

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 21 OF 2015

BETWEEN

HO LOY 1st Applicant

TAM KAI HEI 2nd Applicant

and

DIRECTOR OF ENVIRONMENTAL PROTECTION Respondent

and

THE AIRPORT AUTHORITY HONG KONG Interested Party

AND

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 22 OF 2015

BETWEEN

YU HIN PIK Applicant

and

DIRECTOR OF ENVIRONMENTAL PROTECTION Respondent

and

THE AIRPORT AUTHORITY HONG KONG Interested Party

(Heard together)

Before: Hon Chow J in Court

Date of Hearing: 5-8 July 2016

Date of Judgment: 22 December 2016

J U D G M E N T

INTRODUCTION

1. In March 2012, the Government decided to proceed, in principle, with a project for the expansion of the Hong Kong International Airport by the construction of a third runway. It is inherent in the implementation of a project of this nature that it would have some adverse environmental impacts in respect of (amongst other matters) noise, air quality, and Chinese White Dolphins habitat. It is a legal requirement, before the project can be implemented, that an environmental impact assessment report be approved, and an environmental permit granted, by the Director of Environmental Protection. Approval of the report depends, amongst other things, on its compliance with the requirements of a technical memorandum and an environmental impact assessment study

brief. In relation to the project, the environmental impact assessment report was eventually approved, and permit granted, in November 2014.

2. By these two applications for judicial review, the applicants challenge the Director's decisions to approve the report and grant the permit.

3. The following main issues arise for determination in these applications:-

(1) whether the environmental impact assessment report fails to comply with the study brief and technical memorandum in relation to the noise and air quality impact assessments because it proceeds on an untested and undetermined assumption that the immediate airspace in the Pearl River Delta area will be available for use by the projected air traffic movements into or out of Hong Kong;

(2) whether the Director failed to obtain the Civil Aviation Department's confirmation of the validity of assumptions for deriving airport operational data adopted in the report for noise impact assessment as required by the study brief;

(3) whether the report fails to comply with the study brief and technical memorandum in relation to the ecological impact assessment concerning Chinese White Dolphins, in that:-

(a) no compensation measure is provided for the progressive permanent destruction of habitat during the construction phase of the third runway system; and

(b) there is no consideration of the cumulative ecological impacts on Chinese White Dolphins by the project taken

together with other existing, committed and proposed developments, namely, the Hong Kong-Zhuhai-Macao Bridge Project and the Lung Kwu Tan Project;

- (4) whether the Director's decisions are flawed because she failed to
 - (a) conduct a fair public consultation in respect of certain new measures proposed to compensate for the loss of habitat for Chinese White Dolphins during the construction phase of the Project, or
 - (b) take into account those measures when approving the report;
- (5) whether the study brief requires the report to compare the environmental benefits and dis-benefits of (a) two alternative development options based on the existing two-runway system and (b) the proposed three runway system, or give a description of the environmental factors considered in the option selection;
- (6) whether the Director's decision to grant the permit is flawed because she failed to have sufficient regard to, or make sufficient inquiry on, the possibility that the airspace in the Pearl River Delta area might not available for use by air flights to or from Hong Kong; and
- (7) whether the Director's decision to approve the report is flawed because she failed to disclose the "Marine Ecology and Fisheries Enhancement Plan" for public consultation in breach of the common law duty of fairness.

4. A number of sub-issues arise under each of the main issues identified above. They will be explained in greater detail below after I have given a brief outline of the background facts.

5. For reasons appearing below, I have come to the conclusion that none of the grounds of judicial review advanced by the applicants in these applications is well founded or valid. Accordingly, both applications for judicial review are dismissed.

BRIEF BACKGROUND FACTS

6. The Hong Kong International Airport (“HKIA”) commenced operation in 1998 with a single runway (south runway). In 1999, the second runway (north runway) came into operation.

7. In 2011, the Airport Authority Hong Kong (“AAHK”) formulated plans and conducted a public consultation with a view to the further expansion of HKIA. As a result of that planning and consultation, AAHK prepared a “Master Plan 2030”, in which two principal development options were put forward. The first was to maintain and develop HKIA’s existing two-runway system. The second, recommended, option was to expand the airport into a three-runway system.

8. Between June and September 2011, the public was consulted on the two development options. On 29 December 2011, AAHK submitted the two development options together with its recommendation for the adoption of the second option to the Government for consideration.

9. On 20 March 2012, the Chief Executive in Council ordered, *inter alia*, that:-

- (1) approval in principle be given to AAHK’s recommendation to adopt the option of expanding HKIA into a three-runway system as the future development option for planning purposes; and

(2) AAHK be asked to proceed with the planning related to the development of the three-runway system, including specifically the statutory environmental impact assessment, the associated design details, and the financial arrangements.

10. Since an airport (including its runway and development) is a designated project listed in Section B of Schedule 2 to the *Environmental Impact Assessment Ordinance*, Cap 499 (“the Ordinance”), AAHK cannot construct or operate the project without an environmental permit for it issued under the Ordinance.

11. On 28 May 2012, AAHK submitted a profile for a project entitled “Expansion of Hong Kong International Airport into a Three-Runway System” (“the Project”) to the Director of Environmental Protection (“the Director”) and applied for an environmental impact assessment study brief for the Project.

12. On 8 June 2012, the Director requested AAHK to provide further information concerning the project profile. On 29 June 2012, AAHK submitted the further information sought by the Director.

13. On 10 August 2012, the Director issued a study brief in respect of the Project (“the Study Brief”).

14. On 17 April 2014, AAHK submitted an environmental impact assessment report for the Project (“the EIA Report”) to the Director for approval, and applied for an environmental permit in respect of the Project.

15. On 12 June 2014, the Director advised AAHK to exhibit the EIA Report for public inspection. Between 20 June 2014 and 19 July 2014, the EIA Report was exhibited for public inspection. A total of 29,133 sets of public comments on the report were received.

16. On 23 July 2014, AAHK submitted the EIA Report to the Advisory Council on Environment (“ACE”) for consideration and comment. On 11, 12, 18 and 18 August and 2 September 2014 respectively, the EIA Subcommittee of ACE (“the EIA Subcommittee”) met to discuss the EIA Report. In response to questions or concerns raised by members of the EIA Subcommittee, additional information relating to the EIA Report was provided by AAHK.

17. The EIA Subcommittee submitted a “Report on the 128th Environmental Impact Assessment Subcommittee Meeting” dated September 2014 (“the Subcommittee Report”) to ACE. As mentioned in paragraph 12 of the Subcommittee Report, the EIA Subcommittee recommended that the EIA Report, subject to a number of conditions and recommendations, be endorsed by the full Council of ACE.

18. Before the ACE meeting held on 15 September 2014, AAHK submitted some supplementary information relating to the Project in response to certain requests made by ACE members.

19. On 15 September 2014, a full council meeting of ACE was held to discuss the recommendations of the EIA Subcommittee and the EIA Report. The discussion was divided into two parts, namely:-

- A
- B
- C
- D
- E
- F
- G
- H
- (1) a Presentation and Question-and-Answer Session, at which AAHK was invited to present more detailed information on the design, operation and management of the Marine Ecology and Fisheries Enhancement Plan (“MEFEP”) as well as the Marine Traffic Routes and Management Plan for high speed ferries operating at the SkyPier at HKIA which were relevant to the protection of Chinese While Dolphins; and
- (2) an Internal Discussion Session, at which the majority of the members of ACE agreed to endorse the EIA Report subject to a list of 18 conditions and 4 recommendations.

I

J

20. On 19 September 2014, ACE wrote to the Director endorsing the EIA Report subject to various conditions and recommendations.

K

21. On 30 September 2014, the Director wrote to AAHK:-

- L
- M
- N
- (1) providing a full set of the written comments received from members of the public and ACE on the EIA Report; and
- (2) seeking further information, including the additional information provided by AAHK to the EIA Subcommittee and ACE as well as further elaboration or clarification of the MEPEP.

O

P

22. AAHK provided the information sought by the Director on 10 October 2014.

Q

R

S

23. On 7 November 2014, the Director approved the EIA Report and granted an environmental permit No EP-489/2014 (“the Permit”) to AAHK, subject to various conditions.

T

U

V

THE APPLICATIONS FOR JUDICIAL REVIEW

24. There are two applications for judicial review before me seeking to challenge the Director's decisions to approve the EIA Report and grant the Permit.

(i) HCAL 21/2015

25. In the first application, HCAL 21/2015, there were originally two applicants, namely, Ho Loy ("Ho") and Tam Kai Hei ("Tam"), in the Form 86 dated 6 February 2015. Although leave to apply for judicial review was granted to both applicants by Au J on 20 May 2015, the originating summons dated 29 May 2015 was issued on behalf of Ho only. By a fax dated 4 July 2016, Tam informed the court that he had decided to withdraw his application for judicial review. Accordingly, there is only one applicant remaining in HCAL 21/2015.

26. In the original Form 86, 4 broad grounds of challenge against the Director's decisions are raised, namely:-

(1) Ground 1/AL21: the noise and air quality impact assessments are based on an untested and undetermined assumption that the immediate airspace in the Pearl River Delta area will be available for use by the projected air traffic movements into or out of Hong Kong (see paragraphs 87 to 141);

(2) Ground 2/AL21:

(a) the EIA Report fails to comply with the Study Brief and Technical Memorandum in relation to the ecological impact assessment concerning Chinese White Dolphins, in that –

(i) it fails to provide compensation measure for the progressive permanent destruction of habitat during the construction phase of the Project; and

(ii) there is no consideration of the cumulative ecological impacts on Chinese White Dolphins by the Project taken together with other existing, committed and proposed developments, namely, the Hong Kong-Zhuhai-Macao Bridge Project and the Lung Kwu Tan Project;

(b) further, the Director failed to (i) conduct a fair public consultation in respect of new measures proposed to compensate for the loss of habitat of Chinese White Dolphins during the construction phase of the Project, or (ii) take into account those measures when approving the EIA Report (see paragraphs 142 to 178);

- (3) Ground 3/AL21: consequentially, the Director acted illegally or irrationally in issuing the Permit (see paragraphs 179 to 181); and
- (4) Ground 4/AL21: the Director failed to give cogent or adequate reasons for her decisions (see paragraphs 182 to 186).

27. On 18 March 2016, Ho gave notice of her intention to amend the Form 86 to raise (*inter alia*) an additional argument in support of Ground 1/AL21, namely, that the Director's decision to approve the EIA Report is flawed by reason of her failure to obtain the Civil Aviation Department ("CAD")'s confirmation of the validity of assumptions made for deriving the airport operational data adopted in the report for noise impact assessment (see paragraphs 141A to 141K of the draft Amended Form 86).

28. In Mr Nigel Kat SC's Outline Submissions dated 22 June 2016, he gave notice of a second intended amendment to the Form 86 in

relation to Ground 1/AL21, namely, that had the Director complied with her duties under the Ordinance and/or the *Tameside* duty, she would not have accepted CAD's purported confirmation, or approved the EIA Report (see proposed paragraphs 141HA and 141HB in Yip, Tse & Tang's letter dated 22 June 2016).

29. The Director objects to the proposed amendments to the Form 86 and submits, in any event, that they are factually unsubstantiated.

(ii) HCAL 22/2015

30. In the Amended Form 86 dated 28 December 2015, Yu Hin Bik raises 3 broad grounds of challenge against the Director's decisions, namely:-

- (1) Ground 1/AL22: the EIA Report fails to compare the environmental benefits and dis-benefits of (a) two alternative development options based on the existing two-runway system and (b) the proposed three runway system, or give any description of the environmental factors considered in the option selection as required by the Study Brief (see paragraphs 31 to 41);
- (2) Ground 2/AL22: the Director failed to have sufficient regard to, or make sufficient inquiry on, the "PRD Airspace Issue" (see paragraphs 42 to 61); and
- (3) Ground 3/AL22: the Director failed to disclose the MEFEP for public consultation in breach of the common law duty of fairness (see paragraphs 62 to 75).

31. In what follows, unless the context indicates otherwise, references to Sections shall be references to those of the Ordinance.

DISPUTED LEGAL ISSUES

32. The court's approach to challenges against decisions made by the Director to approve environmental impact assessment reports or grant environmental permits is well established. It was summarised by Au J in paragraphs 27 to 30 of his judgment in *Leung Hon Wai v Director of Environmental Protection*, HCAL 49/2012 (26 July 2013), quoted with approval by the majority of the Court of Appeal (Lam VP and Kwan JA) when the case reached that court: [2014] 5 HKLRD 194, at paragraphs 25 to 26. I do not propose to set out the applicable principles again in this judgment.

33. There are, however, a few legal issues on which the parties are in disagreement. It would be convenient for me to address those legal issues first before turning to the specific grounds of judicial review raised for determination in these applications.

(i) The purpose of the Ordinance

34. Both Mr Kat (on behalf of Ho) and Mr Hector Pun SC (on behalf of Yu Hin Bik) submit that the legislative purpose of protecting the environment governs the interpretation and application of the Ordinance. In support of their submissions, they refer to the following passages 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.” The purpose so declared governs the interpretation of the Ordinance...

25. ...the Court must find the meaning of the relevant provisions of the TM and the SB and the procedure they prescribe in order to determine the scope of the Director’s power to approve the EIA report. Only in that way can the Court determine whether the power was validly exercised or whether the purported approval fell outside the scope of the power. In interpreting the TM and the SB, the Ordinance’s purpose of protecting the environment must inform the meaning attributed to the instruments created under the Ordinance’s authority.”

35. On the other hand, Mr Benjamin Yu SC (on behalf of the Director) submits that the Ordinance seeks to balance (1) the public interest in protecting the environment, and (2) the public interest in ensuring that major designated projects are brought to fruition in a timely and efficient manner. For this reason, a well structured and defined timetable for various steps to be taken relating to the approval of environmental permit assessment reports and granting of environmental permits is set out Parts II and III of the Ordinance. Both aspects of public interest should be borne in mind when considering challenges brought against decisions made by the Director relating to the environmental impact assessment process.

36. In support of his submission, Mr Yu relies on the following passage in the judgment of Fok JA (as he then was) in *Chu Yee Wah v Director of Environmental Protection* [2011] 3 HKC 227, at paragraph 47:-

“It is also relevant to note that the statutory scheme under the EIAO seeks to strike a balance between two interests. In *Kowloon-Canton Railway Corporation v Director of*

Environmental Protection, EIA Appeal Board Appeal No 2/2000, unrep., 20.7.01, the Environmental Impact Assessment Appeal Board noted:

‘There are two main matters of public interest involved. Both are important. The first is the public interest in the protection of the environment upon which the quality of life in Hong Kong will increasingly depend. The second is the public interest in ensuring that major designated projects are brought to fruition in a timely and efficient manner. The time constraints put upon the Director for steps in the process and for his decisions show that the Ordinance aims to satisfy both interests. It is necessary in the implementation of the process that both should be kept in mind. This is so especially when major infrastructural projects (roads, railways, tunnels, reclamation works and the like) which may cause a variety of adverse environmental impacts are proposed.’”

37. The above passage in the decision of the Environmental Impact Assessment Appeal Board in *Kowloon-Canton Railway Corporation v Director of Environmental Protection* was also quoted with approval by Tang VP (with whom Hartmann and Chu JA agreed) when *Chu Yee Wah* reached the Court of Appeal: [2011] 5 HKLRD 469, at paragraph 31.

38. It is apparent from the long title to the Ordinance that its main object is the protection of the environment. The Court of Final Appeal in *Shiu Wing Steel Ltd* has expressed the view that such purpose should “inform”, and even “govern”, the interpretation of the Ordinance, which would include the instruments created under it (ie, the Technical Memorandum and the Study Brief). On the other hand, the aspect of the public interest referred to by Mr Yu (namely, that major designated projects should be brought to fruition in a timely and efficient manner) is already inbuilt in the timetable laid down in the legislative scheme for the environmental impact assessment process. It is not, in my view, a separate or independent purpose of the Ordinance.

39. This having been said, there is a clear limit on the use that may be derived from the legislative purpose when one is engaged in the interpretation of a statute. It must be borne in mind that ultimately, when interpreting a statute, “the court’s task is to ascertain the intention of the legislature as expressed in the language of the statute” (*per* Li CJ in *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568, at paragraph 11).

40. As observed by Lord Millet in *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342, at paragraph 36:-

“There can be no quarrel with the principle that statutory provisions should be given a purposive interpretation, but there has been a distressing development by the courts which allows them to distort or even ignore the plain meaning of the text and construe the statute in whatever manner achieves a result which they consider desirable. It cannot be said too often that this is not permissible. Purposive construction means only that statutory provisions are to be interpreted to give effect to the intention of the legislature, and that intention must be ascertained by a proper application of the interpretative process. This does not permit the Court to attribute to a statutory provision a meaning which the language of the statute, understood in the light of its context and the statutory purpose, is incapable of bearing.”

41. Lord Millet’s observation was echoed by both Fok PJ and Lord Neuberger NPJ in *T v Commissioner of Police* (2014) 17 HKCFAR 593, at paragraphs 195 and 278 respectively.

(ii) Whether “Tameside” duty is applicable to environmental impact assessment process?

42. Mr Yu submits that, given the heavily prescriptive nature of the statutory environmental impact assessment process (both in respect of procedures and contents), and its deliberate design of celerity, transparency and public participation, there is little scope for further duties – whether in

terms of *Tameside* or the duty to inquire/consult – to be engrafted onto it. Mr Kat argues, however, that the so called *Tameside* duty exists alongside the statutory duties imposed on the Director, and relies upon such duty in support of various arguments which he advances on Ho’s behalf in her application for judicial review.

43. The prescribed process for the environmental impact assessment of designated projects under the Ordinance is fully set out in the judgment of the Court of Final Appeal in *Shiu Wing Steel Ltd*, at paragraphs 8 to 14. A shorter summary appears in the judgment of Tang PJ in *Leung Hon Wai v Director of Environmental Protection* (2015) 18 HKCFAR 568, at paragraphs 15 to 16. I do not propose to set out the environmental impact assessment process again in this judgment, save to point out that the Ordinance has expressly laid down a detailed scheme for public consultation. In particular:-

(1) the applicant is required, as soon as reasonably practicable after he has been notified under Section 6(3)(a) that an environmental impact assessment report meets the requirements of the environmental assessment study brief, to –

- (a) make the report available in such numbers as the Director may reasonably require at locations approved by the Director for public inspection free of charge for a period of 30 days (Section 7(1)(a));
- (b) advertise as the Director may require the availability of the environmental impact assessment report once every 10 days during the said period in a Chinese language newspaper and an English language newspaper (Section 7(1)(b)); and

(c) provide free of charge sufficient quantities as the Director may require of the report to comply with paragraph (a) (Section 7(1)(c));

(2) the Director is required to notify ACE if an environmental impact assessment report is suitable for public consultation (Section 7(4));

(3) the public and ACE may give comments on the report to the Director under Section 7(2)(c) and Section 7(5) respectively, and;

(4) the Director is required, in granting or refusing an environmental permit, to have regard to the comments, if any, submitted to him under Section 7 on the report (Section 10(2)(f)).

44. It is also relevant that the Technical Memorandum and Study Brief contain very detailed substantive and procedural requirements which must be observed before an environmental impact assessment report may be approved by the Director.

45. In these circumstances, it seems to me that, generally speaking, compliance with the express obligations imposed by the Ordinance (including the Technical Memorandum and the Study Brief created under it) should be regarded as a sufficient discharge of the Director's duties in relation to the environmental impact assessment process, and the court should not readily impose additional obligations on the Director over and above what is expressly required by the Ordinance.

46. This having been said, I do not consider that it is helpful to generalise that there is little scope for further duties, whether in terms of *Tameside* or the duty to inquire/consult, to be engrafted onto the process. For the purpose of this discussion, it is important to understand what

precisely *Tameside* decided, and what the so called *Tameside* duty actually encompasses.

47. The case of *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 concerned a scheme proposed by a local education authority to bring all the schools in their area under the comprehensive principle by turning the existing grammar schools into comprehensive schools. That scheme was approved by the Secretary of State for Education and Science in November 1975. Implementation of the scheme was envisaged by the beginning of the school year in September 1976. However, following local government elections held in May 1976, the opposition party gained control of the authority and considered that they had a mandate to reconsider their predecessors' education policy. They wrote to the Secretary saying that the schools in their area were not ready for the changed roles proposed by their predecessors and that implementation of the proposal in September 1976 would have caused grave disruption to the children's education, and they wished to maintain the status quo with the least disturbance and disruption to the children's education pending any longer term, well thought out proposals. They further proposed the adoption of a selection procedure for those parents who wished to enrol their children in grammar schools based on a combination of reports, records and interviews without any formal 11-plus examination. The secretary issued a direction under section 68 of the Education Act 1944 (which empowered the Secretary to intervene if he was satisfied that any local education authority had acted or were proposing to act "unreasonably") to the authority to give effect to the proposal previously

approved by him in November 1975, followed by an application for an order of mandamus to compel the authority to comply with his direction.

48. The Divisional Court held that the Secretary was justified in saying in the circumstances there was no time to carry out the proposed selection procedure by September and that accordingly there had been materials on which he had been entitled to express himself as satisfied that the authority were going to act unreasonably.

49. The Court of Appeal received evidence to the effect that the selection procedure proposed by the authority was well known and tried and workable, and allowed the authority's appeal.

50. The House of Lords upheld the decision of the Court of Appeal, holding that the Secretary could give a direction only if the authority were acting "unreasonably", that the critical question was whether the Secretary had had a sufficient factual basis for believing that the authority's proposal would lead to educational chaos or undue disruption, that the question which the Secretary should have considered was whether a reasonable authority would have attempted to carry out the proposed selection procedure in the time available or at all, but that the Secretary did not appear to have directed his mind properly or at all to that question. Accordingly, the Secretary's decision to issue the direction was flawed.

51. It is, in my view, important to appreciate that *Tameside* did not establish any general common law duty to consult before a public officer or body could exercise a statutory power which might affect the public generally. It is a decision based on traditional administrative law

A principles, namely, that a decision-maker exercising a statutory power
B must ask himself the right question and take reasonable steps to acquaint
C himself with the relevant information to enable him to answer it correctly.
D That this is the true basis of the decision in *Tameside* can be seen clearly
E from the speeches of Lord Wilberforce and Lord Diplock at pages 1047C-
E and 1064F-1065C respectively.

F 52. Other cases relied upon by Mr Kat, such as *Hysan*
G *Development Company Limited v Town Planning Board*, CACV 232 and
H 233/2012 (13 November 2014); *Capital Rich Development Ltd v Town*
I *Planning Board* [2007] 2 HKLRD 155, and *Smart Gain Investment Ltd v*
J *Town Planning Board*, HCAL 12/2006 (6 November 2007), also did not
establish any general common law duty to consult or inquire.

K 53. As to the steps which a decision maker should take to collect
L relevant information for the purpose of answering the right question,
M absent any specific statutory requirement, they would generally be matters
N for the decision-maker to decide, subject to the court's supervisory
jurisdiction exercised by way of judicial review. As observed by A
O Cheung J (as he then was) in *Smart Gain Investment Ltd*, at paragraph 87 -

P “It is of course true to say, as has been pointed out by Laws LJ in
Q *R (Khatun) v Newham London Borough Council* [2005] QB 37,
R 55 (para 35), that it is for the decision-maker and not the courts,
S subject to *Wednesbury* review, to decide upon the manner and
T intensity of inquiry to be undertaken into any relevant factor
U accepted or demonstrated as such. His Lordship further approved
V an observation made by Schiemann J in *R v Nottingham City*
Council, ex parte Costello (1989) 21 HLR 301, 309, where the
judge said that the court should only strike down a decision by
the authority not to make further inquiries ‘if no reasonable
council possessed of that material could suppose that the
inquiries they had made were sufficient’”.

54. I should add that if the decision-maker decides to embark upon a public inquiry or consultation, such exercise can, depending on the facts, be challenged on the ground of procedural unfairness (*PCCW-HKT Telephone Ltd v Telecommunications Authority* [2008] 2 HKLRD 282, at paragraph 12 *per* Le Pichon JA).

(iii) Whether strict compliance with the Technical Memorandum and Study Brief is required?

55. Mr Kat argues that there must be “strict compliance” with the Technical Memorandum and Study Brief before the Director can approve an environmental impact assessment report. It is, I believe, important to be clear as to what “strict compliance” means in this context. It is, of course, well established that the Director’s power to approve an environmental impact assessment report can be exercised only in respect of a report that meets the requirements imposed by the Technical Memorandum and Study Brief (see *Shiu Wing Steel Ltd (CFA)*, at paragraph 19). It does not necessarily follow, however, that any deviation or non-compliance from or with the Technical Memorandum and Study Brief, however minor, insignificant or inconsequential, would result in the invalidation of the Director’s approval of the report. The true position seems to me to be as follows.

56. If the Director is aware of any deviation or non-compliance of an environmental impact assessment report from or with the Technical Memorandum and Study Brief, the Director should, pursuant to Section 6(6) of the Ordinance, advise the project proponent of the reasons why the report is unacceptable. The project proponent would, presumably, amend the report to address those reasons.

57. On the other hand, if the Director approves a report which does not, in fact, fully meet the requirements of the Technical Memorandum and Study Brief, it is, I consider, strongly arguable that whether the Director's decision should thereby be treated as being a decision made without jurisdiction, or unlawful, should depend on the circumstances of the case, including the nature and seriousness of the non-compliance. In any event, whether to grant relief in any judicial review, even if a ground of review is made out, is discretionary. If the court comes to the view, for example, that the non-compliance (or breach) is purely technical and has no material impact on the decision or on the environment, the court is entitled not to grant any relief in the exercise of its discretion (see *Mark Alan Sullivan v Warwick District Council* [2003] EWHC 606 Admin, at p16; *Edwards v Environmental Agency* [2007] Env LR 9, at paragraphs 123 to 127).

58. In this regard, one should also not lose sight of the fact that "although it is a matter of construction for the court to decide what is required by the [Technical Memorandum] or [Study Brief], it is often a question of professional judgment what information is required to be contained in an EIA report to enable the Director to perform her duties. In that case unless the judgment is *Wednesbury* unreasonable, the court is not entitled to interfere" (*per* Tang VP, as he then was, in *Chu Yee Wah v Director of Environmental Protection* [2011] 5 HKLRD 469, at paragraph 84).

ISSUE 1: WHETHER EIA REPORT FAILS TO COMPLY WITH THE STUDY BRIEF AND TECHNICAL MEMORANDUM IN RELATION TO NOISE AND AIR QUALITY IMPACT ASSESSMENTS BECAUSE IT PROCEEDS ON AN UNTESTED OR UNDETERMINED ASSUMPTION OF

*AVAILABILITY OF PRD AIRSPACE (ORIGINAL GROUND
1/AL21)*

59. Ho's case runs along the following lines:-

- (1) The Project's stated objective is to increase the air traffic capacity of HKIA in order to cater for the projected substantial increase in the number of air traffic movements into or out of Hong Kong which, it has been determined, would require the construction of a third runway.
- (2) The EIA Report is required to assess the environmental impacts of the capacity increase of HKIA by considering, *inter alia*, the number of aircraft, aircraft fleet mix, runway utilisation, flight tracks to be used, and the number and type of aircraft which would utilize each flight track, in relation to the projected air traffic movements into or out of Hong Kong. The EIA Report is also required to disclose the assumptions and their limitations, and the findings and calculations employed in arriving at those impacts.
- (3) The assumptions as to flight tracks and the limitations of those assumptions are primarily set out in a report prepared by National Air Traffic Services ("NATS"), a United Kingdom air transport consultant engaged by AAHK. The latest version of that report dated 3 August 2008 is titled "Airspace and Runway Capacity Analysis – Final Report (NATS) Phase 2 Report" ("the Phase 2 Report").
- (4) The Phase 2 Report gives prominence to a constraint on the projected capacity increase, namely, the use of the immediate airspace in the Pearl River Delta area ("the PRD Airspace"),

which is not under the control of the Government of the HKSAR, for HKIA flights.

(a) In the Executive Summary, it is stated, *inter alia*, that –

“In order to realise the capacity increase associated with the commissioning of the third runway, the immediate airspace in the Pearl River Delta area must be significantly reorganized to accommodate the necessary procedures for the new runway and the planned capacity increases at the other airfields in the area. This will require cooperation amongst Civil Aviation Authority China (CACC), Hong Kong Civil Aviation Department (HK CAD) and Autoridade de Aviação Civil Macao (CAAM) in the Pearl River Delta Tripartite Working Group to jointly develop and implement these changes. These changes are essential in order to achieve the capacity increases identified in this report.”

(b) In Section 5.2 (Airspace & Airport Capacity), it is stated that –

(i) “It has been assumed that the airspace changes recommended in the Phase 1 report have been implemented. This could have been implemented as a stand alone project, but there will be benefits in developing an integrated program covering the Phase 1 changes and the revisions to the PRD airspace”;

(ii) “It has been assumed that the proposed changes to the PRD airspace are in place i.e. that Hong Kong traffic can operate in the airspace to the north and west and that all new inbound/outbound routes to/from HK are integrated with adjacent airfields i.e. Macao, Zhuhai and Shenzhen”; and

(iii) “Many of the operational procedures associated with a third runway ... are dependant on revisions to the PRD Airspace. It is assumed that this work will go hand in hand with the physical development of the airport infrastructure and that the airspace changes will be in place in a timely manner to support the opening of the new runway. This is considered to be essential in order to achieve the capacity increases identified in this report. Without the airspace changes, it is unlikely that the third runway will deliver any capacity increases over and above those identified in the Phase 1 report”.

(c) In Section 7.1 (Annual Capacity), it is further stated that –

“As a result of these considerations, it would appear that a daily capacity in the range 1650 to 1800 movements is achievable. Using

the Design Day/Annual ratio of 0.029 supplied by AAHK, this would provide an annual capacity in the range of 570,934 to 622,837.

As with the Phase 1 report, the runway capacity is dependant on the airspace capacity. In order to achieve these capacity figures, the airspace development and other supporting infrastructure such as staff and equipment must be available in addition to the ground infrastructure of taxiways, aprons and terminals etc.”

(5) However, in the EIA Report, the aforesaid limitations are only partially recognised and somewhat under-emphasised:-

(a) In paragraph 2.3.6.6 (Optimisation of Pearl River Delta (PRD) Airspace), it is stated that –

“There are queries as to whether the busy PRD airspace would effectively cap the number of flights that would be permitted to arrive / depart via HKIA, thereby offsetting any increase in HKIA runway capacity... While PRD airspace is busy during certain periods of time, it has not been a constraint to HKIA from an overall development of air services perspective. There is a plan agreed among relevant civil aviation authorities of Mainland, Macao and Hong Kong to address the issues relating to optimising PRD airspace. Thus, it is not expected that growing usage of PRD airspace would affect the viability of capacity expansion at HKIA.”

(b) In paragraph 2.3.7.5 (Restrictions Due to Air Jurisdictions and Air Services Agreements), it is stated that –

“... In the case of Hong Kong and any of the PRD airports, the fact that they do not belong to the same administrative region further complicates matters as they have separate governments, administrative systems, currencies, border controls and immigration requirements, air services agreements, airport operators, stakeholders and designated and operating airlines.”

(c) Finally, in paragraph 3.2.2.4 (Topography, Territorial Boundaries and Anthropogenic Structures), it is stated that

–
“Territorial boundaries affect runway operations by restricting the permitted flight routes for arrivals and departures from

outside of Hong Kong Special Administrative Region (HKSAR). This constraint is however partially negotiable.”

(6) The crucial assumption made in the Phase 2 Report underlying the projected annual capacity of up to 622,837 air traffic movements for HKIA is that the necessary changes to the PRD Airspace will be in place, so that Hong Kong air traffic can operate on tracks in the airspace to the north and west not presently available for such traffic (“the Additional Airspace”) and that all new inbound/outbound routes to/from HK are integrated with adjacent airfields i.e. Macau, Zhuhai and Shenzhen (“the PRD Airspace Assumption”).

(7) Notwithstanding the potential constraint on the projected capacity increase for HKIA, the EIA Report simply adopts the NATS conclusion in paragraph 7.1 of the Phase 2 Report that a three runway system of the type advocated for HKIA could provide a practical maximum of 1,800 air traffic movements per day and around 620,000 air traffic movements per year, and proceeds to assess the environmental impacts accordingly.

60. At paragraphs 110 to 115 of her Form 86, Ho complains that:-

(1) No plans or agreements between AAHK or the Hong Kong Government (by CAD or otherwise) with other relevant civil aviation authorities which would provide for the airspace optimisation required by the Project as mentioned in the Phase 2 Report are provided in the EIA Report, contrary to paragraph 3.5.3 of the Study Brief.

(2) There is no reference at all to the limitations of the key NATS assumptions in the summary in Section 19.16 (or elsewhere) of

A the EIA Report. The supporting documents for the assumptions
B themselves or AAHK's "expectation", and the agreement to
C discuss the airspace issues mentioned in paragraphs 2.3.6.6 and
D 3.2.4.4, are also not provided. Accordingly, the EIA Report
E fails to meet the requirement of paragraph 3.5.3 of the Study
Brief.

F (3) Nothing is provided in the EIA Report to enable the Director on
G review to conclude that the key NATS assumptions are "sound
H or adequate", contrary to paragraph 4.4.2(e) of the Technical
Memorandum.

I (4) The Director has not given any reasons as to how she could have
J reached the conclusion that the said assumptions are sound or
K adequate. The only evidence in the EIA Report is AAHK's
L own "expectation" as set out in paragraph 2.3.6.6 and AAHK's
bald assertion that those restrictions are "partially" negotiable in
paragraph 3.2.2.4 of the EIA Report.

M (5) Lastly, the EIA Report does not assess any of the potential or
N likely environmental impacts of the Project, in particular noise
O and emissions, by reason of increased flight operations at HKIA
using a third runway in the scenario where the PRD Airspace
Assumption fails to materialise in time or at all.

P 61. At paragraph 53 of his Outline Submissions, Mr Kat says that
Q the kernel of Ho's complaint is set out in paragraph 88 of the draft
R Amended Form 86, as follows:-

S "The EIA Report has failed to assess those [noise and air quality]
T impacts by relying upon an untested and undetermined
U assumption ... that the immediate airspace in the PRD area will
V be significantly re-organised so as to accommodate the further
flights and their necessary operational procedures for the optimal

operation of the 3rd runway and the planned capacity increases at the other airfields in the area (in time for the operation of the Project).”

62. Although Ho has raised numerous complaints of non-compliance with the Study Brief and Technical Memorandum in her Form 86, Mr Kat has, at paragraph 62 of his Outline Submissions, identified the following particular provisions in the Study Brief and Technical Memorandum which it is contended have not been complied with:-

- (1) Paragraph 3.5.3 of the Study Brief (Documentation of Key Assumptions, Limitation of Assessment Methodologies and related Prior Agreement(s) with the Director), which states as follows:-

“The EIA Report shall contain a summary including the assessment methodologies and key assessment assumptions adopted in the EIA Study, the limitations of these assessment(s) methodologies/assumptions, if any, plus all relevant prior agreement(s) with the Director or other Authorities on individual environmental media assessment components. The proposed use of any alternative assessment tool(s) or assumption(s) have to be justified by the Applicant, with supporting documents based on cogent, scientific and objectively derived reason(s) before seeking the Director’s agreement. The supporting documents shall be provided in the EIA report.”

- (2) Paragraphs 2.1.3 to 2.1.4 of Appendix C to the Study Brief (relating to the requirements for noise impact assessment), which state as follows:-

“Assumptions and Data adopted for assessment

2.1.3 The Applicant shall explicitly state assumptions made for deriving input data for the computational model, including but not limited to: (a) airport operational data including the number of aircraft, aircraft fleet mix, runway utilization, flight tracks, type of aircraft which utilize each flight track on an annual average daily-basis ...

2.1.4 Validity of the above data shall be confirmed with Civil Aviation Department and documented in the EIA Report.”

(3) Paragraph 3.4.3.1 (under Air Quality Impact) and paragraph 3.4.5.1 (under Noise Impact) of the Study Brief, which expressly import the requirements of the Technical Memorandum. Paragraph 4.4.2 of the Technical Memorandum (Quality of the EIA Report) states as follows:-

“The quality of the EIA report shall be reviewed having regard to the guidelines in Annex 20 and in Section 4.3. The report shall be considered as adequate if there are no omissions or deficiencies identified which may affect the results and conclusions of the assessment. In particular, the following factors shall be considered:

...

(e) whether the assumptions and methodologies used are sound and adequate”.

63. I do not accept Ho’s complaints that the EIA Report has failed to comply with the above provisions of the Study Brief and Technical Memorandum. My reasons are as follows.

64. In respect of the complaint of non-compliance with paragraph 3.5.3 of the Study Brief, the summary required by that paragraph is given in Table 19.3 under Section 19.16 (Key Assessment Assumptions, Limitations of Assessment Methodologies and Prior Agreements) of the EIA Report.

65. In respect of the complaint of non-compliance with paragraph 2.1.3(a) of Appendix C to the Study Brief, the assumptions for deriving the input data or other relevant data for the computational model for carrying out the aircraft noise impact assessment are fully set out in

Section 7.3.3 (Aircraft Noise Assessment Methodology), in particular paragraphs 7.3.3.7 to 7.3.3.34 (Assessment Assumptions and Data), of the EIA Report. Those assumptions include “Flight Tracks and Flight Track Utilisation” as detailed in paragraphs 7.3.3.26 to 7.3.3.28 of the EIA Report.

66. In respect of the complaint of non-compliance with paragraph 2.1.4 of Appendix C to the Study Brief:-

(1) The validity of the data referred to in paragraph 2.1.3 of Appendix C to the Study Brief was confirmed by the Civil Aviation Department, as evidenced by (i) Mott MacDonald (AAHK’s consultant)’s letter to CAD dated 24 March 2014, and (ii) CAD’s reply dated 25 March 2014. I shall come back to the terms of CAD’s confirmation in the letter dated 25 March 2014 later when I address Ho’s complaint that it is not an independent, unequivocal or unconditional confirmation, or amounts only to a “partial” confirmation.

(2) CAD’s confirmation is also documented in the EIA Report as required (see paragraph 7.3.3.30 thereof).

67. In respect of the complaint of non-compliance with paragraph 4.4.2 of the Technical Memorandum (Quality of the EIA Report), I am unable to see in what respects it may be said that there are omissions or deficiencies in the EIA Report which may affect the results and conclusions of the assessment, or that the assumptions and methodologies used in the EIA Report are unsound or inadequate.

68. Underlying the above mentioned complaints by Ho is the premise that the PRD Airspace Assumption is a necessary assumption for the environmental impact assessment study for the Project which must be stated, confirmed and justified in the EIA Report. In my view, this underlying premise is wrong.

69. This is because the noise impact assessment study is concerned with finding out (*inter alia*) what may be the possible or likely noise impact of the Project based on a set of projected airport operational data including “the number of aircraft, aircraft fleet mix, runway utilization, flight tracks, type of aircraft which utilize each flight track on an annual average daily-basis”, etc (referred to in paragraph 2.1.3 of Appendix C to the Study Brief). The *relevant* assumptions for the noise impact assessment study are how such data have been derived, not whether the legal or practical circumstances will be such as would allow AAHK to use the PRD Airspace to achieve the projected capacity increase, or whether such capacity increase is viable or sustainable. On this point, I agree with Mr Shieh SC’s submissions for AAHK that Ho has wrongly conflated (i) an assumption stated in the Phase 2 Report with (ii) an assumption which is required to be stated and justified in the EIA Report under paragraph 3.5.3 of the Study Brief and paragraph 4.4.2(e) of the Technical Memorandum. The two reports were produced for completely different purposes. The Phase 2 Report was prepared for the purpose of investigating the feasibility of a three runway system for HKIA, whereas the EIA Report was prepared for the purpose of assessing the environmental impacts of the Project.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

70. I also accept Mr Yu and Mr Shieh’s submissions that the relevant assumption in relation to the PRD Airspace which is required by paragraph 3.5.3 of the Study Brief to be stated in the EIA Report is the flight tracks, not the future ability or entitlement to use the PRD Airspace generally or the specific flight tracks in particular (see paragraphs 9 to 16 of the affirmation of Cheng Po Keung (of CAD) dated 6 August 2015). In other words, what is relevant for the purpose of the noise impact assessment is the position or orientation of the flight tracks which it is assumed would be used by Hong Kong air traffic, not that those flight tracks would actually be available for such use.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

71. In passing, I should make it clear that nothing in this judgment should be read as suggesting that the Project is not viable or sustainable because the Additional Airspace will not be available for use by Hong Kong air traffic. The evidence filed on behalf of the Director is that issues relating to the rationalisation of the use of the PRD Airspace and air traffic management arrangements in the PRD region are addressed by the “PRD Region Air Traffic Management Planning and Implementation Tripartite Working Group” set up by CAAC, CAD and CAAM which have concluded an agreement called the “PRD Plan”. The nature of the PRD Plan was discussed in my previous decision handed down on 6 June 2016 in relation to Ho’s discovery application and I shall not repeat the discussion here.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

72. At the risk of repetition, the viability or sustainability of the Project goes to the issue of AAHK’s wisdom in pursuing the Project which is a matter of public policy and not a matter for determination in the present judicial review. As emphasised by the Court of Appeal in

Leung Hon Wai v Director of Environmental Protection [2014] 5 HKLRD 194, at paragraph 26, “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”.

ISSUE 2: WHETHER DIRECTOR FAILED TO OBTAIN CAD’S CONFIRMATION OF VALIDITY OF ASSUMPTIONS FOR DERIVING AIRPORT OPERATIONAL DATA FOR NOISE IMPACT ASSESSMENT (PROPOSED ADDITIONAL ARGUMENT UNDER GROUND 1/AL21)?

73. The following requirements of the Technical Memorandum and Study Brief are relevant:-

- (1) paragraph 2.1.3(a) of Appendix C to the Study Brief, requiring AAHK to “explicitly state assumptions made for deriving input data for the computational model, including but not limited to: (a) airport operational data including the number of aircraft, aircraft fleet mix, runway utilization, flight tracks, type of aircraft which utilize each flight track on an annual average daily-basis”;
- (2) paragraph 2.1.4 of Appendix C to the Study Brief, requiring that the “[v]alidity of the above data shall be confirmed with Civil Aviation Department and documented in the EIA Report”; and
- (3) paragraph 9.1 of the Technical Memorandum, requiring the Director to take advice from (*inter alia*) the Director of Civil Aviation on civil aviation matters.

74. The basic facts relevant to this complaint are as follow:-

- (1) By a letter dated 24 March 2014, Mott MacDonald wrote to CAD seeking the latter’s confirmation of (*inter alia*) the

“assumptions and data adopted in computational modelling” pursuant to paragraphs 2.1.3 and 2.1.4 of Appendix C to the Study Brief.

- (2) CAD replied on 25 March 2014 providing confirmation in the following terms -

“With respect of Section 2.1.3(a), CAD would like to confirm its view that the assumptions and input data adopted in the computational model of the aircraft noise impact assessment are valid premised on the consideration that the expert opinion of the consultants, including IATA, of the Project Proponent regarding the constrained demand forecast methodology and assumptions adopted for deriving the long-term aircraft operation data are robust. Validity of the operational data referred to in Section 2.1.3(b) and (c) is also confirmed.”

- (3) In the EIA Report, CAD’s confirmation was mentioned in paragraph 7.3.3.12 (“Validity of the above measures, and other relevant input data, including operation modes, which are described below has been confirmed with CAD”), and also in Table 19.3 (“Assumptions and data adopted for assessment, inventory of noise sources, operation mode of scenarios, and direct mitigation measures confirmed with CAD”).

- (4) On 17 April 2014, AAHK sent the EIA Report to the Director for her approval.

- (5) On 26 May 2014, the Director forwarded the EIA Report to various departments (including CAD) and asked each recipient to:

“sign the attached proforma after reviewing the [relevant parts of the EIA Report] to clearly show that ... the captioned EIA Report has met requirements of Technical Memorandum on EIA Process (TM) and EIA Study Brief in accordance with [the recipient’s] responsibility as stipulated in Section 9.1 of TM”.

(6) On or about 29 May 2014, CAD replied to the Director stating:

“We consider the captioned EIA report has met requirements of Technical Memorandum on EIA Process (TM) and EIA Study Brief in accordance with our responsibility as stipulated in Section 9.1 of TM”.

75. Mr Kat’s argument is that CAD’s confirmation in the letter dated 25 March 2014 is not independent, unequivocal or unconditional, and amounts only to a “partial” confirmation.

76. In my view, this argument is based on a misreading or mis-characterisation of CAD’s letter dated 25 March 2014. That letter must be read in its proper context, in particular:

- (1) in the 2nd paragraph on the first page of that letter, CAD expressly stated that “we would like to advise CAD’s confirmation as follows”; and
- (2) the words quoted in paragraph 74(2) above appeared in a table under the heading “CAD’s confirmation”.

77. As set out above, the letter stated that “CAD would like to confirm its view that the assumptions and input data adopted in the computational model of the aircraft noise impact assessment are valid premised on ...” [emphasis added]. What followed thereafter was CAD’s reason or explanation for confirming the validity of the assumptions and input data, namely, the expert opinion of consultants of AAHK which CAD considered to be robust. There is nothing in the Study Brief or Technical Memorandum to prohibit CAD from relying upon the expert opinions of consultants of the project proponent in coming to the conclusion that the relevant assumptions and input data are valid, or giving

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

its confirmation of the same on such basis. CAD has also explained why they accepted the consultants' expert opinion, namely, that they were reputable international organisations whom CAD were familiar with and considered could be relied upon, and that the computational model adopted was widely used by aviation agencies around the world (see paragraph 15 of Cheng Po Keung's 2nd affirmation, and paragraphs 19 to 20 of Cheng Po Keung's 4th affirmation). I do not see how it can be said that CAD's confirmation is not independent, unequivocal or unconditional, or is only "partial".

78. In my view, it is clear that CAD did confirm the validity of the relevant assumptions and input data. This has been further confirmed in the evidence filed on behalf of the Director in this application (see paragraph 8 of Cheng Po Keung's 1st affirmation, paragraph 15 of Cheng Po Keung's 2nd affirmation and paragraphs 21 to 22 of Cheng Po Keung's 4th affirmation).

79. The above conclusion is sufficient to dispose of all other points raised by Ho under this complaint. I would only add the following:-

- (1) There is no basis to contend that the Director did not obtain CAD's confirmation as required by paragraph 2.1.4 of Appendix C to the Study Brief. Quite apart from the fact that the obligation to obtain the confirmation by CAD rested primarily on the project proponent (ie AAHK), the Director in fact received CAD's confirmation on or about 29 May 2014.
- (2) There is no error of fact in CAD's confirmation which would vitiate the Director's approval of the EIA Report.

(3) CAD's confirmation to the Director dated 29 May 2014 is clear and unequivocal. There is nothing in that confirmation which should cause the Director to embark on any relevant inquiry.

(4) Hence, any argument based on *Tameside* or any common law duty to inquire is misconceived.

(5) Lastly, Mr Kat's argument of non-compliance of paragraph 9.1 of the Technical Memorandum, on the basis that CAD's confirmation is limited to their "responsibility as stipulated in Section 9.1 of TM", is likewise unsound. It is in the nature of environmental impact assessment process that knowledge and expertise from different disciplines outside the Director's own field of expertise would be required, as clearly recognised in paragraph 9.1 of the Technical Memorandum which obliges the Director to obtain advice from identified authorities on a list of prescribed matters. It is, I consider, a statement of the obvious that CAD could only give its confirmation within the area of its responsibility as stipulated in paragraph 9.1 of the Technical Memorandum.

ISSUE 3: WHETHER EIA REPORT FAILS TO COMPLY WITH STUDY BRIEF AND TECHNICAL MEMORANDUM IN RELATION TO ECOLOGICAL IMPACT ASSESSMENT CONCERNING CHINESE WHITE DOLPHINS (GROUND 2/AL21)

80. Two main arguments have been raised by Ho under this ground of challenge.

(i) Failure to provide compensation measure during construction phase

81. First, Ho complains that no compensation measure was provided for the progressive permanent destruction of habitat of Chinese

A White Dolphins during the construction phase of the third runway system.
B In paragraph 139 of his Outline Submissions, Mr Kat clarifies that the
C present challenge is concerned with the failure of the EIA Report to
D consider the possibility of off-site mitigation measures because the
E evidence shows that the Director believed that so long as she considered
F that the proposed marine park to be adequate, there was no need to further
G consider off-site mitigation measures. It would appear, therefore, that the
H focus of Ho's complaint is the failure of the EIA Report to consider or
provide off site compensation measures during the construction phase of
the Project.

I 82. In order to properly evaluate the validity of this complaint, it
J is first necessary to consider the requirements of the Study Brief relating to
K the protection of Chinese White Dolphins and their habitat, and how those
requirements are addressed in the EIA Report.

L 83. The following provisions of the Study Brief are relevant for
M the purpose of the present discussion.

N (1) By paragraph 2 of Appendix F to the Study Brief (Requirements
O for Ecological Impact Assessment (Terrestrial and Marine)), the
assessment shall include the following major tasks:

P "(iv) investigate and describe the existing wildlife uses of
Q various habitats with special attention to those wildlife
groups and habitats with conservation interest, including
but not limited to the following: (h) marine mammals
especially Chinese White Dolphins;

R (vii) recommend possible and practicable mitigation measures
S such as alternative design and alignment of the Project and
T modification/change of construction methods to avoid,
U minimise and/or compensate for the adverse ecological
V impacts identified during construction and operation of the
Project".

(2) Paragraph 3 (Impacts on Marine Mammals) of Appendix F to the Study Brief provides that the assessment of impacts on marine mammals especially Chinese White Dolphins shall include the following tasks:

“(v) assess the direct and indirect impacts to marine mammals during the construction and operation phases of the Project, in particular the following:

(b) impacts to Chinese White Dolphins due to reclamation, in particular the direct and permanent loss of dolphin habitat, habitat fragmentation, and reduction in ecological carrying capacity for dolphins;

(vii) identify and recommend practicable mitigation measures to avoid, minimise and/or compensate for the adverse ecological impacts identified during construction and operation of the Project to the Chinese White Dolphins. In identification of applicable measures, the Applicant shall consider the feasibility and appropriateness of, including but not limited to, the following:

(f) setting up additional marine park, extend or connect together existing, planned or potential marine parks, but subject to the requirements in Section (viii)(b) below;

(viii) evaluate and demonstrate feasibility and effectiveness of the recommended mitigation measures, assess possible secondary impacts arising from the implementation of the recommended mitigation measures, and specify the scope, type, location, implementation arrangement, resources requirement, subsequent management and maintenance of such measures, special attention should be paid to the following:

(b) if marine park establishment or extension is proposed as a mitigation measure for impacts on Chinese White Dolphins, full justification should be provided on how such measure could offset the identified impacts (e.g. extensive permanent habitat loss, blockage, narrowing or disruption of travelling corridors, and reduced connectivity between their core areas of activities or between different social clusters)”.

84. In what follows, I shall set out how the EIA Report addresses the above requirements of the Study Brief, in so far as they are relevant to the protection of Chinese White Dolphins or their habitat.

85. Paragraph 2(iv)(h) of Appendix F to the Study Brief: a baseline description of Chinese White Dolphins is given in paragraphs 13.4.6.49 to 13.4.6.114 of the EIA Report.

86. Paragraph 3(v)(b) of Appendix F to the Study Brief: the assessment of the direct and indirect impacts on Chinese White Dolphins due to reclamation, in particular the direct and permanent loss of dolphin habitat, habitat fragmentation, and reduction in ecological carrying capacity for dolphins, during the construction and operational phases of the Project, is contained in Section 13.9 of the EIA Report. In particular:

- (1) paragraphs 13.9.1.1 to 13.9.1.32 deal with “direct impacts” during the “construction phase”, including temporary habitat loss, loss of carrying capacity and habitat fragmentation;
- (2) paragraphs 13.9.2.1 to 13.9.2.128 deal with “indirect impacts” during the “construction phase”; and
- (3) paragraphs 13.9.3.1 to 13.9.3.20 deal with “direct impacts” during the “operational phase”, including permanent habitat loss, loss of carrying capacity, permanent habitat fragmentation and permanent loss of travelling areas and connectivity between core habitat areas; and
- (4) paragraphs 13.9.4.1 to 13.9.4.53 deal with “indirect impacts” during the “operational phase”.

87. Paragraphs 2(vii) and 3(vii) of Appendix F to the Study Brief:
the identification and recommendation of practicable mitigation measures
to avoid, minimise and/or compensate for the adverse ecological impacts
identified during construction and operation of the Project on Chinese
White Dolphins is contained in Section 13.11 of the EIA Report. In
particular:-

- (1) Section 13.11.1 refers to a series of mitigation measures relating to the Project layout and construction methods which have been chosen to avoid and minimise potential ecological impacts, including minimisation of land formation area, use of construction methods with minimal risk/disturbance, consideration of alternative alignment for pipeline diversion with minimal risk/disturbance, consideration of alternative treatment to existing pipelines after diversion, strict enforcement of no-dumping policy, and good construction site practices.
- (2) Section 13.11.2 refers to the implementation of recommended water quality mitigation measures to minimise the impacts on marine ecological resources.
- (3) Section 13.11.3 refers to the establishment of a new marine park which would comprise an area of approximately 2,400 ha and also provide critical linkages between the current Sha Chau and Lung Kwu Chau Marine Park (“SCLKCMP”, an area of 1,200 ha) and the planned Brothers Marine Park (“BMP”, an area of 850 ha), making a total of about 4,450 ha for the three marine parks, to compensate for the loss of 672 ha of seabed habitat and 650 ha of open waters habitat associated with the land formation for the Project.

(4) Section 13.11.5 deals specifically with various measures for the protection of marine mammals (Chinese White Dolphins).

(a) Tables 13-30 and 13-31 under paragraph 13.11.5.1 summarise a range of recommended mitigation measures, as well as ecological monitoring, during the construction and operational phases of the Project.

(b) Paragraphs 13.11.5.3 to 13.11.5.23 deal with the construction phase mitigation and precautionary measures, including establishment of new marine protected areas/linking of existing marine parks, SkyPier High Speed Ferries' speed restrictions and route diversions, dolphin exclusion zones, acoustic decoupling of construction equipment, spill response plan, and construction vessel speed limits and skipper training.

(c) Paragraphs 13.11.5.24 to 13.11.5.52 deal with the operational phase mitigation and precautionary measures, including establishment of new marine protected areas/linking of existing marine parks, SkyPier High Speed Ferries' speed restrictions and route diversions, and operational spill response plan.

88. Paragraphs 3(viii)(b) of Appendix F to the Study Brief: the evaluation and demonstration of the feasibility and effectiveness of the proposed establishment of a new marine park and justification of how it could offset the identified impacts are set out in paragraphs 13.11.3.1 to 13.11.3.4 and paragraphs 13.11.5.24 to 13.11.5.43 of the EIA Report.

89. In paragraph 13.14.1.6 of the EIA Report, under the heading "Residual Impacts", it is concluded that "the residual impacts associated

A with the [Chinese White Dolphins] habitat loss for the 3RS project would
B be considered to be acceptable and have met the requirements of
C Section 4.4.3 of the TM-EIAO.”

D 90. This conclusion has been confirmed by the Director of
E Agriculture and Fisheries, from whom the Director is required by
F paragraph 9.1 of the Technical Memorandum to take advice on matters
G relating to (*inter alia*) ecological assessment. In paragraph 16 of the
H affidavit of Sham Chun Hung, Assistant Director (Country and Marine
I Parks) of the Agriculture, Fisheries and Conservation Department, dated
J 6 August 2015), the following is stated:-

I “In the 3RS, the temporary loss of marine habitats due to
J construction activities is evaluated as small and not expected to
K result in any significant long term impacts to the CWD
L (Section 13.9.1.1 to 13.9.1.4 of the EIA Report refers), and as
M such mitigation measures to address the temporary habitat loss is
N considered not necessary¹. In the 3RS, it is the substantial
O permanent habitat loss due to reclamation, of moderate to high
P impact significance, that is the issue of concern. To address the
Q permanent habitat loss, feasible and effective mitigation
R measures have been provided in the 3RS EIA Report which, as
S I have pointed out in paragraphs 12-15 above, are in compliance
T with the SB and TM requirements.”

O 91. As earlier noted, the crux of Ho’s complaint lies in the alleged
P failure of the EIA Report to consider or provide off site compensation
Q measures during the construction phase of the Project. In my view, this
R complaint is unfounded, for the following reasons:-

R (1) Paragraph 5.4.1 of Annex 16 to the Technical Memorandum
S provides as follows:

S “The general policy for mitigating impacts on important habits
T and wildlife, in order of priority, are:

T ¹ See the discussion in paragraph 94 below.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

(a) Avoidance

Potential impacts shall be avoided to the maximum extent practicable such as adopting suitable alternatives (e.g. change of site, design, construction method, alignment, layout programme, etc.). In extreme cases when the ecological assessment identifies some very serious impacts which could not be mitigated, the ‘no-go’ alternative may be the only realistic option and shall be included and assessed against all other options.

(b) Minimizing

Unavoidable impacts shall be minimized by taking appropriate and practicable measures such as transplanting important plant specimens, confining works in specific area or season, restoration (and possibly enhancement) of disturbed areas, etc.

(c) Compensation

The loss of important species (e.g. trees) and habitats (e.g. woodland) may be provided elsewhere (on-site or off-site) as a compensation. Enhancement and other conservation measures shall always be considered, whenever possible.”

(2) Paragraph 5.4.3 of Annex 16 to the Technical Memorandum provides that:-

“From an ecological point of view, mitigation measures for ecological impact shall preferably be carried out on-site, and well in advance of the works rather than off-site, and after completion of works.”

(3) Paragraph 5.4.5 of Annex 16 to the Technical Memorandum further provides that:-

“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;

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

(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”.

- (4) There is nothing in the Technical Memorandum to suggest that all three forms of mitigation measures, ie, “avoidance”, “minimizing” and “compensation”, must be provided during both the construction phase and the operational phase.
- (5) Paragraph 5.4.1 of Annex 16 to the Technical Memorandum makes it clear that, in terms of priority, “avoidance” should be considered first, “minimizing” second and “compensation” third.
- (6) There is also nothing in the Technical Memorandum to suggest that both on-site and off-site mitigation measures must be provided during both the construction phase and the operational phase.
- (7) Paragraph 5.4.5 of Annex 16 to the Technical Memorandum makes it clear that on-site ecological mitigation measures shall first be investigated and fully exhausted before consideration and provision of off-site ecological mitigation measures.
- (8) As mentioned in paragraphs 87(1), (2) and (4) above, the EIA Report identifies and recommends a series of on-site mitigation measures during the “construction” phase of the Project which are designed to “avoid” and/or “minimize” the adverse ecological impacts caused by the Project.
- (9) In addition to those avoidance and minimizing measures, Section 13.11.3 refers to the establishment of a new marine park as an off-site “compensation” measure to be implemented around 2023, ie, during the operational phase of the Project.

(10) In paragraph 13.11.5.3 of the EIA Report, under the heading “Construction Phase Mitigation and Precautionary Measures”, the following is stated:

“The loss of 650 ha of marine waters habitat utilised by the [Chinese White Dolphins] is considered a moderate-high impact for the construction phase. With the following mitigation measures recommended, short-term residual impacts are considered acceptable (Section 13.14). The habitat loss due to construction would become permanent habitat loss in the operation phase. This permanent habitat loss arising from the 3-RS project can practically be compensated by the provision of the proposed Marine Park to be implemented around 2023 to tie in with the full operation of the 3-RS.”

(11) For the purpose of the present discussion, it is significant that the EIA Report expressly points out that “[i]t is not practicable to seek to designate the proposed new areas of Marine Park while construction activities for the 3RS project are ongoing” (paragraph 13.11.5.37). In other words, the possibility of off-site compensation measure during the construction phase has been considered, but rejected because of impracticability.

(12) It is thus incorrect to suggest that the EIA Report has failed to “consider” off site compensation measure during the construction phase of the Project as alleged by Ho.

(13) Further and in any event, there is nothing in the Technical Memorandum or the Study Brief which requires the EIA Report to specifically “consider” or “provide” off-site compensation measures during the construction phase of the Project.

92. There is one other complaint raised by Ho that I should deal with here. In paragraph 151 of the Form 86, it is alleged that the assessment in the EIA Report that the habitat loss during the construction

phase is “temporary” is wrong, being contrary to paragraph 4.4.2(b) of the Technical Memorandum, which provides as follows:-

“The report shall be considered as adequate if there are no omissions or deficiencies identified which may affect the results and conclusions of the assessment. In particular, the following factor shall be considered:

(b) whether the information and descriptions in the EIA report are factually correct”.

93. In support of her complaint, Ho refers Table 13-22 (at page 13-80), Table 13-32 (at page 13-204 to 13-207), and paragraph 13.14.1.6 of the EIA Report where the habitat loss during the construction phase is described as being “temporary”. However, those references in the EIA Report must be read in their proper contexts. The EIA Report clearly recognises that there will be a habitat loss due mainly to land formation which is progressive in nature during the construction phase, that the actual construction footprint and associated silt curtain arrangement will change continuously over time, and that the amount of the open waters and Chinese White Dolphins habitat loss will increase progressively to the ultimate amount of 650 ha at completion (see paragraph 13.9.1.8 of the EIA Report). The same point is made in paragraph 13.11.5.3: “The habitat loss due to construction would become permanent habitat loss in the operation phase”. See also paragraphs 13.9.1.17 and 13.9.3.1 of the EIA Report.

94. In my view, the word “temporary” appearing in various places in the EIA Report referred to by Ho is used in the sense that the amount of the habitat loss will be changing and progressive as construction works are being carried out and will become crystallised or permanent upon completion of the works. It is not used in the sense that the habitat loss

A will be “reversible” after completion of the works. This conclusion is
B reinforced by the fact that the EIA Report also refers to another type of
C habitat loss arising from construction activities in terms of works areas and
D work platforms as being “purely” temporary loss. The total area of such
E temporary loss is small (of 0.67 ha), and its impact is considered to be low
F and reversible once the respective construction works have been completed,
G and no mitigation measures are therefore required for those activities (see
H paragraphs 13.9.1.3 to 13.9.1.5 of the EIA Report).

95. In all, I do not consider the descriptions in the EIA Report of
H the habitat loss during the construction phase as being “temporary” to be
I factually incorrect if one reads them in their proper contexts.

J (ii) No consideration of cumulative ecological impacts

K 96. Second, Ho complains that there is no consideration in the
L EIA Report of the cumulative ecological impacts on Chinese White
M Dolphins by the Project taken together with other existing, committed and
N proposed developments, namely, the Hong Kong-Zhuhai-Macao Bridge
Project and the Lung Kwu Tan Project.

O 97. The following provisions of the Technical Memorandum and
P Study Brief are relevant for the purpose of the present discussion:-

- Q (1) Paragraph 4.3.1(c)(ii) of the Technical Memorandum, which
R provides that –

S “Impact evaluation: an evaluation of the anticipated changes and
T effects shall be made with respect to the criteria described in
U Annexes 4 to 10 inclusive, and in quantitative terms as far as
V possible. The methodologies for evaluating the environmental
impact shall be capable of addressing the following issues:

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

(ii) the projected environmental conditions with the project in place and the sum total of the environmental impacts taking into account all relevant existing, committed and planned projects”.

(2) Paragraph 4.3.3 of the Technical Memorandum, which provides that –

“Where applicable, the applicant shall be required to evaluate the environmental impacts resulting from the project over a period of time, through interactions among different environmental pollutants or emissions, or in combination with other existing, committed and proposed developments. Any such requirements shall be clearly set out in the study brief and are only limited to those that may have a bearing on the environmental acceptability of the project.”

(3) Paragraph 3.2.1(xiii) of the Study Brief, which provides that –

“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:

(xiii) potential cumulative environmental impacts of the Project, through interaction or in combination with other existing, committed or planned projects, and that the impacts of these projects may have a bearing on the environmental acceptability of the Project.”

(4) Paragraph 3(vi) of Appendix F to the Study Brief, which provides that –

“The assessment of impacts on marine mammals especially Chinese White Dolphins shall include the following tasks:

(vi) assess the overall cumulative ecological impacts on the Chinese White Dolphins due to this Project and any planned and on-going development projects (e.g. the SkyPier, Hong Kong-Zhuhai-Macau-Bridge – Hong Kong Boundary Crossing Facilities & Hong Kong Link Road ...).”

98. In relation to the complaint that the EIA Report has failed to consider the cumulative ecological impacts on Chinese White Dolphins associated with the Hong Kong-Zhuhai-Macao Bridge Project:

(1) Paragraph 3(vi) of Appendix F to the Study Brief makes specific references to two of the three components of that project, namely, “Hong Kong Boundary Crossing Facilities” and “Hong Kong Link Road”. The cumulative impact assessments associated with these two components of the Hong Kong-Zhuhai-Macao-Bridge Project can be found in paragraphs 4.5.1.20 to 4.5.1.25 and Section 4.5.2 of the EIA Report.

(2) Ho’s argument focuses on the third component of the Hong Kong-Zhuhai-Macao-Bridge Project, namely, a section of the bridge located outside the boundaries of the HKSAR which is not specifically referred to paragraph 3(vi) of Appendix F to the Study Brief.

(3) In paragraph 4.5.1.28 of the EIA Report, it is stated that:-

“As this section of the bridge is located outside HKSAR territory, cumulative impacts associated with the bridge itself will not be assessed, however, the new artificial islands associated with HZMB will be incorporated in the water quality assessment.”

(4) The evidence before the court is that this third component of the Hong Kong-Zhuhai-Macao-Bridge Project “would not result in any direct or permanent loss of CWD habitat within Hong Kong waters”, and its “exclusion from or inclusion into cumulative impact assessment would not affect the results or conclusions of the assessment with respect to the overall cumulative loss of CWD habitats within Hong Kong waters” (see paragraph 23 of the affidavit of Sham Chun Hung dated 6 August 2015). This is a matter of professional judgment.

(5) In light of this evidence, I consider it justifiable for the EIA Report not to consider the cumulative ecological impacts on Chinese White Dolphins associated with the section of the bridge located outside the boundaries of the HKSAR.

(6) Mr Kat characterises the aforesaid evidence of Mr Sham as “retro-reasons” which he submits should not be admitted. There is, in my view, nothing inconsistent between the evidence of Mr Sham and paragraph 4.5.1.28 of the EIA Report, and I do not see why his evidence cannot be admitted to explain the reason for not carrying out a cumulative ecological impact assessment associated with that section of the bridge located outside the boundaries of the HKSAR.

(7) I should add that if, contrary to my view, such an assessment ought to have been carried out and expressly mentioned in the EIA Report, it seems clear on the evidence that the omission would have no material impact on the Director’s decisions or on the environment. I would not therefore be minded, in the exercise of my discretion, to grant any relief in this application for judicial review on this ground.

99. In relation to the complaint that the EIA Report has failed to consider the cumulative ecological impacts on Chinese White Dolphins associated with the Lung Kwu Tan Project:

(1) The requirement to carry out a cumulative impact assessment of the ecological impact on Chinese White Dolphins applies only to “planned and on-going” development projects under paragraph 3(vi) of Appendix F to the Study Brief. For this purpose, the Study Brief (instead of the Technical Memorandum)

is the governing provision (see *Chu Yee Wah v Director of Environmental Protection* [2011] 5 HKLRD 469, at paragraph 31; *Leung Hon Wai v Director of Environmental Protection* [2014] 5 HKLRD 194, at paragraph 25).

(2) The evidence shows that the Lung Kwu Tan Project has only been shortlisted as a possible reclamation site, and no decision has yet been made that the site will be so used (see paragraphs 4.5.1.14 to 4.5.1.16 of the EIA Report, and paragraph 68 of the 1st affirmation of Tang Kin Fai dated 6 August 2015). It cannot therefore be regarded as a “planned and on-going” project.

(3) It follows that there is no requirement for the EIA Report to consider the cumulative ecological impacts on Chinese White Dolphins associated with the Lung Kwu Tan Project.

ISSUE 4: WHETHER DIRECTOR FAILED TO CONDUCT FAIR PUBLIC CONSULTATION IN RESPECT OF NEW MEASURES PROPOSED TO COMPENSATE FOR LOSS OF HABITAT OF CHINESE WHITE DOLPHINS DURING CONSTRUCTION PHASE OF THE PROJECT, OR TAKE INTO ACCOUNT THOSE MEASURES WHEN APPROVING THE EIA REPORT (GROUND 2/AL21)

100. The alleged “new measures” that Ho relies upon are:-

(1) a proposal contained in the MEFEP to establish a dolphin protection area of about 1,000 ha to be designated within the new marine park of 2,400 ha (as recommended in the EIA Report) and a number of other enhancement measures proposed in the MEFEP; and

(2) the Government’s decision to designate 2 new marine parks (at Southwest Lantau and Soko Islands) announced on 1 September 2014.

101. The basic facts relevant to the first complaint by Ho can shortly be stated as follows.

102. In addition to the mitigation measures mentioned in paragraph 87 above, Section 13.13 of the EIA Report further recommends a number of measures, through the formulation and implementation of a “Marine Ecology and Fisheries Enhancement Strategy (MEFES)”, to enhance the marine environment.

103. In paragraph 13.13.1.4 of the EIA Report, it is proposed that the MEFES should be framed under the following key aspects:

- (1) enhancement of habitats for marine ecology and fishery resources;
- (2) promotion of a sustainable fisheries industry;
- (3) encouragement of scientific research and studies; and
- (4) promotion of environmental education and eco-tourism.

104. Some further details of these enhancement measures are given in Sections 13.13.2 to 13.13.5 of the EIA Report. In paragraph 13.13.5.2, it is stated that the MEFES, associated management arrangements, funding amounts and fund allocation mechanisms shall be established prior to commencement of the construction phase of the project, and AAHK will continue to engage with a range of fisheries and other stakeholder groups so that their concerns and suggestions on fisheries and other potential marine ecological enhancement measures can be taken into consideration

A where appropriate during the formulation and implementation of the
B MEFES.

C
D 105. It seems clear that, as at the date of the EIA Report, the
E enhancement measures under the MEFES were still under formulation and
F it was envisaged that their details would be worked out after consultation
with the relevant stakeholders.

G 106. At the EIA Subcommittee meetings held to discuss the EIA
H Report, members requested AAHK to provide further information relating
I to the funding amounts, and management and operation arrangements
J concerning the MEFES for their better understanding of the strategy. In
K response, AAHK prepared the Marine Ecology and Fisheries Enhancement
Plan dated August 2014 (ie the MEFEP) and provided the same to the EIA
Subcommittee for members' consideration.

L 107. The following statements in the MEFEP are relevant for the
M purpose of the present discussion:-

N "1.1.4 It should be noted that that the MEFES and associated
O enhancement and assistance initiatives are not intended to
P address or directly mitigate impacts as identified in the
EIA as these are already addressed through specific
construction practices, mitigation measures and
monitoring programs also defined in the EIA ...

Q 1.1.6 Nonetheless, it is envisaged that enhancements and
R support initiatives as proposed in the MEFES will serve
S to further ensure that during and after the 3RS project a
range of practicable actions and measures are taken
giving cumulative benefit to marine ecology and fisheries
in North Lantau Waters, including to those fishermen
impacted by the 3RS development ...

T 1.1.7 The Framework for MEFES has been developed based on
U the ecological and fisheries baseline information
V

collected during the course of the 3RS Project EIA study and the on-going public consultation with different stakeholders.

1.1.9 It is intended that the proposed MEFEP would be a dynamic document that is continually updated and developed during the various phases of the 3RS Project, including pre-construction, construction, post-construction and operation.”

108. The MEFEP gives some further details about the proposed enhancement measures.

- (1) Chapter 3 sets out a tentative Marine Park Management Plan for the new marine park proposed in the EIA Report.
- (2) Chapter 4 sets out various proposed measures to enhance marine ecology during the construction phase of the Project, including the identification of areas within North Lantau waters (eg the waters immediately to the west of HKIA) as dolphin protection area where enhancement measures would be implemented by AAHK, including the restriction of SkyPier HSFs and construction vessels from entering those areas under normal circumstances (under exceptional circumstances, SkyPiers HSFs and construction vessels may be permitted to enter, however speeds would be limited to 15 knots or less and 10 knots respectively when in those areas).
- (3) Chapter 7 sets out various measures to promote sustainable fisheries industry, including support and enhancement of ongoing fisheries operations, improvement of mariculture, fishing technologies and techniques, and promotion and enhancement of fisheries-related business opportunities.

109. At the ACE meeting held on 15 September 2014, AAHK explained that the measures proposed in the MEFEP were not new measures but were elaborations on measures already included in the EIA Report. AAHK also reiterated that they were not part of the mitigation measures for mitigating the impacts on Chinese White Dolphins. In particular:-

(1) Mr Kevin Poole said that “the MEEF was not part of the mitigation measures for mitigating the construction impacts on CWD, but rather an enhancement measure to support research and studies on marine ecology and the promotion of environmental education and eco-tourism” (see paragraph 17 of the Confirmed Minutes of ACE meeting held on 15 September 2014).

(2) Mr Peter Lee said that “to his understanding, mitigation measures were those that required evidence to prove their effectiveness, whereas enhancement measures were those taken to be useful for long-term conservation of marine ecology, including CWD. The MEFES was not for mitigating the construction impacts of the 3RS but for enhancing the protection/conservation of CWD” (see paragraph 19 of the Confirmed Minutes of ACE meeting held on 15 September 2014).

110. Apparently, the Director also accepted, or treated, the measures proposed in the MEFES, as elaborated in the MEFEP, as not forming part of the mitigation measures for the avoidance, minimization or compensation of the adverse ecological impacts of the Project which AAHK put forward to meet the requirements of the Study Brief and

Technical Memorandum, but were measures proposed for the enhancement of the marine environment (see paragraphs 60 to 64 of the affirmation of Tang Kin Fai dated 6 August 2015, and paragraphs 18 to 20 of the affirmation of Sham Chun Hung dated 6 August 2015, see also paragraph 31 to 32 of the affirmation of Peter Lee dated 21 September 2015.)

111. The eventual Permit granted by the Director is subject to (*inter alia*) the following express conditions:-

- (1) AAHK shall, in consultation with the Agriculture, Fisheries and Conservation Department, submit a marine park proposal including the proposed size and management plan of the marine park as recommended in the EIA Report;
- (2) AAHK shall formulate a detailed Marine Ecology Conservation Plan for the conservation of marine life particularly Chinese White Dolphins and submit the plan to the Director for approval;
- (3) AAHK shall devise a Marine Traffic Routes and Management Plan for high speed ferries of the SkyPier and submit the plan to the Director for approval; and
- (4) AAHK shall submit a detailed Fisheries Management Plan in collaboration with fishermen for supporting the fishing industry and enhancing fisheries resources in the western Hong Kong waters especially the Lantau waters to the Director for approval.

112. I do not accept Ho's complaint, for the following reasons:-

- (1) It is, in my view, generally a matter for the project proponent to decide what mitigation measures he wishes to put forward to avoid, minimise or compensate for the adverse environmental

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

impacts of his project for the purpose of meeting the relevant requirements of the study brief and technical memorandum. If he fails to put forward sufficient mitigation measures, he runs the risk of the Director rejecting his environmental impact assessment report. In the present case, AAHK did not put forward the measures proposed in the MEFES, as elaborated in the MEFEP, as part of the mitigation measures. In the words of Mr Shieh, they were “icing on the cake” or “something on top of the mitigation measures required to be addressed in the EIA Report”. That was also how those measures were understood and treated by the Director, who considered that the mitigation measures properly so called were sufficient to comply with the requirements of the Study Brief and Technical Memorandum.

- (2) Alternatively, if the additional measures proposed in the MEFES were part of the mitigation measures properly so called, an outline of those measures had already been given in the EIA Report which was published in accordance with the Ordinance for public consideration and comment. The details contained in the MEFEP were merely elaborations provided by AAHK in response to requests for further information by members of the EIA Subcommittee.
- (3) In either case, I do not consider that the Director was required to conduct any public consultation in respect of the details of the measures set out in the MEFEP, including the proposed designation of a dolphin protection area in the new marine park (bearing in mind the prescribed timetable laid down in the Ordinance for the environmental impact assessment process), or
- A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

to take into account those measures when approving the EIA Report.

113. In so far as the designation of the two new marine parks at Southwest Lantau and Soko Islands is concerned (ie the second complaint by Ho):-

- (1) They are not new initiatives proposed in the EIA Report, and do not form part of the compensation measures proposed to be implemented during the construction phase of the Project. Their origin can be traced back to the Chief Executive's Policy Address in 2000 as part of the commitment of the Government to enhance the protection of Chinese White Dolphins, and are entirely unrelated to the Project (see paragraph 60 of Tang Kin Fai's affirmation dated 6 August 2015, and paragraph 21 of Sham Chun Hung's affirmation dated 6 August 2015).
- (2) At the EIA Subcommittee meeting held on 2 September 2014, the Assistant Director (Country and Marine Parks) of the Agriculture, Fisheries and Conservation Department explained to the members that the designation of these two new marine parks was independent of the Project and therefore AAHK (as the project proponent) would not be involved. It is apparent from the minutes of that meeting that the chairperson and members of the EIA Subcommittee were fully aware that the two new marine parks were independent of the Project, and were not to be regarded as part of the mitigation measures for the Project (see paragraphs 5 to 10 of the minutes of that meeting).
- (3) In my view, it is clear that the Director was under no duty to take into account, or conduct any public consultation on, the two new

marine parks when deciding whether to approve the EIA Report or grant the Permit.

ISSUE 5: WHETHER STUDY BRIEF REQUIRES EIA REPORT TO COMPARE ENVIRONMENTAL BENEFITS AND DIS-BENEFITS OF (A) TWO ALTERNATIVE DEVELOPMENT OPTIONS BASED ON EXISTING TWO-RUNWAY SYSTEM AND (B) PROPOSED THREE RUNWAY SYSTEM, OR GIVE DESCRIPTION OF ENVIRONMENTAL FACTORS CONSIDERED IN OPTION SELECTION (GROUND 1/AL22)

114. The applicant complains that the EIA Report fails to meet the requirements of paragraph 3.3.2 of the Study Brief, which states as follows:-

“Consideration of Alternative Development Options

The Applicant shall consider alternative development options including siting and alignment for the Project in conjunction with the existing airport, provide justifications regarding how the proposed development option is arrived at. The Applicant shall describe the environmental factors considered in the option selection and compare the environmental benefits and dis-benefits of alternative development options with a view to recommending the preferred option to avoid adverse environmental effects.”

115. In support of this complaint, Mr Pun points out that, in Section 2.3.7 of the EIA Report, two “alternatives to airport expansion” are identified, namely:-

- (1) optimising the remaining two-runway capacity; and
- (2) co-operation with neighbouring airports.

However, there is no comparison of the “environmental benefits and dis-benefits” of the two alternative development options, or any description of the “environmental factors” considered in the option

selection in the EIA Report. Mr Pun argues, therefore, that there has been a breach of the requirement of paragraph 3.3.2 of the Study Brief.

116. This ground of judicial review raises an issue of construction of paragraph 3.3.2 of the Study Brief, in particular whether the reference to “alternative development options” in that paragraph is a reference to (a) different options with and without the third runway, or (b) different options within the parameters of the Project itself (in other words, on the premise that a three-runway system will be adopted). In my view, it is clear that the latter represents the correct construction of paragraph 3.3.2 of the Study Brief, for the following reasons:-

- (1) As a starting point, paragraph 3.3.2 of the Study Brief must be read in its proper context.
- (2) The Study Brief was issued by the Director in response to AAHK’s application for a study brief to proceed with an environmental impact assessment study for the “Project”, which involved the construction of a new (ie, the third) runway.
- (3) The word “Project” in the Study Brief is a term of art; it is defined at beginning of the Study Brief to refer to the “Project Title: Expansion of Hong Kong International Airport into a Three-Runway System”.
- (4) Paragraph 3.3.1 of the Study Brief provides that the applicant shall provide information on “the need of the Project, including the purpose and objective of the Project, and describe scenarios with and without the Project”.
- (5) Under this paragraph, AAHK is required to describe scenarios with and without the Project; in other words scenarios based on

the existing two-runway system and scenarios based on a three-runway system.

(6) This paragraph does not, however, require AAHK to describe the “environmental factors considered” in the option selection or “compare the environmental benefits and dis-benefits” of alternative development options. This makes perfect sense because, by the time that AAHK applied to the Director for the issue of a study brief, a policy decision had already been made to proceed with the Project involving a three-runway system. There was at that stage no purpose in comparing the environmental benefits and dis-benefits of different options with and without the third runway.

(7) The requirements of paragraph 3.3.1 of the Study Brief are satisfied by the information provided in Chapter 2 of the EIA Report entitled “Need of the Project”. In particular:-

(a) Section 2.2 (Background) presents the historical setting for the Project, including a review of the airport planning and development process which led to the existing HKIA and its current operations.

(b) Section 2.3 (Constraints of the Existing HKIA to Meet Future Traffic Demand) explains why the third runway project is needed and why it is considered that there is no other viable alternative to meet the future demands on HKIA. Section 2.3.7 describes two scenarios without the Project, namely, “Optimising the Remaining Two-Runway Capacity” and “Co-operation with Neighbouring Airports”.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

(c) Section 2.4 (Benefits of the Project) describes scenarios with the Project, and the benefits associated with a three-runway system at HKIA.

(d) Section 2.5 (Consequences of Not Proceeding with the Project) describes scenarios without the Project and the consequences associated with restriction of HKIA as a two-runway system.

(8) Paragraph 3.3.2 of the Study Brief provides that the applicant shall consider “alternative development options including siting and alignment for the Project in conjunction with the existing airport ... [and] describe the environmental factors considered in the option selection and compare the environmental benefits and dis-benefits of alternative development options with a view to recommending the preferred option to avoid adverse environmental effects” [emphasis added].

(9) The language of this paragraph makes it clear that the reference to “alternative development options including siting and alignment” is a reference to different options for the Project (ie within the parameters of the Project). The references to “environmental factors” considered in the option selection and the comparison of the “environmental benefits and dis-benefits” of alternative development options in paragraph 3.3.2 of the Study Brief are to the environmental factors, and benefits and dis-benefits arising under different development options for the Project involving a three-runway system.

(10) The requirements of paragraph 3.3.2 of the Study Brief are satisfied by the information provided in Chapter 3 of the EIA Report entitled “Consideration of Alternatives”. In particular:-

- A
- B
- C
- D
- E
- F
- G
- H
- I
- J
- K
- L
- (a) Section 3.3 (Consideration of Alternatives for the Third Runway Alignment) presents the runway alignment options assessment leading to identification of the shortlisted alignments.
- (b) Section 3.4 (Consideration of Alternatives for Airport Layout under a Three-Runway System) presents the engineering and environmental evaluation of the shortlisted airport layout options leading to identification of the preferred option.
- (c) Table 3.9 provides a summary of the environmental evaluation, including a comparison of the benefits and dis-benefits, of the shortlisted options.
- (d) Section 3.5 (Further Development of the Preferred Runway and Airport Layout) presents the further considerations and fine-tuning of the preferred option leading to the preferred runway and airport layout.

M 117. In support of his argument that the reference to “alternative development options” in paragraph 3.3.2 of the Study Brief should be read as a reference to different options with and without the third runway, Mr Pun relies on:-

- N
- O
- P
- Q
- R
- S
- T
- U
- V
- (1) AAHK’s response to certain questions raised by a member of the EIA Subcommittee, which suggests that AAHK might have understood that paragraph 3.3.2 of the Study Brief required a comparison of the environmental benefits and disbenefits of various scenarios with and without the Project;
- (2) paragraph 2.3.7 of the EIA Report, which refers to two alternatives to airport expansion, namely, optimising the

remaining two-runway capacity and co-operation with neighbouring airports;

(3) the Master Plan 2030 prepared by AAHK, which refers to the need to explore different “development options” (other than various committed enhancement measures), in particular the two-runway system and the three-runway system identified in Chapters 5 and 6 respectively thereof;

(4) paragraph 1.2.1 of the Project Profile, which refers to the aforesaid two development options mentioned in the Master Plan 2030; and

(5) the purpose of the Ordinance, which is to protect the environment.

118. In my view, none of the above matters supports Mr Pun’s construction of paragraph 3.3.2 of the Study Brief.

(1) In respect of AAHK’s response to questions raised by a member of the EIA Subcommittee, the true meaning of paragraph 3.3.2 of the Study Brief is a matter of law. AAHK’s understanding, or misunderstanding, of paragraph 3.3.2 of the Study Brief cannot affect the true meaning of that paragraph.

(2) The reference to the two alternatives to airport expansion in paragraph 2.3.7 of the EIA Report is in the context of an explanation on why a three-runway system is needed for HKIA and why there is no other viable alternative to meet the future demands of HKIA (see paragraph 2.3.1.1 of the EIA Report).

(3) The Master Plan 2030 refers to two broad development options based on the two runway system (Chapter 5) and the three-runway system (Chapter 6), and compares their respective pros

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

and cons as part of the planning discussion on the future needs of HKIA in order to achieve sustainable growth while retaining its long-term competitiveness and position as an international aviation hub. On the other hand, the Project Profile refers, by way of background information, to the two broad development options considered by AAHK in the Master Plan 2030 and explains that the three-runway system is the preferred option by a majority of those who responded to The University of Hong Kong’s Social Sciences Research Centre’s questionnaire and has been adopted by the Government of the HKSAR as the future development option for HKIA for planning purposes. In no way can the two broad development options based on the existing two-runway system mentioned in the Master Plan 2030 and the Project Profile be transposed to paragraph 3.3.2 of the Study Brief and treated as being the “alternative development options ... for the Project” referred to in that paragraph of the Study Brief.

- A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V
- (4) Finally, I am unable to see how the fact that the purpose of the Ordinance is to protect the Ordinance can lead to the conclusion that the reference to “alternative development options” in paragraph 3.3.2 of the Study Brief should be read as being a reference to different options with and without the third runway. As mentioned in paragraphs 40 above, it is an improper use of the legislative purpose to distort or ignore the plain meaning of the text of a statute.

119. In all, I am of the view that there is no substance in the complaint that the EIA Report fails to meet the requirements of paragraph 3.3.2 of the Study Brief.

ISSUE 6: WHETHER DIRECTOR FAILED TO HAVE SUFFICIENT REGARD TO, OR MAKE SUFFICIENT INQUIRY ON, PRD AIRSPACE ISSUE (GROUND 2/AL22)

120. The “PRD Airspace Issue” is defined in paragraph 43 of the Amended Form 86 as follows:-

- (1) the flight tracks alignment for the Project (as shown in Drawing No MCL/P132/EIA/7-3-004 to 005 attached to the EIA Report) include tracks that are within the PRD airspace;
- (2) this is premised upon the assumption that the existing “air wall” between the Hong Kong and Mainland airspaces will be removed, so that the PRD airspace will be available in the future; and
- (3) in the event that the PRD airspace is not available in the future, the northbound flights will have to be re-routed.

121. The applicant’s complaint is that the PRD Airspace Issue was raised by the public and in one of the EIA Subcommittee Meetings held on 18 August 2014, but the Director:-

- (1) in granting the Permit, failed to have sufficient regard (or at all) to the PRD Airspace Issue, in breach of section 10(2)(f) of the Ordinance; and/or
- (2) failed to make sufficient inquiry on the PRD Airspace Issue, in breach of the *Tameside* duty.

122. Mr Pun, on behalf of the applicant, does not dispute that there is nothing in either the Technical Memorandum or the Study Brief which requires or mandates the Director to take into account the PRD Airspace Issue. He argues, however, that the Director is under a duty to have regard to and/or make inquiry on the PRD Airspace Issue by virtue of Section 10(2)(f) of the Ordinance (see paragraphs 61 and 62 of Mr Pun’s skeleton argument).

123. Section 10(2)(f) of the Ordinance states as follows:-

“In granting or refusing an environmental permit, the Director shall have regard to –

(f) the comments, if any, submitted to him under section 7 on the report.”

124. Section 7(2)(c) of the Ordinance provides that “a member of the public may give the Director written comments on the [EIA Report] before the period of public inspection expires”, while Section 7(5) of the Ordinance provides that ACE “may give any comments it has on the [EIA Report] to the Director within 60 days of its receiving a copy of the report”.

125. It follows from Section 10(2)(f), read together with Section 7(2)(c) and (5), that the Director is under a duty to have regard to such comments as may be given by the public or ACE on the EIA Report when deciding whether to grant or refuse an environmental permit. However, it must be implicit in Section 10(2)(f) that the comments that the Director is required to have regard to must be in respect of a matter or matters that is/are relevant to the exercise of the Director’s power in granting or refusing an environmental permit.

126. In my view, the PRD Airspace Issue is not a matter relevant to the Director's exercise of power to grant or refuse an environmental permit in this case, for two reasons.

127. First, it is not the Director's function, when deciding whether to grant or refuse an environmental permit, to vet the wisdom of AAHK's proposal to expand the airport into a three-runway system. Her function is to consider the assessment and acceptability of the environmental impacts which may be caused by the Project. The PRD Airspace Issue is relevant to the former, but not the latter, issue.

128. Second, under paragraph 2.3.1 of Appendix C to the Study Brief, AAHK has to assess the aircraft noise impact of various operation modes, including (i) "the worst operation mode which represents the maximum noise emission in connection of combination of number of aircraft, type of aircraft which utilize each flight track in time periods for both approaches and departures for the selected year", and (ii) "full operation of the three runway system which represents the operation of the proposed 3rd runway together with two existing runways at design capacity", and the Director has to consider whether such impact is environmentally acceptable having regard to the criteria for evaluating noise impact as set out in Annex 5 of the Technical Memorandum. As stated in paragraph 53 of the affirmation of Tang Kin Fai filed on 14 March 2016:-

"... even if some of the projected flight tracks would not become available, it just means that all the flights utilizing the expanded HKIA (including the 3RS) would have to use the remaining projected flight tracks. Even in that situation, the Project Proponent would have to decide how many more flights it would be able to direct to utilize the remaining projected flight tracks, for it is bound by the approved EIA Report and the EP that the

operation of the [HKIA] cannot generate noise impact in excess of those predicted and permitted in the EIA Report. Put another way, if the revised operation of the HKIA through increased utilization of the remaining projected flight tracks results in an increase in the number of the noise sensitive receivers within the NEF25 contour, the Project Proponent would not be able to rely on the approval of the EIA Report and the EP to continue operation, but may have to submit a fresh EIA Report and ensure that the noise generated from the operation in any revised design (including flight paths and frequencies) would not exceed the requirements permitted. Accordingly, from an environmental protection point of view, it does not matter whether the HKIA can utilize all the projected flight tracks, because the scheme of the EIAO is such that there cannot and will not be any additional adverse noise impacts in respect of the flight tracks, within the NEF25.”

129. It is thus clear that the PRD Airspace Issue is not relevant to the assessment of the noise impact of the Project or the protection of the environment which are what the Director would be concerned about when deciding whether to grant or refuse an environmental permit in the present case.

130. In any event, even if the PRD Airspace Issue was relevant to the exercise of the Director’s power in granting or refusing an environmental permit, the evidence shows that the Director did obtain, on 12 September 2014, CAD’s confirmation of the validity of the assumptions and airport operational data adopted in the computational model of the aircraft noise impact assessment (see paragraph 54 of the affirmation of Tang Kin Fai filed on 14 March 2016), and consider or have regard to the comments relating to that issue as evidenced by EPD’s internal minutes recommending the approval of the EIA Report (see pages 2020 and 2023-2024 of Bundle BE6).

131. On the materials before me, I do not see that the Director was under a duty to make any further inquiry on the PRD Airspace Issue, or was in breach of any *Tameside* duty as alleged.

ISSUE 7: WHETHER DIRECTOR FAILED TO DISCLOSE MEFEP FOR PUBLIC CONSULTATION IN BREACH OF COMMON LAW DUTY OF FAIRNESS (GROUND 3/AL22)

132. The analysis under Issue 4 above applies equally to this ground of complaint. For the reasons given above, I do not consider that the Director was under a duty to conduct any public consultation in respect of the MEFEP.

OTHER GROUNDS WHICH DO NOT REQUIRE CONSIDERATION

133. In respect of Ground 3/AL21, Mr Kat informs the court, in paragraphs 17 and 18 of his Outline Submissions, that the only remaining argument is a “consequentiality” challenge. Since I have rejected all the challenges under Grounds 1 and 2/AL21, the challenge under Ground 3/AL21 also fails.

134. Ground 4/AL21 has not been dealt with in this judgment because Mr Kat informs the court, in paragraph 16 of his Outline Submissions, that it is not being pursued by Ho.

135. Various other points have been raised by Mr Kat in his Outline Submissions, but not in either the Form 86 or draft Amended Form 86. They are not dealt with in this judgment because I do not consider that it is open to an applicant to expand his/her case in this manner.

136. I believe that I have dealt with all major points properly raised by Mr Kat and Mr Pun on behalf of their respective clients. If I have omitted some minor points which may have been mentioned by them, I do not believe that those points would add anything of substance to their respective cases.

DISPOSITION

137. For the foregoing reasons, the two applications for judicial review are dismissed. For the avoidance of doubt, Ho's applications to amend her Form 86 are also refused.

138. On the question of costs, I make an order that:

- (1) Ho shall pay the respective costs of the Director and AAHK in HCAL 21/2005 to be taxed if not agreed, with certificate for two counsel; and
- (2) Yu Hin Pik shall pay the respective costs of the Director and AAHK in HCAL 22/2005 to be taxed if not agreed, with certificate for two counsel.

139. Ho's own costs in HCAL 21/2005 and Yu Hin Pik's own costs in HCAL 22/2005 are to be taxed in accordance with legal aid regulations.

POSTSCRIPT

140. Mr Shieh commenced his oral submissions by reminding the court of the following observation by Litton PJ in *Lau Kong Yong v Director of Immigration* (1999) 2 HKCFAR 300, at 340E-G:-

“No system of administrative law can operate in the amorphous way seen in this case. Grounds for quashing the exercise of administrative power by the court if well-founded should be capable of being stated clearly and succinctly, in a few numbered paragraphs. I would emphasize the word *few*. Once leave to apply for judicial review is granted, amendment of the grounds should rarely occur. All too often applications are made for amendment after leave to issue proceedings has been granted, as if Order 53 r.3 were simply the portals to a playground of infinite possibilities where the administrators could then be made to leap through more and more hoops of fire. It is up to the judges of the High Court to stop this kind of extravaganza.”

141. This observation is entirely apposite to Ho’s application. Her Form 86, in its un-amended form, runs to 70 pages with 203 paragraphs. They contain a mixture of allegations of fact, quotations from documents, citations from authorities, and disparate factual and legal arguments. The draft amended Form 86 adds another 11 pages of the same type of materials. Many of the matters set out in the Form 86 or draft Amended Form 86 are irrelevant to the real issues in the case. In fairness to Mr Kat, I should mention that the original Form 86 was, it would appear, not drafted by him.

142. Unfortunately, this is not the first time that this court has been presented with exceedingly long and tedious Form 86. Apparently, some practitioners have considered it appropriate to include all sorts of irrelevant facts and details and all manners of legal and factual arguments in the Form 86. Practitioners would be well advised to read carefully the above observation by Litton PJ. What is required, in a proper Form 86, is to

A
B state the grounds of judicial review clearly, succinctly and in a few
C numbered paragraphs. It is hoped that no further reminder is necessary,
D and the court will not be compelled to take actions to enforce compliance
E with these basic requirements of the Form 86 in future.
F

G (Anderson Chow)
H Judge of the Court of First Instance
I High Court

J HCAL 21 of 2015

K Mr Nigel Kat, SC and Mr Ernest Ng, instructed by Yip, Tse & Tang,
L assigned by Director of Legal Aid, for the 1st applicant

M The 2nd applicant acting in person and absent

N Mr Benjamin Yu, SC and Ms Eva Sit, instructed by Department of Justice,
O for the respondent

P Mr Paul Shieh, SC and Mr Jin Pao, instructed by Hogan Lovells, for the
Q interested party

R HCAL 22 of 2015

S Mr Hectar Pun, SC and Ms Isabel Tam, instructed by Rowdget W Young
T & Co, assigned by Director of Legal Aid, for the applicant

U Mr Benjamin Yu, SC and Ms Eva Sit, instructed by Department of Justice,
V for the respondent

Mr Paul Shieh, SC and Mr Jin Pao, instructed by Hogan Lovells, for the
interested party