IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 317 OF 2005

(ON APPEAL FROM HCAL NO. 160 OF 2004)

BETWEEN

LEUNG T C WILLIAM ROY	Applicant
and	
SECRETARY FOR JUSTICE	Respondent

Before: Hon Ma CJHC, Woo VP & Tang JA in Court

Dates of Hearing: 6 & 7 July 2006

Date of Handing Down Judgment: 20 September 2006

J U D G M E N T

Hon Ma CJHC :

1. This appeal raises, among a number of others, two points of some considerable importance : - first, the limits of the court's power to hear cases and if necessary grant appropriate relief when so called academic points are raised; secondly, whether homosexual men have been unjustifiably discriminated against by certain provisions contained in the Crimes Ordinance, Cap.200 relating to buggery. In this latter context, an interesting argument has emerged : - can a piece of legislation be deemed unequal or discriminatory where on their face, the relevant provisions can be seen to apply equally (in the present case, to men and women, homosexuals and heterosexuals alike)?

2. The Applicant in the judicial review proceedings that have led to this appeal is a young man, now 21 years of age, who is a homosexual. At the time the application for judicial review was taken out by him (on 18 December 2004), he was then aged 20 and it is in this context that I deal with the facts of the case. He has been since the age of 10 attracted to members of the same sex. Since the age of 16, he has felt the desire to express himself sexually with other boys. He puts it in the following way in the Notice of Application for Leave to Apply for Judicial Review : -

"The Applicant felt the desire for sex at the age of 16. He was sure that he is mature enough to consent to sexual acts. He has had relationships with male partners over the years. However, he has experienced great difficulties in developing lasting homosexual partnerships because the law prohibits consensual homosexual sex until a man reaches the age of 21, as oppose to 16, which is the case for heterosexual or lesbian relationships."

3. The relevant statutory provisions (all in the Crimes Ordinance) which were targeted by the Applicant in the Form 86A relate to the offences of buggery and gross indecency committed in private when two or more are present. I shall identify these offences presently.

4. The existence of the said statutory offences has placed the Applicant (and I would assume other homosexual men in a similar position) in the following dilemma : -

(1) He has not been able to have any fulfilling relationships with partners for fear of prosecution. When, for example, he and his partners returned home, he feared that security guards or neighbours might report their activities to the police.

(2) He has not even been able to tell his parents about his sexual orientation in case they would worry about the possible legal consequences of his having a homosexual relationship.

(3) As a result, the Applicant has suffered from distress and loneliness.

5. In the present judicial review proceedings, the Applicant challenges the constitutionality of certain provisions of the Crimes Ordinance as being an infringement of his rights to equality and privacy. The relevant articles protecting these fundamental rights are contained in Articles 25 and 39 (bringing into force the provisions of the International Covenant on Civil and Political Rights (" the ICCPR")) of the Basic Law and Articles 1, 14 and 22 of the Hong Kong Bill of Rights, Cap.383 ("the Bill of Rights") (the latter reflecting the equivalent provisions in the ICCPR).

The challenged provisions in the judicial review proceedings

6. Part XII of the Crimes Ordinance deals with sexual and related offences. For example, the offence of rape is covered. The offence of buggery is also dealt with. Sections 118C, 118D and 118F provide as follows : -

"**118C. Homosexual buggery with or by man under 21**

A man who –

(a) commits buggery with a man under the age of 21; or

(b) being under the age of 21 commits buggery with another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

118D. Buggery with girl under 21

A man who commits buggery with a girl under the age of 21 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

118F. Homosexual buggery committed otherwise than in private

(1) A man who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.

(2) An act which would otherwise be treated for the purposes of this section as being done in private shall not be so treated if done –

(a) when more than 2 persons take part or are present; or

(b) in a lavatory or bathhouse to which the public have or are permitted to have access, whether on payment or otherwise.

(3) In this section, 'bathhouse' (浴室) means any premises or part of any premises maintained for the use of persons requiring a sauna, shower-bath, Turkish bath or other type of bath."

7. Sections 118C and 118F(2)(a) were challenged by the Applicant but section 118D is also relevant as will be apparent in the discussion below.

8. Next, I turn to the offence of gross indecency. Here, sections 118H and 118J(2)(a) were challenged by the Applicant : -

"**118H. Gross indecency with or by man under 21**

A man who –

(a) commits an act of gross indecency with a man under the age of 21; or

(b) being under the age of 21 commits an act of gross indecency with another man,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years.

118J. Gross indecency by man with man otherwise than in private

(1) A man who commits an act of gross indecency with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years.

(2) An act which would otherwise be treated for the purposes of this section as being done in private shall not be so treated if done –

(a) when more than 2 persons take part or are present; or

(b) in a lavatory or bathhouse to which the public have or are permitted to have access, whether on payment or otherwise.

(3) In this section, 'bathhouse' (浴室) means any premises or part of any premises maintained for the use of persons requiring a sauna, shower-bath, Turkish bath or other type of bath."

9. As I have mentioned, the Applicant's challenge to these provisions were on the basis that they infringed his right to equality and privacy. Briefly, the challenge was as follows : -

(1) The buggery provisions (sections 118C and 118F(2)(a)) discriminated because
(a) as an act of or akin to sexual intercourse as far as consensual sex was concerned, the minimum age limit for buggery was put at 21 years whereas as far as sexual intercourse between men and women were concerned, the age limit was 16 years of age (section 118C compared with section 124 of the Crimes Ordinance); and
(b) notwithstanding consent or that both parties were 21 years or older, it was an offence for buggery to take place when more than two persons were present whereas there was no such offence for men and women when having sexual intercourse (section 118F(2)(a)).

(2) As for acts for gross indecency (which Hartmann J in the court below called an act of sexual intimacy with or towards another person that felt short of sexual intercourse), while it was an offence for a man to commit an act of gross indecency with another man if either was under the age of 21, the minimum age limit for heterosexual (meaning in this context men and women) or lesbian couples was 16 (section 118F compared with section 122(2), which deals with the offence of indecent assault). Further, even if a man reached the said minimum age of 21 and notwithstanding consent, it was an offence if more than two persons were present whereas no such offence existed for heterosexuals or lesbians (section 118J(2)(a)).

10. The relief sought by the Applicant in the judicial review proceedings were declarations that : -

(1) Sections 118C and 118H were, to the extent that they applied to a man aged 16 or over and under 21, inconsistent with Articles 25 and 39 of the Basic Law and Articles 1, 14 and 22 of the Bill of Rights and therefore unconstitutional; and

(2) Sections 118F(2)(a) and 118J(2)(a) were inconsistent with the said Articles of the Basic Law and the Bill of Rights and therefore also unconstitutional.

11. For reasons that will appear below, we are really in this appeal (as Hartmann J was) only concerned with the constitutionality of section 118C of the Crimes Ordinance.

The proceedings in the court below

12. In a Ruling dated 18 January 2005, Hartmann J granted leave ex parte to the Applicant to apply for judicial review. On 17 June 2005, the Respondent applied to set aside leave but in a judgment handed down on 28 June 2005, this was dismissed.

13. The substantive hearing of the judicial review took place on 21 and 22 July 2005. At the hearing, the Respondent contended first that the court lacked jurisdiction to hear the judicial review or grant the declarations sought. However, the Respondent conceded that if the court did have the necessary jurisdiction, then he would accept that sections 118F(2)(a), 118H and 118J(2)(a) were unconstitutional in the light of the Basic Law and the Bill of Rights. The effect of the concessions was that section 118H would be read down so that references to the age limit of 21 would be read as references to 16. Sections 118F(2)(a) and 118J(2)(a) were accepted to be unsustainable in their entirety.

14. Notwithstanding these concessions, the Respondent nevertheless contended that section 118C did not breach either the Basic Law or the Bill of Rights. The submissions on this point, together with those on the jurisdiction issue, formed the bulk of the arguments before Hartmann J. The Judge agreed with the Applicant on both issues. He held that the court had the necessary jurisdiction to deal with the judicial review and further held that section 118C did breach the Basic Law and Bill of Rights. The following declarations were made : -

"1. Sections 118C and 118H of the Crimes Ordinance, Cap.200, to the extent that they apply to a man aged 16 or over and under 21, are inconsistent with Articles 25 and 39 of the Basic Law and Articles 1, 14 and 22 of the Hong Kong Bill of Rights ('HKBOR') provided in section 8 of the Hong Kong Bill of Rights Ordinance, Cap.383 and are unconstitutional; and

2. Sections 118F(2)(a) and 118J(2)(a) of the Crimes Ordinance, Cap.200 are inconsistent with Articles 25 and 39 of the Basic Law and Articles 1, 14 and 22 of the HKBOR and are unconstitutional."

The appeal

15. The Respondent has appealed to this court seeking to set aside the said declarations only insofar as section 118C of the Crimes Ordinance is concerned. Before us, the Respondent was represented by Mr Gerard McCoy SC, Mr Stephen Wong and Mr Alexander Stock. We have been greatly assisted by their submissions as well as those of Mr Philip Dykes SC and Mr Hectar Pun (for the Applicant) and Mr Clive Grossman SC and Mr Raymond Leung (as the amici curiae).

16. Essentially, the Respondent maintained his contention that the court lacked jurisdiction to deal with the Applicant's challenge to section 118C (though curiously, this objection was not made for the other provisions in the Crimes Ordinance in respect of which declarations were granted by the Judge) but in the event that the court had jurisdiction, then it was submitted that section 118C did not in any event breach the equality or privacy provisions in the Basic Law and the Bill of Rights.

17. These two issues involved important points of principle to which I now must turn.

Issue 1 : Jurisdiction

18. The Respondent's arguments on jurisdiction can be condensed into the following points : -

(1) The application for judicial review, in challenging the constitutionality of statutory provisions, was an academic exercise in that the Applicant neither had been prosecuted for an offence involving section 118C (or any other provision) of the Crimes Ordinance nor had he been subject to any decision by a public body that was judicially reviewable. He therefore lacked the necessary *locus standi* to bring the present proceedings.

(2) In any event, since any judicial review was subject to the time constraints imposed by RHC O.53, r.4, there had been serious and undue delay in bringing the present proceedings. Despite having been invited to ask for an extension of time, the Applicant had declined to do so. This was enough by itself for the court to dismiss the application for judicial review, it was argued.

19. Before dealing with these questions in detail, I should set out the context in which they arise. What is being challenged in these proceedings is the legality of a statutory provision. It is said, quite simply, that the statutory provision in question (section 118C of the Crimes Ordinance) is unconstitutional and of no effect as it breaches certain Articles in the Basic Law and the Bill of Rights.

20. Unlike some other jurisdictions, Hong Kong does not have a constitutional court or some such equivalent which is charged specifically with the responsibility of adjudicating on constitutional challenges. The ordinary courts have to deal with constitutional challenges in the same way as it deals with other types of disputes that come before it. Constitutional challenges therefore have to be fitted into the existing framework as permitted by the procedural rules governing proceedings in Hong Kong (be they civil or criminal). The present case involves civil proceedings although the subject matter is a criminal statute.

21. Where what is sought is a declaration that a statute or statutory provision is unconstitutional, the most suitable proceedings would be judicial review proceedings, which constitute the form of proceedings on the whole most appropriate for public law cases. The procedural conditions imposed in judicial review proceedings such as the need to act without delay and the need for an applicant to obtain leave, afford a measure of protection to public authorities to ensure that matters involving the public at large are not unnecessarily disrupted where the damage to the individual is outweighed by the public interest. As a general rule, where the subject matter of an action involves public law, judicial review proceedings should be the norm. And where a challenge to the constitutionality of legislation is made, one would have thought this to be a quintessential situation for the judicial review procedure to be utilized. *Lee Miu Ling & Anor v Attorney General* [1996] 1 HKC 124 involved a challenge to the constitutionality of the Legislative Council (Electoral Provisions) Ordinance, Cap.381 relating to functional constituencies, by reference to Article 21 of the Bill of Rights (which guaranteed universal and equal suffrage). The proceedings,

however, were commenced by way of originating summons and despite some scepticism as to this procedure by Keith J in the Court of First Instance, they were permitted to go ahead, no doubt in view of the urgency and importance of the matter. Nevertheless, when the matter came to be determined by this court, Litton VP was critical of the procedure that had been adopted. It was his view that the matter ought to have been dealt with in judicial review proceedings and that the applicants in that case ought to have been subjected to the various requirements of O.53 such as the need to demonstrate they had "sufficient interest" for the purposes of O.53, r.3(7) : - at 135. The Vice President put it thus at 135C :

"… if there ever was a matter in the public law domain, it would be a constitutional challenge of this kind."

22. I agree with these views insofar as they represent what should normally be the position but of course in this area as in others, one needs to be flexible because at times, the distinction between public law and private law may not be easy to draw : - see *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48, at 57D-E. As Lord Slynn of Hadley put it at 57E-F : -

"It has to be borne in mind that the overriding question is whether the proceedings constitute an abuse of the process of the court."

It should be noted that section 21K(1) of the High Court Ordinance, Cap.4 and O.53, r.1(1) provide that certain remedies (mandamus, prohibition, certiorari and an injunction restraining a person from acting in an office in which he is not entitled to act) can only be applied for by way of judicial review. On the other hand, an application for a declaration (such as in the present judicial review proceedings) "may" be made by way of judicial review based on a just and convenient test taking into account various stated factors : - section 21K(2) and O.53, r.1(2).

23. I have drawn attention to the procedure to be followed because two matters raised by the Respondent in relation to the applicable procedure in judicial review proceedings fall to be determined under the jurisdiction issue : -

(1) The absence of a judgment, order, decision or other proceeding that was judicially reviewable. The Respondent contended that the whole proceedings were academic in the sense that the Applicant neither had been prosecuted nor had he been the subject of any judgment, order , decision or any other proceeding that could be reviewed. Apart from anything else, this meant that the Applicant was not a person who had "sufficient interest" to bring a challenge to those provisions of the Crimes Ordinance I have earlier identified (see here O.53, r.3(7)).

(2) Even if the Applicant had sufficient standing to bring judicial review proceedings, there was undue delay in the application for leave. The Respondent pointed to the fact that the relevant statutory provisions first came into effect in 1991 and that the Applicant turned 16 in 2000 (nearly six years ago). The three-month period stipulated in O.53, r.4 had therefore long been exceeded and no extension of time was either sought or granted.

I now deal with these two points.

Are the proceedings academic and does the Applicant have "sufficient interest"?

24. In the vast majority of judicial review proceedings, a relevant order, judgment, decision or other proceeding exists which can then be challenged on a number of well-known bases, such as that the relevant order, judgment, decision or other proceeding was made irrationally or was based on a statutory power that was wrongly construed. Occasionally, such challenges are based on the argument that the statutory provision relevant to the order, judgment, decision or other proceeding is unconstitutional. In criminal proceedings, a constitutional objection may be taken at the appropriate time (we are of course not involved in this scenario as no criminal proceedings are in existence).

25. The Respondent contends there is simply no order, judgment, decision or other proceeding affecting the Applicant and that therefore the present judicial review proceedings are impermissible. Mr McCoy points to Form 86A (the requisite form to be used in judicial review proceedings) in which the relevant judgment, order, decision or other proceeding in respect of which relief is sought must be identified. He contends that there is no such event in the present instance. In the Form 86A in the present case, the Applicant has in the relevant box only set out the challenged provisions.

26. The Respondent's submissions here can be analyzed as containing two parts. First, it is in effect being contended that as a matter of form, the challenge to legislation simpliciter without there being any event or proceeding that has directly affected the Applicant is not permitted and that the wording of Form 86A reinforces this. Secondly, it is contended as a matter of substance that the Applicant does not have "sufficient interest" at all in challenging the relevant provisions in the Crimes Ordinance as he is not affected by them, not having for example been prosecuted for any offence under those provisions. The Applicant may or may not in the future be prosecuted but that is a purely hypothetical situation which may never occur and the court ought not grant declarations relating to hypothetical events in the future.

27. Attractive though these submissions are at first glance, I am ultimately not at all persuaded by them. As to the "form" submissions : -

(1) Neither section 21K nor section 53 requires the existence of a "judgment, order, decision or other proceeding" as such, although in the vast majority of cases this will be so. As pointed out above, there are references in section 21K and O.53 to the available forms of relief and in particular as regards declarations, the court is required to look at all the circumstances of the case in order to decide whether it would be just and convenient for a declaration to be made (see section 21K(2)(c); O.53, r.1(2)(c)). This suggests that there is considerable flexibility and that as a matter of form, it is permissible simply to target legislation rather than any particular judgment, order, decision or other proceeding that has directly affected the would be applicant. Nevertheless, in such a situation, the court will more closely look at an applicant's standing and whether or not he does have a sufficient interest to bring judicial review proceedings.

(2) Further, in any event, even if it is a requirement that there be a relevant judgment, order, decision or other proceeding, in the case of challenges to legislation, the

relevant event can be said to be the assent to the statutory provisions in question (the assent was formerly that of the Governor, now the Chief Executive), this coming under the rubric of "other proceeding" : - see *Lee Miu Ling* at 135D-F. This may appear strained, but I would, if necessary, follow the view of Litton VP in that case. In my view, however, this highlights some of the procedural difficulties faced in constitutional challenges to legislation when there is an absence of a procedural regime other than O.53.

28. Before dealing with the "substance" arguments, I wish to address directly the question whether the courts have the jurisdiction to grant relief in cases which involve future events which may or may not occur and which are therefore sometimes said to be hypothetical. In my judgment, the court clearly has jurisdiction but it must be carefully exercised : -

(1) I have already referred to the relevant statutory provisions which indicate considerable flexibility and width in the granting of declarations.

(2) In a number of cases, the courts have stated that notwithstanding that future events or proposed conduct are involved, then in "exceptional cases", the courts would countenance granting appropriate relief : - see *R(Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2002] 1 AC 800, at 851 (paragraph 116) per Lord Hobhouse of Woodborough; *R(Rusbridger and another) v Attorney General* [2004] 1 AC 357, at 366-7 (paragraphs 16 to 19) per Lord Steyn, 370 (paragraph 32) per Lord Hutton. *Airedale N.H.S. Trust v Bland* [1993] AC 789 was just such an exceptional case. There, a patient who had been involved in the Hillsborough football ground tragedy was left with catastrophic and irreversible brain damage (he was diagnosed as being in a persistent vegetative state). With the concurrence of the patient's family, the health authority responsible for the hospital where the patient was being treated sought declarations as to the lawfulness of the hospital in the future discontinuing all life-sustaining treatment and medical support to the patient except to enable him to die in peace. There is some similarity between that case and the present appeal in that the civil courts were being asked to adjudicate on the lawfulness of an act which might otherwise have criminal sanctions and which had not taken place. Notwithstanding that the declarations sought dealt with the legality of future conduct, the House of Lords considered the facts sufficiently exceptional to justify a remedy. As Lord Goff of Chieveley put it at 862H-863A : -

"It would, in my opinion, be a deplorable state of affairs if no authoritative guidance could be given to the medical profession in a case such as the present, so that a doctor would be compelled either to act contrary to the principles of medical ethics established by his professional body or to risk a prosecution for murder."

(3) Regarding challenges to the constitutionality of legislation, in *Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong* [1970] AC 1136, the plaintiffs in that case in effect challenged the legality of certain legislation (there regarding the extension of certain provisions of the United Kingdom Copyright Act 1956 to Hong Kong) that was proposed to be passed in Hong Kong. The plaintiffs sought a declaration that it would be unlawful for the Legislative Council to pass the bill into legislation and also an injunction to restrain the Council from presenting the bill to the

Governor. The Attorney General applied to strike out the action (it was commenced by originating summons) on the basis that the court had no jurisdiction to grant the relief sought and that no reasonable cause of action existed. The Judicial Committee of the Privy Council held that although the plaintiffs had sought a declaration on hypothetical and future matters, the court's jurisdiction was not to be excluded as the plaintiffs' rights were seriously affected : - see 1157H-1158C. In a sense of course, the questions raised by the plaintiffs were abstract ones but as Lord Diplock said in the majority judgment at 1158B-C that in the exercise of its discretion in the circumstances I have described : -

"the defendants [that is the Government] would have to show that the questions were purely abstract questions the answers to which were incapable of affecting any existing or future legal rights of the plaintiffs."

(4) It follows from the above that notwithstanding the absence of a relevant decision, the court may in exceptional cases deal with the matter : - see for example *R v Secretary of State for Employment Ex parte Equal Opportunities Commission and Another* [1995] AC 1, at 26G-27H (a challenge to legislation on the basis it contravened European Community law) referring to the *Factortame* cases (see 26H-27A).

(5) It is of course up to the court on a case by case basis to determine whether sufficiently exceptional circumstances exist to enable it to exercise the discretion to hear cases notwithstanding that future conduct or a hypothetical situation is involved. It serves no purpose to try to enumerate exhaustively these situations. I have already given some examples of this. Further examples include situations where it would be undesirable or prejudicial to force interested parties to adopt a wait and see attitude (that is, to force persons to wait until an event occurs) before dealing with a matter : - see *Ealing London Borough Council v Race Relations Board* [1972] AC 342, at 347 (implementation of a housing scheme being subject to potential action by the Race Relations Board); *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (declaration sought to prevent doctors from giving contraceptive advice to girls under the age of 16 without the parent's consent); *Rediffusion (Hong Kong) Ltd*.

(6) In my judgment, another area in which the court may be more inclined to engage itself in determining issues is where constitutional challenges are made to legislation. Here, the courts in Hong Kong are duty bound to enforce and interpret the Basic Law so that if any legislation infringes the Basic Law (or the Bill of Rights), that law must be held invalid : - see *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4, at 25G-J. This is all the more so where fundamental rights are involved and even more acute if a risk exists of a wrong prosecution.

(7) The reason why there is a stress on the need to show exceptional circumstances in such cases is simply that on the whole, the courts perform the function of adjudicating on real disputes and controversies and not fictitious ones. One of the recognized dangers of dealing with hypothetical or academic cases is that the court may be asked to decide important principles without the benefit of a full set of facts. There is also to be considered a practical factor : - the administration of justice would hardly be served if the courts were regularly to entertain cases which were not real but only hypothetical.

(8) Ultimately, I am persuaded that where academic or hypothetical issues are involved, the question is not really one of jurisdiction but of discretion. I am in this context grateful for the analysis contained in *Zamir & Woolf : The Declaratory Judgment* (3rd ed.) at paragraph 4.032. The obiter passage in the judgment of this court in *Chit Fai Motors Co Ltd v Commissioner for Transport* [2004] 1 HKC 465, at 472 (paragraph 20(1)) will have to be modified accordingly. There, the court had referred to the matter as a question of jurisdiction. It is probably better to refer to it simply as a matter of discretion.

29. I now turn to the "substance" issue, which is really the contention that the Applicant does not have sufficient standing to challenge the relevant provisions of the Crimes Ordinance. For the following reasons, I am likewise not persuaded by the objections raised here by the Respondent : -

(1) In many ways, this issue is encapsulated in the point dealt with above regarding the appropriateness of declaratory relief where academic or hypothetical questions are involved : - see paragraph 28 above.

(2) Notwithstanding the fact that a prosecution is neither in existence nor in contemplation and there is no relevant decision which directly affects the Applicant, yet it is clear on the facts that he and many others like him have been seriously affected by the existence of the legislation under challenge. The facts outlined in paragraphs 2 and 4 above, uncontradicted by the Respondent, amply demonstrate this. It is fair to say that the Respondent has been living under a considerable cloud. The effect of the Respondent's submissions is really that the constitutionality of the affected provisions can only be tested if the Applicant were to go ahead with those activities criminalized by the provisions in question and be prosecuted for them. In other words, access to justice in this case could only be gained by the Applicant breaking what is according to the statutory provisions in question, the law. In my view, this is a powerful factor in favour of the court dealing with the matter now and I agree with the approach of Hartmann J in this respect. The Judge makes reference to the following passage from *De Smith, Woolf & Jowell : Judicial Review of Administrative Action* (5th ed.) at paragraph 18-002 where the authors say this : -

"However, as will be seen, it [a declaration] is increasingly being used to pronounce upon the legality of a future situation and in that way the occurrence of illegal action is avoided."

These sentiments are also reflected in the opinion of Mr Advocate General Jacobs in *Union de Pequenos Agricultores v Council of the European Union (supported by Commission of the European Communities)* [2003] QB 893, at 907 (paragraph 43) where he said : -

"The fact that an individual affected by a Community measure might, in some instances, be able to bring the validity of a Community measure before the national courts by violating the rules laid down by the measures and rely on the invalidity of those rules as a defence in criminal or civil proceedings directed against him does not offer the individual an adequate means of judicial protection. Individuals clearly cannot be required to breach the law in order to gain access to justice."

(3) I have already mentioned the vigilance required on the part of the courts to examine closely the circumstances whenever relief is sought in relation to a hypothetical or academic situation (that is, a situation which an applicant has not been subject to any judgment, order, decision or other proceeding directed at him). This is the requirement of having to show a sufficient interest. In *Lee Miu Ling* (see paragraph 21 above), Litton VP at 135F said this regarding the requirement in O.53, r.3(7) : -

"These words have been construed liberally by the courts, but nevertheless there are limits."

In the present case, however, the Applicant is hardly a busybody or speculator with an insufficient interest. His life has been seriously affected by the existence of the legislation in question. And, for fear it may be lost sight of, the present case also involves the expression of love and intimacy by homosexual men towards one another. I associate myself with the words of Sachs J in *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and Others* (1998) 6 BHRC 127 at 163 (paragraph 107) (Constitutional Court, South Africa) : -

"Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution of the Republic of South Africa (the constitution)."

(4) In *Sutherland v United Kingdom*, Application No.25186 of 1994, the applicant in that case sought to challenge certain legislation in the United Kingdom which criminalized buggery and acts of gross indecency between men unless they had attained the age of 21 while, as far as women were concerned, the relevant age was 16. The challenge was made in reliance on Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), these being the equality and privacy provisions similar to Articles 1, 14 and 22 of the Bill of Rights. One can therefore instantly see a parallel with the present case. The European Commission of Human Rights said this at paragraph 36 : -

"the Commission considers that the maintenance in force of the impugned legislation constituted an interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention. Even though the applicant has not in the event been prosecuted or threatened with prosecution, the very existence of the legislation directly affected his private life: either he respected the law and refrained from engaging in any prohibited sexual acts prior to the age of 18 or he committed such acts and thereby became liable to criminal prosecution."

(5) In my judgment, the question before us in the present case affects the dignity of a section of society in a significant way and as such provides a member of that section, the Applicant, with a sufficient interest.

30. Much of what has been dealt with in the previous paragraph supports a conclusion that exceptional circumstances exist in the present case to enable (indeed compel) the court to take the view (as Hartmann J did) that there was sufficient justification to entertain the present application for judicial review even though it may be said to involve a hypothetical or academic situation. Apart from the matters already identified above, the following additional features in the present case also support this conclusion : -

(1) The legislation under scrutiny affects not just the Applicant but many persons in the same position as him.

(2) The questions raised in the appeal regarding the constitutionality of the laws affecting homosexuals are of significant public interest.

(3) The resolution of these questions involve pure points of law, unencumbered with the need to make findings of fact.

(4) Where the constitutionality of laws (all the more so if they are criminal laws) is involved, the court should be more eager to deal with the matter. Put bluntly, if a law is unconstitutional, the sooner this is discovered, the better.

31. The Respondent warned of the dangers of assuming jurisdiction in the present case in that the floodgates would be opened to challenges of all sorts in hypothetical or academic situations. The particular situation highlighted by the Deputy Director of Public Prosecutions in an affidavit before the court was that the Applicant had not been charged with any offence and was not affected by any executive decision. As he states in his affidavit : -

"The Respondent is concerned that granting leave in the present application for judicial review will irreversibly open the floodgates for persons to allege the statutory offences are somehow unconstitutional when there is no prosecution of that person under the legislation."

32. In my judgment, this fear is exaggerated. The applicable principles have already been dealt with above. In summary, there is no question of the court assuming jurisdiction in any case involving a hypothetical or academic situation unless exceptional circumstances exist and the would be applicant has sufficient interest to bring proceedings. This, I believe, provides sufficient protection from any unmeritorious applications.

33. I now deal with the issue of delay.

Delay

34. I start with the relevant statutory provisions. Sections 21K(6) and (7) of the High Court Ordinance state : -

"(6) Where the Court of First Instance considers that there has been undue delay in making an application for judicial review, the Court may refuse to grant -

(a) leave for the making of the application; or

(b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made."

RHC O.53, r.4(1) further provides : -

4. (1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

35. The combination of these provisions means in effect that applications for judicial review must generally be commenced within three months "when grounds for the application first arose" unless good reason for extension appears. As mentioned above, the Respondent's arguments were quite straightforward : - the relevant legislation was passed in 1991, the Applicant turned 16 in 2000, the application for leave to apply for judicial review in the present case was commenced only in December 2004 and there has been no application for an extension of time. For his part, the Applicant's argument was equally simple : - since the main issue in the judicial review proceedings was the constitutionality of legislation and as the existence of legislation that the Applicant contended was unconstitutional was a continuing one, there was no applicable time limit.

36. The existence of a three month time limit regarding challenges to the constitutionality of legislation may seem at first sight to be somewhat odd in that it is difficult to see how the continuation of an unconstitutional piece of legislation can ever be said to be conducive to "good administration" (the term used in section 21K(6)), but this is in my view an inevitable consequence of procedurally confining such challenges to the judicial review mechanism of O.53. As stated above (see paragraphs 20 to 22), it appears that this procedure is the most appropriate for challenges to the legality of legislation as far as civil proceedings are concerned. Attractive though the Applicant's arguments are superficially, I am of the view that the time limit imposed by O.53, r.4(1) must equally be applicable to challenges such as that in the present case. As a matter of principle, any challenges involving the legality of legislation ought to be brought promptly but here, it has to be said that the relevant starting time may not necessarily be the date of the assent to the statute at all. For example, in the present case, at the time the relevant statutory provisions came into force, the Applicant was not even 16 years of age. It could not be said that time should have started to run from the date of the Governor's assent to the 1991 legislation. Further, if a person was tried on a criminal charge based on a statute that was said to be unconstitutional, any challenge to the legality of the statute would inevitable be made (and allowed to be made) well after the date of the assent.

37. The Judge below agreed with the Applicant's submissions that as the unconstitutionality of the laws in question was a continuing one, so any delay was not significant.

38. In my judgment, the three month period imposed by O.53, r.4(1) applies to the Applicant as it does to any other applicant in judicial review proceedings. Although the asserted breach of his rights can be said to be a continuing one, the requirement in O.53, r.4(1) is that the applicant is made "promptly" and in any event within three months of the date "when grounds for the application first arose". According to the factual background contained in the Notice of Application in the present proceedings, the Applicant felt the desire for sex when he reached the age of 16 (in 2000). From the point of view of O.53, r.4(1), the three month period therefore started to run from then and there has accordingly been undue delay.

39. In spite of this, there are, however, in my view, compelling grounds for the court to allow the present judicial review proceedings to proceed (in other words for the court to extend the period within which the application can be made) : -

(1) When the constitutionality or legality of a statute is involved, providing that the point is an arguable one and the applicant has a sufficient interest, the time factor, while it is relevant, is nevertheless perhaps not as compelling a consideration as in other situations.

(2) There are two reasons for this. First, if a statute or statutory provision is indeed unconstitutional, the court should take the first available opportunity to grant the appropriate relief (providing of course an applicant has sufficient standing) and be hesitant in taking too strict an approach on time. It is important to bear in mind that where the constitutionality of a statute is being questioned on the basis that fundamental human rights have been breached, the public interest is very much engaged. Secondly, the time factor is not of great significance when one considers that the constitutional challenge to the legislation under scrutiny may be brought at any time whether now or in the future by someone who has or will turn 16 or who may in the future be prosecuted for one of the relevant offences.

(3) The subject matter of the present judicial review proceedings is one of considerable public interest and importance, as I have already remarked. As Hartmann J put it in his judgment at paragraph 88 : -

"88. What must be remembered is that, even if there is a lack of promptness, the court possesses a discretion to condone it. In exercising that discretion, one of the matters to be taken into account will be the general importance of the matter raised. If the matter, as in the present case, goes to the fundamental human rights of a class of persons, that, it seems to me, in the interests of public policy, must be material : see, for example, *R. v. North West Leicestershire District Council, ex parte Moses* [2000] ENV LR 443, at 452."

(4) The Respondent does not point to any particular prejudice whether to good administration or otherwise caused by the delay on the part of the Applicant. Indeed there is none.

(5) Finally, I would point out that notwithstanding the fact that the delay factor is one that went to each of the provisions originally challenged in the application for judicial review (see paragraphs 6 to11 above), the Notice of Appeal only seeks to challenge the Judge's declaration regarding section 118C of the Crimes Ordinance. The other declarations are to be left intact. Though a relatively minor point, it reinforces the view that the time factor is not perhaps such an important one in the present context.

(6) I acknowledge of course the fact that the Applicant has not applied for an extension of time as such. However, there is perhaps little doubt that if such were necessary, an application was implicitly made.

40. I now turn to the second major issue.

Issue 2 : ***The constitutionality of section 118C of the Crimes Ordinance***

41. The Applicant's contention, accepted by Hartmann J, was that section 118C of the Crimes Ordinance infringed his rights to privacy and equality contained in Articles 25 and 39 of the Basic Law and Articles 1, 14 and 22 of the Bill of Rights.

42. We are in these proceedings not so much concerned with the right to privacy as that of equality. Of course, homosexual acts committed in private between consenting men are an aspect of privacy so that, for example, the existence of legislation prohibiting such acts may constitute an infringement of the right to privacy : - see *Norris v Ireland* (1988) 13 EHRR 186. However, since 1991, homosexual acts in the form of buggery have been legalized in Hong Kong between consenting adults. The particular issue that arises for determination in these proceedings is the age limit. Section 118C places the limit at 21 years of age whereas, as pointed out above (see paragraph 9(1)), the age of consent for sexual intercourse between men and women is 16. The Applicant argues this is discriminatory and is unequal (hence the infringement of the right to equality).

43. As with most inquiries into whether a piece of legislation is unconstitutional, two stages should be analysed as a matter of legal approach : -

(1) First, has a right protected by the Basic Law or the Bill of Rights (the ICCPR) been infringed?

(2) Secondly, if so, can such infringement be justified?

An infringement that cannot be justified will mean that the relevant piece of legislation will be held to be unconstitutional and of no effect.

44. As a matter of the burden of proof, it is for the Applicant to make good the first stage inquiry, viz, whether the Basic Law or the Bill of Rights has been breached. If this cannot be shown, that is the end of the matter. But if an infringement is proved, then the second stage comes into play and it is for the Respondent (usually the Government or one of its arms) to demonstrate that the breach is justified. It is at the second stage that the court examines whether the constitutional infringement can be legally justified by the application of the proportionality test. Any restriction on a constitutional right can only be justified if (a) it is rationally connected to a legitimate

purpose and (b) the means used to restrict that right must be no more than is necessary to accomplish the legitimate purpose in question. This is sometime known as the components of the proportionality test : see *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229, at 253-4 (paragraphs 36-37).

Stage 1 : Has the right to equality been infringed?

45. The Applicant's case was simply put : while heterosexuals (that is, men and women) can engage in sexual intercourse at 16 years of age (the age of consent for a girl being that age : - section 124 of the Crimes Ordinance), the age of consent for buggery is 21 (section 118C). It followed there was unequal treatment.

46. The Respondent's response had two facets : -

(1) Buggery was not to be equated with sexual intercourse between a man and a woman : they were, quite simply, different acts.

(2) In any event, there was no inequality : the minimum age restrictions applied equally to both men and women (see sections 118C and 118D). In other words, the legislative scheme here was non gender specific.

I should just note here that the Respondent accepted that homosexuality was a status for the purpose of Articles 1 and 22 of the Bill of Rights.

47. As far as the first facet is concerned, for the following reasons, I agree with Hartmann J's conclusion that buggery and sexual intercourse between a man and a woman are to be regarded as being similar : -

(1) Sexual intercourse between men and women is not just for the purposes of procreation. It also constitutes an expression of love, intimacy and constituting perhaps the main form of sexual gratification. For homosexual men, buggery fits within these definitions. At one stage, societal values dictated that buggery was some form of unnatural act, somehow to be condemned and certainly not condoned. These values have changed in Hong Kong and perhaps one needs to look no further than the 1991 amendments that led to the legalisation of buggery to confirm this.

(2) The courts have consistently treated buggery as a form of sexual intercourse and have certainly treated the two acts as being comparable when examining the constitutionality of legislation dealing with buggery. The cases I now deal with provide some examples of this.

(3) I have already referred to the case of *Sutherland v the United Kingdom* (see paragraph 29(4) above) and to the parallels one can draw between that case and the present. In arriving at its conclusions that the relevant legislation (also about the minimum age requirement of sexual activities between men) was discriminatory, the European Commission of Human Rights equated sexual relations between homosexuals (buggery) with such relations between heterosexuals (sexual intercourse between a man and a woman). Before the matter could be heard by the European Court of Human Rights, however, the United Kingdom amended its legislation so that the age of consent for homosexual acts was reduced to 16 (in line with heterosexual

acts). The case was accordingly struck out : - see *Sutherland v the United Kingdom*, Application No. 25186 of 1994) dated 27 March 2001.

(4) This question was eventually determined by the European Court of Human Rights in *L v Austria* (2003) 13 BHRC 594. That case concerned Article 209 of the Austrian Criminal Code which criminalized the homosexual acts of adult men with consenting boys aged between 14 and 18. The provisions expressly referred to acts of buggery. To be contrasted with this provision was the fact that heterosexual or lesbian acts between adults and persons over the age of 14 were not punishable. In determining that the Austrian legislation had infringed Articles 8 and 14 of the European Convention, the court equated the sexual acts between men with the sexual acts between men and women : - at 603 (paragraph 49). At paragraph 50, the court referred to the ages of consent for "heterosexual, lesbian and homosexual relations". The case of *Sutherland* was expressly referred to.

(5) Many cases have treated buggery as a form of sexual intercourse, among them the decision of this court in *R v Chan Chi Wa* [1997] 2 HKC 549, at 551E ("anal sexual intercourse"), the decision of the English Court of Appeal in *R v Kumar* [2005] 1 Cr App R 34 566, at 569 (paragraph 11) ("intercourse per anum by a man with another man or woman of whatever age") and that of the South African Constitutional Court in *NCGLE v Minister of Justice* (see paragraph 29(3) above) at 141a ("sexual intercourse per anum").

(6) To be fair, I should point out that Mr McCoy was not really pushing with any great vigour the point that somehow buggery was to be treated as a totally different act to that of sexual intercourse between a man and a woman.

48. He did, however, submit that there was no inequality in that the restriction on buggery applied to both men and women (the second facet (see paragraph 46(2) above)). This was the question I had earlier identified as an interesting aspect of the matter before us : - see paragraph 1 above. The point can be disposed of relatively quickly. In my judgment, the answer lies in what Hartmann J held, namely that "for gay couples the only form of sexual intercourse available to them is anal intercourse." For heterosexuals, the common form of sexual intercourse open to them is vaginal intercourse. This is obviously unavailable as between men. It is clear then that section 118C of the Crimes Ordinance significantly affects homosexual men in an adverse way compared with heterosexuals. The impact on the former group is significantly greater than on the latter. I agree with the following passage from the judgment below : -

"Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as 'disguised discrimination'. It is, I think, an apt description. It is disguised discrimination founded on a single base : sexual orientation."

49. For the above reasons, I am of the view that the existence of section 118C does infringe the rights to privacy and equality contained in those articles of the Basic Law and the Bill of Rights earlier identified. But can the infringement be justified?

Stage 2 : Can the infringement be justified?

50. The proportionality test (see paragraph 44 above) has as a starting point the inquiry as to the purpose of the legislation in question. It must be shown that the purpose is a legitimate one for legislation to pursue and that the legislation is rationally connected to it. If this can be shown, the final hurdle is to demonstrate that the means used in the legislation to achieve the legitimate purpose is no more than is necessary to accomplish it. A colourful way of describing this latter aspect is that it must be shown that a sledgehammer has not been used to crack a nut.

51. Adopting this approach, I reach the conclusion that the Respondent has not sufficiently demonstrated any justification for the infringement of the Applicant's rights : -

(1) The purpose of the legislation can be said to be the protection of the young from sexual activities which are, for want of a better term, for more mature persons. I can well see the force of the argument that it is for the legislature, rather than the court, properly to determine the relevant age limits for sexual activities. The legislature is obviously better equipped to gauge public opinion and to assess the relevant health or other considerations. This was precisely the view taken by the European Court of Human Rights in *Dudgeon v United Kingdom* (1981) 4 EHRR 149 where the court had to examine the legislation in Northern Ireland in relation to buggery. The court held that while a total criminalization of buggery was unconstitutional, it was nevertheless permissible for countries to fix the necessary age limits. The court recognized that "one of the purposes of the legislation is to afford safeguards for vulnerable members of society, such as the young, against the consequences of homosexual practices" : - at 163 (paragraph 47). I shall say something further below about the concept of 'margin of appreciation' afforded to the legislature by the court.

(2) The focus therefore shifts to the age limit of 21 that the legislature has imposed in our legislation. For my part, I fail to see on any basis the justification of this age limit. No evidence has been placed before us to explain why the minimum age requirement for buggery is 21 whereas as far as sexual intercourse between a man and a woman is concerned, the age of consent is only 16. There is, for example, no medical reason for this and none was suggested in the course of argument.

(3) We were shown the relevant extracts from Hansard recording the debates in the Legislative Council regarding the 1991 amendments. It is there recorded that the legislative provisions closely followed the recommendations of the 1983 Law Reform Commission Report on Laws Governing Homosexual Conduct : - see the speech of the Secretary for Security on 17 April 1991 when moving the Second Reading of the Crimes (Amendment) Bill 1991. In the Law Reform Commission Report, the age limit of 21 was recommended on the basis that it was the age of majority in Hong Kong and that it would allow for more mature consideration before this form of sexual activity and propensity were embarked on. It was thought that there was a need to tread carefully at that stage. It is also worth noting that the Administration took the view in 1991 that "homosexual and heterosexual conduct should not always be equated" : - see the speech of Mrs Selina Chow on the 10 July 1991 on the 1991 Bill.

(4) In my judgment, these reasons (if they were the operative ones) cannot be sustained. First, the age of majority in Hong Kong became 18 when in 1990, section 2 of the Age of Majority (Related Provisions) Ordinance, Cap.410 was passed. Voting rights are attained at 18 years of age as well : - see the Legislative Council Ordinance, Cap.542. Yet when the 1991 amendments took place, the majority age remained at 21. Secondly, it is difficult to see just what was the justification to treat homosexuals differently to heterosexuals. If, as was possible, the Administration took the view that homosexual and heterosexual activities were to be regarded differently, this constituted discrimination for the reasons already discussed above. The Law Reform Commission Report also seemed to distinguish between the two types of behaviour but without any cogent reasoning either : - see, for example, paragraph 11.20 of the Report. On this aspect, the Respondent has, with respect rightly, not sought to make any distinction between homosexual and heterosexual behaviour. The concessions made by the Respondent (see paragraph 13 above) confirm this.

(5) In the Legislative Council debates and in the said Law Reform Commission Report, there are references to the need to curb blackmail as being some form of justification for the different age limits. With respect, this is difficult to see. No figures or any other evidence were produced to support this assumption. In any event, it is difficult just how the lowering of the age of consent for buggery to 16 would give rise to a greater risk of blackmail than in the case sexual intercourse between men and women.

(6) In my view, the Respondent has not discharged the burden of justifying the infringement of the Applicant's fundamental rights. I cannot see any justification for either the age limit of 21 or, in particular, for the different treatment of male homosexuals compared with heterosexuals.

52. I cannot leave this aspect of the case without dealing with one of the main arguments put forward by the Respondent : this was the concept of the margin of appreciation that should be accorded by the courts to the legislature whenever legislation is being challenged as being unconstitutional. This term encapsulates the recognition by the court that the legislature is in a better position to assess the needs of society whenever it passes legislation. It is not for the courts to take over this role; indeed the role of the court is to defer to the legislature in matters of policy. In *Dudgeon*, the European Court of Human Rights said this at paragraph 52 : -

"In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them. However, their decision remains subject to review by the Court."

In particular, see also the decision of this topic in the judgment of the Chief Justice and Ribeiro PJ in *Lau Cheong & Another v HKSAR* (2002) 5 HKCFAR 415, at 447-449 (paragraphs 100-104).

53. There are, however, limits to the margin of appreciation that can be accorded to the legislature. Where there is an apparent breach of rights based on race, sex or sexual orientation, the court will scrutinize with intensity "the reasons said to constitute justification" : - see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, at 568

(paragraph 19) per Lord Nicholls of Birkenhead. Where the court does not see any justification for the alleged infringement of fundamental rights, it would be its duty to strike down unconstitutional laws, for while there must be deference to the legislature as it represents the views of the majority in a society, the court must also be acutely aware of its role which is to protect minorities from the excesses of the majority. In short, the court's duty is to apply the law; in constitutional matters, it must apply the letter and spirit of the Basic Law and the Bill of Rights. With respect, I associate myself with the words of Lord Bingham of Cornhill in *A v Secretary of State for the Home Department* [2005] 2 AC 68, at 110 (paragraph 42) : -

"It follows from this analysis that the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic."

54. I also stress the need for the court to be provided with sufficient materials to understand just what might be the justification for any infringement of fundamental rights. In *The Queen v Sin Yau-ming* [1992] 1 HKCLR, Silke VP said at 145 (line 42) : -

"The evidence of the Crown needs to be cogent and persuasive."

55. In the present case, I have not been persuaded there is any justification for the infringement of the Applicant's rights.

Conclusion

56. For the above reasons, I would agree with the Judge's conclusion that section 118C is unconstitutional and breaches the Basic Law and the Bill of Rights. For my part, I would dismiss the appeal with an order nisi as to costs in favour of the Applicant.

57. Finally, I have not forgotten the Respondent's argument that should section 118C be declared unconstitutional and of no effect, this would leave section 118D and it is said that the continued existence of that provision would constitute an inequality in that buggery would remain unlawful as far as a man and a girl under the age of 21 were concerned. Be that as it may, whatever the constitutionality of section 118D itself (which was not the subject matter of the present proceedings), this does not justify in any way the continued existence of section 118C in its present form.

Hon Woo VP :

58. I agree.

Hon Tang JA :

59. I agree.

Hon Ma CJHC :

60. Accordingly, for the above reasons, the appeal is dismissed and there will be an order nisi that the Respondent do pay the costs to the Applicant, such costs to be taxed if not agreed.

(Geoffrey Ma)	(K H Woo)	(Robert Tang)
Chief Judge, High Court	Vice-President	Justice of Appeal