

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 441 OF 2021

BETWEEN

JOIN SMART LIMITED

Applicant

and

DIRECTOR OF ENVIRONMENTAL PROTECTION

1st Putative
Respondent

and

DIRECTOR OF CIVIL ENGINEERING
AND DEVELOPMENT

2nd Putative
Respondent

Before: Hon Chow JA (sitting as an additional judge of the Court of
First Instance) in Court

Date of Hearing: 16-17 November 2021

Date of Judgment: 17 February 2022

J U D G M E N T

INTRODUCTION

1. In this application for judicial review, the Applicant seeks to challenge the following decisions of the Director of Environmental Protection (“**the Director**”):

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- (1) the decision made on 30 December 2020 (“**the First Decision**”) to approve an environmental impact assessment report (“**the EIA Report**”) prepared and submitted by the Civil and Engineering Development Department (“**CEDD**”) of the Government of the Hong Kong Special Administrative Region in respect of a proposed public housing development project at San Hing Road and Hong Po Road, Tuen Mun, New Territories, under s 8(3) of the Environmental Impact Assessment Ordinance, Cap 499 (“**the Ordinance**” or “**the EIAO**”); and
- (2) the decision made on 11 February 2021 (“**the Second Decision**”) to grant an environmental permit (“**the Permit**”) for a Sewage Pumping Station at San Hing Road (No EP-584/2021) to CEDD under s 10 of the Ordinance.

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BACKGROUND FACTS

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(i) The Project Profile

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2. Since the Chief Executive’s 2011-2012 Policy Address, it has been the Government’s policy objective to increase the supply of land for housing developments to meet the housing demands of the public. To this end, 3 sites at San Hing Road and Hong Po Road in Tuen Mun, New Territories, known as the “SHR Site”, “SHR Site Extension” and “HPR Site”, amongst others, have been identified by the Government as a potential combined site for integrated and comprehensive public housing developments with Government, institution and community uses and associated infrastructural works (“**the Project**”).

A 3. In order to carry forward the Project, in June 2017, CEDD
B submitted a project profile (“**the Project Profile**”) to the Director,
C advertised the Project Profile and applied to the Director for the issue of
D an environmental impact assessment (“**EIA**”) study brief pursuant to s
E 5(1)(a) of the Ordinance.

F 4. The Project Profile states, amongst other things, the
G following:

H **“1.2 Purpose and Nature of Project**

I 1.2.1 As stated in the Chief Executive’s 2011-2012 Policy
J Address, the Government is committed to expanding
K the land resources and increasing housing land supply.
L To meet this policy objective, San Hing Road and Hong
M Po Road is identified as potential long term public
N housing sites.

O 1.2.2 The Project is to plan the future land use of the
P potential development sites at San Hing Road and Hong
Q Po Road, which are located at the north of Siu Hong
R Court near Tsing Lun Road, Tuen Mun.

S **1.3 Name of Project Proponent**

T 1.3.1 The Project Proponent is Housing Projects 2 Division
U (HP2), Civil Engineering Office (CEO), Civil and
V Engineering Development Department (CEDD) of the
Government of the HKSAR.

1.4 Location and Scale of Project and History of Site

1.4.2 The proposed development sites fall within an area
mainly zoned ‘Green Belt’ (‘GB’) and partly zoned
‘Residential (Group E)’ (‘R(E)’) on the approved Tuen
Mun Outline Zoning Plan (OZP) No. S/TM/33 and Lam
Tei and Yick Yuen Outline Zoning Plan No.
S/TM-LTYYY/8 (LTYYY OZP).

1.4.3 The existing land use is generally a mixed urban-rural
nature typical of a developing rural area on the fringe of
a growing urban development. Most building land is
occupied by low density residential development of not

more than 3 storeys, with smaller number of higher density development. The agricultural land is generally occupied by cultivation, orchards and other farm uses, together with areas of mixed commercial/industrial uses, the majority of which are of a low intensity, local nature, many with temporary types of structures. There are also numerous business operations, including container yard, vehicle repair workshop, vehicle parking area, ice-making factory, motor services yard, workshop for woodworking and sawmill, open parking area and warehouse, which may be subject to potential contamination by petroleum hydrocarbon, metals and organic solvents.

1.4.5 The proposed development within the assessment area comprises the housing development sites, school sites, public transport interchanges, the proposed Road L7 and associated infrastructure works.

1.4.7 This Project Profile is prepared for application to the Director of Environmental Protection for an EIA Study Brief for the Project.

1.5 Number and Types of Designated Projects to be Covered by the Project

1.5.1 The proposed development at San Hing Road and Hong Po sites has an area of about 27 ha, with a total population of about 63,000. Therefore, the planning and engineering study falls within Item 1 under Schedule 3 of the Environmental Impact Assessment Ordinance (EIAO), i.e. ‘Engineering feasibility study of urban development projects with a study area covering more than 20 ha or involving a total population of more than 100,000.’ It is a Designated Project requiring an EIA report.”

(ii) The Study Brief

5. On 4 August 2017, the Director issued an EIA Study Brief No ESB-299/2017 (“**the Study Brief**”) pursuant to s 5(7) of the Ordinance to CEDD for the preparation of an EIA report for the Project.

6. The Study Brief states, amongst other things, the following:

“1. BACKGROUND

1.2 The Applicant proposes to conduct a planning and engineering feasibility study for ‘Development at San Hing Road and Hong Po Road, Tuen Mun’ (the Project). The Project is to plan the future land use of the potential development sites at San Hing Road and Hong Po Road ...

1.3 The proposed development has an area of about 27 ha ... The Project also includes individual work items that may fall under Schedule 2 of the EIAO to be identified during the course of the EIA study. In particular, the following element of the Project, which may be proposed under the study, is a designated project under Item F.3(b) in Part I, Schedule 2 of the EIAO:

- Sewage pumping stations with capacity of more than 2,000 m³ per day and a boundary of which is less than 150 m from an existing or planned residential area.

1.4 Pursuant to section 5(7)(a) of the EIAO, the Director of Environmental Protection (the Director) issues this EIA Study Brief to the Applicant to carry out an EIA Study.

1.5 The purpose of this EIA Study is to provide information on the nature and extent of environmental impacts arising from the construction and operation of the Project and associated activities that will take place concurrently. This information will contribute to decisions by the Director on:

- (i) the overall acceptability of any adverse environmental consequences that are likely to arise as a result of the Project and its staged implementation;
- (ii) the conditions and requirements for the detailed design, construction and operation of the Project to mitigate against adverse environmental consequences wherever practicable; and
- (iii) the acceptability of residual impacts, after the proposed mitigation measures are implemented.

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3. DETAILED REQUIREMENTS OF THE EIA STUDY

3.1 The Purpose

3.1.1 The purpose of this EIA Study Brief is to set out the purposes and objectives of the EIA study, the scope of the environmental issues which shall be addressed, the requirements that the EIA study shall need to fulfil, and the necessary procedural and reporting requirements. The Applicant shall demonstrate in the EIA report whether the criteria in the relevant sections of the Technical Memorandum on Environmental Impact Assessment Process of the EIAO (hereinafter referred to as the 'TM') are complied with.

3.2 The Scope

3.2.1 The scope of the EIA study shall cover the Project and associated works mentioned in sections 1.2 and 1.3 above. For the purpose of assessing whether the environmental impacts shall comply with the criteria of the TM, the EIA study shall address the key issues described below, together with any other key issues identified during the course of the EIA study:

- (x) potential cumulative environmental impacts of the Project, through interaction or in combination with other existing, committed and planned projects in the vicinity of the Project, and that those impacts may have a bearing on the environmental acceptability of the Project;

3.3 Description of the Project

3.3.1 Purpose(s) and Objectives of the Project

The Applicant shall provide information on the purpose(s) and objectives of the Project, and describe the benefit of the Project and scenarios with and without the Project.

3.3.3 Background and History of the Project

The Applicant shall provide information on the site locations and site history of the Project, approved planning applications within the Project Area, any related projects, and the consideration of the different land use options and layout options of the proposed

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development with regard to the approved planning applications, and the practicable siting for the supporting infrastructures at available locations as well as its compatibility with the surrounding landscape context. The key reasons for selecting the proposed land use and layout of the Project and the part environmental factors played in the selection shall be described. The main environmental impacts of the different land use and layout options shall be compared with those of the Project and with the likely future environmental conditions in the absence of the Project.”

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7. Section 3.4 (Technical Requirements) goes on to set out the technical requirements to be met in the EIA study when assessing the environmental aspects of the Project under 10 topics, including air quality impact, noise impact, water quality impact, sewerage and sewage treatment implications, waste management implications, land contamination, ecological impact (terrestrial), landscape and visual impacts, impact of cultural heritage, and impact from electric and magnetic fields.

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8. The Technical Memorandum on Environmental Impact Assessment Process issued by the Secretary for the Environment, Transport and Works on 16 May 1997 under s 16(1) of the Ordinance mentioned in the Study Brief shall hereinafter be referred to as the “TM”.

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(iii) The EIA Report

9. Pursuant to the Study Brief and TM, CEDD prepared the EIA Report in October 2020 and submitted it to the Director for approval under s 6(2) of the Ordinance.

10. In the EIA Report, it is stated that the proposed development area (“**the PDA**”) under the Project mainly comprises the SHR Site, SHR Site Extension and HPR Site, the proposed Road L7 and the realigned Hong Po Road, covering an area of about 29.7 ha, and the Project would provide approximately 21,600 public housing units for a total population of about 61,000. The PDA falls within (i) an area zoned “Residential (Group E)” (“**R(E)**”) and “Green Belt” (“**GB**”) on the approved Lam Tei and Yick Yuen Outline Zoning Plan No S/TM-LYTT/10 (“**the LTYO OZP**”), and (ii) an area zoned “Residential (Group E)1” (“**R(E)1**”), “GB”, “Village Type Development” (“**V**”) and “Road” on the approved Tuen Mun Outline Zoning Plan No S/TM/35 (“**the TM OZP**”).

11. The EIA Report consists of 16 sections, including:

- (1) Section 1 - Introduction;
- (2) Section 2 - Consideration of Alternative Development Options;
- (3) Section 3 - Project Description and Construction Methodologies;
- (4) Sections 4 to 13, relating to the 10 topics of environmental impacts required to be assessed under the Study Brief (see §7 above);
- (5) Section 14 - Environmental Monitoring and Audit Requirements;
- (6) Section 15 - Summary of Environmental Outcome; and
- (7) Section 16 - Conclusion.

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12. Section 2 (Consideration of Alternative Development Options) contains 6 sub-sections:

- (1) Section 2.1 - Formulation of Development Layout;
- (2) Section 2.2 - Public Views;
- (3) Section 2.3 - Consideration of Alternatives;
- (4) Section 2.4 - Implementation Programme;
- (5) Section 2.5 - Planning Applications within PDA; and
- (6) Section 2.6 - Recommended Development Parameters and Land Use.

13. Section 2.3 (Consideration of Alternatives) sets out CEDD’s consideration of alternative layout/design, as well as construction methods, of the Project, including (i) site constraint for the project site boundary, (ii) optimization for the design and alignment of proposed Road L7, (iii) alternative construction methods, and (iv) alternatives for the preservation of the existing semi-natural stream at the HPR Site.

14. Section 2.5 (Planning Applications within PDA) contains 3 sub-paragraphs:

- (1) §2.5.1 gives information concerning the location of the site of the Project (between Lam Tei LTR Station and Siu Hong WRL/LRT Interchange Station), and the zonings of the PDA on the TM OZP and LTYO OZP (namely, “R(E)”/ “R(E)1”, “GB”, “V” and “Road”).

(2) §2.5.2 gives a summary of 2 approved planning applications under s 16 of the Ordinance (“**the 2 Approved Planning Applications**”) in respect of proposed private residential developments within the PDA, including (i) the nature of the proposals, (ii) approval date, (iii) validity period, and (iv) site area -

(a) Application No A/TM-LTYYY/337, being an application approved by the Rural New Town Planning Committee (“**RNTPC**”) of the Town Planning Board (“**TPB**”) on 23 June 2017 for a proposed private residential development consisting of 35 flats at a site with an area of about 3,832.4 m² located at the north-eastern corner of the SHR Site; and

(b) Application No A/TM-LTYYY/381, being an application submitted by the Applicant on 1 August 2019 and approved by RNTPC on 29 May 2020 for a proposed private residential development consisting of 96 flats and some 164 car parking spaces at a site with an area of about 14,553 m² located to the north of Hong Po Road.

(3) §2.5.3 states as follows -

“Two approved planning applications (Nos. A/TM-LTYYY/381 and A/TM-LYTT/337) for private housing developments are located within the study area of this Project and have a maximum plot ratio of 1.0. To maximize the development potential and for comprehensive planning of the area; a domestic plot ratio of 6.0 for public housing developments has

been adopted under this project. It is considered that the proposal for implementation of public housing developments will impose more environmental impacts on the surroundings, and such design scenario has been used for carrying out the environmental impact assessment under this project.”

15. Section 3 of the EIA Report is titled “Project Description and Construction Methodologies”. Section 3.3, titled “Consideration of Scenario With and Without the Proposed Development”, contains a discussion under 2 sub-headings:

(1) Scenario without the Project -

“Without the Project, alternative housing sites may need to be identified on alternative greenfield site... It would be more effective to develop on previously developed land instead of looking for scarce greenfield land. (§3.3.1)

From urban planning perspective, it is more effective to develop this area as it is close to the development of Tuen Mun Area 54 with well-developed public transport infrastructures such as LRT stations and MTR WRL Stations. The proposed development would meet long-term housing, economic, social and environmental needs ... (§3.3.2)

Under the scenario without the proposed development, the area would remain in its present stage. As a result, no strategic land parcels in this area would be developed to provide housing to meet the public needs. In addition, the present mix of non-compatible land uses ... would remain. The predominant uses are brownfield operations ... Proliferation of brownfield sites has resulted in degradation of the rural environmental due to the increasing noise nuisances to surrounding residents, and discharge of industrial waste water. Furthermore, any of these industrial premises which may not be properly connected with sewer system could result in discharge of untreated sewage into nearby water bodies and hence deteriorate water quality. (§3.3.3)

... Without the project, the developments would also be scattered within the region without any strategic planning. The

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B	could further decrease the quality of the living environment. (§3.3.4)”	B
C	(2) Scenario with the Project -	C
D	“This Project was putting forward to provide approximately 21,600 public housing units, accommodating a total population 61,000. The proposed developments would also include supporting social welfare and other facilities to serve the proposed developments. These facilities include primary school, kindergartens, community centre, child care centre, residential care home for the elderly, children and youth service centre, retail, etc.	D
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H	<i>Optimising the Land Use for Provision of Public Housing</i>	H
I	Of the approximately 29.7 ha of land proposed for development of public housings as well as the proposed Road L7 and the realigned Hong Po Road, approximately 10.3 ha of this land is currently used for various types of brownfield operations. The transition of this land being used for brownfield operations into housing developments proposed under the Project could optimise the land use as well as addressing the public housing needs. (§3.3.5)	I
J		J
K		K
L	<i>Improvement of Rural Environment</i>	L
M	The PDA is currently rural area with a mixture of land uses, with brownfield operations as the predominant uses... The expansion in brownfield sites has resulted in deterioration of the rural [environment] due to the increasing noise nuisances to the surrounding residents. In addition, the possibility of improper discharge of industrial waste water and contaminants without proper treatment into the nearby watercourses could deteriorate the water quality in the vicinity. (§3.3.6)	M
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P		P
Q	With the implementation of the proposed public housing developments, proper sewerage facilities will be provided to convey the sewage collected within the PDA to the downstream public sewerage system, [while] on the other hand alleviating the impact caused by the existing brownfield operations. (§3.3.7)	Q
R		R
S		S
T	By transforming the brownfield sites for housing developments and other associated ancillary facilities ... not only the living	T
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condition at the study area would be improved, the public's expectation on provision of more traffic and transport infrastructure and G/IC facilities at the area could also be met and therefore, improving the overall living environment for the existing residents in the vicinity and future residents. (§3.3.8)

Provision of Alternative Road Linkage

The proposed Road L7 and the realigned Hong Po Road will provide an alternative route for the areas adjacent to the PDA, e.g. San Hing Tsuen and Tsz Tin Tsuen, to the nearby road networks, which could release the burden of the existing road linkages within the area. (§3.3.9)"

(iv) The Decisions

16. The Director considered that the EIA Report met the requirements of the Study Brief and TM under s 6(3) of the Ordinance. On 6 October 2020, the Director informed CEDD that the EIA Report was suitable for public inspection pursuant to s 6(4) of the Ordinance.

17. Between 23 October 2020 and 21 November 2020, the EIA Report was exhibited for comment by the public.

18. The Applicant gave written comments on the EIA Report under s 7 of the Ordinance through its planning consultant, Masterplan Limited ("**Masterplan**"), by a letter dated 20 November 2020 ("**the Masterplan Letter**") to the Environmental Protection Department ("**EPD**"). At §§5.1 to 5.7 of the Masterplan Letter, it was contended that the requirements of §3.3.3 of the Study Brief had not been met. In particular, it was said that:

- (1) §3.3.3 of the Study Brief required that the following be included in the EIA Report -

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“The Applicant shall provide information on the site location and site history of the Project, approved planning applications within the Project Area, any related projects, and the consideration of the different land use options and layout options of the proposed development with regard to the approved planning applications”. [emphasis original]

(2) The Study Brief therefore specifically required that different land use options be considered and that they specifically took account of the approved planning applications within the study area. These layout options were then to be compared with those of the Project.

(3) The EIA Report was completely inadequate in this respect and had ignored the requirement of the Study Brief in that -

(a) the location of the sites of the 2 Approved Planning Applications and the approved schemes were not shown on any plan within the EIA Report and without identifying the location of the land concerned, no alternative layout could be prepared;

(b) no alternative layouts were prepared and included in the EIA Report and no assessment or comparison of alternative layouts was made.

(4) The assessment in Section 2.5.3 of the EIA Report was not in compliance with the requirements of the Study Brief as no options had been considered which would take account of the location and approved uses of the 2 Approved Planning Applications.

A 19. In response to the aforesaid comment from Masterplan, on 4
B December 2020, the Director wrote to CEDD to request for the following
C further information pursuant to s 8(1) of the Ordinance, namely:

D “Elaboration of the consideration of the different land use
E options and layout options of the proposed development
with regard to the approved planning applications”.

F 20. Under cover of a letter dated 18 December 2020, CEDD
G provided the further information (“**the Further Information**”) sought by
H the Director in a document entitled “Elaboration on the consideration of
I the different land use options and layout options of the proposed
J development with regard to the approved planning application”. In the
Further Information, CEDD stated, *inter alia*, as follow:

K (1) In response to §3.3.3 of the Study Brief, the 2 Approved
L Planning Applications within the Project area were identified
and presented in the EIA Report (in Section 2.5).

M (2) In respect of the considerations given to the requirements
N under §3.4 of the Study Brief¹, two different options were
O considered for environment impact assessment purpose: (i)
P the proposed developments as in the EIA Report (Option 1),
Q and (ii) the proposed developments subject to the 2
Approved Planning Applications (Option 2). The land use
R and layout arrangement for the proposed developments
under Option 1 and Option 2 were the same in respect of the

T ¹ §3.4 of the Study Brief sets out the detailed technical requirements for the EIA study to address the
U environmental aspects of the Project.
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SHR Site Extension and HPR Site, but differed in respect of the SHR Site.

(3) Under Option 1, the SHR Site was proposed to be developed for public housing at a maximum domestic plot ratio of 6.0 to provide about 9,400 public housing units.

(4) Under Option 2, the SHR Site excluding the site areas of the 2 Approved Planning Applications could only provide about 7,000 public housing units (at a maximum plot ratio of 6.0), while the 2 Approved Planning Applications (with a maximum domestic plot ratio of 1.0) would provide a total of about 131 private housing units.

(5) Apart from the reduction of the site area for proposed public housing developments under Option 2, exclusion of the site areas of the 2 Approved Planning Applications would result in an awkward remaining site area which would impose constraints in planning of the proposed public housing developments.

(6) The potential environmental impacts associated with Option 1 and Option 2 are similar since they were both mainly for residential purposes.

(7) However, it was predicted that the increment of traffic flow and sewage generation from the developments under Option 1 would be higher than Option 2, and thus the impacts on air

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quality, traffic noise and sewage collection and treatment would be more serious under Option 1 than Option 2.

(8) Option 1 and Option 2 would have similar compatibility issues with surrounding landscape context, but there would be more serious visual impact associated with the developments under Option 1, in that higher visual blockage would result from the more high-rise public housing developments under Option 1 than Option 2.

(9) Other potential environmental impacts (ie water quality, ecology, waste management, land contamination, cultural heritage, landscape, and electric and magnetic fields) arising from the developments under Option 1 would be similar to Option 2.

(10) In view of the above, Option 1 was considered to be the reasonable worst case scenario in terms of environmental impacts and infrastructure needs, and was therefore adopted for detailed environmental impact assessment under the Project.

21. Pausing here, I should mention that although it was stated in the Director's letter of 4 December 2020 that the Further Information to be provided by CEDD would form part of the EIA Report and would be uploaded onto the EIAO website for the public to access, as stated or confirmed in the Affirmation of Tsang Sai Wing, Assistant Director (Environmental Assessment) of EPD:

(1) On 6 October 2020, the Director had already decided that the EIA Report met the TM and Study Brief requirements under s 6(3) of the Ordinance. Without that decision, it would be unlawful for the Director to advise CEDD that the EIA Report was suitable for public response (§43).

(2) The Director sought the Further Information not for the purpose of deciding whether the EIA Report met the requirements of Study Brief and the TM under s 6(3) of the Ordinance, but for the purpose of addressing relevant public comments and deciding whether to approve the EIA Report under s 8(3) of the Ordinance (§45).

22. On 30 December 2020, the Director approved the EIA Report under s 8(3) of the Ordinance, and the public was informed of the same in early January 2021. This approval of the EIA Report by the Director constitutes the First Decision under challenge in the present application for judicial review.

23. On 11 February 2021, the Director granted the Permit to CEDD under s 10 of the Ordinance in light of the approval of the EIA Report. This constitutes the Second Decision under challenge in the present application for judicial review.

APPLICATION FOR JUDICIAL REVIEW

24. On 29 March 2021, the Applicant filed a Form 86 to apply for leave to apply for judicial review of the First and Second Decisions.

A In the Form 86, two grounds of judicial review are advanced, namely, that
B the EIA Report failed to comply with the Study Brief and the TM in the
C following aspects:

D (1) **Ground 1:** the EIA Report did not provide information on
E the different land use options and layout options of the
F proposed development with regard to the 2 Approved
G Planning Applications, as required by the first sentence of
H §3.3.3 of the Study Brief and TM Annex 11 and TM Annex
I 20 (see §56 of the Form 86).

J (2) **Ground 2:** the EIA Report did not compare the main
K environmental impacts of the 2 Approved Planning
L Applications with (a) the main environmental impacts of the
M Project, and (b) the likely future environmental conditions in
N the absence of the Project, as required by the third sentence
O of §3.3.3 of the Study Brief and TM Annex 11 and TM
P Annex 20 (see §56 of the Form 86).

Q Accordingly, the Director had (i) no power to approve the EIA Report
R under s 8(3) of the Ordinance, and (ii) no approved EIA Report to have
S regard to in exercising the power to grant the Permit under s 10(3) of the
T Ordinance.

U 25. On 30 March 2021, the Court directed a rolled-up hearing of
V (i) the application for leave to apply for judicial review, and (ii) the
substantive application for judicial review (if leave to apply for judicial

review should be granted). The rolled-up hearing took place on 16 and 17 November 2021.

THE STATUTORY ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

26. An exposition of the statutory environmental impact assessment process under the Ordinance can be found in the judgment of the Court of Final Appeal in *Shiu Wing Steel Ltd v Director of Environmental Protection and Airport Authority (No 2)* (2006) 9 HKCFAR 478:

[7] The purpose of the Ordinance, 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 incidental matters’...

[8] The process leading to the issuing of an environmental permit commences with the submission by an applicant of a project profile which must comply with the ‘technical memorandum’ (‘TM’) issued by the Secretary for the Environment, Transport and Works (s.5(2)(b)) and which must be advertised in Chinese and English daily newspapers circulating in Hong Kong: s.5(2)(c)...

[9] The [applicant] submitted a project profile to the Director, advertised the profile as the Ordinance prescribed and applied to the Director for the issue of an Environmental Impact Assessment Study Brief pursuant to s.5(1)(a) of the Ordinance. That is the next step in the process...

[10] When the Director issues a study brief, the Ordinance (s.6(1)) then requires an applicant to prepare an EIA report:

‘in accordance with-

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B	(a)	the requirements of the environmental impact assessment study brief; and	B
C	(b)	the technical memorandum applicable to the assessment.'	C
D	[11]	In due course, [the applicant prepares] an EIA report and ... [delivers] it to the Director 'for approval' as prescribed by s.6(2). Section 6(3) directs that, within 60 days of receiving an EIA report, the Director is to decide if the assessment:	D
E			E
F	'(a)	meets the requirements of the environmental impact assessment study brief and technical memorandum; or	F
G			G
H	(b)	does not meet the requirements of the environmental impact assessment study brief and technical memorandum.'	H
I			I
J		If, within 60 days of the Director's receipt of an EIA report, he does not give an applicant notice in writing that the report does not meet the requirements of the environmental impact assessment study brief and technical memorandum, the Director is taken to have decided that the report did meet those requirements: s.6(5) ... [Section 6(4)] provides:	J
K			K
L			L
M	'(4)	If the Director decides that the environmental impact assessment report meets the requirements of the brief and the technical memorandum, he shall advise the applicant when the report must be exhibited for public inspection, whether the advertisement is to contain any specific material and whether a submission to the Advisory Council on the Environment or its subcommittee is required.'	M
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Q	[12]	After the Director advises an applicant to publish the EIA report for public comment and for comment by the Advisory Council on the Environment ('ACE'), the applicant publishes the EIA report and advertises its availability for public inspection: s.7(1) and (2) ...	Q
R			R
S	[13]	The next step in the process is prescribed by s.8(3) of the Ordinance which provides:	S
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‘The Director shall, within 30 days of-

- (a) the expiry of the public inspection period;
- (b) the receipt of comments from the Advisory Council on the Environment; or
- (c) the receipt of information under subsection (1), whichever is the later, approve, approve with conditions or reject an environmental impact assessment report for the designated project.’

If, but only if, public comments on the EIA report are submitted to the Director, he may ask an applicant for further information he requires to decide whether to approve the report: s.8(1) and (2) ...

[14] After approval was received, the Director placed the report upon the register in compliance with s.8(5). Once a report is placed on the register, the way is open for an applicant to apply for an environmental permit for the project. Section 10 of the Ordinance section provides:

‘(1) A person who wishes to have constructed, construct or operate a designated project ... shall -

- (a) apply to the Director for an environmental permit in the form approved by the Director; and
- (b) refer to an environmental impact assessment report on the register in the application for an environmental permit; or

...

(2) In granting or refusing an environmental permit, the Director shall have regard to-

- (a) the approved environmental impact assessment report on the register;
- (b) the attainment and maintenance of an acceptable environmental quality;

- (c) whether the environmental impact caused or experienced by the designated project is or is likely to be prejudicial to the health or well being of people, flora, fauna or ecosystems;
- (d) any relevant technical memorandum;
- (e) any environmental impact assessment report approved under this Ordinance or any conditions in an approval; and
- (f) the comments, if any, submitted to him under section 7 on the report.

...

- (5) The Director may issue an environmental permit subject to the conditions, if any, as the Director thinks fit and specifies in the permit.”

PRINCIPLES FOR DETERMINING WHETHER AN EIA REPORT MEETS THE REQUIREMENTS OF THE TECHNICAL MEMORANDUM AND STUDY BRIEF

27. The following principles for considering whether an EIA report meets the requirements of the TM and the relevant study brief, extracted from §7 of Mr Benjamin Yu, SC’s Skeleton Submissions dated 4 November 2021, have not been disputed by Mr John Litton (for the Director and the Director of Civil Engineering and Development):

- (1) An EIA report must meet the requirements of the TM and the relevant study brief. It would be contrary to the Director’s duty to approve a report that does not meet the requirements.

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- (2) If the EIA report does not meet the requirements of the TM and the study brief, the Director has no power to (i) approve it under s 8(3) of the Ordinance, or (ii) issue an environmental permit under s 10(5) of the Ordinance, since the Director would have no approved EIA report to have regard to under s 10(2) of the Ordinance.
- (3) Whether an EIA report meets or does not meet those requirements is a question of law for the Court.
- (4) The Court should find the meaning of the TM and the study brief and the procedure they prescribe in order to determine the scope of the Director’s power to approve the relevant report.
- (5) The question as to whether the relevant report meets the requirements of the TM and the study brief is to be determined objectively. It is a question of construction, although these documents 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 “practical down-to-earth way”. Technical evidence may be needed to show that a report meets or does not meet the requirements so determined.
- (6) In construing the TM and the study brief, the Ordinance’s purpose of protecting the environment should inform the meaning to be attributed to the instruments created under the Ordinance’s authority.

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(7) 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.

(8) 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 study brief (if any), which is made specifically for the project.

(9) Although it is a matter of construction for the Court to decide what is required by the TM and the study brief, 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.

See *Shiu Wing Steel Ltd, ante*; *Leung Hon Wai v Director of Environmental Protection* [2014] 5 HKLRD 194 (CA), (2015) 18 HKCFAR 568 (CFA); and *Chu Yee Wah v Director of Environmental Protection* [2011] 5 HKLRD 469)

THE REQUIREMENTS UNDER §3.3.3 OF THE STUDY BRIEF

28. The Applicant's complaint in this case is that the EIA Report fails to comply with the requirements of §3.3.3 of the Study Brief and TM Annex 11 and TM Annex 20.

29. §3.3.3 of the Study Brief consists of three sentences:

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(1) The first sentence - “The Applicant shall provide information on the site locations and site history of the Project, approved planning applications within the Project Area, any related projects, and the consideration of the different land use options and layout options of the proposed development with regard to the approved planning applications, and the practicable siting for the supporting infrastructures at available locations as well as its compatibility with the surrounding landscape context.”

(2) The second sentence - “The key reasons for selecting the proposed land use and layout of the Project and the part environmental factors played in the selection shall be described.”

(3) The third sentence - “The main environmental impacts of the different land use and layout options shall be compared with those of the Project and with the likely future environmental conditions in the absence of the Project.”

30. The requirements imposed by these three sentences of §3.3.3 of the Study Brief are informed by the provisions in TM Annex 11 and TM Annex 20, having regard to §5.1 of the Study Brief, which states as follows:

“In preparing the EIA report, the Applicant shall refer to Annex 11 of the TM for the contents of an EIA report. The Applicant shall also refer to Annex 20 of the TM, which stipulates the guidelines for the review of an EIA report ...”

A 31. TM Annex 11 stipulates that an EIA report shall include,
B *inter alia*:

C (1) a section on “Description of the Project”, which shall set out,
D amongst other things -

E (a) “Background and history of the project, including
F considerations given to different options, and the
G project’s different siting or alignment”; and

H (b) “Description of scenarios with or without the project”;
I and

J (2) a section on “Prediction and Evaluation of Environment
K Impacts”, which shall set out -

L (a) “Prediction of environmental impacts (including
M beneficial or adverse; direct or indirect; short term or
N long term; reversible or irreversible; transboundary;
O cumulative)”; and

P (b) “Evaluation of predicted environmental impacts
Q against applicable environment legislation, policies,
R plans, standards and criteria”.

S 32. TM Annex 20 sets out various guidelines for the review by
T the Director of an EIA report submitted by a project proponent.

U (1) In relation to “Background and History of the Project”, §3
V thereof states as follows -

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- “3.1 Where appropriate does the information include reference to the consideration of the project’s siting or alignment by the project proponent?
- 3.2 Are the reasons for selecting the proposed project or its siting and alignment, and the part environmental factors played in the selection, adequately described?
- 3.3. Have the main environmental impacts of different siting or alignment options been compared clearly and objectively with those of the proposed project and with the likely future environmental conditions in the absence of the project?”

(2) In relation to “Description of the Environment”, §4 thereof states (*inter alia*) as follows -

“Basement Conditions

- 4.6 Has a prediction of the likely future environmental conditions in the absence of the project been developed?”

33. I shall further consider the requirements imposed by §3.3.3 of the Study Brief, read in the light of the provisions of TM Annexes 11 and 20, when I deal with the individual grounds of judicial review advanced by the Applicant.

GROUND 1: INFORMATION ON DIFFERENT LAND USE OPTIONS AND LAYOUT OPTIONS OF THE PROJECT WITH REGARD TO THE 2 APPROVED PLANNING APPLICATIONS

34. Ground 1 of judicial review concerns the first sentence of §3.3.3 of the Study Brief, which requires CEDD to provide information on, *inter alia*, “... the consideration of the different land use options and layout options of the proposed development with regard to the approved planning applications”.

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(1) The Applicant argues that the EIA Report fails to comply with this requirement because it does not provide information such as the option of -

(a) having a mix of public and private housing with the same or different plot ratios; or

(b) excising the sites of the 2 Approved Planning Applications from the assessment area and increasing the plot ratios of the remaining sites (see §56 of the Form 86).

(2) On the other hand, the Director and CEDD argue that the required information is given in Section 2.5 of the EIA Report².

35. The language of §3.3.3 of the Study Brief does not make clear the precise nature of the information that CEDD is required to provide in the EIA Report. As I understand it, the Applicant's case is that CEDD is required to provide information on its consideration of the scenario or possibility of the 2 Approved Planning Applications being accommodated within the Government's proposed public housing developments in the PDA by the adoption of different land use and/or layout options. Assuming that this is what §3.3.3 of the Study Brief requires CEDD to do, the following points should be noted:

² See the Affirmation of Leung Shuk Fong, Senior Engineer of CEDD, filed on 5 July 2021, at §§22(e) and 30-32, and the Affirmation of Tsang Sai Wing, Assistant Director (Environmental Assessment) of EPD, filed on 5 July 2021, at §§28-29 and 33-34.

A (1) The “consideration” that CEDD is required to give to this
B matter cannot be open-ended. In theory, the consideration
C can be from many different perspectives, eg maximizing the
D number of housing units to be built, maximizing the
E economic return, minimizing the adverse environmental
F impacts, producing the most aesthetic form of development,
G and no doubt others. The consideration that CEDD is
H required to give to the matter should, in my view, be tied to
I the purpose of the EIA study, which, as stated in §1.5 of the
J Study Brief, is to provide information on the nature and
K extent of environmental impacts arising from the
L construction and operation of the Project and associated
M activities to assist the Director to decide on -

(a) the overall acceptability of any adverse environmental
consequences likely to arise from the Project;

(b) the conditions and requirements for the detailed
design, construction and operation of the Project to
mitigate against adverse environmental consequences
where practicable; and

(c) the acceptability of residual impacts, after the
proposed mitigation measures are implemented.

The focus is on the Project proposed by the Government, not
any other proposed developments (whether approved or not),
in the PDA, and the ultimate question is whether the residual
environmental impacts arising from the Project (after

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implementation of proposed mitigation measures) are acceptable from the point of view of protecting the environment, this being the purpose of the Ordinance as stated in its long title (“... to provide for assessing the impact on the environment of certain projects and proposals, for protecting the environment and for incidental matters”).

(2) The requisite information is to be set out in the “Background and History of the Project” section of the EIA Report under Section 3.3 (Description of the Project), and not Section 3.4 (Technical Requirements), of the Study Brief. There is no requirement that CEDD should set out in the EIA Report any evaluation, analysis or assessment of the different environmental impacts arising from (a) the Project as proposed by the Government unaffected by the 2 Approved Planning Applications, and (b) the Project as proposed by the Government but subject to the 2 Approved Planning Applications (ie accommodating the 2 Approved Planning Applications within the Government’s proposed public housing developments in the PDA).

36. In §2.5.3 of the EIA Report, CEDD explains why the Project as proposed by the Government without taking into account the 2 Approved Planning Applications has been used for carrying out the environment impact assessment. CEDD considers that the Project, which proposes public housing developments with a domestic plot ratio of 6.0 to be constructed in the PDA, would impose more serious environmental impacts than one which accommodates the 2 Approved

A Planning Applications, each with a maximum plot ratio of 1.0. In other
B words, the Projects without the 2 Approved Planning Applications
C represents a worse scenario (referred to as the “reasonable worst case
D scenario” in §32 of the Affirmation of Leung Shuk Fong, Senior Engineer
E of CEDD) from an environmental impact point of view than one which
F accommodates the 2 Approved Planning Applications. If the
G environmental impacts arising from the Project without taking into
H account the 2 Approved Planning Applications are found to be acceptable
I by the Director, other things being equal, an alternative project which
accommodates the 2 Approved Planning Applications should likewise be
acceptable.

J 37. In my view, Section 2.5 of the EIA Report is a sufficient
K statement of the consideration given by CEDD of the different land use
L options and layout options of the proposed development with regard to
M the 2 Approved Planning Applications as required by the first sentence of
N §3.3.3 of the Study Brief and TM Annexes 11 and 20. It may be argued
O that a more detailed explanation, or further details of the consideration
P given by CEDD, should be provided in the EAI Report. However,
Q §3.3.3 of the Study Brief does not prescribe the depth of the consideration
R required to be given by CEDD, or the details of the information required
S to be set out by CEDD in the EIA Report. The present application for
T judicial review is not an occasion for a merits review of the EIA Report.
U As mentioned in §27(9) above, it is often a question of professional
V judgment what information is required to be contained in an EIA report to
enable the Director to perform her duties, and the Court will not interfere
with the Director’s judgment unless it is *Wednesbury* unreasonable. The
Director’s acceptance of the sufficiency of the information given by

A CEDDD for the purpose of compliance with the first sentence of §3.3.3 of
B the Study Brief is not, I consider, *Wednesbury* unreasonable in the
C circumstances of the present case.

D 38. In passing, as mentioned in §13 above, Section 2.3 of the
E EIA Report also provides some information concerning CEDDD's
F consideration of various alternative layout/design, as well as construction
G methods, of the proposed development under the Project. Such
H information is, however, not relevant for the purpose of the present
I discussion, because it does not pertain to a consideration of the different
land use options and layout options of the proposed development under
the Project *with regard to* the 2 Approved Planning Applications.

J *GROUND 2: COMPARING THE ENVIRONMENT IMPACTS OF THE*
K *PROJECT WITH THE LIKELY FUTURE ENVIRONMENTAL*
L *CONDITIONS IN THE ABSENCE OF THE PROEJCT*

M 39. Ground 2 of judicial review concerns the third sentence of
N §3.3.3 of the Study Brief, which requires that “the main environmental
O impacts of the different land use and layout options shall be compared
with those of the Project and with the likely future environmental
conditions in the absence of the Project”.

P 40. The Applicant complains that the EIA Report fails to comply
Q with this requirement because it does not compare the main
R environmental impacts of the 2 Approved Planning Applications with -

- S (1) the main environmental impacts of the Project; and
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B (2) the likely future environmental conditions in the absence of
C the Project, which means -

D (a) without any developments in the assessment area of
E the Project; and

F (b) with developments for uses under Column 1 (without
G planning permissions from the TPB) and Column 2
H (with planning permission from the TPB) in the “GB”
I and “R(E)” zones on the TM OZP and LTTY OZP,
J since TM 11 Annex 11 requires an evaluation “of
K predicted environmental impacts against applicable ...
L plans” (see §57 of the Form 86).

M 41. On the other hand, the Director and CEDD argue that the
N relevant comparisons are given in Sections 2.3, 2.5.3 and 3.3 of the EIA
O Report³.

P 42. It is common ground that two comparisons are required to be
Q conducted under the third sentence of §3.3.3 of the Study Brief, namely:

R (1) a comparison between the main environmental impacts of
S different land use and layout options and those of the Project;
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³ See §53 of the Form 86, and the Affirmation of Leung Shuk Fong, at §§34, 35 and 37, and the Affirmation of Tsang Sai Wing, at §§37-30.

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- (2) a comparison of the main environmental impacts of different land use and layout options and the likely future environmental conditions in the absence of the Project⁴.
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The parties differ, however, on the scenarios which are required to be considered in these two comparisons.

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43. Mr Yu argues that:

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- (1) The 2 Approved Planning Applications are “different land use and layout options” because they are private housing developments each with a plot ratio of 1.0.

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- (2) The “likely future environmental conditions in the absence of the Project” provide a baseline against which the possible effects of the Project can be measured.
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- (3) The third sentence requires CEDD to compare, in the EIA Report, the main environmental impacts of the 2 Approved Planning Applications with (a) the main environmental impacts of the Project, and (b) the likely future environmental conditions in the absence of the Project in the 2 situations mentioned in §40(2)(a) and (b) above⁵.
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44. I am unable to accept this argument of Mr Yu. The EIA Report is an environmental impact assessment report *of* the Project, not the 2 Approved Planning Applications. The purpose of the EIA study, as

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⁴ See §21 of the Respondent’s and Interested Party’s Skeleton Submissions dated 11 November 2021.

⁵ See §§22-24 of the Applicant’s Skeleton Submissions dated 4 November 2021.

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earlier noted, is to assess whether the residual environmental impacts
arising from the Project, not those arising from the 2 Approved Planning
Applications, are acceptable from the environmental protection point of
view. Mr Yu's argument would turn the 2 Approved Planning
Applications (and potentially other land use and layout options of the
PDA) into the subject matter of the EIA study under the Study Brief. I
see no good reason why the Study Brief should, or would, require CEDD
to assess what might be the main environmental impacts of the 2
Approved Planning Applications in the various scenarios as suggested by
the Applicant.

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45. Taking into account the purpose of the EIA Study mentioned
in §1.5 of the Study Brief and the provisions of TM Annex 11 under the
sub-heading "Prediction and Evaluation of Environmental Impacts"
(referred to in §31(2) above) and TM Annex 20 §§3.3 and 4.6 (referred to
in §32 above), I consider that the third sentence of §3.3.3 of the Study
Brief requires the following comparisons to be conducted:

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(1) the main environmental impacts of the Project and of other
land use and layout options for the PDA ("**the First
Comparison**"); and
(2) the main environmental impacts of the Project and the likely
future environmental conditions in the absence of the Project
("**the Second Comparison**").

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46. In respect of the First Comparison, it is plainly not possible
for CEDD to compare the Project with all other possible land use and

A layout options for the PDA. CEDD considers the main environmental
B impacts arising from the Project and those arising from the Project
C subject to the 2 Approved Planning Applications in Section 2.5 of the EIA
D Report, and comes to the view that the former is likely to impose more
E adverse environment impacts.

F 47. In respect of the Second Comparison, CEDD considers the
G main environmental impacts arising from the Project and the likely future
H environmental conditions in the absence of the Project in Section §3.3 of
I the EIA Report (see §15 above). Although some of the matters
J considered by CEDD may not directly relate to issues of environmental
K impact (eg housing needs of the public, availability of transport
L infrastructures, overall living conditions, etc), CEDD has also considered
M issues of environmental impact in the two scenarios (ie with and without
N the Project) such as noise nuisance, discharge of industrial waste water
O into nearby watercourses, sewerage treatment, water quality, etc.

M 48. As correctly submitted by Mr Litton, the nature, level of
N detail of the information and the extent of analysis carried out are matters
O of judgment for the Director, and only subject to *Wednesbury* review⁶. I
P do not see that the CEDD is required to consider specifically the
Q environmental impacts arising from any potential uses (without or
R without planning permissions from the TPB) of the PDA under the TM
S OZP/LTYO OZP, as contended by the Applicant. In my view, the
T Director is entitled to accept the *general* comparison conducted by CEDD
U of the main environmental impacts arising from the Project with the
V likely future environmental conditions in the absence of the Project.

T ⁶ See §25 of the Respondent's and Interested Party's Skeleton Submissions.

49. Overall, I am of the view that the EIA Report sufficiently complies with the third sentence of §3.3.3 of the Study Brief and TM Annexes 11 and 20.

OTHER MATTERS

50. There are four other matters that I should mention. First, in coming to the conclusion that the EIA Report sufficiently complies with the first and third sentences of §3.3.3 of the Study Brief and TM Annexes 11 and 20, I have not find it necessary to rely on the Further Information provided by CEDD on 18 December 2020.

51. Second, in the Applicant’s Skeleton Submissions dated 4 November 2021, at §§28-29, it is argued that the EIA Report also fails to meet the requirement under the second sentence of §3.3.3 of the Study Brief (“The key reasons for selecting the proposed land use and layout of the Project and the part environmental factors played in the selection shall be described.”). However, there is no complaint in the Form 86 of any non-compliance with the second sentence of §3.3.3 of the Study Brief. I do not consider it is open to the Applicant to rely on the matters raised at §§28-29 of the Applicant’s Skeleton Submissions.

52. Third, Mr Litton argues that the Applicant has delayed in making the present application, in that the Director’s decision to approve the EIA Report was made on 6 October 2020 but the leave application was not made until 29 March 2021. However, in *Shiu Wing Steel Ltd*, the Court of Final Appeal held, at §§80 to 83 of its judgment, that the decision which affected the rights and interests of the applicant in that

A case was the decision under s 10 of the Ordinance to grant an
B environmental permit to the project proponent, and time to apply for
C leave to apply for judicial review only started to run from that decision.
D In this case, the Director’s decision to grant the Permit was made on 11
E February 2021, and the leave application was made within 3 months from
F that date. It follows that the leave application was made within time.
G Mr Litton submits that the Court of Final Appeal’s ruling on this point
H should be re-visited in light of various subsequent decisions in the UK, in
I particular *R (Champion) v North Norfolk DC* [2015] 1 WLR 3710, at §63;
J *R (Fylde Coast Farms) v Fylde Borough Council* [2021] UKSC 18, at
K §§36-38 and 40-41; and *R (Malster) v Ipswich BC* [2002] PLCR 14, at
L §§98-103. He recognizes, nevertheless, that the Court of Final Appeal’s
judgment in *Shiu Wing Steel Ltd* is binding on this court. As mentioned
in the course of the hearing, I would simply record in this judgment that
the Putative Respondent / Putative Interested Party reserve their right to
argue this matter in the higher courts (if necessary and/or so advised).

M 53. Fourth, having rejected both grounds of judicial review
N raised in the Form 86, it is not necessary for me to consider the issues of
O (i) whether any deviation or non-compliance with the requirements of the
P TM and/or the relevant study brief, however minor, insignificant or
Q inconsequential, would necessarily result in the invalidation of the
R Director’s approval of the relevant EIA report, and (ii), in any event,
S whether the court has any residual discretion to refuse relief where an
T EIA report is found to have failed to strictly comply with the
U requirements of the TM and/or the relevant study brief, being issues on
V which I expressed some provisional views in *Ho Loy and Another v*

Director of Environmental Protection, HCAL 21 & 22/2015 (22 December 2016), at §§55-58.

DISPOSITION

54. Leave to apply for judicial review is granted on the basis that the intended application is reasonably arguable with a realistic prospect of success, but the substantive application for judicial review is dismissed upon full consideration of the merits. The Applicant shall pay the Putative Respondent/Putative Interested Party's costs of this action, to be taxed if not agreed, with certificate for 2 counsel.

(Anderson Chow)
Justice of Appeal

Mr Benjamin YU, SC and Mr Anthony ISMAIL, instructed by M/s Mayer Brown, for the Applicant

Mr John LITTON and Mr Anthony CHAN, instructed by Department of Justice for the Putative Respondent and Putative Interested Party