

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO 2 OF 2015 (CIVIL)
(ON APPEAL FROM CACV NO 176 OF 2013)**

BETWEEN

LEUNG HON WAI (梁翰偉)

Applicant
(Appellant)

and

DIRECTOR OF ENVIRONMENTAL PROTECTION

1st Respondent
(Respondent)

Before: Chief Justice Ma, Mr Justice Ribeiro PJ,
Mr Justice Tang PJ, Mr Justice Fok PJ and
Lord Collins of Mapesbury NPJ

Date of Hearing
and Judgment : 26 November 2015

Date of Reasons
for Judgment : 18 December 2015

REASONS FOR JUDGMENT

Chief Justice Ma:

1. At the conclusion of counsel's submissions, we dismissed the appeal with costs, the reasons to be handed down at a later date. I agree with the reasons for dismissing the appeal contained in the judgment of Mr Justice Tang PJ, and also with the observations of Mr Justice Ribeiro PJ and Lord Collins of Mapesbury NPJ.

2. The issue before this court was the true construction of the Environmental Impact Assessment Ordinance ("the EIAO"),¹ in particular s 5 of the Ordinance.²

3. As has been stated and reiterated on numerous occasions, a statute must be construed with regard to its context and purpose – the contextual and purposive approach. Once this approach is adopted in the present case, as the judgments which follow clearly demonstrate, the answer in the present appeal becomes clear:-

- (1) The purpose of the EIAO is to make provision for the assessment of the environmental impact of certain designated projects or proposals. A clear statement of this purpose is contained in the long title to the Ordinance.
- (2) The particular project or proposal with which the present appeal was concerned, namely an integrated waste management facility,

¹ Cap 499.

² The relevant parts of this provision are set out in para 15 below. The Court of Appeal gave leave to appeal to the Court of Final Appeal on the following point said to be of great general or public importance:-
"Whether on a true and proper construction of the Environmental Impact Assessment Ordinance, Cap 499, the Director of the Environmental Protection can be an 'applicant' applying to herself for approval of an environmental impact assessment report or an 'applicant' applying to herself for an environmental permit in respect of the construction and operation of a designated project?"

was exactly such a designated project under the Ordinance requiring an environmental assessment.

- (3) Under s 5 of the EIAO, a “person who is planning a designated project” must make an application to the Director of Environmental Protection (“the Director”)³ and go through the prescribed process under the Ordinance. This “person” would principally be the proponent of a prescribed project.
- (4) In the context of the EIAO and the Waste Disposal Ordinance (“the WDO”)⁴, the Director can clearly be the proponent of a waste management facility such as the facility in the present case. The more accurate way of putting it is perhaps to say that the Director had a statutory responsibility in such matters. As the judgments of Mr Justice Ribeiro PJ and Mr Justice Tang PJ note, the Director was both the “collection authority” and the “waste disposal authority” under the WDO.
- (5) Accordingly, given this context as well as the purpose of the EIAO, it is clear that the word “person” in s 5 of the Ordinance should be accorded a wide meaning (and this is also its natural meaning) to include government departments such as the Environmental Protection Department (“EPD”).

³ The Respondent in the appeal.

⁴ Cap 354.

- (6) Admittedly, it does mean that where the proponent of a designated project is the Director, she does in a sense make an application to herself under s 5. However, given the principles of natural justice and the in-built divisions within the EPD itself, this point does not by itself provide any support for the Appellant's principal contention in this appeal that the Director must, as a matter of statutory interpretation, be excluded from the application of s 5 of the EIAO. Quite the contrary: if the Appellant were right to exclude the Director from the application of s 5 of the EIAO, it would result in the absurd position that projects proposed by the Director (these projects being otherwise designated ones under the EIAO) would escape the application of that Ordinance. Equally absurd would be the notion that the Director, instead of being the appropriate project proponent of a designated project under EIAO, must instead ask another government department or official to be the proponent of the project.

Mr Justice Ribeiro PJ:

4. I respectfully agree with the Reasons for Judgment provided by Mr Justice Tang PJ as well as the observations of the Chief Justice and Lord Collins of Mapesbury NPJ, and also wish to add a few words of my own.

5. The appellant's argument is that on its proper construction, the Environmental Impact Assessment Ordinance⁵ ("the EIAO") excludes the Director of Environmental Protection ("the Director") from ever being the

⁵ Cap 499.

proponent of a designated project which is required to go through the prescribed Environmental Impact Assessment (“EIA”) process under the Ordinance.

6. Mr Hectar Pun SC acknowledged that he was unable to point to any language in the EIAO which supported that argument. He relied instead on what he submitted was a purposive interpretation, contending that permitting the Director to act as a proponent would lead to the absurd result that she would make all relevant applications under the EIAO to herself.

7. Such alleged absurdity is however purely notional and unsupportable both as a matter of statutory interpretation and on the facts.

8. A “person” planning a “designated project” listed in Schedule 2 of the EIAO is obliged⁶ to go through the prescribed EIA process. As provided in the Interpretation and General Clauses Ordinance,⁷ the word “person” is generally to be construed as including “any public body and any body of persons, corporate or unincorporate”. Since the EIAO binds the Government,⁸ it follows (and Mr Pun accepted) that a department of the Government is a “person” for these purposes and therefore must, if it is planning a designated project, go through the EIA process.

9. Where the designated project involves waste management, the department one would naturally expect to formulate and implement relevant government policy, including policy involving the construction and operation of a municipal waste incinerator, is the Environmental Protection Department (“EPD”). It is hard to envisage any other department that would be as well

⁶ EIAO section 5.

⁷ Cap 1, section 3.

⁸ EIAO section 3(1).

placed to play the role of planner of the designated project and of the applicant submitting a project profile which complies with the technical memorandum as required by EIAO section 5. The Director is, after all, designated as the Waste Disposal Authority under the Waste Disposal Ordinance.⁹

10. The EIAO therefore suggests on its face that the EPD, just as much as any other government department, may appropriately act as the proponent of a designated project and be subject to the EIA process, seeking the Director's eventual approval. It is only if, in playing such role, an inevitable conflict of interest, or the kind of absurdity referred to by the appellant, must arise or does in fact arise, that the Court should either construe the EIAO as excluding the EPD (and the Director as its head) generally or intervene in relation to a particular project where the objections do in fact arise.

11. Numerous features of the EIAO militate against a general exclusion. The statutory scheme is designed to make the EIA process transparent and to provide real opportunities for stakeholders to participate, subject to an appeal and judicial reviewability. The published technical memorandum sets out criteria regarding technical and other content against which the project profile, the study brief, the EIA report and the terms of the environmental permit can objectively be assessed.¹⁰ The Advisory Council is given oversight throughout and the Appeal Board (which must not include public officers¹¹) operates where the applicant or permit holder has grievances against the Director. As was demonstrated in the present case, the transparent standards and process make judicial review an effective check against possible abuse or failure of enforcement on the Director's part.

⁹ Cap 354, section 2.

¹⁰ EIAO section 16.

¹¹ EIAO section 19(5).

12. The evidence establishes that the present EIA process was implemented by two functionally segregated sections of the EPD, scrutinised by the public and in judicial review proceedings. It is clear that the Director did not herself play any role in it. The fact that the complaints as to conflict of interest and apparent bias made by the appellant below are not pursued in this Court represents an implicit acceptance that the statutory process involving the Director as project proponent can occur, and did in this case occur, without giving rise to such objections.

13. There is accordingly no basis for departing from the natural construction of the EIAO enabling the EPD (nominally the Director) to act as project proponent in the EIA process.

Mr Justice Tang PJ:

14. The organisational chart of the Environmental Bureau and Environmental Protection Department (“EPD”), which is not disputed, shows that the Permanent Secretary for the Environment is also the Director of Environmental Protection (“the Director”), and that within the Environmental Protection Department, there are three divisions. We are concerned with only two, each of which is headed by a Deputy Director of Environmental Protection (“DDEP”). One division is called Environmental Assessment Division (“EAD”) which is headed by DDEP(1). The Infrastructure Planning Group (“IPG”) is part of another division and headed by DDEP(2).

15. Under the Environmental Impact Assessment Ordinance (“EIAO”) Cap 499, no designated projects¹² should be carried out without an

¹² s 4(1): “The projects listed in Schedules 2 and 3 are designated projects.”

environmental permit (“EP”)¹³. In order to obtain an EP, a person who is planning a designated project must first apply for an environmental impact assessment study brief to proceed with an environmental study for the project¹⁴ under s 5 which provides:

“(1) A person who is planning a designated project shall apply to the Director —

(a) For an environmental impact assessment study brief ...

(2) The applicant shall —

(a) submit the application in the form approved by the Director;

(b) submit a project profile that complies with the technical memorandum; ...”

16. The application may lead to the Director issuing to the applicant an environmental impact assessment study brief.¹⁵ On the basis of which the applicant should prepare an Environmental Impact Assessment Report (“EIA report”) for the approval of the Director under s 8. Such a report, if approved, would be placed “on the register.”¹⁶ Then, if the applicant wishes to “have constructed, construct or operate a designated project or to decommission one”, he/she should refer to the EIA report on the register¹⁷ and apply to the Director under s 10(1)(a) for an EP.

17. This appeal concerns a designated project namely, the project to construct and operate the Integrated Waste Management Facilities (“IWMF”) Phase I, commonly known as the municipal waste incinerator (“the facilities”), at an artificial island near Shck Kwu Chau (“SKC”). It is common ground that

¹³ s 9.

¹⁴ s 5(1)(b) provides also for a direct application for an EP, but we are not concerned with this possibility and will not deal with it.

¹⁵ s 5(7)(a).

¹⁶ s 8(5).

¹⁷ s 10(1)(b).

an EP under s 10 was required for the facilities. For that purpose, applications were made under s 5 for a study brief, under s 8 for an EIA report and finally for an EP under s 10. The applications were made in the name of the Director because the IPG was the proponent of the facilities. The applications were dealt with in the usual way by the EAD, the Director having delegated to the officers in the EAD the requisite powers under the relevant provisions.¹⁸ The applications resulted in decisions made in the name of the Director to approve the EIA report as well as the issue of the EP. These decisions are the subject of these judicial proceedings. A further decision challenged was the Town Planning Board's decision to submit the draft SKC Outline Zoning Plan No S/I-SKC/1 to the Chief Executive in Council based on these other impugned decisions.

18. At first instance, the applicant relied on eight grounds.¹⁹ Au J rejected all of them. The first five grounds were concerned with alleged deficiencies in the EIA report. These arguments were repeated and rejected unanimously by the Court of Appeal and we are not concerned with them. The 6th ground complained of the breach of natural justice. It was said that since the Director was the applicant for and the grantor of the approval — she was the judge in her own cause, and there was actual or apparent bias. On this ground, the learned judge found on the evidence that the IPG was responsible for the planning of the facilities and the applications, and that these applications were dealt with by the EAD. Au J found as a fact that there was “structural segregation between the EAD and the IPG”.²⁰ That:

¹⁸ Instrument of Delegation (Departmental Standing Circular No 1-EIAO(1)-2007).

¹⁹ The applicant was represented by Mr Valentine Yim and Mr Hectar Pun. Throughout these proceedings, the respondent was represented by Mr Johnny Mok SC and Ms Eva Sit.

²⁰ Au J para 176(3).

“The EP was issued in the name of the Director only because she is the head of the EPD, not because she had played any actual role in the approval of the EIA Report or the decision to issue the EP.”²¹

19. Au J also found, applying well established principles, that having regard to the actual segregation of personnel and duties, there was no actual or apparent bias.²² There was no appeal, and rightly so, from the rejection of this ground. The 7th ground complained of illegality. It was argued that on the proper construction of s 5, “the applicant” under s 5²³ could not include the Director for these reasons, first, for the reasons advanced under the 6th ground. Secondly, because it was absurd. The examples of absurdity given were,²⁴ in the case of the Director rejecting the EIA report under s 8 since it would involve “the Director rejecting a report tendered by herself and to give reasons to herself in so doing.” It was said it would be absurd to think the Director could be aggrieved by her own decision and lodge an appeal.²⁵ The 8th ground concerned the decision of the Town Planning Board which depended on the challenge to the other decisions.

20. The appellant²⁶ appealed to the Court of Appeal on the 7th, the “illegality”, ground. Since Au J had rejected the breach of natural justice and real or apparent bias ground²⁷ which was not challenged on appeal, the Court of Appeal was only concerned with the “absurdity” argument.

²¹ Au J para176(6).

²² Au J para 183.

²³ If the Director could not be the applicant under s 5, it would follow that she could not be the applicant under s 8 nor the “person” under s 10.

²⁴ Au J para 189(2)(a).

²⁵ Under s 17.

²⁶ The applicant was represented by Ms Gladys Li SC, Mr Valentine Yim and Mr Hectar Pun.

²⁷ The 6th ground.

21. The appeal was dismissed by a majority.²⁸ Counsel's detailed submission on "absurdity" can be found at para 80 of the majority's argument. These submissions were repeated before us by Mr Pun SC.²⁹ These arguments were encapsulated by Mr Pun at the outset of his submissions when he invited us to look at the EP and to note the statement on its face that "... (the Director) grants this environmental permit to the Director of Environmental Protection". With respect, once it is accepted, as Mr Pun has rightly accepted, that there was actual separation of function in the EPD, and that there was no breach of natural justice, I respectfully agree with the majority's description of Mr Pun's complaint as being "more or less of a formalistic nature".³⁰ In substance, the applications were made by DDEP(2) to DDEP(1),³¹ each acting under authority duly delegated by the Director.

22. Mr Pun accepted that the facility is a designated project and that its proponent should apply under s 5, and that the Director could not "construct or operate a designated project or decommission a designated project" under s 9 without an EP. However, he submitted the Director could not be the named applicant because it would be absurd for the Director to apply to herself, regardless of the actual functional separation.³²

23. Mr Pun submitted that we should construe "applicant" under s 5 as excluding the Director³³ and this is the correct construction because the legislature could not have intended an absurdity. McWalters JA agreed with Mr Pun although he said he was troubled most by the fact that:

²⁸ Lam VP and Kwan JA

²⁹ With Mr Newman Lam.

³⁰ CA para 117.

³¹ See para 14 above.

³² Nor could she be the applicant under s 8 or s10 for the same reason.

³³ The same argument applies to s 8 and s 10. It is unnecessary to deal with them separately.

“... prior to the enactment of the EIAO the Director was already performing the dual roles of project proponent and regulator in respect of his duties under the Waste Disposal Ordinance.”³⁴

24. McWalters JA was right to be concerned about the Director’s duties under the Waste Disposal Ordinance (“WDO”) Cap 354. Both before and after the enactment of EIAO, the Director was the waste disposal authority under the WDO.³⁵ The facilities which are waste disposal facilities were the responsibilities of the Director under WDO.

25. However, McWalters JA concluded that because the legislative purpose of the EIAO was that particular projects³⁶ should go through an environmental impact assessment process which is presided over and enforced by the Director³⁷ and that in a real sense the Director is the guardian of the environment :

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

26. With respect, I cannot agree. As Lam VP and Kwan JA pointed out in their joint judgment, the approval process is highly transparent and that during the approval process other stakeholders (including members of the public concerned about environmental issues) have full opportunity to comment and state their views. As these and other proceedings have shown there is also the

³⁴ Para 147.

³⁵ The Director is also the collection authority under the WDO in relation to chemical waste and clinical waste and in relation to any other waste, the Director and the Director of Food and Environmental Hygiene are the collection authority.

³⁶ Designated projects.

³⁷ Para 129.

possibility of recourse to the courts by way of judicial review.³⁸ Moreover, as the organisational chart shows so clearly, the functions of EAD and the IPG divisions are clearly separated. Indeed, they are housed in separate premises.

27. With respect, McWalters JA failed to have sufficient regard to the fact that Au J had found that having regard to the actual and effective separation of function in the EPD, there was no real or apparent bias in the application and decision process. The majority in the court of appeal was of the same view.³⁹ Indeed, McWalters JA said⁴⁰ the legislature could have expressly enacted “a scheme of which the Director was regulator and enforcer and also a participant as a project proponent”. No doubt the legislature could have done so. No doubt, any such scheme would have provided for actual separation of function. If one compares what was actually done in the separation of function with what the legislature might have chosen to do, it is clear the actual separation is not deficient in any way. Were it otherwise, relief might have been obtained by judicial review. With respect it begs the question to say that the legislature had implicitly rendered illegitimate a scheme which had actually provided functional separation.

28. McWalters JA said :

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

29. Waste removal facilities were mentioned expressly in Schedule 2 and made designated projects such that applications would have to be made in

³⁸ Para 96.

³⁹ Para 118.

⁴⁰ Para 139.

respect of such facilities under EIAO. The legislature must have been aware of the Director's duties under the WDO. Moreover, as the organisational chart clearly shows the EPD included a division dealing specifically with waste management which was involved with waste management policy, infrastructure, facilities and reductions, for which the legislature had voted the necessary funds. They provide the context in which the EIAO should be construed. They inform the clear separation of function in the EPD. I have no doubt it was clearly envisaged by the legislature that the Director, as waste disposal authority under the WDO and proponent of waste disposal facilities, might apply for an EP under the EIAO.

30. For the above reasons and those given by the Chief Justice, Mr Justice Ribeiro PJ and Lord Collins of Mapesbury NPJ, we dismissed the appeal at the end of the hearing with costs.

Mr Justice Fok PJ:

31. I agree with the judgment of Mr Justice Tang PJ and the additional observations of the Chief Justice, Mr Justice Ribeiro PJ and Lord Collins of Mapesbury NPJ respectively.

Lord Collins of Mapesbury NPJ:

32. I agree with the judgment of Mr Justice Tang PJ and the observations of the Chief Justice and Mr Justice Ribeiro PJ. In my view the appellant is forced into an impossible position by having to argue, as he does, that the word "applicant" in section 5 does not include the Director and so does the word "person" *in so far as it refers to the applicant* (counsel for the appellant's emphasis). The starting point must be the meaning of the words "a person." Of course, exceptionally there may be a departure from the plain

meaning of expressions such as “a person” or “any person”: see for recent decisions in England rejecting such a departure *Yarl’s Wood Immigration Ltd v Bedfordshire Police Authority* [2009] EWCA Civ 1110, [2010] QB 698; and *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23, [2015] 2 WLR 1168. But in the present case there is not only no basis for a rewriting of the Ordinance to achieve the result for which the appellant contends, but it would make a nonsense of the Ordinance as a whole, particularly section 9, which provides that “a person” shall not construct or operate a designated project without an environmental permit. It is simply impossible to interpret the Ordinance as a whole by giving different meanings to the word in what is essentially a single context.

(Geoffrey Ma)
Chief Justice

(RAV Ribeiro)
Permanent Judge

(Robert Tang)
Permanent Judge

(Joseph Fok)
Permanent Judge

(Lord Collins of Mapesbury)
Non-Permanent Judge

Mr Hectar Pun SC and Mr Newman Lam, instructed by Lee Chan Cheng,
assigned by the Director of Legal Aid, for the applicant (appellant)

Mr Johnny Mok SC and Ms Eva Sit, instructed by the Department of Justice, for
the 1st respondent (respondent)

