The Environmental Impact Assessment Ordinance, Cap. 499 –

"*A question of professional judgment*"

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This paper largely reiterates for visiting Middle Templars a paper given at the HKIAC in March 2015. The Court of Final Appeal is yet to decide the case of Leung Hon Wai v the Director of Environmental Protection on appeal from [2014] 5 HKLRD 194, for which leave was granted on 13th January this year.

I Introduction

1. In some of the last sessions of LegCo prior to 30th June 1997, Christine Loh Kung Wai and her colleagues championed the introduction of an Environmental Impact Assessment Ordinance. The present Ordinance was assented to on 4th February 1997 but did not come into effect until 1st April 1999.

2. Despite the fast pace of its development, Hong Kong was late in recognising this imperative. The United States had similar legislation from 1970, Australia since 1975, Canada since 1978, the UK since 1989 and Taiwan since 1994.

3. The Bill's passage through the various committees had not been an entirely smooth process. As David Elvin notes, the resulting Ordinance differs materially from its English equivalent. It reflects a typical Hong Kong compromise between development pressure and government

control, with public involvement where that does not unduly impede the first 2 reaching a mutually agreeable position[1].

4. Thus residential developments of less than 2000 units have been excluded from the lists of 'designated protects' subject to the EIA regime so long as they are connected to public sewerage. The definition of 'environmental impact' in *Schedule 1* is carefully drawn. It does not include purely aesthetic visual impact unless that impact is an '*physical or cultural heritage*' or '*antiquities and monuments*'.[2] Under *s.4(2),* the Secretary can add and delete categories of development to the lists of projects which require EIA approval, whilst *s.30* empowers the Chief Executive in Council (CEIC) to exempt a project from the provisions of the Ordinance "*in the public interest*".

5. This has not precluded proponent developers and their representatives complaining that the process introduces a substantial further level of delay to major projects. In Hong Kong, this is said to have been exacerbated by an increasing tendency on the part of the reviewing civil servants to call for further information, including under *s.8(3)(c)* on the comments of the Advisory Committee (below) rather than deciding on compliance or otherwise.

6. This delay in Government's process is a luxury not permitted to English applicants for judicial review of these decisions, as pointed out in David Elvin's paper. While we in Hong Kong still have the 3 month cutoff in *Order 53 Rule 4(1),* that period is often too short for an individual

[1] To be fair, Government rejected REDA's proposal that proponents also write the Study Brief which prescribes the action to be taken to protect the environment.

[2] In Hong Kong, we have Country and Marine Parks, which enjoy statutory protection against development, but unlike the UK and other jurisdictions, no similar protection for areas of "outstanding natural beauty" or their equivalent.

applicant to obtain Legal Aid to bring an application for judicial review or a pressure group or charity either to find an eligible applicant.

7. The basic scheme of the Ordinance can be seen in the CFA decision in *Shiu Wing Steel v The Director of Environmental of Pretention and the Airport Authority*[3], which provides a worked description of its principal stages at [7]-[22].

8. A principal and vital difference is Hong Kong's adoption of a binding Technical Memorandum (TM) in *Part V* of the Ordinance which is to set out "*principles, procedures, guidelines, requirements and criteria*" which the project profile put up for a Study Brief must include, with which the Study Brief must comply, and with which the Report must also comply. The Ordinance provides that the TM is not subsidiary legislation, although it is put before the Legislative Council (LegCo) for negative vetting. How to construe its terms and how strictly those terms bind the proponent, and how they are to bind the Director of Environmental Protection to his statutory task of protecting the environment, has proved controversial.

9. While the Court of Appeal has indeed held in *Shiu Wing Steel*. that the construction of the TM is "a matter of law" for the Court, it remains to be seen whether the broader, *Tesco Stores* approach to the interpretation and application of planning policy in England, referred to by David Elvin in §6 of his paper, would be upheld and applied in Hong Kong given that the TM by statute includes "*requirements and criteria*" and is not just an instrument setting out planning policy.

[3] (2006) 9 CFAR 478, [2006] 3 HKLRD 467

II The Director of Environmental Protection, public input and judicial review

10. Whilst the Ordinance expressly binds the Government[4], it is often the Government or its proxy authorities, such as the Hospital Authority, or the Airport Authority, and quasi-governmental statutory corporations such as the MTR who are the proponents of development projects to which the EIA procedure is to be applied.

11. This has led to the remarkable position where the Director of Environmental Protection (the Director or DEP) is not only the proponent of the controversial incinerator project at Shek Kwu Chau but is also the regulator charged, at each stage of the Ordinance, with the formulation of the applicable environmental conditions, scrutiny and approval of her own project and then the enforcement of those conditions. As David Elvin notes, this anomaly has become the subject of a so-far unsuccessful judicial review in *Leung Hon Wai*[5], which is shortly to go before the Court of Final Appeal.

12. The public may comment on a 'project profile' during the brief, 14 day window after its advertisement under *s.5*. ***After*** the Director of Environmental Protection has already indicated her provisional[6] approval of an EIA report under *s.6*., the public has 30 days from advertisement to comment on an EIA report.

13. The procedure provided by *s.17* for appeals against the decisions of the Secretary on designation under *s.4* and the decisions of the Director as t

[44] *Section 3(1)*.
[5] [2014] 5 HKLRD 194 (CA); HCAL 49 of 2012 (CFI, Au J.)
[6] *Shiu Wing Steel* at [82].

the contents of the Study Brief (SB) is open only to project proponents and applicants for an Environmental Permit.

14. The proponent developers complain of delays at this stage also. The introduction of an independent appeal panel inevitably results in a slower process, a commercial disincentive to challenge at this stage. Unsurprisingly, there has so far been no test of the *s.17* procedure so far.

15. Other people who are affected and take issue with the Director's approval of a report under *s.8*, or the issue of a permit under *s.10*, may only have recourse to judicial review. As is trite law, judicial review does not concern itself with the substantive merits of the decision at issue but only with the lawfulness of that decision. So long as the Director has lawfully set her requirements in the SB, consistent with the TM, and she exercises her statutory discretion reasonably in deciding that the proponent has complied with the requirements she has herself set, her decision will be unimpeachable[7].

16. Thus the Hong Kong jurisprudence to date has largely concerned itself with the legality and public law "reasonableness" of the Director's decisions to approve an EIA report and to issue a permit[8]. So long as The Director has not misunderstood the requirements of the TM and the SB, and thus erred in law, and she has ensured she has before her sufficient and adequate material on which she may decide, there is little room left for error of law. As David Elvin observes, our Court recognised at §§29, 30 of *Shiu Wing Steel* that the substantive task of the Director in deciding whether an EIA report in fact complies with the statutory requirements,

[7] Civic Exchange (Renton, 2011) points out that any failure of this process to protect the environment, particularly in large-scale projects in the numbers which the Government is itself promoting, is therefore that of the DEP and those to whom she answers.

[8] Save for *Ho Loy*, below, in which the challenge was to later Government decisions under *s.14* of the Ordinance not to suspend or cancel a permit in what were said to be changed circumstances.

the Technical Memorandum (TM) and the Study Brief (SB), is essentially a merits decision. The Director is required to ask and answer "*a question of professional judgment*"[9] and those documents will be construed as they are meant to be read, by professionals in the field. She may rely upon the "*professional advice*" of other government departments[10], commonly the Agriculture Fisheries and Conservation Department (AFCD) as to environmental impact. In doing so, she will generally be held to be acting "reasonably" in law.

17. For that reason, in Hong Kong as in England, challenges to EIA decisions have not so far enjoyed much success. Of the 4 challenges so far heard, only *Shiu Wing Steel* back in 2006, has been upheld.

III A Caveat – Hong Kong planning and environmental law

18. David Elvin has rightly identified a number of similarities between the EIAR and the EIA Ordinance but Hong Kong law is not the law of England and Wales, especially not our planning regime and environmental ordinances. Our EIA Ordinance not only draws on different drafting sources but its structure, requirements and effects are rather different from these in the EIAR. These are several important differences, not least the requirement of compliance with the detailed substantive provisions of the TM and SB before a permit may be issued. Unlike the EIAR and its caselaw, our planning and environmental legislation owes little or nothing to that enacted so as to give effect to the European Directives.

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[9] *Chu Yee Wah v The Director* [2011] 5 HKLRD 469 (CA) at [84], [96]; *Leung Hon Wai v The Director* [2014] 5 HKLRD 194 at [57]

[10] *Chu Yee Wah v The Director* [2011] 5 HKLRD 469 (CA); *Leung Hon Wai v The Director* [2014] 5 HKLRD 194

19. Whereas constitutional rights and obligations under the Basic Law are often construed with the aid of reference to the equivalent provisions of the ICCPR and the Canadian Charter and our common law remains closely tied to that of England and other common law jurisdictions, the Hong Kong courts are increasingly astute to distinguish domestic Hong Kong enactments where their structure, wording and context differ from legislation elsewhere. See, eg the recent rejection of Nigel Pleming QC's arguments in sections D1, D2 and D3 of a strong HKCA's decision in *Oriental Generation v Town Planning Board*, CACV 127 of 2012 and Au J's 1st instance costs decision in *Leung Hon Wai*, HCAL 49 of 2012, 26th November 2013 at §16(1).

IV Drawing up the Project Profile in compliance with the Technical Memorandum, per *s.5(2)(b)* and adherence to the Study Brief (SB) issued under *s.5(7)(a)*

20. If the report fails to comply with the EM and the SB, a decision to approve that report will be unlawful: *Shiu Wing Steel* at [23]. Likewise the issue of a permit under *s.10*.

21. Although the TM is not legislation or even subsidiary legislation, it exhibits a number of the same characteristics which bedevil statutes. It is not necessarily up-to-date. Although a technical document, the standards it prescribes (which have been set by the DEP) are not necessarily the latest, most appropriate for a particular project, "best practice" or most precise. It is generally worded in such a way as to enable compliance on

the issues it requires proponents to address but it is also unduly rigid in places, which can be an impediment to including best practice measures in the report.

22. Drawing up the Project Profile will therefore condition, at least in part and subject to those views of the public and the ACE which the DEP chooses to take on board, the SB. Proponents no doubt draft their Profiles accordingly.

23. While the TM remains a governing document and the SB inevitably repeats the requirement of compliance with the TM, the TM "informs" the requirements in the SB. The SB is a more detailed document, focussed on the environmental impact of particular project and the measures required in the report. The SB "sets the agenda for the project". There is no longer any need for the proponent to comply with what he may have promised in the Project Profile[11]. Proponents and opponents will take care not to construe further requirements from the various provisions of the TM.

24. There has so far been no judicial review challenge to the Director's decision to issue an SB, which David Elvin likens to a scoping opinion in England. It appears that even if the scenario for impact prediction in the SB is defective, a ground on which one might be forgiven for suspecting unreasonableness if not of the irrationality variety, the Hong Kong Court is unlikely to intervene. In *Chu Yee Wah*, a challenge was brought to the Director's approval of the EIA report for part of the HK-Zhuhai-Macau Bridge project in which the meaning and requirements of the TM (and SB) for a predictive measure of air quality were at issue.

[11] See *Leung Hong Wai*, [2014] 5 HKLRD 194 at [70] and *Chu Yee Wah* [2011] 5 HKLRD 469 at[31]

25. The arguments on review revolved around two matters. First, whether the "baseline" study required by the TM required the report to consider the **actual** air pollution recorded in Hong Kong at the sensitive receivers and then to predict the resulting pollution levels including the additional impact of the project, or whether the report should use the method PATH indicated in the TM and SB. PATH is based on assumptions, not actuals, and includes other non-HK data, which it applies and projects to produce a series of predictions. Secondly, whether the TM and SB called for a "standalone" study which would show the resulting levels of pollution if the HKZMB was not built but other, committed and planned projects went ahead. The actual figures showed that if the project went ahead, producing even a small increase in air pollution that would go beyond the levels permitted by the Air Quality Objectives[12]. The applicant also demonstrated that the comparative method employed in the Report did not produce an assessment of the pollution expected if all projects expected to proceed including the HKZMB, went ahead.

26. On review, the Court held that, on their proper construction, the TM and the SB did not require either a baseline study based on actual pollution or a standalone study, and refused relief.

27. In *Leung Hon Wai*, avoidance of the destruction of an important finless porpoise habitat was inevitable if the project was to proceed at all. To over-simplify, the scheme of the TM and SB is that the relevant impact on flora and fauna is to be avoided; if it cannot be avoided, it is to be mitigated and remaining impacts are to be compensated. For off-site mitigation, Annex 16 of the TM specifies that the report shall recommend measures which are *feasible* to implement, 'like for like' *so far as is*

[12] And that the method prescribed in the TM and SB was, in part, flawed.

practicable and *technically feasible and practicable*. Annex 20 of the TM requires the report to make clear to what extent the mitigation methods will be effective. The Court of Appeal held that on their proper construction, those provisions did not require certainty at the date of the report; indeed, they meant no more than that it is "*reasonably possible* [for the measures] *to be practically implemented*." The applicant is not required to include a commitment in his report that those measures (there a Marine Park to provide a safe replacement habitat) will actually be carried out [13]. Proponents are no doubt alive to the implications of that decision.[14]

28. The standard of review does not appear to be particularly intensive. David Elvin touches on this in the first part of his paper, but it cannot readily be seen that the HK Courts have recognised the procedure in the EIAO requiring more scrutiny than that on the English framework, as David perceives at §9. In *Leung Hon Wai*, the Court of Appeal agreed with Au J in that it was not unreasonable as a matter of law for the Director, advised as to such matters by the AFCD, to approve a report which provided, as a mitigation measure, the reasonable possibility of the practical implementation of a Marine Park which could only be put in place *after* the project's destruction of the finless porpoise habitat.

V Time and consideration between Report and Permit

29. It is to be noted that the Ordinance provides for two separate and different decisions to be taken on two different sets of information: firstly

[13] At *[47],[48]*. It may be asked why those measures should be required to be set out in the report at all if the intention of the TM is only to demonstrate that they can be implemented rather than that they will be implemented, in a "feasible" and "practical" way.

[14] This point is likely to recur in another, forthcoming judicial review application.

when deciding upon an EIA report under *s. 8(3)* and secondly when deciding upon an environmental permit under *s.10.*

30. *S.8(3)* requires the Director to satisfy herself that the report complies with the SB and the TM. She has before her the Report and its supporting materials and the TM and SB documents. She will also have before her the public and ACE's comments provided earlier under *s.7.*

31. Upon approving the report, the Director must place it on the register: *s.8(5).* She may also require the applicant to make a submission to the ACE – *s.8(4)* .

32. *S.10(1)* requires a person who wishes to construct etc a project for which a report has been registered to apply for an environmental permit. *S.10(2)* sets out 5 categories of matters and information to which the Director shall have regard when deciding whether or not to grant a permit. They are:

> "(a) the approved environmental impact assessment report on the register;
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> (b) the attainment and maintenance of an acceptable environmental quality;
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> (c) whether the environmental impact caused or experienced by the designated project is or is likely to be prejudicial to the health or well being of people, flora, fauna or ecosystems;
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> (d) any relevant technical memorandum;
>
> (e) any environmental impact assessment report approved under this Ordinance or any conditions in an approval; and

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

33. It is not clear whether the ACE is expected to comment in response to a submission made under s.8(4).

34. It does appear plain that the intention of this section is to require the Director to consider, beyond what may be dealt with in the report itself, the TM, the SB and any section 7 comments and her own view implicit in report approval, whether (b) an acceptable environmental quality will be attained and maintained and (c) whether the environmental impact is likely to be prejudicial to health or well-being **assuming** the environmental impact and the implementation of the measures set out in the report.[N] Nonetheless, proponents may wish to learn that some applications for permits appear to have been made at the same time as the submission of reports for approval, possibly subject to the approval of a report. There have been instances of environmental permits being granted on the same day as the relevant environmental report is approved and registered. How that decision-making has come to pass remains to be seen but it is at least arguable that the scheme of the Ordinance is to allow time for the Director to consider those further matters and, perhaps, any representations he may have received once the report is placed on the register.

1. [N] See the approach taken to this particular decision in the Administration's Paper CB1/BC/20/95 promoting the Bill to LegCo's Bills Committee in January 1997.

VI Another bite of the cherry but a higher hurdle as well: s.14 suspension, variation and cancellation: *Ho Loy*[15]

35. Section 14(1) provides *inter alia* that:

> "The Director may, with the consent of the Secretary, 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"

36. Section 14(3) provides that:

> "The Chief Executive in Council 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."

37. Tolo Harbour provides habitats for a number of rare and conserved marine species, some of which make their homes along the shoreline. Government decided to construct an artificial beach at Lung Mei on that shore. Studies were done and the approved EIA report said that '*Lung Mei did not appear to serve as critical/unique habitat for species of conservation*

[15] HCAL 100/2013, Au J., 12th August 2014

importance, or support significant populations of such species'(the statement*)*. A permit was then granted. Sometime later, some green groups reported a breeding pair of spotted seahorses and at Lung Mei.

38. One group applied to the Director to exercise her power to suspend or cancel the permit under *s.14(1)* of the Ordinance. Another group applied to the Chief Executive in Council to exercise his power to suspend or cancel be permit under *s.14(3).*

39. The Director obtained further survey information from the AFCD. The new surveys found "a few" spotted seahorses and 3 other species of rare fish at Lung Mei but concluded that the ecosystem of Lung Mei was basically the same since the earlier surveys and the new findings were not "so significant as to affect Lung Mei's overall ecological status".

40. The Director gave notice on 10th May 2013 of her refusal to exercise her power under s.14(1) and the CE in C gave notice on 4th of June 2013 of his refusal likewise.

41. The applicant sought judicial review on classical grounds – illegality and unreasonableness.

42. Au J accepted that both discretions are amenable to review. He dismissed both challenges on all grounds. He applied a conventional approach to reasonableness and, rejecting the claim that an ecological assessment particular to the seahorses was required in order to establish the original statement in the report and to substantiate the AFCD's conclusions, he went on to find both decisions not unreasonable. Interestingly, he construed the CE in C's reasons for his decision from the blank statement that the grounds were not made out, in the letter advising the decision, and an unchallenged affirmation made for the proceedings.

43. Possibly because the applicant's challenge on grounds of illegality to the decision of the CE in C under s.14(3) was put rather high[16], this case brought forth a result the applicant and green groups cannot have desired. Prompted by counsel for the Director, Au J held s.14(3) to be an exceptional, reserve power; that *"more prejudicial to the health and well being of people, flora, fauna or ecosystems than expected"* is to be construed as meaning that the entire relevant environment and , or the environment as whole is or is likely to be *"seriously or significantly more adversely harmed"* at the time of application than was expected at the time the permit was granted: see [90], [93], [95].

VII Remedies: Quashing

44. If a decision of the Director under ss.8 or 10 is found to have been unlawful, the Hong Kong practice is reasonably certain. The principles on the exercise of discretion remain largely the same in Hong Kong as in England (save that, as seen in *Walton*, the English Court may have to take into account that it is enforcing a European Directive). The courts of Hong Kong continue generally to follow the principle stated in the first part of paragraph 77 of *Shiu Wing Steel:*

> "The jurisdiction to judicially review an administrative decision is exercised to apply the rule of law to the exercise of administrative power (*A-G of New South Wales v Quin* (1990) 170 CLR 1 at p.35).When the repository of a power fails to comply with the conditions which govern its exercise, it is the function and duty of the court to quash the purported exercise of the power unless there are substantial grounds warranting the refusal of relief, but the grounds on which relief might be

[16] Counsel contended that the CE in C should suspend or cancel the permit even if the increase in environmental damage was *de minimis:* see [94]. He also contended another particular ecological survey was required in that case for the CE in C to be able to take a decision under *14(3):* [108]

refused when the court finds an excess of power are "very narrow" as Lord Bingham of Cornhill held in *Berkeley v Secretary of State for the Environment, Transport and the Regions & Another* [2001]2 AC 603 at p.608."

45. The only ground that troubled the CFA on this question in *Shiu Wing Steel* was the statutory discretion under *s.21K(6)* of Cap.4 and *Order 53 r.4(1)* of the *RSC* to refuse relief if there had been undue delay which is likely to cause hardship to, or prejudice the rights of any person or would be detrimental to good administration. Undue delay was not established, as the applicant had challenged the operative, *s.10* decision to grant the permit written time. The s.6 approval operative was held to be only 'provisional' for these purposes.[17].

46. The Hong Kong Courts have rarely if ever declined to quash an unlawful decision. The principle that the Court is unable to say whether, if lawfully taken, the decision will be the same and that therefore the decision must be quashed so that it may be taken again by the proper decision-maker remains the guiding principle: see, e.g. *Lee Yiu Cheong v Commissioner*, CACV 90/2004.

47. Other than where *s.21K(6)* and *O.53 r.4(1)* are engaged[18], HK applicants can be reasonably confident that the Court will quash an unlawful decision under the Ordinance. It may be that in an exceptional case, in which the relief sought is academic as in *Berkeley* and it can be established that no

[17] See [83], [87], [89].

[18] Most Hong Kong applicants in environmental cases have difficulty in this respect, due in part to the inevitable delays in obtaining legal aid. It is to be hoped that this will soon be alleviated by a clear ruling as to the availability of protective costs orders in HCAL 49 of 2014. That decision is presently expected around mid-April this year.

prejudice would result (as in the screening case *R(Perry) v Hackney*), such an application might perhaps succeed but neither of those circumstances is probable where likely environmental damage as a result of the decision has prompted the challenge.

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