ensure the satisfactory implementation of necessary prevention and mitigation measures to protect the environment." (Emphasis added)

But, this language, in my view, falls far short of evidencing the intention which the respondent expressed in its submission as being:

> "The EIAO was largely a formalization of the then existing procedures, and was not intended to introduce a new regime." [21]

145. The imprecise language of the Deputy Secretary does not indicate that the Bill is simply a statutory version of an existing administrative scheme and is intended to replicate, without change, the then administrative arrangements. In my view, the vagueness of his language does not enable a conclusion to be drawn that it was intended that the Director would be the protector of a particular public interest as the regulator and enforcer of the new Ordinance and also be a project proponent under it seeking to advance a different and potentially contradictory public interest.

146. Reliance is also placed on the fact that a functional segregation of responsibilities has been achieved within the EPD to allow the Director to be a project proponent and to also perform his duties

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[21] Paragraph 22(3) of the Skeleton Submission for the Respondents.

under the EIAO. However, the fact that the EPD has accommodated dual roles for the Director is, in my view, largely irrelevant to the court's task which is to ascertain the intention of the legislature and in performing this task I do not see how the view that the EPD has taken of the operation of the Ordinance is helpful. If it is being said that the functional segregation of responsibilities demonstrates that as a matter of practicality the apparently contradictory roles of the Director can be properly and fairly accommodated, then I am sceptical of such a claim.

147. In my view the true significance of the functional segregation of responsibilities within the EPD is that it reminds us that prior to the enactment of the EIAO the Director was already performing the dual roles of project proponent and regulator in respect of his duties under the Waste Disposal Ordinance. It is this aspect of the context which has troubled me most.

148. But, when I weigh this contextual factor with the importance of the public interest the Director is entrusted to safeguard, the importance of the process over which he presides in safeguarding that public interest and the importance of him performing that role independently without regard to other public interests then I reach what is for me the only conclusion; namely that the legislature decided that henceforth in performing this very important role the Director should no longer be a project proponent.

149. Thus, although the extrinsic materials provide a contextual background that helps to illuminate the problem the EIAO was enacted to address, there is nothing in them which would cause me to construe the Ordinance in the way propounded by the respondent.

150. For these reasons, I am of the view that the words "a person" and "an applicant" should be construed as not including the Director or the EPD for such a construction is the only one that is consistent with and gives effect to the legislative purpose of the EIAO.

151. The consequence of the construction I would adopt is not that government projects that would otherwise be subject to the EIAO suddenly become exempt from its provisions; merely that the project proponent for such projects must be a government department other than the EPD. Whether a particular project is subject to the EIAO depends on whether that project is caught by this Ordinance, not on who is its project proponent.

152. I would, therefore, allow the appeal and declare that the decisions of the Director to approve the EIA Report pursuant to section 8(3) of the EIAO and to grant an EP pursuant to section 10(3) of the EIAO are illegal and quash them.

Hon Lam VP:

153. By a majority, there will be an order in terms of para 120 above.

(M H Lam) Vice-President	(Susan Kwan) Justice of Appeal	(Ian McWalters) Justice of Appeal

Ms Gladys Li SC, Mr Valentine Yim & Mr Hectar Pun, instructed by Lee Chan Cheng, assigned by Director of Legal Aid, for the Applicant (Appellant)

Mr Johnny Mok SC & Ms Eva Sit, instructed by the Department of Justice, for the 1st & 2nd Respondents (1st & 2nd Respondents)