HCAL 49/2014

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 49 OF 2014

IN THE MATTER OF an Application by Designing Hong Kong Limited for leave to apply for judicial review pursuant to Order 53 rule 3 of the Rules of the High Court (Cap 4A)

and

IN THE MATTER OF the Town Planning Ordinance (Cap 131)

BETWEEN

DESIGNING HONG KONG LIMITED Applicant

and

THE TOWN PLANNING BOARD Respondent

Before: Hon Au J in Chambers
Dates of Hearing: 16 and 17 December 2014
Date of Judgment: 30 April 2015

JUDGMENT

A. INTRODUCTION

1. The applicant applied for leave to apply for judicial review against the respondent's decision ("the Decision") not to amend the relevant Amended Draft Outline Zoning Plan ("ADOZP") of the Central District.

2. In issue under the ADOZP is a 150-metre strip of land along the north shore of the Hong Kong Island ("the Site") which has been marked for the planned Central Military Dock. The Site is situated along Victoria Harbour within the new Central Harbourfront Promenade.

3. In the ADOZP, it is proposed to re-zone the Site from "Open Space" to "Other Specified Uses" annotated "Military Use (1)" ("OU(MU1)"). The applicant together with many other representators objected to the proposed re-zoning. They say, among others, the re-zoning would interfere and restrict Hong Kong residents' right to enjoy the Site to (as they would be able to do so under the original "Open Space" zoning) walk along the Central Harbourfront uninterrupted. The applicant, together with those other representators, asked the Town Planning Board ("the Board"), the respondent, to amend the ADOZP by zoning the Site back to "Open Space" from the proposed "OU(MU1)".

4. By way of the Decision, the Board rejected those representations and refused to amend the ADOZP.

5. The applicant applied for leave to judicially review the Decision in May 2014. This court granted leave in July 2014 after hearing submissions from parties.

6. This is now the applicant's application for a protective costs order ("PCO") as set out in the Amended Form 86. In the PCO application, the applicant asks for an order:

(1) Protecting the applicant from all costs of the respondent in the interlocutory applications and the substantive proceedings herein.

(2) Alternatively limiting the costs that may be awarded to the respondent to HK$10,000 and limiting the cost that may be awarded to the applicant to the reasonable costs of a solicitor and junior counsel or such sum as the court may think fit.

7. The Board (represented by Mr Mok SC leading Ms Eva Sit) opposes the application.

8. As this is the first time the Court of First Instance has to deal with a proper application for a PCO and look at the principles applicable thereto, the court has invited the assistance of Mr Stewart Wong SC (leading Ms Bonnie Cheng) as *amicus curiae*. The *amicus* has made very comprehensive submissions (both written and oral) and the court is most grateful to their valuable and able assistance.

9. Similarly, at the invitation of the court, the Director of Legal Aid has appeared also at the hearing to assist the court on the question of the non-availability of legal aid to corporate litigants under the legal aid

scheme in Hong Kong. The Director has also filed an affirmation for that purpose. Again the court is most grateful to the Director's assistance.

10. Before I look at the merits of the present PCO application, it is pertinent to deal with the applicable principles first.

B. THE APPLICABLE PRINCIPLES

11. A PCO (sometimes also known as pre-emptive costs order) is in the nature of an order that is made before the conclusion of the proceedings which directs as to the costs order that will be made against the applicant no matter what the outcome of the case is. Although the court has a wide discretion in ordering the terms of the PCO that would cater for the circumstances of each case, it is generally called protective costs order as usually incorporated in the order is a term that the applicant would not be liable to pay the respondent's costs (or that his liability to costs is limited) even if the applicant turns out to be unsuccessful in the proceedings.

12. I should first start with those principles which parties in the present case agree to be applicable to a PCO application.

13. First, there is no dispute that the court has jurisdiction to make a PCO, which jurisdiction comes from the statutory discretion vested in the court to make costs order at any stage of the proceedings which is fair and just in all the circumstances. See: section 5A(1) of the High Court Ordinance (Cap 4) ("HCO"), Order 62 rule 3(3) of the Rules

of High Court (Cap 4A); *Chan Wai Yip Albert v Secretary for Justice* (unreported, HCAL 36/2005, 19 May 2005) at paragraphs 23-32 *per* Hartmann J (as the learned NPJ then was); *姚寶昌 對 統計處處長*, (unreported, CACV 87/2013, Lam VP and Cheung JA, 14 October 2014) at paragraphs 3-4.

14. Second, it is also accepted that the governing general principles laid down by the English Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at paragraph 74 in relation to the factors that the court should take into account in deciding whether to make a PCO are equally applicable in Hong Kong.

15. The *Corner House* principles and factors are:

(1) A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

(a) the issues raised are of general public importance;

(b) the public interest requires that those issues should be resolved;

(c) the applicant has no private interest in the outcome of the case;

(d) having regard to the financial resources of the applicant and the respondent and to the amount of costs that are likely to be involved, it is fair and just to make the order; and

(e) if the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

(2) If those acting for the applicant are doing *pro bono* this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in light of the consideration set out above.

16. Third, the twin criteria in *Corner House* principle (1)(a) and (b) above, which are commonly now often referred to as the "public interest litigation" factors are the *overarching requirements* that an applicant must meet before the court would consider whether to grant a PCO or not after taking into consideration the other relevant factors set out in *Corner House*.

17. After setting out the above principles which are not in dispute, I now move on to discuss those aspects of these principles which are disputed.

18. The first aspect relates to the question of what can be regarded as public interest litigation.

19. In relation to this question, Lam J (as the learned VP then was), after reviewing a line of authorities, including *Corner House*, has formulated in *Chu Hoi Dick v Secretary for Home Affairs (No 2*) [2007] 4 HKC 428 at paragraph 29 the relevant guiding criteria for identifying a public interest challenge.

20. These criteria are:

(1) A litigant has properly brought proceedings to seek guidance from the court on a point of general public importance so that the litigation is for the benefit of the community as a whole to warrant the costs of the litigation to be borne by the public purse as costs incidental to good public administration.

(2) The judicial decision has contributed to the proper understanding of the law in question.

(3) The litigant has no private gain in the outcome.

21. These criteria have been recently endorsed by the Court of Final Appeal in *Leung Kowk Hung v The President of the Legislative Council* (unreported, FACV 1/2014, 5 December 2014, Ma CJ, Ribeiro, Tang and Fok PJJ, Sir Anthony Mason NPJ) ("*Leung Kwok Hung (CFA)*") at paragraph 17(10).

22. In *Chu Hoi Dick*, the applicant failed in her judicial review, and Lam J was considering the question of whether he should, in departure from the usual starting position of costs following the event, make no order as to costs in light of the applicant's argument that the judicial review was a public interest litigation. Although *Chu Hoi Dick* concerns a consideration made at the conclusion of the litigation, as submitted by the *amicus* Mr Wong, there is nothing in principle to render the learned judge's analysis on the question of what amounts to public interest litigation not equally applicable to a consideration made at any stage before that. Quite to the contrary, as a matter of principle and logic, the same analysis should apply, as whether a litigation can be

regarded (for the purpose of considering costs) as a public interest litigation must involve the same considerations at any stage of the proceedings, as the crucial question is what is the nature of the matter litigated and issues involved therein. The parties have also not contended otherwise.

23. In the premises, Lam J's said criteria in identifying a public interest litigation, which have been endorsed and approved by the Court of Final Appeal, are bidding on this court and applicable in considering a PCO application.

24. In looking at these criteria, what divides the parties at the hearing is whether (as contended by the Board), for a matter to fall within the first and second criteria, the issues required for determination *must* involve a question of law where the relevant legal principles involved have either not been settled or are very much in dispute. This is so as (Mr Mok for the Board submits) Lam J has made it clear in the second criteria that the judicial decision on the relevant issues litigated must be one that "contribute[s] to the proper understanding of the law in question". Thus (continues Mr Mok), if the legal principles or questions involved in the litigation is one which have been well settled, and the issues raised in that context is the application of the well settled legal principles to a particular set of facts (even if those facts involve a subject matter that is of general public concern), the judicial decision of those issues would not contribute to any better understanding of the question of law, as the "law" is clear even before the litigation.

25. With respect to Mr Mok, I do not agree with his submissions. In my view, that is too narrow a construction of Lam J's formulation of the criteria.

26. In arriving at these criteria, Lam J at paragraph 18 has specifically explained that the meaning of "the proper understanding of the law" includes not just points of statutory construction or *development of the common law principles*, but also the application of the law to the facts of a case. As the learned judge emphasised, in some cases "how the law is to be applied to a particular factual matrix can contribute to the proper understanding of the law" and "in broad sense, the application of the law to the facts of a case is itself a question of law".

27. Thus, in laying down the criterion of contribution to the proper understanding of the law, Lam J is clearly not limiting himself to issues where the legal principles have not been settled and thus need further development or clarification, as he has made it clear that the proper understanding of the law does not only include questions concerning the development of the common law principle or statutory construction. In that context, the learned judge clearly also has in mind that the criterion should cover a question of *how* the relevant law (whether or not the relevant legal principles in that law are settled ones) is applied to a particular sets of fact (being itself also a question of law).

28. This is also consistent with the general context as to why public interest litigation may (as a triggering requirement) justify a departure from the usual starting position of costs following the event: it is that the court recognises that there are matters which by themselves are

of such general public importance that it is in the general public's interest to have them judicially resolved. It would therefore not in the interest of the public to allow these issues not to be resolved because the applicant is reasonably not in a position to pursue the judicial review because of his fear or inability to bear the costs of the respondent if he loses the application. It is then seen as fair and just in those circumstances to have the costs burden left with the public authority as "an incident to good administration".[1] Thus, in this context of focusing on the importance of public interest in general, it is difficult to see as a matter of principle why such public interest litigations would only be limited to question of law concerning legal principles that cannot be regarded as settled.

29. *Corner House* itself is perhaps a good example where public interest litigation concerns *not* only with issues involving unsettled or difficult legal principles. In that case, the applicant sought to challenge the decision of the Secretary of State for Trade and Industry to amend the relevant procedures for the Export Credits Guarantee Department ("ECGD") and its standard form relating to bribery, corruption and money laundering for business entities carrying on international trade. The challenge was premised on procedural unfairness in that the Secretary had failed to consult the applicant, which was an educational and research organisation with a special interest in the role of export credit agencies in the prevention of corruption and bribery in international business transactions.

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[1] See *Leung Kwok Hung v The President of the Legislative Council* (unreported, HCAL 87/2006, 27 April 2007, Hartmann J) ("*Leung Kwok Hung (CFI)*") at paragraphs 20-24.

30. The legal principles governing procedural unfairness in public law cannot be said to be unsettled. However, in allowing the appeal against the first instance judge's refusal to grant the PCO, the Court of Appeal held[2] that the judicial review was one which raised issues of general public importance that were in the public interest to see it to be resolved by court. This was so as (a) they related to the way in which major British companies, supported by credit guarantees backed by the taxpayers in accordance with a statutory scheme, did business abroad; (b) obtaining contracts by bribery was an evil which offends against public policy, and when taxpayers interests were involved, questions of whether these companies were required (by the procedures set out in the standard forms) to provide details of money paid to middleman was a matter of general public importance; and (c) the unfairness challenge based on the complaint that the failure to consult the applicant was in breach of ECGD's own published consultation policy (which stated to the effect that it would consult appropriate stakeholders).

31. The decision in *Corner House* thus shows that the question of public interest litigation cannot be limited to only question of law involving unsettled or difficult legal principles. As demonstrated above, and as observed by Lam J in *Chu Hoi Dick*, it could also include questions of law concerning the application of the relevant law (even if one with generally settled principles) to the particular circumstances of the case, in particular where the underlying subject matter is something of general public importance (such as the one identified in *Corner House*).

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[2] See paragraphs 137-140.

32. I therefore conclude that under the criteria expounded in *Chu Hoi Dick*, the second requirement that the judicial decision required to be made in the litigation should contribute to "the proper understanding of the law in question" is not limited to only resolution of issues that involve difficult or unsettled legal principles.

33. At this juncture, it is perhaps convenient for me to mention two matters that also arise from these criteria.

34. The first is that in considering the question of whether it is in the public interest to have the issues resolved, it must also involve the consideration as to the merits of the applicant's judicial review. As said by Lam J (in adopting the observations in *Corner House*), in considering the question of whether "the litigation is for the benefit of the community as a whole to warrant the costs of the litigation to be borne by the public purse as costs", the court should take into account the merits of the applicant's grounds of judicial review, and the test is that those grounds are at the minimum properly arguable with a realistic prospect of success. This test has later been accepted and approved in *Chan Noi Heung v Chief Executive in Council* [2009] 3 HKLRD 362 at paragraph 12(3) *per* Ma CJHC (as the learned CJ then was). It is common ground now that the test is the same as the one required for the grant of leave to apply for judicial review, that is, whether the judicial review grounds are reasonably arguable with a realistic prospect of success.[3]

35. Second, it relates to what the meaning of "general public importance" entails in this inquiry.

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[3] *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676 at paragraphs 14-17 *per* Li CJ.

36. In this respect, it must be noted that there is no absolute standard by which to define what amounts to an issue of general public importance. The question is ultimately a matter of degree to which the requirement may be satisfied. It is an objective exercise where the court would pay regard to the qualitative significance of the issues at stake. See: *R (Compton) v Wiltshire Primary Care Trust* [2009] 1 WLR 1436 at paragraph 24, *per* Waller LJ, and paragraph 75, *per* Smith LJ; *Chu Hoi Dick*, *supra*, at paragraph 26.

37. Moreover, the word "general" does not necessarily mean that the subject issue must be of interest to *all* the public nationally or would directly affect all of them. The requirement may still be satisfied by different sizes or extents of the group or section of the public that could be affected by it. Obviously, the larger the group or section of the public that is to be affected by the determination of the issue, the more likely that it will satisfy the meaning of general public importance. Again, this is a matter of degree for the court to evaluate and assess in the circumstances of each case. As observed by Waller LJ in *Compton*, *supra*, at paragraph 24:

> "… I do not read the word 'general' as meaning that it must be of interest to all the public nationally. On the other had I would accept that a local group may be so small that issues in which they alone might be interested would not be issues of 'general public importance'. It is a question of degree and a question which the Corner House case would expect judges to be able to resolve."

38. Similarly, Smith LJ in *Compton* said these at paragraph 77:

> "**77** During the hearing, there was some discussion about the meaning of the word 'general' in the context of 'general public importance'. As Buxton LJ says, it must add something to

> mere 'public importance'. In some cases, the answer is easy. For example, if the case will clarify the true construction of a statutory provision which applies to and potentially affects the whole population, the issues are of general public importance. But if the issue is of public importance and affects only a section of the population, it does not in my view follow that it is not of general public importance, although it will not be in the first rank of general public importance. Mr Havers for the PCT accepted that a local issue might be sufficiently "general" to be of general public importance but submitted that one could not decide whether it was so merely by taking a headcount of the numbers of people who would be affected by the decision of the court. He may be right although he did not explain how the general importance of a local issue was to be assessed. It seems to me that a case may raise issues of general public importance even though only a small group of people will be directly affected by the decision. A much larger section of the public may be indirectly affected by the outcome. Because it is impossible to define what amounts to an issue of general public importance, the question of importance must be left to the evaluation of the judge without restrictive rules as to what is important and what is general."

39. As also helpfully pointed out by the *amicus*, although it is neither possible nor appropriate to define in absolute terms what amounts to an issue of general public importance, the authorities so far have shown that the following considerations would help to identify its scope for the purpose of considering whether to make a PCO:

(1) The courts have stressed that not all public law challenges, even if constitutional issues of importance are raised, bring with them an automatic protection against adverse costs orders. Each case will depend on its own circumstances: see *Scott v Government of the HKSAR*[4] at paragraph 18 *per* Hartmann J.

(2) The Court of Final Appeal has confirmed that the starting point in civil litigation, even that involving the public

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[4] [2004] 2 HKLRD 989.

interest, is that costs follow the event: *Leung Kwok Hung (CFA)* at paragraph 17(8). Thus, the "public interest" element is in itself insufficient.

(3) In *Oshlack v Richmond River Council* (1998) 193 CLR 72, Kirby J also suggested at paragraph 138 that merely resolving a question of law in not enough as "[i]n one sense, all litigation, in so far as it elucidates the law, is in the public interest". Picking up on this, Hartmann J in *Leung Kwok Hung (CFI)* also observed at paragraph 25 that "[p]ublic interest litigation, as Kirby J noted in *Oshlack v Richmond River Council*, does not grant an immunity from costs or a 'free kick' in litigation". Similarly, in *The Democratic Party v The Secretary for Justice*,[5] Hartmann J said at paragraph 22 that "the fact that a ruling of importance arises out of litigation cannot of itself be determinative". Further, public interest litigation "should not be confused with the fact that the decision would provide some guidance for future actions and decisions", given that in our legal system, "every judicial decision is a precedent and can provide some guidance for future actions and decisions". See also *Clark v Bar Council*[6] at paragraph 38 *per* Le Pichon JA.

(4) The above judicial statements underline the need for the issues involved to be "*of real public concern*",[7] and for their resolution by the courts to be "*a significant contribution to a point of general public importance*".[8]

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5 Unreported, HCAL 84/2006, 28 December 2007.
6 [2011] 3 HKLRD 122.
7 *Leung Kwok Hung (CFI)* at paragraph 37, *per* Hartmann J.
8 *Chu Hoi Dick* at paragraph 46, *per* Lam J.

(5) The courts have also emphasised their proper role and function in this exercise. In particular, they have made it clear that they are *not* a forum for:

(i) debate on legislative changes: *Chu Hoi Dick*, at paragraph 43; and

(ii) resolution of political or social disputes: *Leung Hon Wai v Director of Environmental Protection*,[9] at paragraph 11.

40. Finally, Mr Mok for the Board submits that the following principles can be derived from *Corner House* and *Chu Hoi Dick* which govern the court's consideration of whether to make a PCO:

(1) The starting point is that even in public law litigation, costs should follow the event.

(2) Where a public interest challenge is made, this can be a factor in displacing the general rule.

(3) Nevertheless, the court must be satisfied, firstly, that the applicant has properly brought proceedings to seek guidance from the court on a point of general public importance, so that the litigation is for the benefit of the community as a whole to warrant the costs of the litigation be borne by the public purse as costs incidental to good public administration.

(i) The dispute is not confined to points of statutory construction or development of common law principles; application of the law to the facts of a case, where that contributes to the proper understanding of

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[9] Unreported, HCAL 49/2012, 26 November 2013, Au J.

the law, can also satisfy this criterion: see *Chu Hoi Dick* at paragraph 18; *姚寶昌* (*supra*): "例如澄清某些重要會影響整體社會利益的法律議題".

(ii) The court must have regard to the merits of the challenge, and there must be a real prospect of success: see *Chu Hoi Dick* paragraphs 21 and 23. At the leave stage the grant of leave on the *Po Fun Chan* test may well be sufficient, though not necessarily conclusive: see *Chan Noi Heung* paragraph 12(3)-(5).

(iii) The court must also consider the utility of litigating the matter in a court of law as opposed to ventilation of the objection by other channels. It must be borne in mind that the court is concerned with the legality of administrative decision in judicial review, and is not a forum for debating the political or social judgment embodied in an administrative decision: see *Chu Hoi Dick* paragraphs 20-21.

(iv) The above are to be objectively assessed, having regard to the interest of the community as a whole: see *Chu Hoi Dick* 437D.

(4) Secondly, the judicial decision will likely contribute to the proper understanding of the law in question.

(5) Thirdly, the litigant has no private gain in the outcome.

(6) Even if the above are satisfied, the court must also have regard to other relevant factors, such as (i) the conduct of the litigant (*Chu Hoi Dick* paragraph 30); (ii) the financial means of the parties and the likely costs involved (*Chan Noi Heung* paragraph 21; *Corner House* condition (iv)); and (iii) whether the applicant will probably discontinue the

proceedings and be reasonable in so doing in the event that no PCO is made (*Corner House* condition (v)).

41. Mr Mok then further contends that these principles do not only give guidance as to the exercise of a judicial discretion, but "delimit" the court's jurisdiction to make a PCO and "must be followed if the judge is to have jurisdiction to make a PCO at all".

42. With respect, I do not accept these submissions.

43. I agree with the *amicus*' submissions that other than the overarching twin criteria of public interest litigation, the other factors (namely, the merits of the applicant's case, the existence or otherwise of a private interest, the relative financial resources of the applicant and respondent, the reasonableness of the applicant in probably withdrawing the case if no PCO is granted), are all matters that the court *could* take into account in its exercise of discretion to decide whether it is just and fair to depart from the usual costs follow the event position and make a PCO. The court should adopt a flexible approach in considering these other factors and guidelines.

44. This is so as:

(1) As mentioned above, the court's jurisdiction to make a PCO is founded on section 52A of the HCO and Order 62 rule 3(2). It is a discretion vested in the courts by statute.

(2) Those principles as summarised by Mr Mok are all judicially devised guidelines or principles, and cannot be said to have

the effect of delimiting or defining the statutory jurisdiction conferred on the courts. These are only factors which guide the court in the exercise of its discretion in an application for a form of costs which it has jurisdiction to make in the first place. As observed by Gaudron and Gummow JJ in *Oshlack, supra*, at paragraph 35:

> "In the administration of the discretion conferred by these provisions upon courts of general jurisdiction, practices or guidelines have developed. Observations by Brennan J in *Norbis v Norbis* are in point. His Honour said:
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> > 'It is one thing to say that principles may be expressed to guide the exercise of a discretion; it is another thing to say that the principles may harden into legal rules which would confine the discretion more narrowly than the Parliament intended. The width of a statutory discretion is determined by the statute; it cannot be narrowed by a legal rule devised by the court to control its exercise.'
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> …"

(3) Similarly, it has been repeatedly observed by the courts in England and Australia that the principles laid down in *Corner House* should *not* be read and treated as if they were statutory provisions. A flexible approach should be adopted to the exercise of judicial discretion in the granting of PCOs to decide whether it is just and fair after taking into account all the circumstances of the case. See: *Compton, supra*, at paragraphs 23 (*per* Waller LJ) and 87 (*per* Smith LJ); *R (Buglife) v Thurrock Thames Gateway* [2009] 1 Costs LR 80 (CA) at paragraphs 19-20; *Baker v Hinton Organics* [2010] 1 Costs LR 1 (CA) at paragraph 40; *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424 at paragraph 96.

(4) Lam J also expressed a similar sentiment in adopting a flexible approach in *Chu Hoi Dick* at paragraph 30 as follows:

> "I should also mention that the public interest element is only one of the factors that is relevant for the exercise of the discretion as to costs. Even if all these criteria are satisfied, the court must also have regard to other relevant factors such as the conduct of the litigants in the proceedings in coming to a final decision on what is just in the circumstances. It is ultimately a matter of discretion, hence the use of the word 'occasionally' in the dicta of Kirby J [in *Oshlack*]"

45. Having disposed of Mr Mok's above contention, it may also be convenient at this point to mention one more matter. As pointed out by the *amicus*, there may be a concern as to whether, even if an applicant is able to meet all the principles set out in *Corner House*, there is still an *additional* requirement of "exceptionality" which seems to have been suggested by Dyson J in *R v Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 WLR 347 at paragraph 355F. This apparent requirement of exceptionality was picked up in *Corner House*. Referring to Dyson J's remark that "the jurisdiction to make a PCO should be exercised only in the most exceptional circumstances", the Court of Appeal in *Corner House* said at paragraph 72 that they agreed with that statement.

46. However, I again agree with Mr Wong's submissions that there is *no* additional requirement of "exceptionality" on top of those factors set out in the *Corner House* principles. This is because the authorities, including *Corner House* itself, show that there is no such additional requirement and exceptionality is likely to be met in a case where the court finds that those governing principles are satisfied:

(1) In *Corner House*, the court was of the view at paragraph 144 that it was an exceptional case where a PCO should be made after it was satisfied that all the governing principles had been satisfied:

> "… we considered that the public interest required that these issues should be litigated, and since Corner House had no private interest in the outcome of the case, and since our fourth and fifth principles … were both satisfied, we considered in the exercise of our discretion that it was appropriate to permit Corner House to proceed with the benefit of a PCO, and that this was one of those exceptional cases in which such an order should be made."

(2) In *Compton*, *supra*, Waller LJ also observed at paragraph 24 that "exceptionality" was not seen in the *Corner House* case as some additional criterion to the principles set out in paragraph 74 therein, but as a prediction as to the effect of applying those principles. See also similar observations by Smith LJ at paragraph 82, and Bean J in *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2006] EWHC 250 (Admin) at paragraph 10.

47. The Board also does not appear to contend otherwise that there is an additional requirement of "exceptionality" on top of the guiding principles set out at paragraph 74 in *Corner House* and agrees that it is only an effect of meeting those governing principles.[10]

48. Bearing the above principles in mind, I now turn to look at the present application for PCO.

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[10] See paragraph 6(4) of Mr Mok's skeleton submissions.

C. APPLYING THE PRINCIPLES TO THE PRESENT CASE

C1. The applicant and its judicial review

49. The applicant is a local, non-profit organisation limited by guarantee. It has currently three founder directors, namely, Mr Markus Shaw, Mr Peter HY Wong and Mr Johannes Zimmerman (who is also the current Chief Executive Officer). It was formed in 2007 in response to the plans announced by the Government for the Tamar Site and the Central Wanchai Waterfront reclamation. The applicant's stated aim is to increase public awareness and to improve Hong Kong's collective ability to plan and deliver a sustainable and "beautiful" city. It advocates the adoption of sustainability, quality of life and good design as core values in planning and development.

50. Pursuant to the applicant's above stated aim, it is currently engaged in a number of on-going projects concerning the planning development of various sites and areas over Hong Kong.

51. As mentioned above, the applicant, among other representators, objected to the ADOZP, and attended the Board's hearing to make representations. The Board by the Decision refused to accept those objections.

52. In this judicial review, the applicant challenged the Decision on a number of grounds. In summary, the applicant says:

(1) the Board erred in law in disregarding its own statutory duty under section 3(1) of the Town Planning Ordinance (Cap 131) ("the TPO") in upholding the ADOZP which is

contrary to its own declared planning intention ("Ground 1");

(2) the Decision is irrational in the public law sense ("Ground 2");

(3) the Board failed to take into account to relevant matters such as its own declared policy to protect the Harbourfront, ensure public access thereto and maintain visual access to the harbour, the Planning department's own report made in 2011 prescribing public "Open Space" land use for the Site, the views and recommendations of the Harbourfront Commission and the Administration's public commitment to effectively keep the Site open for public use ("Ground 3(a)");

(4) the Board mistook or ignored an established and relevant fact that if the Site was to be closed for military use, there would not be a continuous pedestrian connection along the waterfront ("Ground 3(b)");

(5) in its reasons, the Board misapplied the public law principle of "consistency" by saying that the proposed zoning of the Site was consistent with the existing military exclusive "Military Use" zoning of the PLA headquarters sited nearby in Admiralty ("Ground 3(c)");

(6) the Board failed to give effect to the applicant's legitimate expectation that it would take into account the relevant matters identified under Ground 3(a) ("Ground 4"); and

(7) the Board abdicated its duty under section 3(1) of the TPO in not to amend the ADOZP so as to impose any development restriction on the Site other than height restriction ("Ground 5").

53. Having set out the above, I now move on to consider the applicant's PCO application under the *Corner House* principles.

C2. Principle (1)(i) and (ii): whether the issues raised are of general public importance and the public interest requires that those issues should be resolved

54. Applying the criteria set out in *Chu Hoi Dick* as also explained above, I accept that the issues raised in the present case are of general public importance and it is in the public interest to have them resolved. My reasons are as follows:

(1) The subject matter underlying the challenge is whether the Site along the Harbourfront can continue to be used as an open space by the public in general to walk along the Harbourfront Promenade uninterrupted. This must be a matter that the public in general or at least potentially a reasonably large section of it would have interest in. This is particularly so when the evidence as it now stands shows that both the Administration and the Board had previously and publicly indicated that the Site would be kept open for public use. I fully understand the Board's position that by zoning it for "Military Use", and given the undertaking from the PLA, the public would still generally be able to walk through the Site when the military pier intended to be constructed over the Site is not in use. That however is subject to debate in this judicial review as to whether the Board is correct and entitled to take that into account, and this is also a matter the resolution of which concerns the public generally or a relatively significant section of it. The

underlying matter is thus to me of general public importance and concern.

(2) Moreover, I believe the resolution of at least some of the issues would also contribute to the better understanding of the law by seeking to apply some perhaps well established principles of law (such as that the relevant authority must in making a decision act within the boundary of the duty vested in it by the statue, and the relevant authority must take into account relevant matters and not take into account irrelevant matters in making its decision) to the facts of the present case. For example, under Ground 1, it would help to further clarify and identify the scope of the law in planning and public law context as to whether (as a matter of statutory or common duty), and if so how, the Board should take into account its previously made planning intention in making planning decision. Similarly, the resolution of the issue raising under Ground 3(a) would further the understanding of and identify the scope of the law in planning and public law context as to whether, and if so how, the Board should take into account of matters (as a matter of relevance) such as its own planning policy, the Administration's publicly made planning related statement and a related Commission's recommendations.

(3) As such, and coupled with the general public's concern of the underlying subject matter, it should be in the interest of the public to have these issues resolved by the court, which would also help further clarifying the scope and duty of the Board generally in making planning decisions.

55. The applicant has therefore shown that at least some of issues raised in the judicial review are of general public importance, and public interest requires that they should be resolved.

C3. Principle 1(iii): the applicant has no private interest

56. Mr Mok fairly accepts for the present purpose that the applicant has no private gain or interest (other than that as a member of the public) from the outcome of this judicial review. I also agree.

C4. Principle 1(iv): having regard to the financial resources of the applicant and the respondent and to the amount of costs that are likely to be involved, it is fair and just to make the order

57. Under this consideration, the applicant has filed affirmations made by Mr Zimmerman to the following effect:

(1) Its current bank account balance as at 30 June 2014 was only $170,094.74. The applicant was expected to have a negative net income that would result in it exhausting its cash by 31 December 2014. It does not carry on any profit-making business and has no assets of any real value against which it might be able to obtain funds by way of loan.

(2) The applicant's directors have already dug into their personal resources to fund its activities and Mr Zimmerman "do not believe they would be willing or able to fund this action further". Further, Mr Zimmerman had reported the status of the case to the Board of Directors and asked for their personal and financial support for the applicant's costs. They had also been informed of the applicant's exposure to

costs of the respondent should it lose the judicial review. The other directors have told him that they were not in a position to provide additional funds to the applicant to pursue this case or expose themselves to an open commitment to the Government's costs.

(3) It is difficult to raise money from outside sources, whether corporate bodies or the general public at large, as there are many environmental and civic causes which are continuously calling upon them for support. The applicant had at the commencement of the judicial review raised sponsorship of HK$50,000 through other concern groups, and Mr Zimmerman does not "believe" that the applicant or he himself would be able to raise more than this amount to pay legal costs and *the applicant's own legal costs* for this project.

(4) Given the applicant's limited resources, the applicant has obtained *pro bono* services from solicitors and counsel, who have agreed to act up to the decision of the PCO.

(5) In his 1st affirmation at paragraph 19, Mr Zimmerman deposes that if a PCO order is not made to protect the applicant from exposure to costs, the applicant will abandon the proceedings. In his second affirmation at paragraph 6, Mr Zimmerman further deposes that if no PCO is made, the applicant "would be unable to continue these proceedings. It will *not be able to meet its own costs*, much less the costs of the Respondents from its own resources…".

58. Mr Mok submits that this is clearly inadequate evidence to show that the applicant is unable to afford costs to proceed with the

judicial review. This is so as there is no evidence whatsoever to show the applicant's founder directors' personal financial circumstances and, in light of those circumstances, why they could not "fund" the applicant for this judicial review. The lack of such evidence is further underlined by the fact that the residential address of these directors shown on the documents filed with the Companies Registry shows that they are residing at relatively prestigious addresses. If the directors are financially resourceful persons, it must thus be relevant under this consideration as to whether it is reasonable for them not to financially support the applicant to pursue this judicial review, and whether it is then fair to require the public purse to shoulder the costs. This is particularly so when these are the founder directors of the applicant and the judicial review is, in their own case, instigated to further the applicant's founding stated aims. As the applicant was set up by them as a non-profit making organisation and thus has no independent source of income, they should know very well that they may well be required to fund its operations to pursue and further the stated aims.

59. Mr Kat (together with Mr Marwah) for the applicant submits that as matter of principle, the court should *not* look behind the corporate applicant as to the financial position or resources of the shareholders or directors.

60. With respect to Mr Kat, I disagree.

61. As rightly submitted by the *amicus*, as a matter of principle, the court should not be confined to considering the financial means of a corporate applicant alone, when its resourceful (if shown) shareholders

and directors may hide behind an impecunious corporate (for which legal aid is unavailable but may, subject to the presence of other factors, be granted a PCO). Given that legal aid could not be provided to corporate litigants under the Legal Aid Ordinance (Cap 91),[11] if Mr Kat's submissions are correct, it would become easy for any resourceful litigants (who would not be able to obtain legal aid given their financial position) to simply set up a corporate vehicle to pursue a public interest litigation in order to obtain a PCO. That cannot be right as a matter of principle. As a matter of public interest, PCO is to be granted to litigants (provided they also satisfy the other relevant principles) who are *genuinely* unable to bear the costs of the respondent. That should not be extended to self or artificially created situation of inability to bear costs.

62. Hence, as a matter of principle, the court must be able to look at a corporate applicant's sources of fund, including its immediate shareholders and directors, to satisfy itself that the applicant is genuinely unable to bear the costs of the respondent and therefore has to reasonably withdraw the litigation due to its fear for costs liability.

63. To support his submissions that the court should not look at "the backers" behind a PCO applicant on the question of financial resources, Mr Kat relies on the decision of Haddon Cave J in *R (Plantagenet Alliance) v SSJ and Leicester University* [2013] EWHC 3164 (Admin) at paragraphs 45 and 46 as follows:

> "45. … Mr Clarke also submitted that, in any event, it would be inappropriate to require a party seeking a PCO to disclose financial information about its supporters. He submitted that

[11] As, to reflect the legislative intention, the relevant definition of "person" in the Ordinance to whom legal aid may be granted excludes a body of persons corporate or unincorporated.

> this would impose a 'novel and seriously detrimental restriction' on the ability of campaign groups to seek orders of this nature, and may well discourage individuals from supporting campaign groups at all because of the risk that their means will be scrutinised by the Courts by a party resisting such an application.
>
> 46. I do not accept Miss Proops' submission that a PCO is inappropriate because the Claimant 'could and should' have raised funds from the public. This is ***speculative*** and **runs contrary to the evidence that the fund-raising position has not improved**. Nor do I accept her submission that PCOs should not be granted unless applicants prove they have taken 'diligent steps' to obtain *pro bono* legal representation in the first place. If lawyers are prepared to act free of charge in particular cases all well and good; but it cannot be a *sine qua non* to the grant of a PCO that applicants are required to prove that they have trawled the legal market for *pro bono* representation. This would be contrary to the principle of free choice of representation." (**emphasis added** by Mr Kat)

64. I do not think *Plantagenet* assists Mr Kat.

65. In that case, *Plantagenet* had only a sole director and shareholder, Mr Nicolay. He had filed evidence not only about the company's financial position *but also* his *own* financial information. This is set out at paragraph 42 of the judgment as follows:

> "… [Mr Nicolay's] evidence as to financial means was clear and was as follows (paragraph 37 [of his witness statement]):
>
> > 'I do not personally have funds to finance this litigation personally. I work primarily as a self-employed gardener, and have no realisable assets, savings or other capital. Nor am I aware of any other person who has the funds to finance this litigation. Accordingly, in the event that a [PCO] is not granted, neither the Company nor the individuals which it represents will be in a position to continue with this claim, and the issue will not be considered by the Court.'" (emphasis added)

66. The respondent in that case apparently did not challenge this evidence. Haddon Cave J accepted that and made express reference to the evidence of Mr Nicolay's *own* financial position at paragraph 44 before arriving at his observations at paragraphs 45 and 46 quoted above. The learned judge said this at paragraph 44:

> "There were no reasons on the papers to doubt Mr Nicolay's evidence as to either his own personal circumstances or as to the Claimant's cash-flow or fund-raising situation or as to his knowledge of the non-availability of funds of others to finance the litigation. Absent any such countervailing evidence, in my judgment, there was no reason not to take Mr Nicolay's evidence at face value. He is a self-employed gardener without the means himself." (emphasis added)

67. In the premises, this case shows and supports that for a corporate applicant, it is legitimate and proper for the court to look at the financial means of not only the company itself but also its directors and shareholders, as well as the ability of the company to raise funds from other sources. It is then a matter of the quality of the evidence as to whether the court would accept it. This is effectively what Haddon Cave J was observing at paragraphs 45 and 46. The learned judge is clearly *not* saying that, as a matter of principle, the court should not and cannot look at the financial position of a corporate applicant's directors and shareholders to assess whether the applicant cannot genuinely afford costs.

68. In the present case, the applicant has given evidence why it has not been able to raise funds from *other* sources. However, other than an assertion of Mr Zimmerman's belief that he and the other founder directors would not be willing or able to dig further into their own

pockets to fund this particular judicial review, there is no evidence (as in the case of *Plantagenet*) as to their personal financial means and position. As such, the court is simply unable to assess whether there are legitimate or reasonable bases as to why they are unable or not willing to fund the litigation. This in my view is insufficient to satisfy the court that the applicant is genuinely not in a position to bear the costs of the respondent. Moreover, with the lack of this evidence, it would not be fair and just to require the respondent to bear the costs. In this respect, I accept the submissions made by Mr Mok as summarised at paragraph 58 above.

69. In the premises, I am not satisfied that, having regard to the financial position of the applicant and the Board, it is just and fair to make a PCO.

C5. Principle (v): reasonable for the applicant to probably withdraw the judicial review

70. Given my above conclusion that the applicant has failed to show with sufficient evidence that it is genuinely not in a position to bear costs, it follows that it is not reasonable for it to probably withdraw the judicial review if no PCO is granted.

71. The applicant has therefore also not been able to satisfy this principle.

C6. Right to access to court

72. Finally, Mr Kat submits that, in the circumstances of this case, the absence of a PCO protecting the applicant against the Government's costs will debar it from exercising its right to access to justice under Article 35 of the Basic Law and Article 10 of the Hong Kong Bill of Rights.

73. Mr Kat accepts that the right is subject to reasonable and proportionate restriction. However, he submits that the circumstances of the present case render it a disproportionate restriction if a PCO is not granted.

74. I am unable to accept these submissions.

75. As submitted by the *amicus*, it is clear from the authorities that PCOs are aimed to protect, and facilitate the exercise of, applicants' right of access to court in an appropriate case.[12] It is however one thing to say that PCOs serve to protect and facilitate the exercise of the right of access to court, yet quite another to contend that the refusal to grant a PCO *ipso facto* violates the said right.

76. In that context of right of access of court considered under the effect of costs, the courts have developed and adopted the *Corner House* principles to govern how the court should exercise its discretion in granting a PCO. In other words, those principles as guidelines represent

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[12] See for example, *Corner House*, at paragraph 6; *British Columbia v Okanagan Indian Band* [2003] 3 SCR 371 at paragraph 31; *Leung Kwok Hung (CFA)*, at paragraph 13; *Corona Coal Action Group Inc v Coal Mines Australia Pty Ltd* (2009) 170 LGERA 22 at paragraphs 16 and 23.

what the courts have already accepted as a proportionate response under the statutory discretion vested in the court on how that right may be restricted in the context of costs.

77. Thus, if an applicant, as in the present case, is refused a PCO after applying those principles, there is no question in my view that his right of access to court has been disproportionately restricted.

78. The applicant's above contention must therefore be rejected.

D. CONCLUSION

79. As explained above, the applicant has not shown that (a) it is genuinely not in a position to bear the costs of the respondent if it fails; and (b) it is reasonable for it to probably withdraw from the judicial review if no PCO is granted. I am not satisfied that it is fair and just in all the circumstances to depart from the general starting position of costs follow the event and grant the PCO. I would therefore refuse the application. As such, it is also unnecessary and inappropriate for me to determine what should be the proper terms and form of the PCO to be granted.

80. There are apparently no reasons why costs should not follow the event in this application. I therefore make an order *nisi* that costs of this application be to the Board to be taxed if not agreed, with certificate for two counsel.

81. Lastly, I thank counsel for their helpful submissions. In particular, I would like to again express my gratitude to the *amicus* and the Director of Legal Aid for their valuable assistance.

(Thomas Au)
Judge of the Court of First Instance
High Court

Mr Nigel Kat and Mr Azan Marwah, instructed by Boase, Cohen & Collins, for the applicant

Mr Johnny Mok SC, leading Ms Eva Sit, instructed by Department of Justice, for the respondent

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