

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

CIVIL APPEAL NO. 216 OF 2014
(ON APPEAL FROM HCAL NO. 100 OF 2013)

BETWEEN

HO LOY

Applicant

and

DIRECTOR OF ENVIRONMENTAL PROTECTION

1st Respondent

CHIEF EXECUTIVE IN COUNCIL

2nd Respondent

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

Date of Hearing: 23 February 2016

Date of Judgment: 4 March 2016

J U D G M E N T

Hon Lam VP:

1. I agree with the judgment of Kwan JA.

Hon Kwan JA:

Introduction and background

2. This is an appeal against the dismissal by Au J of an application for judicial review on 12 August 2014 concerning the

proposed construction and operation of an artificial bathing beach at Lung Mei, situated within the Plover Cove area in Tai Po, New Territories. The shoreline of Plover Cove is 9 km and the proposed beach is 200 m long, which is 2.2% of Plover Cove. The project is a designated project in Part 1, Schedule 2 of the Environmental Impact Assessment Ordinance, Cap 499 (“the EIAO”) and is therefore subject to its regulatory regime.

3. On 30 November 2005, the project proponent, the Civil Engineering and Development Department (“CEDD”), applied to the Director of Environmental Protection (“the Director”) for an environmental impact assessment study brief (“the SB”). The SB was issued on 12 January 2006 and required, among other things, an ecological impact assessment to be carried out of all areas within 500 m from the boundary of the project site (“the Study Area”). The assessment should be done in accordance with Annexes 8 and 16 of the Technical Memorandum (“the TM”) issued by the Secretary for the Environment under the EIAO.

4. The Director took advice from the Agriculture, Fisheries and Conservation Department (“AFCD”) in accordance with the requirement of §9.1 of the TM. AFCD duly provided technical advice to the Director on the environmental impact assessment report (“the EIA Report”) on 14 August 2007, 10 September 2007 and 18 October 2007.

5. In late 2007, CEDD submitted the EIA Report to the Director for approval. In Table 17 of Appendix G of the EIA Report, it was recorded that for spotted seahorses, although not sighted within Lung Mei, i.e. the project site, two were sighted at location 5 and one at location 7, which are all within the Study Area. Spotted seahorses are classified as “vulnerable” in the Red Data Books of the International

Union for the Conservation of Nature (“the IUCN”) and are deemed to be of significant conservation value under Table 3 of Annex 8 of the TM. Habitats that constitute a breeding ground for any species, and especially a species that is rare, are classified in Table 2 of Annex 8 as having high conservation value.

6. The EIA Report concluded that the project site was of low ecological importance. It was made available for public inspection and comments and submitted to the Advisory Council on the Environment (“ACE”) for consideration.

7. At the meeting of ACE on 14 January 2008, ACE observed “significant discrepancy” in the list of species between those reported in the EIA Report and those found by some members of the public and noted that at least one species sighted by members of the public “might be near threatened and/or of conservation importance”. As members of ACE “remained doubtful of the sufficiency of the ecological data given in the EIA report”, ACE approved the EIA Report subject to conditions. One of the conditions required CEDD to provide additional information on ecological matters and CEDD was provided with a list of species allegedly identified by the public. This targeted specifically the conclusion in the EIA Report that the overall ecological value of Lung Mei was low.

8. After conducting an active ecological search at Lung Mei and three other sites in Plover Cove and Inner Tolo Channel, CEDD submitted additional information in October 2008 (“the Additional Information”), which contained this material statement (“the Statement”):

“Lung Mei did not appear to serve as a critical/unique habitat for any species of conservation importance, or support significant populations of such species.”

9. The active searches did not reveal any spotted seahorses whether in Lung Mei or the five reference sites in nearby waters. Although three fish species of conservation importance (two-spot goby, tropical sand goby and grass puffer) not mentioned in the EIA Report were found to be present at Lung Mei, the Additional Information stated that all three species were very common in the Tolo area. The Additional Information concluded that the “overall habitat quality of Lung Mei” was “relatively low”, and drew the same conclusion as in the EIA Report that the “overall ecological value of Lung Mei was low”.

10. ACE considered the Additional Information on 12 November 2008. By a margin of one casting vote, ACE endorsed the EIA Report with the condition that precautionary measures should be taken to reduce the size of the project.

11. On 17 November 2008, AFCD gave further advice to the Director on the Additional Information and opined that the overall conclusion of the ecological impact assessment remained valid.

12. The Director approved the EIA Report under section 8 of the EIAO on 21 November 2008. There was no legal challenge of the Director’s decision to approve the EIA Report.

13. CEDD applied for an environmental permit (“the EP”). After seeking comments from AFCD, the Director issued the EP on 26 April 2010. Again, there was no legal challenge of the Director’s decision to issue the EP at the time.

14. In the latter part of 2012, discussions were held by CEDD with green groups regarding the project. On 27 October and 2 November 2012, Designing Hong Kong Limited, a member of the Save

Lung Mei Alliance (“the Alliance”), wrote to the Director asking her to exercise her power under section 14(1) of the EIAO to suspend or cancel the EP on the ground that CEDD gave misleading, wrong, incomplete or false information in the EIA Report. The Alliance also wrote to the Chief Executive in Council (“CEIC”) on 19 October 2012 asking him to suspend or cancel the EP under section 14(3) of the EIAO.

15. Under section 14(1), the Director may, with the consent of the Secretary for the Environment, suspend, vary or cancel an environmental permit if he is satisfied that “(a) on the application for the environmental permit the applicant gave – (i) misleading information; (ii) wrong information; (iii) incomplete information; or (iv) false information”.

16. Under section 14(3), the CEIC may suspend, vary or cancel an environmental permit if he is satisfied that “the continuation of the designated project is, or is likely to be more prejudicial to the health and well being of people, flora, fauna or ecosystems than expected at the time of issuing the environmental permit.”

17. During this time, the applicant, Ms Ho Loy, and other persons and organisations also wrote to the Environmental Protection Department (“EPD”) seeking to show that the diversity of marine species of conservation value at Lung Mei was much greater than was stated in the EIA Report.

18. EPD took advice from AFCD and between December 2012 and January 2013, AFCD conducted surveys at Lung Mei and the three other sites that had previously been surveyed in 2008, to obtain updated

ecological information. AFCD compiled a report of the surveys in April 2013 (“the AFCD 2013 Surveys”) with inter alia these key findings:

(1) Out of the five target fish species the green groups reported as having been sighted at Lung Mei beach but were not recorded in the Additional Information in 2008, three were encountered in the intertidal and subtidal surveys conducted by AFCD, being cowfish, dragonet and spotted seahorses.

(2) A total of 27 spotted seahorses were found at all four survey sites, of which the highest number was recorded at Yung Shue O North (12), followed by Ting Kok East (8) and Lai Chi Chong (5), with the lowest number recorded at Lung Mei (2).

19. AFCD’s assessment was that as in April 2013 the ecosystem of Lung Mei beach including the number of species and the overall diversity of species assemblages had basically remained the same since the completion of the study in 2008. Although the presence of cowfish, dragonet and spotted seahorses would add to the diversity of fish fauna at Lung Mei, it would not be so significant as to affect Lung Mei’s overall ecological status.

20. By a letter dated 10 May 2013, the Director informed the applicant and the other persons and organisations that she “is of the view that no case has been made out for the exercise of power under section 14(1) of the [EIAO]”. This is the Director’s decision sought to be challenged on judicial review (“the Director’s Decision”).

21. By a letter in Chinese dated 4 June 2013 (“the CEIC Letter”), the Secretary to the Executive Council replied that the CEIC decided not

to invoke the power under section 14(3) of the EIAO to suspend, vary or cancel the EP because there was no evidence to support such an exercise¹. This is the decision of the CEIC under challenge in the judicial review (“the CEIC’s Decision”).

22. After a contested hearing of the leave application, on 30 October 2013 Au J granted leave to the applicant to apply for judicial review only on the following grounds:

(1) The Director’s Decision is irrational or *Wednesbury* unreasonable, given that the failure to carry out an ecological impact assessment of the Study Area in relation to spotted seahorses renders the Statement an incomplete, misleading or wrong information for the purpose of section 14(1)(a) of the EIAO.

(2) The CEIC’s Decision is illegal and/or irrational.

23. The application for judicial review was heard on 18 February 2014 and on 12 August 2014, Au J handed down his judgment dismissing the application. The applicant appealed against this judgment, contending that the judge was in error in rejecting her grounds.

If the Director’s Decision is irrational

24. Under the ground on which leave to apply for judicial review is granted, it is the applicant’s contention that the Director’s Decision is *Wednesbury* unreasonable or irrational because the Statement amounts to misleading or incomplete information.

¹ The relevant part of the CEIC Letter read: “認為不應就有關計劃行使《環評條例》第14(3)條賦與的權力，因為沒有證據支持這個決定”

25. Mr Cooney, SC²'s arguments for the applicant are as summarised by the judge in §55 of the judgment:

- (1) It is common ground that the SB required an ecological impact assessment to be carried out of the Study Area in accordance with Annexes 8 and 16 of the TM.
- (2) In the surveys carried out by Halcrow [Halcrow China Ltd, the consultant engaged by CEDD] for the EIA Report, although spotted seahorses were *not* sighted within Lung Mei (ie, the project site), they were in fact sighted in the other parts of the Study Area.
- (3) At the same time, Annexes 8 and 16 of the TM effectively provide that an ecological assessment would be needed if the proposed development affects habitats supporting animal species that are, among others, listed in the Red Data Books.
- (4) Given that spotted seahorse is a rare species listed under the Red Data Books, an ecological impact assessment *in relation to spotted seahorses* was therefore mandatorily required (under the TM) to be carried out also over the Study Area. This is particularly so as (Mr Cooney further submits) even the AFCD (as set out in the AFCD 2013 Surveys) was of the view that the entire Plover Cove area could be treated as one habitat for spotted seahorses, particularly given their fertility loyalty.
- (5) However, it is not disputed that no ecological impact assessment was carried out specifically vis-à-vis spotted seahorses in the Study Area.
- (6) In the circumstances, the Statement saying that "*Lung Mei did not appear to serve as a critical/unique habitat for any species of conservation importance, or support significant populations of such species*" must at least be misleading or incomplete, since no ecological impact assessment specifically of spotted seahorse was carried out in the Study Area (as required by the TM and SB) to support that conclusion. This is also so as it is implied (contended Mr Cooney) in the Statement that an ecological impact assessment had been carried out in the Study Area to support it.
- (7) As such, the Director's conclusion that there was no case to show that CEDD gave misleading or incomplete information at the time of the EP is irrational or *Wednesbury* unreasonable."

² Appearing with Mr Hectar Pun, SC, on appeal and below

26. In short, the contention was that the existence of three spotted seahorses sighted in the Study Area, although not within Lung Mei, made it mandatory to carry out an ecological impact assessment specifically in relation to spotted seahorses, and as this specific assessment was not done, the Statement must be misleading or incomplete.

27. Au J rejected this contention with cogent reasons and they have been helpfully summarised by Mr Yu, SC³.

28. Firstly, based on the requirements of the TM, an ecological impact assessment would be required only if the project would affect habitats that support “significant population” of wild fauna listed in the IUCN Red Data Books (Annex 16 to the TM §2.1; Appendix A Note 3 §1). The Director is required to take advice from the Director of Agriculture, Fisheries and Conservation (“DAFC”)⁴ in relation to matters concerning nature conservation and ecological assessment (§9.1 of the TM)⁵.

29. Secondly, whether the Study Area was a habitat supporting “significant population” of spotted seahorse is a matter of professional judgment, on which the Director was bound to take advice from DAFC⁶. See also Annex 16 to the TM §5.3.1, stating that value or professional judgment are involved in the evaluation of the conservation value of a site or species and hence the significance of an impact.

³ Appearing with Ms Eva Sit on appeal and below

⁴ Formerly the Director of Agriculture and Fisheries (“DAF”)

⁵ Judgment, §§60 to 66

⁶ Judgment, §§71 and 72

30. Thirdly, DAFC considered the general ecological impact assessment in the EIA Report and other relevant literature and concluded that Lung Mei was not a critical or unique habitat for spotted seahorse. It is clearly within a reasonable range of expert or professional opinions open to DAFC that the Study Area did not constitute a habitat that supported a significant population of spotted seahorse and would not mandate the carrying out of a further specific ecological impact assessment of spotted seahorse⁷.

31. Fourthly, not only was the view of DAFC a reasonable one that a public authority could take, it was consistent with the undisputed evidence that (1) since as early as October 2007 (the time of the EIA Report), the nearby waters of Lung Mei (Tai Mei Tuk and Yeung Chau) were already habitats of spotted seahorse, and given the location of and the connection with nearby habitats, and the fact that spotted seahorses move freely in water, even if they were found in Lung Mei, that of itself does not show Lung Mei was a unique or critical habitat for spotted seahorse compared to other nearby habitats; and (2) marine habitat fragmentation is not expected as a result of the construction of the beach at Lung Mei, since the project site is within the inner bay of Tolo Harbour and next to Tai Mei Tuk and marine organisms move freely in the sea⁸.

32. Fifthly, the applicant has failed to adduce any evidence to show that the opinion of the DAFC as to habitat was wrong⁹.

33. Ground 1 of the amended notice of appeal is essentially a rehash of the arguments before the judge. It is not readily apparent from what was set out in relation to that ground how and why it is said that the

⁷ Judgment, §§73 to 75

⁸ Judgment, §§74(1) and (2)

⁹ Judgment, §74(3)

judge had erred. The real arguments advanced on appeal would seem to be grounds 1A and 1B.

34. Ground 1A was introduced by way of an amendment to the notice of appeal and sought to raise an argument that DAFC's advice given to the Director in 2007¹⁰ the Study Area did not constitute a habitat that supported a significant population of spotted seahorses and thus an ecological impact assessment for spotted seahorse in the Study Area was unnecessary is irrational because the matters relied on by DAFC are incapable of supporting his advice. Hence, the Director's Decision, which relied on DAFC's advice, is likewise tainted and is irrational.

35. Mr Cooney took issue with these matters relied on by DAFC as summarised in §73 of the judgment:

"73. In forming that view, the DAF had looked at the results of the general ecological impact assessment contained in the EIA Report and other relevant literature, which show that:

- (1) Lung Mei is not a site of special scientific interest or an area of conservation importance (Sham 2nd, paragraph 10);
- (2) Although 3 spotted seahorses were found outside Lung Mei and within the Study Area, a professional judgment must be found, under Note 3 in Appendix A to Annex 16 of the TM, whether they are a sufficiently important species. The AFCD considered that spotted seahorse should be so regarded (Sham 2nd, paragraphs 12-15);
- (3) The AFCD then reviewed the available literature which indicates that spotted seahorse was moderately abundant in Hong Kong, with wide distribution in Indo-Pacific, and is of medium resilience to habitat disturbance or loss (Sham 2nd, paragraphs 16-19);
- (4) The academic opinion was consistent with the information available to the AFCD through the annual

¹⁰ 1st affidavit of Sham Chun Hung ("Sham"), §7; 2nd affidavit of Sham, §§8 to 23; Sham holds the post of Assistant Director (Country and Marine Parks) of AFCD

reef check showing significant sightings of spotted seahorse (Sham 2nd, paragraph 20);

- (5) On the basis of the above, the AFCD concluded that an ecological assessment on spotted seahorse was not necessary, and the Statement that Lung Mei was not a critical or unique habitat for species of conservation importance or support significant populations of such species was correct (Sham 1st, paragraph 21; Sham 2nd, paragraph 21).”

36. Mr Cooney submitted there was no logical connection between the matters summarised by the judge in §73 and the advice of DAFC that the Study Area did not constitute a habitat that supported a significant population of spotted seahorses. It does not follow from §73(1) that Lung Mei is not a site of special scientific interest or an area of conservation importance that it did not constitute a habitat that supported a significant population of spotted seahorses. The matters relied on by DAFC in §73(3) concern Hong Kong as a whole and the Indo-Pacific region and are not an assessment of the habitat at the Study Area. Nor does it follow from the moderate abundance of spotted seahorses outside the Study Area and the species’ medium resilience to habitat disturbance that the population of spotted seahorses in the Study Area is not significant. That the academic opinion was consistent with the information available to AFCD through the annual reef check of spotted seahorse in local waters mentioned in §73(4) is just a circular argument. In short, the matters relied on tell nothing about whether the habitat comprising the Study Area supported a significant population of spotted seahorses. Mr Cooney submitted there was no evidence before DAFC that could inform him of the site-specific significance of the spotted seahorse population in the habitat comprising the Study Area.

37. I reject Mr Cooney’s submissions. As was pointed out to him in argument, what he is attempting to do is to challenge the original

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decisions of the Director in approving the EIA Report and in issuing the EP by way of a back door. The decision the applicant seeks to impugn in this judicial review is the Director's Decision made under section 14(1), and it is for the applicant to show that information given by CEDD, the project proponent, to the Director on the application for the EP was misleading, wrong or incomplete. As submitted by Mr Yu, what Mr Cooney was seeking to challenge was not any information but the professional opinion formed by DAFC on the basis of the information considered as summarised in §73. DAFC was not the project proponent and his advice to the Director cannot properly be the subject of a challenge under section 14(1), quite apart from the fact that there was no attempt to challenge DAFC's advice in Form 86.

38. In giving advice to the Director whether the sighting of three seahorses within the Study Area but outside the project site was evidence that Lung Mei was a habitat supporting significant population of spotted seahorses, DAFC made a professional judgment on the information it had considered. For the reasons explained in detail in Sham's 2nd affidavit, DAFC considered the matters as summarised in §73 relevant to the exercise of his professional judgment. There is nothing to indicate to this court it would be perverse for DAFC to take those matters into consideration. It would be wrong to look for some "logical connection", from a layman's perspective, between the matters considered and the conclusion reached, as Mr Cooney has invited us to do.

39. Whether an ecological impact assessment specifically of spotted seahorses is required and whether sufficient information is available to enable a determination to be made are matters for the public authority, subject to review by the court on *Wednesbury* principles (*R (on the application of Jones) v Mansfield District Council* [2003] 1 P &

CR 31 at 504 at §§7, 49(iv), 52; and on appeal at [2004] 2 P & CR 14 at 233 at §§14, 15, 17). The Director's Decision was based on the professional judgment that was made after taking advice from DAFC, and where the existence or non-existence of a fact is left to the judgment and discretion of a public body, it is the duty of the court to leave that fact to the public body entrusted with the decision-making power, save where it is obvious that the public body, consciously or unconsciously, is acting perversely (*Puhlhofer v Hillingdon London Borough Council* [1996] 1 AC 484 at 518D to E, per Lord Brightman)¹¹. As the Director has taken expert advice from DAFC sensibly and rationally at every stage, there is no room for any doctrine of vicarious unreasonableness in these circumstances (*R v Council of Legal Education, ex parte Eddis and Others* [1995] Admin LR 357 at 380E to H, per Henry LJ).

40. I turn to consider ground 1B of the amended notice of appeal.

41. Mr Cooney pointed to §7 of the AFCD 2013 Surveys, the relevant part of which read as follows:

“Since Ting Kok East and Lung Mei are actually located in the same body of waters within the embayment of Plover Cove, treating the whole Plover Cove as one habitat for the spotted seahorse is considered justified. Ting Kok East, and the waters in its immediate vicinity including Lung Mei, could be a habitat for the spotted seahorse.”

42. He submitted that since it is DAFC's own opinion that Plover Cove as a whole could be treated as one habitat for spotted seahorses, a relevant consideration for DAFC to take into account is whether the population of spotted seahorses in Plover Cove as a whole was significant such that a specific ecological assessment in relation to

¹¹ Judgment, §80 and footnote 26

spotted seahorses would be required under Note 3 in Appendix A to Annex 16 of the TM. As this relevant consideration was not taken into account by DAFC in his advice to the Director in 2007, DAFC's advice must be irrational.

43. This again is a new point not raised in Form 86. In any event it is without merit. The opinion of DAFC in §7 of the AFCD 2013 Surveys was based on field surveys carried out by AFCD between December 2012 and January 2013, and could not feature as a relevant consideration in the earlier periods when DAFC gave advice to the Director in 2007, or with regard to the Additional Information in 2008. Further, as the judge has stated in §79(1), "the mere fact that Plover Cove can be treated as a habitat for spotted seahorses does not naturally show that it is also a habitat that supports a "significant population" of spotted seahorses" for the purpose of Note 3.

44. There is no basis to impugn the judge's holding that it is not irrational or *Wednesbury* unreasonable for the Director to find that the Statement was not misleading or incomplete even though no ecological impact assessment of spotted seahorses was done over the Study Area.

If the CEIC's Decision is illegal

45. As mentioned earlier, the AFCD 2013 Surveys revealed the presence of three of the target fish species in Lung Mei, not found in the surveys in 2007 and 2008. They were two spotted seahorses, one cowfish and eight dragonets. Cowfish and dragonet enjoyed no threatened or statutory protection in Hong Kong.

46. The applicant's contention is as summarised in §87 of the judgment. When the results of the AFCD 2013 Surveys are compared

with the findings of the surveys in 2007 and 2008, it is apparent that there were changes in the fauna in Lung Mei in 2013, in contrast to the time when the EP (which was premised on the results of the EIA Report) was issued in 2010. It must follow as a matter of logic that the project would have a “more prejudicial” effect on the fauna and ecosystems of Lung Mei in 2013, as it would affect more in number and more in species of the animals forming the fauna there than in 2010. As the CEIC had failed to assess whether the continuation of the project is, or is more likely to be more prejudicial to the health and well being of the fauna or ecosystems of Lung Mei in exercising his power under section 14(3), the CEIC’s Decision is illegal.

47. The judge rejected this contention for these principal reasons.

48. Firstly, the words “more prejudicial” in section 14(3) should be construed purposively and in the context of the EIAO. The words do not mean that the powers of the CEIC to suspend, vary or cancel an EP would be triggered whenever there is any increase in the kinds or quantities of species of the fauna or ecosystem as compared to the time when the EP was issued. It is the objective intention of the legislature that the powers under this provision are to be exercised very sparingly in exceptional circumstances and as a last step, to cater for any unexpected significant or dramatic change in environmental impact that has arisen since the approval of the EP. The use of the words “fauna” and “ecosystems”, which are collective terms, requires and entitles the CEIC to look at a host of facts and factors, and to exercise judgment as to degree and extent, to see if the criteria that the relevant fauna or ecosystems are more prejudicially affected are met. On a proper construction, the requirement of “more prejudicial” would only be met

where it is shown that the relevant fauna or ecosystems are seriously or significantly more adversely affected or harmed at the time when the CEIC is asked to exercise his powers under the provision¹².

49. Secondly, applying the provision thus properly construed to the evidence, the judge held that the CEIC had taken into consideration various matters, including the materials presented by the Alliance, the EIA Report, the Additional Information, the EP and the conditions attached thereto, the AFCD 2013 Surveys and various advice given therein. The matters taken into account on the unchallenged evidence have been summarised in §97 of the judgment.

50. On the proper construction of “more prejudicial” in section 14(3), Mr Cooney argued that the judge’s construction of these words as importing an increase in adverse affects that are or are likely to be serious or significant is to put an impermissible gloss on those words and is tantamount to rewriting the provision. I do not agree with his submission.

51. Mr Cooney did not contend that the provision should not be construed purposively and in context. Nor has he disputed that the EIAO was intended to strike a balance between the public need to carry out a designated project and the need to protect the environment in requiring a project proponent to obtain an EP by complying with the comprehensive statutory regime of the environmental impact assessment process. The powers to be exercised by the CEIC under section 14(3) are positioned at the very end of that process, where the project proponent has gone through the various stages and completed the process and the EP has been approved without any or any successful challenge, including a

¹² Judgment, §§89 to 95

further remedial situation in section 14(1) where the Director may suspend, vary or cancel an EP if satisfied that it was granted on wrong, misleading or incomplete information given by the project proponent. Viewed in this context, it can hardly be disputed that the powers of the CEIC in section 14(3) are meant to be exercised as a last resort and only in truly exceptional circumstances. This purposive construction is entirely consistent with the legislative materials considered by the judge¹³, for the permissible purpose of ascertaining the legislative purpose of section 14(3).

52. Mr Cooney contended that whether the CEIC has exercised his powers in accordance with the law should be looked at as a two-stage process. The first stage is to consider whether a designated project is or is more likely to be more prejudicial to health and well being than expected at the time of issuing the environmental permit. If the CEIC is satisfied in the first stage that the project is or is more likely to be more prejudicial, the CEIC is to consider at the second stage whether to exercise the discretion to suspend, vary or cancel the EP.

53. He submitted that the CEIC did not properly engage in the first stage because the CEIC failed to assess whether the continuation of the project is or is more likely to be more prejudicial to the health and well being of the cowfish, dragonets and spotted seahorses now found at Lung Mei, which were not found at the time of the EP. Had the CEIC asked the question what was the expected prejudice to the health and well being of the three species at the time of issuing the EP, the answer would be no prejudice. The CEIC should then have asked the further questions what is or is likely to be the project's prejudice to the health and well

¹³ The Environmental Impact Assessment Bill; the minutes of meeting of the Bills Committee on the Environmental Impact Assessment Bill, §§14 to 15; the proceedings of the Legislative Council on 29 January 1997, p 80

being of the three species in 2013 and whether the prejudice is or is likely to be more than expected at the time of issuing the EP, which was nil. As the CEIC had failed to ask these pertinent questions or do the necessary assessment, the CEIC's Decision is illegal.

54. I reject the above submission, which is just a variant of Mr Cooney's contention before the judge that any change in the kind or quantities of species of the fauna or ecosystem would somehow trigger the operation of section 14(3). This is contrary to the proper construction of the provision as held by the judge. The powers are engaged when the CEIC is satisfied that the continuation of the project is or is likely to result in any serious or significant increase in the adverse effect on the fauna or ecosystem. The CEIC had considered the effect of the continuation of the project on the well being of the spotted seahorses, cowfish and dragonet subsequently found at Lung Mei¹⁴, as rightly found by the judge¹⁵. Taking into account all the matters as summarised in §97 of the judgment, the CEIC concluded that the answer is in the negative and exercised his discretion accordingly. There is no basis in the contention that the CEIC's Decision was not made in accordance with the law. There is no merit in Mr Cooney's contention that the CEIC's assessment of the ecological value of Lung Mei, relying on the professional view of the AFCD, is not a consideration of any prejudice to the ecosystem or fauna that may result from the continuation of the project. That is just not a proper reading of the evidence.

¹⁴ 2nd affidavit of Sham, §§28, 29, 30, 31, 33, 34 and 35; 1st affirmation of Choi Man Yee, §§19, 21 to 24; 2nd affirmation of Choi Man Yee, §§8 to 16

¹⁵ Judgment, §103

If the CEIC's Decision is irrational

55. The applicant contended before the judge that the CEIC's Decision is irrational because before he could come to a view whether the criteria in section 14(3) are met given the recent sighting of two spotted seahorses, one cowfish and eight dragonets at Lung Mei, the CEIC had to call for ecological impact assessments to these three species first. As such assessments had not been done, there is no rational basis for his decision¹⁶.

56. The judge rejected this contention as section 14(3) does not prescribe it is mandatory for the CEIC to rely on any such ecological impact assessment before the CEIC could form a view whether to exercise the powers. It is for the CEIC to exercise a value judgment here and it must be open to the CEIC to look at a host of relevant matters in making his decision. The CEIC had sought the professional view of the AFCD and the latter did not find it necessary to call for further ecological impact assessments¹⁷. The judge is clearly correct on this.

57. On appeal, Mr Cooney contended that the CEIC's Decision is irrational because it was not supported by evidence whether the continuation of the project is or is likely to be prejudicial to the three species at Lung Mei, repeating the submission he advanced earlier that CEIC's assessment of the ecological value of Lung Mei is not a consideration of any prejudice to the ecosystem or fauna that may result from the continuation of the project. I reject this contention for the reason given earlier.

¹⁶ Judgment, §107

¹⁷ Judgment, §§110 to 113

Conclusion

58. I would dismiss the applicant’s appeal with costs to the respondents, there being no dispute that costs should follow the event. I would give a certificate for two counsel to the respondents and order the applicant’s own costs to be taxed in accordance with the Legal Aid Regulations.

Hon Barma JA:

59. I agree with the judgment of Kwan JA.

(M H Lam)
Vice-President

(Susan Kwan)
Justice of Appeal

(Aarif Barma)
Justice of Appeal

Mr Nicholas James Cooney SC and Mr Hectar H Pun SC, instructed by Bird & Bird, assigned by Director of Legal Aid, for the Applicant (Appellant)

Mr Benjamin Yu SC and Ms Eva Y W Sit, instructed by the Department of Justice, for the 1st & 2nd Respondents (1st & 2nd Respondents)

