CHOW CHUI FONG CANDY AND ANOTHER v. THE DIRECTOR OF LANDS [2010] HKCFI 808; HCAL 99/2010 (24 September 2010)

HCAL 95/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 95 OF 2010

IN THE MATTER of an Application for Leave to apply for Judicial Review under Order 53 rule 3, Rules of the High Court

and

IN THE MATTER of the Lands Resumption Ordinance, Cap. 124

and

IN THE MATTER of Section 21L of the High Court Ordinance, Cap. 4

BETWEEN

WONG WAI HING CHRISTOPHER	Applicant
and	
DIRECTOR OF LANDS	Respondent

AND

HCAL 97/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 97 OF 2010

IN THE MATTER of an Application by Mr CHAN TZE YAN 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 a Clearance Notice under Section 6 of the Lands (Miscellaneous Provisions) Ordinance, Cap. 28

and

IN THE MATTER of the right to home and the right to family life under Articles 29, 37 of the Basic Law and Articles 14, 19(2) of the Hong Kong Bill of Rights Ordinance, Cap. 383

BETWEEN

CHAN TZE YAN	Applicant
and	
THE DIRECTOR OF LANDS	Respondent

AND

HCAL 98/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 98 OF 2010

IN THE MATTER of an Application by Mr CHOW SIU KUEN and Madam AU SHIU KUM for Leave to apply for Judicial Review pursuant to Order 53 rule 3 of the Rules of the High Court, Cap. 4A

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IN THE MATTER of a Clearance Notice under Section 6 of the Lands (Miscellaneous Provisions) Ordinance, Cap. 28

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BETWEEN

CHOW SIU KUEN	1st Applicant
AU SHIU KUM	2nd Applicant
and	
THE DIRECTOR OF LANDS	Respondent

AND

HCAL 99/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 99 OF 2010

IN THE MATTER of an Application by Madam CHOW CHUI FONG CANDY and Mr YUEN KAI CHUN 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 a Clearance Notice under Section 6 of the Lands (Miscellaneous Provisions) Ordinance, Cap. 28

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IN THE MATTER of the right to home and the right to family life under Articles 29, 37 of the Basic Law and Articles 14, 19(2) of the Hong Kong Bill of Rights Ordinance, Cap. 383

BETWEEN

CHOW CHUI FONG CANDY	1st Applicant
YUEN KAI CHUN	2nd Applicant
and	
THE DIRECTOR OF LANDS	Respondent

(Heard Together)

Before: Hon Lam J in Court

Date of Hearing: 22 September 2010

Date of Judgment: 24 September 2010

J U D G M E N T

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1. Tsz Tin Tsuen is a village in Tuen Mun Area 54. It had been the home of about 40 families. Some of these families had been living there for several generations. As in some other rural villages in the New Territories, most of the residents no longer earn their living in the agricultural sector. But there are exceptions, as demonstrated by the case of one of the applicants in these proceedings.

2. The Applicants were all previous owners of plots of land at Tsz Tin Tsuen. In legal terms, their land was held by way of lots granted under a Block Crown Lease as agricultural land. With the development in the New Territories in the last few decades, the use of most of the land had been converted to other uses. As illustrated by the facts of these cases, structures had been built on the land for residential and storage purposes. Storage was held to be permitted use in *Attorney General v Melhado Investment Ltd* [1983] HKLR 327. Though the Government took the view that the lease condition did not permit the land to be used for building purposes, some structures erected before a certain date have been "tolerated" in the sense that no action was taken to demand any premium from the owners or to require the demolition of the same. Thus, the villagers were able to live there peacefully and over the years built their homes and social circle there.

3. The Government intends to develop Tuen Mun Area 54 and the Chief Executive in Council decided in 2009 that the land at Tsz Tin Tsuen is required for public purpose. The land is needed for building public housing to provide accommodation to 5,000 households. An order was made for the resumption of various lots (including those of the applicants in these proceedings) in April 2009.

4. As a result of the resumption, the villagers had to face a problem which they did not need to address before: the legality of their structures and use of the land. Though they could claim compensation under the Lands Resumption Ordinance, Section 12(b) of the ordinance provides that no compensation shall be given in respect of any use of the land which is not in accordance with the terms of the Government lease under which the land is held[1]. As further explained below, this court is not concerned about the level of compensation in these proceedings. The proper forum for deciding that, as provided for in the legislation, is the Lands Tribunal.

5. Apart from the compensation to which the villagers are entitled under the Lands Resumption Ordinance, the Government has a scheme of *ex gratia* payments which in effect provide non-statutory compensation to owners of resumed land. The details of the scheme are set out in exhibit LKLA-14, which I annex to this judgment. Mr Dykes submitted that though this non-statutory scheme covers compensation for loss of home, it is not a matter of entitlement and any villager who has disagreement with the amount offered cannot have the matter decided by an Article 10 compliant tribunal. On the other hand, I was told by Mr Yu that there are authorities suggesting that the administration of the non-statutory scheme may also be subject to judicial review[2]. Again this is a question I need not decide in these proceedings.

6. As a matter of fact and in accordance with general practice, the Lands Department did make offers to all the villagers affected under the scheme of *ex gratia* payments. As far as the Applicants are concerned, the latest offers, according figures provided by counsel for the

applicants, are as follows,

(a) HCAL 95: $1,456,400 for the land plus a sum of $256,000;

(b) HCAL 97: $2,270,934 for the land plus $400,000 for the houses, $26,800 for plants and $23,300 for facilities;

(c) HCAL 98: $1,239,036 for the land plus $10,666.93 for plants and $54,586.59 for facilities;

(d) HCAL 99: $2,270,934 for the land, $400,000 for the houses, $26,00 for plants and $23,300 for facilities.

7. In the evidence filed on behalf of the Respondent, it is suggested that these offers under the scheme of *ex gratia* payments are much higher than what the applicants could achieve if they seek statutory compensation under the Lands Resumption Ordinance. The villagers have to consider that with the benefit of advice from their lawyers and surveyors. But the current situation is that these applicants considered the offers to be too low.

8. Another concern of the villagers was the provision of alternative accommodation. The Lands Resumption Ordinance does not have any provision for alternative accommodation. The applicants hold the grievance that the amounts offered by way of compensation would not be adequate for them to purchase another private property of comparable character, size and location in the market. To a large extent, this stems from the problem as to the legality of the existing structures and the policy guided by Section 12(b) of the Lands Resumption Ordinance.

9. However, the Government did make offers for interim housing. For villagers qualified for public housing, interim housing was offered at concessionary rents whereas for villages not so qualified, interim housing was offered at market rents. It is up to each villager to decide whether he or she would take up such offers. In one of the case, the applicants in HCAL 98 of 2010 were able to secure a tenancy at a unit at Prosperous Garden, an estate managed by the Housing Society. They, through their counsel, complained that the unit was too small. Similar complaints were advanced in respect of interim housing offered by the Government. Details of the steps taken by the Government to offer and assist the applicants in securing alternative accommodation are set out in several summaries handed up to the court at the hearing. Mr Dykes drew attention to the fact that these arrangements are non-statutory.

10. Finding the offers from the Lands Department not satisfactory, some of the villagers refused to vacate from their land. The applicants in these proceedings are amongst those. The Director of Lands issued notices under Section 6(1) of the Land (Miscellaneous Provisions) Ordinance Cap. 28 on 2 July 2010, starting the eviction process. The applicants now seek to challenge the eviction process by judicial review.

11. Based on what I have been told and what I read from their evidence, the applicants wish the Government to reach a satisfactory settlement with them before they are required to vacate from the land. From their point of view a satisfactory settlement should enable each family to relocate to a new home of comparable standard in terms of size, character and location with their existing

homes at Tsz Tin Tsuen without any difficulties.

12. But whether this can be achieved by these proceedings is another matter. As I said, the level of compensation is a matter to be decided by the Lands Tribunal if parties cannot come to agreements. As regards the deadline for vacating from the land, these proceedings focus on the legal effect (if any) of the notices issued Section 6(1) of the Land (Miscellaneous Provisions) Ordinance Cap. 28. If the applicants were to succeed here, the eviction process might be delayed. But this court does not have the power (on any analysis, as explained below) to restrain the Government from evicting the applicants until a settlement is reached.

HCAL 95 of 2010

13. The Applicant had been one of the tenants-in-common of section A of Lot No 372 in demarcation district No.132 ["the Land"]. The Land is situated in an area known as Tsz Tin Tsuen. He is also a village representative of Tsz Tin Tsuen. He lived there since 1969. His wife (whom he married in 1980) and three children (aged 29, 15 and 12 respectively) are also living there. Since 1978, he operated a business at the Land in the manufacturing of wooden products. According to his counsel, the Land is 14,375 square feet and a house of 85 square metres was built upon it.

14. On 14 December 2007, the Director of Lands issued a letter informing the residents of Tsz Tin Tsuen, including the Applicant, that the Government would resume the land at Tsz Tin Tsuen, including the Land. The letter was in the form of a Notice stating that clearance of the area was scheduled to take place in March 2010 and all residents should clear their belongings and vacate from the area by March 2010. Another letter of the same date was a clearance survey notice informing the occupants that Lands Department staff would carry out a pre-clearance survey in order to establish the eligibility of the residents for rehousing and of the operates of shops, workshops and other undertakings for ex-gratia payments.

15. The resumption was gazetted in April 2009 and it was effected in accordance with the Lands Resumption Ordinance Cap. 124. On 17 July 2009, the title of the Land reverted to the Government. The Applicant does not challenge the legality of the resumption.

16. Thus, as from 17 July 2009, the Applicant has no right to occupy and use the Land. All he has is the right to claim compensation under the Lands Resumption Ordinance and if the quantum as to the compensation cannot be agreed, that would be assessed by the Lands Tribunal, see *黃榮生及地政總署* CACV 157 of 2008, 20 June 2008.

17. Compensation offers were made by the Lands Department to the Applicant on 14 May and 31 July 2009. The Applicant did not respond. Nor did he vacate from the Land.

18. The clearance of Tsz Tin Tsuen was discussed in a working Group meeting under the Environment, Hygiene and District Development Committee of Tuen Mun District Council on 5 November 2009. Mr Tang Tung Chiu, the village head of Tsz Tin Tsuen and Mr Chan Tsz Yan, a representative of a concern group and the applicant in HCAL97 of 2010 attended the meeting. A request was made for deferral of the clearance date of March 2010. In response, with a view to

give more time to the affected persons to vacate and relocate, the Government deferred the clearance date to July 2010. A notice was posted on all affected areas in Tsz tin Tsuen on 26 January 2010 informing the villagers of the change of clearance date to July 2010.

19. On 2 July 2010, the Director issued a Clearance Notice under Section 6(1) of the Land (Miscellaneous Provisions) Ordinance Cap. 28 informing the Applicant that he had to cease the occupation of the Land before 3 August 2010. The applicant did not comply with such notice.

20. On 24 August 2010, the Director wrote to the Applicant informing him that the Director would take action to demolish all the remaining structures on the Land on 9 September 2010.

21. On 8 September 2010, the Applicant received an ex-gratia payment of $256,555.65 from the Director and signed an undertaking that he would vacate from the Land on or before 9 September 2010.

22. Instead of honoring his undertaking, the Applicant made an *ex parte* application to the court for an interim injunction to restrain the Director from going ahead with the demolition. In that application, the Applicant did not inform the court of his undertaking and the receipt of the ex-gratia payment. In his Third Affirmation, the Applicant explained that he was misled as to the nature of the document he signed and collected the money on the basis that it would not prejudice his future claim. He further said that at that time he was under great pressure as he worried about the livelihood of his wife and his children if he were to be arrested as a result of his "fierce opposition to the demolition". He intended to keep the money as a contingency payment for the use of his family. The allegation of the Applicant as to his being misled was refuted by the affirmation of Mr Yip, a Clearance Officer of the Lands Department. In view of the focus of the challenge as it is ultimately argued before this court, it is not necessary to resolve this factual dispute.

23. That *ex parte* application came before Deputy Judge L Chan as an urgent application. I was told that an interim injunction was granted at 7:00 am up to 1:00 pm on 9 September with a view that the Director would be given an opportunity to address the court at about noon on that date. Before the matter was further argued before the court, the Director agreed with the Applicant to withhold demolition up to 27 September 2010. The court was informed of the agreement and the Applicant was granted an extension up to 16 September 2010 to file his Form 86.

24. On 16 September 2010, the Applicant made an application for leave to apply for judicial review in respect of the Clearance Notice of 2 July 2010 and the letter of 24 August 2010. The Applicant seeks to obtain an order of certiorari quashing the Clearance Notice and the "Notice" of 24 August 2010 to demolish the structures on the Land.

25. In a nutshell, the complaint of the Applicant as presented in his affirmation was that the period of notice given to him to vacate from the Land is too short bearing in mind that he has been there for decades. As such, it is contended on his behalf that the decision to issue such notices was *Wednesbury* unreasonable. By reference to the letter of 24 August 2010, the Applicant said at para.27 of his Form 86,

"A three weeks' notice is simply insufficient for the Applicant's family to relocate themselves especially given the belated compensation offers. The applicant could not be expected to be able to relocate his family and business on or before 9 September 2010 upon his acceptance of the provisional compensation on 1 September 2010."

26. The Applicant received an offer for provisional compensation on 1 September 2010. He accepted the same on the same date. He would receive a sum of $1,456,400 upon production of the title documents and other conditions stipulated in the offer letter. The acceptance of the provisional compensation would not prevent the Applicant from pursuing his claim for full compensation in the Lands Tribunal.

27. His request as put forward by his solicitors in correspondence, as summarized at para.18 of his Affirmation, is as follows,

"… we ask for postponement of the TTT clearance projects … We ask for 2 months so that we can resolve the relocation issue and conclude negotiations with the authorities. … Hopefully with the cooling-off period sought, the crisis can be defused and all the aggrieved TTT residents could be brought back to the negotiation table and have all the differences ironed out amicably."

28. However, shortly before the application for leave was heard by this court on 20 September 2010, the Applicant changed the primary basis of his attack. By the Amended Notice of Application, he put forward the argument that Section 6 of the Land (Miscellaneous Provisions) Ordinance Cap. 28 is unconstitutional in that it infringes the Applicant's rights under Article 14 of the Hong Kong Bill of Rights and Article 29 of the Basic Law. This becomes the main plank of his challenge and at the hearing on 22 September 2010, Mr Yee abandoned the previous line of attack and confirmed that the Applicant would instead rely on the grounds canvassed by Mr Dykes at that hearing. If the Applicant succeeds, Mr Dykes submitted that the notices would be quashed and the Government would have to resort to ordinary civil proceedings to recover possession of the Land if no settlement is reached with the Applicant. Insofar as the resolution of the challenge based on Article 29 of the Basic Law and Article 14 of the Hong Kong Bill of Rights involves factual disputes, counsel submitted that the matter has to be decided by a writ action if the court held that there is a seriously arguable defence.

29. On 20 September 2010, shortly before the hearing of the leave application in HCAL 95 of 2010, three further applications by other Tsz Tin Tsuen villagers were presented to the court. Since the Director did not have time to consider the same, all the applications were adjourned to be heard on 22 September 2010. Mr Dykes indicated that all the applications can be dealt with on a roll-up basis, viz. the court can deal with application for leave and the substantive application for judicial review at the same time. In view of the fact that the withholding of action by the Director would end on 27 September, and in the light of the limited scope of the argument, I think it is a sensible course to take. Direction was given as to the filing of evidence by the Director.

HCAL 97 of 2010

30. This applicant was the owner of Section B Lot No.391, Demarcation District No.132, again a

piece of land in Tsz Tin Tsuen. He is a farmer and he farms and lives there. His younger also lives there with him. Both of them lives there since they were born in 1965 and 1966 respectively. The land was bought by his grandfather in 1960.

31. His land was about 4,800 square feet and 3 structures were built on it,

(a) A house of about 80 square metres for residence;

(b) A house of 25 square metres for storage;

(c) A house of 75 square metres, once as a factory, now for storing fertilizers.

32. The two brothers also occupied the neighbouring lot at Section A Lot No.391 and used the same as farmland.

33. This applicant has raised objection to the resumption before the Chief Executive in Council made the decision to resume in April 2009. His objection had been considered. On 7 March 2008, a meeting was held between the applicant and the Civil Engineering and Development Department at which the objections of the applicant and his concerns were canvassed. The need for the resumption, the basis of compensation and the arrangement for alternative accommodation were explained to him.

34. The land was subsequently resumed by the Government with the same chronology of material events. Despite his previous objections, the applicant did not challenge the decision of the Chief executive in Council by way of judicial review. As mentioned, the applicant was the representative of a concern group who attended another meeting on 5 November 2009.

35. On 29 September 2009, the applicant applied for public housing. The application was withdrawn when he found out his family assets exceeded the prescribed limit. He also declined interim housing.

36. Like the applicant in HCAL 95 of 2010, he accepted and collected an *ex gratia* payment in the sum of $406,045.88 and signed an undertaking on 10 September 2010 promising to vacate from the land by 27 September 2010. However, on 17 September 2010, the applicant returned the cheque to the Lands Department.

HCAL 98 of 2010

37. The applicants are mother (aged 76) and son (aged 41). The land in question is Lot No.304, Demarcation District No.132. It was bought by the late father around late 1960’s or early 1970’s. The family had been living there since the land was acquired.

38. The size of the land is 2,500 square feet and there is a house of 1,000 square feet built upon it with an open garden of 1,500 square feet.

39. The case has a similar resumption history.

40. The applicant accepted a tenancy at Prosperous Garden in Yau Ma Tei from the Housing Society and his family moved into it in August 2010. However, counsel complained on his behalf that the unit is too small as compared with the resident they previously enjoyed at Tsz Tin Tsuen. He is not qualified for public housing managed by the Housing Authority because he had been given the Home Starter Loan in 2001 and his income limit exceeded that prescribed by the Housing Authority. At his request, his case was referred to the Housing Society and the unit at Prosperous Garden was offered and accepted accordingly.

41. The Government had offered him a moving allowance in the sum of $6,000. He declined to accept it.

HCAL 99 of 2010

42. The Applicants are married couple. The wife (the 1st Applicant) was the owner of Lot No.394 in Demarcation District No.132, another plot of land in Tsz Tin Tsuen. That piece of land was originally owned by the grandfather of the husband (the 2nd Applicant). He has been living there since he was born in 1963. He married the 1st Applicant in 1996 and she also lived there ever since. After the grandfather passed away, the ownership of land was transferred to the wife. They have three daughters, also living there.

43. Their land has 4,356 square feet and four houses were built on it.

(a) House 1 is about 65 square metres and occupied by the three daughters;

(b) House 2 is 45 square metres and used for storage;

(c) House 3 is 20 square metres and occupied by the couple.

(d) House 4 is 30 square metres and leased out to a tenant.

44. The resumption history is similar.

45. The applicants applied for public housing in March 2009 and at an interview on 21 October 2009 they declared their means exceeded the Housing Authority's asset limit. Interim housing was also offered and declined. Their case was reconsidered again in August 2010 and again they failed on means test. The case was referred by the Housing Department to the Social Welfare Department but the applicants declined the services of the latter.

46. An offer for compensation ($2 million odd) were made to them in May 2009 in respect of the land. A further offer (about $217,000) was made in February 2010 in respect of the houses. That further offer was increased to $237,000 in September 2010.They did not accept the offers.

47. The applicants challenge the Clearance Notice of 2 July 2010 and the further notice of 24

August 2010 on similar grounds as advanced in other cases.

Amenability to judicial review

48. The recovery of possession of land already resumed (as opposed to the decision made by the Chief Executive in Council in resuming the land) is undertaken by the Director in the performance of his role as the land agent of the Government. As such, the decisions made in connection to such process and the steps taken thereunder is *prima facie* not judicially reviewable in accordance with the principle laid down in *Hang Wah Chong Investment v Attorney General* [1981] HKLR 336.

49. The Applicant relied on *Hong Kong & China Gas v Directors of Land* [1997] HKLRD 1291 to argue that *Hang Wah Chong* is not applicable. The dichotomy between these two lines of cases has been examined by A Cheung J in *Anderson Asphalt v Secretary for Justice* [2009] 3 HKLRD 217. The relevant principles were summarized by His Lordship at para.57 of the judgment after reviewing the relevant authorities. In a nutshell, the mere presence of some public element in the decision or action being challenged may not be sufficient to render it a public law decision. The crucial question is whether there is a public element of sufficient weight in the sense that the role played or the function performed by the Government official is sufficiently public to render it susceptible to judicial review.

50. In the context of land resumption, in my judgment, there is a distinction between the decision to resume the land and thereafter the actual process of recovering the land (including the eviction of those continues to remain on the land after resumption has been legally effected). No matter what one may say as regards the reviewability of the former decision, I think the latter process and each step taken pursuant thereto by the Director of Lands must be regarded as acts in the performance of his role as the land agent of the Government. As such, subject to an important rider, the steps taken by the Director in his negotiation with the occupiers and the clearance of the land, insofar as they are done in a similar manner as a private landlord recovering possession of his land from an occupier, are not amenable to judicial review.

51. As mentioned, there is one rider. The Director is not seeking to recover possession by means of legal proceedings like any ordinary private landlord. The Clearance Notice of 6 July 2010 was issued under Section 6 of the Land (Miscellaneous Provisions) Ordinance Cap. 28.

52. That ordinance provides for matters relating to Government land. After resumption, the land in question becomes Government land and the Director, as the designated authority under the Schedule to the Ordinance, can give a notice under Section 6 requiring any unauthorized occupation of the land to be ceased. Section 6 reads as follows,

"(1) Subject to subsection (2A), if unleased land is occupied, otherwise than under a licence or a deed or memorandum of appropriation, the Authority may cause a notice, requiring the occupation of the land to cease before such date as may be specified in the notice, to be posted in one or more places –(Amended 56 of 1979 s. 3)

(a) on or near the land; or

(b) on any property or structure on the land.

(2) If the occupation of unleased land does not cease as required by a notice under subsection (1), any public officer, or other person, acting on the direction of the Authority may, with the assistance of such other public officers or other persons as may be necessary-

(a) remove from the land the persons (if any) thereon; and

(b) take possession of any property or structure on the land.

(2A) Notwithstanding subsection (1), where –

(a) a structure is being erected on or over unleased land, otherwise than under a licence or a deed or memorandum of appropriation; or

(b) a structure has been erected on unleased land, otherwise than under a licence or a deed or memorandum of appropriation, and the Authority is reasonably satisfied that the structure is not being habitually and bona fide used, any public officer, or other person, acting on the direction of the Authority may, with the assistance of such other public officers or other persons as may be necessary, and without giving any notice –

(i) remove from the structure any person or property therein;

(ii) demolish the structure; and

(iii) take possession of such property and of any property resulting from the demolition of the structure. (Added 56 of 1979 s. 3)

(3) Any property or structure of which possession is taken under subsection (2)(b) or subsection (2A)(iii) shall become the property of the Government free from the rights of any person and may be demolished or otherwise dealt with as the Authority thinks fit. (Amended 56 of 1979 s. 3; 29 of 1998 s. 105)

(4) Any person occupying unleasedland, otherwise than under a licence or a deed or memorandum of appropriation, who without reasonable excuse does not cease to occupy the same as required by a notice under subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine of $10000 and to imprisonment for 6 months.

(4A) Any person who –

(a) is engaged in any way in the erection of a structure on unleased land; or

(b) arranges or directs the erection of a structure on unleased land, being a structure being erected otherwise than under a licence or a deed or memorandum of appropriation, shall be guilty

of an offence and shall be liable on conviction –

(i) where the offender has been engaged in any way in, or has arranged or directed, the erection of the structure for the purpose of disposing of the structure for gain for himself or another, to a fine of $50000 and to imprisonment for 1 year; and

(ii) in any other case, to a fine of $10000 and to imprisonment for 6 months. (Added 56 of 1979 s. 3. Amended 46 of 1982 s. 2)

(5) The Authority may recover from any person convicted of an offence under subsection (4) or (4A) any cost incurred in or arising out of the demolition of any property or structure under subsection (2A) or (3) and the exercise of the powers conferred by this section. (Amended 56 of 1979 s. 3)"

53. Thus, the issue of the Clearance Notice has the following legal consequences. First, the Director may direct any persons or public officer to remove any persons and property remaining on the land and take possession of the property. He may also direct the demolition of the structure in the land, see Section 6(2). This is essentially the remedy of self-help. Instead of coming to court to seek an order for possession and then enforcing the order for possession, the Director is given the statutory authority to clear the site after issuing a Section 6 notice.

54. Second, the property so taken would become the property of the Government free from the rights of any person, see Section 6(3). In other words, any personal belongings or chattels removed at the direction of the Director after the issue of a clearance notice would be forfeited.

55. Third, any person remaining in occupation of the land after the notice without reasonable excuse shall be guilty of an offence and liable to be sentenced to imprisonment for up to 6 months, see Section 6(4).

56. Fourth, the Director may recover against a person so convicted the costs of demolition of any structure or property on the land, see Section 6(5).

57. It should further be noted that the exercise of the authority under the Ordinance is buttressed by Section 16 of the Ordinance as regards offence in respect of obstruction to the carrying out of any function under that authority as well as Sections 17 and 18 as to the use of force in the exercise of that authority and the Director and the Government's immunity from claims.

58. Hence, the Director has considerable power in dealing with unauthorized occupation of Government land which goes much beyond the power that can be exercised by a private landowner. Though the issue of a Section 6(1) notice can be regarded as the commencement of the eviction process, it has ramifications beyond the recovery of possession of the land in question. It has potential criminal consequences for the person in occupation. It can affect the legal ownership of chattels remaining in the land.

59. In view of that, I think the exercise of the power of the Director under Section 6(1) has a sufficiently public element to render it susceptible to judicial review even though the primary

objective of the Director is the recovery of possession of the land as the land agent of the Government.

The challenge

60. Article 29 of the Basic Law provides that the homes and other premises of Hong Kong Residents shall be inviolable. Arbitrary or unlawful search, or intrusion into, a resident's home or other premises shall be prohibited.

61. Article 14 of the Hong Kong Bill of Rights gives similar protection,

"(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence …

(2) Everyone has the right to the protection of the law against such interference or attacks."

62. In both articles, as far as they are relevant for present purposes, the protection is directed against arbitrary or unlawful interference with/intrusion into one's home or premises. I accept (and I do not think Mr Yu disputed) that the eviction of the applicants from their land is interference or intrusion. The crucial question is whether such interference or intrusion is unlawful or arbitrary.

63. Relying on some case law in England (derived from jurisprudence stemming from the European Convention on Human Rights), Mr Dykes contended that these constitutional rights of the applicants afford them the right to challenge any eviction as arbitrary or unlawful even though their land has been resumed. Based on *Kay v Lambeth LBC* [2006] 2 AC 465 and *Doherty v Birmingham CC* [2009] 1 AC 367, counsel submitted that there are two types of possible defence,

(a) Constitutional challenge to the law under which eviction is sought;

(b) Conventional challenge under public law principles that the evicting authority made a decision that was beyond the bounds of the options open to a reasonable decision-maker on the facts of the case.

64. In the present context, counsel challenged the constitutionality of the procedure under Section 6 of the Land (Miscellaneous Provisions) Ordinance Cap. 28. It is argued that the applicants' rights under Article 10 of the Hong Kong Bill of Rights to have their rights in a suit at law determined by a competent, independent and impartial tribunal are infringed since the Director is authorized by Section 6 to take action in respect of the home and premises of the applicants without due process in court.

65. Under the second limb, viz. the conventional public law challenge, Mr Dykes submitted that having lost their homes without any offer of re-housing, the applicants should not be rushed into accepting *ex gratia* payments under the threat of eviction. The dilemma facing the applicants, counsel said, is that they would be disqualified from public housing if they accept the

compensation.

66. Counsel also made submissions on the basis for calculating compensation. I do not intend to deal with such submissions because, as I said earlier, if necessary arguments on the basis and the level of compensation should be ventilated in the Lands Tribunal (and there is no suggestion that the Lands Tribunal is not Article 10 compliant). If the applicants have any valid constitutional challenge to the statutory basis for assessing compensation under the Lands Resumption Ordinance, they could do so in the context of proceedings in the Lands Tribunal. Suffice to say that in the context of Article 29 of the Basic Law and Article 14 of the Hong Kong Bill of Rights, I do not see any arguable ground to suggest that the eviction should await the final resolution of the question of compensation. I shall further elaborate on this point below.

Constitutionality of Section 6 the Land (Miscellaneous Provisions) Ordinance

67. In my view, bearing in mind the submissions of counsel, the constitutional challenge to Section 6 of the Ordinance is in substance a challenge based on Article 10 of the Hong Kong Bill of Rights though the applicants need to refer to their constitutional rights under Article 29 of the Basic Law and Article 14 of the Hong Kong Bill of Rights to establish a right in a suit at law.

68. Assuming for the moment that the applicants have a right in a suit at law, as submitted by Mr Yu, the requirement of Article 10 can be satisfied by the availability of judicial review in respect of the Director's decision under Section 6 when the decision involves no factual disputes or where the fact finding is part of a much broader policy judgment[3].

69. Even assuming that the principles laid down in *Kay v Lambeth LBC* [2006] 2 AC 465 and *Doherty v Birmingham CC* [2009] 1 AC 367 are applicable to the full extent in Hong Kong, the permissible challenges based on Article 29 of the Basic Law and Article 14 of the Hong Kong Bill of Rights as identified by Mr Dykes are the constitutional challenge and the conventional public law challenges.

70. Given my above conclusion as to the availability of judicial review in respect of the decision of the Director under Section 6, I see no reason why the permissible challenges cannot be fully investigated within the confines of judicial review proceedings. Judges dealing with judicial review are familiar with constitutional challenges as to the legality of legislation. As regards the second limb challenges based on conventional public law grounds, again they can be dealt with properly in the context of an application judicial review.

71. Mr Dykes relied principally on the decision of the European Court of Human Rights in *Connors v United Kingdom* (2005) 40 EHRR 9 where it was held that the availability of judicial review does not provide the answer to the challenge based on Article 8 of the European Convention. But as pointed out by Mr Yu, the case turned on special facts which have no application here. The claimant in that case had made an application for judicial review, and leave was refused because the local authority evicting him was not required to establish any substantive justification (in the light of the decision in *Sheffield City Council v Smart* [2002] EWCA Civ 4. There was a dispute of fact as to whether the claimant was responsible for the nuisance created at a local authority gypsy site. Thus, without any procedure for proper

adjudication of such factual dispute, the European Court held that procedural safeguards offered by judicial review were in the circumstances inadequate. It was against such background that the court said at the end of para.92 of the judgment,

"While therefore the existence of judicial review may provide a valuable safeguard against abuse or oppressive conduct by local authorities in some areas, the Court does not consider that it can be regarded as assisting the applicant, or other gypsies, in circumstances where the local authority terminates licences in accordance with the applicable law."

72. After referring to margin of appreciation, the special situation of the gypsies and obligation on the part of the Convention States to give special consideration to them at para.93, the court said, at para.94,

"However, even allowing for the margin of appreciation which is to be afforded to the State in such circumstances, the Court is not persuaded that the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family has been sufficiently demonstrated by the Government. The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal or to provide any specific benefit to members of the gypsy community. …"

The European Court was referring there to the specific situation where summary eviction was achieved by the termination of licence without any obligation to give reasons and the legitimate aim of the scheme was said to be for the common good of the gypsy community using the site.

And the court concluded at para.95,

"In conclusion, the Court finds that the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regards as justified by a 'pressing social need' or proportionate to the legitimate aim being pursued. There has, accordingly been a violation of Article 8 of the Convention."

73. These exceptional features of *Connors* were highlighted by Lord Scott in *Kay v Lambeth* [2006] 2 AC 465 at paras.158 to 160. Further, in the paragraphs that followed, His Lordship referred to *Blecic*, another European Court case. In that case the challenge by the claimant based on Article 8 failed on the basis of the wide margin of appreciation to be accorded to domestic authorities in socio-economic matters such as housing policy. Then at para.165, His Lordship compared *Connors* with *Blecic* and highlighted the difference in the level of margin of appreciation in different domains. See also the discussion of Lord Hope in *Doherty v Birmingham City Council* [2009] 1 AC 367 at paras.25 to 33 regarding the special position of the gypsies in *Connors*.

74. The interference in *Connors* was effected forensically by the termination of licence. In our case, we are dealing with a different domain: resumption. As Mr Yu submitted by reference to the following dicta of Lord Hoffmann in *R (Alconbury Developments Ltd) v Secretary of State*

for the Environment [2003] 2 AC 295, at para.87, whether the availability of judicial review satisfies the requirement of Article 10 depends on the nature of the decision,

"The reference to 'full jurisdiction' [in *Albert and Le Compte v Belgium* (1983) 5 EHRR 533]has been frequently cited in subsequent cases and sometimes relied upon in argument as if it were authority for saying that a policy decision affecting civil rights by an administrator who does not comply with article 6(1) has to be reviewable on its merits by an independent and impartial tribunal. … But subsequent European authority shows that 'full jurisdiction' does not mean full decision–making power. It means full jurisdiction to deal with the case as the nature of the decision requires."

(see also the discussion by Ribeiro PJ in *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237)

75. Thus, we have to ask what would be the issues that could be raised by a villager under Article 29 of the Basic Law and Article 14 of the Hong Kong Bill of Rights in the context of the Director exercising his power under Section 6 of the Ordinance to recover resumed land. Mr Yu quite rightly reminded this court that in terms of procedural safeguards one should not be confined to the decision process under Section 6. The legitimacy of the eviction stems from the resumption and there were ample opportunities for the applicants to object and to challenge the decision of the Chief Executive in Council to resume their land, including challenge by way of judicial review. As a matter of fact, one of the applicants in these cases did raise objection to resumption and such objection was considered by the Chief Executive in Council before the decision to resume was made. But no-one sought to challenge that decision by way of judicial review.

76. In this connection, I reject Mr Dykes' submission that the Section 6 decision has to be considered on its own. Mr Dykes argued that the person whose land was resumed might be quite happy with relocation and for such person there is no infringement of Article 14. But in my judgment, it does not follow from this analysis that for those who are not happy to be relocated the resumption did not constitute interference. Whilst I can see that a Section 6 Clearance Notice posed as a more direct and immediate form of interference for the purpose of Article 14, a decision to resume is also a kind of interference (and our courts have entertained challenge based on Article 14 in the wake of resumption, see *Fok Lai Ying*). There appears to be similar jurisprudence in England in respect of Article 8 challenges to compulsory purchase orders, see *Clayton & Tomlinson, The Law of Human Rights*, 2nd Edn. Para.12.199.

77. Bearing in mind the possible human rights challenges as postulated by Lord Hope in *Kay v Lambeth* [2006] 2 AC 465 at para.110 (as applied in *Doherty v Birmingham City Council* [2009] 1 AC 367), it is difficult to perceive any viable challenges that cannot be satisfactorily ventilated by way of judicial review applications. At para.110, Lord Hope said,

"…Subject to what I say below, I would hold that a defence which does not challenge the law under which the possession order is sought as being incompatible with article 8 but is based only on the occupier's personal circumstances should be struck out. … But if the requirements of the law have been established and the right to recover possession in unqualified, the only situations

in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these:

(a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with article 8 …;

(b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again the point is seriously arguable …"

78. It is also illuminating to quote from the following paragraphs in *Kay* to understand the reasons behind the limited scope of viable challenges. I would start with the judgment of Lord Bingham at para.32 where His Lordship referred to three fundamental principles. The first and second are about the margin of appreciation accorded to national authorities. The third principle is stated as follows,

"that inherent in the whole of the Convention is a search for balance between the rights of the individual and the wider rights of the society to which he belongs, neither enjoying any absolute right to prevail over the other."

Then in the context of housing legislation, His Lordship commented on the relevance of this third principle at para.33,

"Most of these statutes … were no doubt prompted by recognition that housing … is a scarce and in the short term finite commodity. The demand for housing at a reasonable price is greater than the supply. This of course means that security of tenure for A means a denial of accommodation for B, recognition of a right for C to succeed to a tenancy means there is no tenancy for D, an extension of time granted to E defers the date when F can find somewhere to live. Our housing legislation strikes a balance between the competing claims to which scarcity gives rise, taking account, no doubt imperfectly but as well as may be, of the human, social and economic considerations involved. And it is, of course, to housing authorities such as the respondents that Parliament has entrusted the power of managing and allocating the local authority housing stock …"

79. Then in the judgment of Baroness Hale, at para.185,

"My Lords, we are all agreed that it must be possible for the defendant in a possession action to claim that the balance between respect for his home and the property rights of the owner, struck by the general law in the type of case of which his is an example, does not comply with the Convention. We also agree that the cases in which such a claim will have a real prospect of success are rare, This is an area of the law much trampled over by the legislature as it has tried to respond to shifting and conflicting social and economic pressures. If there were enough suitable and affordable housing to share amongst those who needed it there would be no problem. But there is not, so priorities have to be established, either by Parliament or by the public sector landlord, who has to allocate this scarce resource in accordance with the priorities set by

Parliament."

And then at para.187,

"To the extent that a court insists that a public authority does not rely upon its rights to evict an occupier, it is obliging that public authority to continue to supply that person with a home in circumstances where Parliament has not obliged (and may not even have empowered) it to do so. In this politically contentious area of social and economic policy, any court should think long and hard before intervening in the balance currently struck by the elected legislature."

80. If I may say so with great respect, what Her Ladyship said at paras.190 and 191 goes to the heart of the matter,

"My Lords, I myself do not think that the purpose of article 8 was to oblige a social landlord to continue to supply housing to a person who has no right in domestic law to continue to be supplied with that housing, assuming that the general balance struck by domestic law was not amenable to attach and that the authority's decision to invoke that law was not open to judicial review on convention grounds. It should not be forgotten that in an appropriate case, the range of considerations which any public authority should take into account in deciding whether to invoke its power can be very wide …

There is no doubt that article 8 entails both negative obligations --- not to interfere --- and positive obligations --- to secure the right to respect for a person's private and family life, his home and his correspondence. But it does not confer any **right to health** or welfare benefits or to housing. The extent to which any member state assumes responsibility for supplying these is very much a matter for that member state, In this country, housing law defines the extent of the obligation and the power to provide housing at public expense. Social services law defines the extent of the obligation to provide services (which sometimes includes assistance with housing) for vulnerable people … If social services law does not provide assistance to an occupier whose personal circumstances are said to make eviction from this particular accommodation disproportionate, then I question whether housing law should be made to do so. In an appropriate case, it is incumbent upon the housing authority to liaise with the social services and education authorities before deciding to take action. There is nothing in the jurisprudence to in indicate that article 8 requires more of them than is already required."

81. The context in which these observations were made is slightly different from the cases I have to deal with. In *Kay*, the House of Lords considered the Article 8 challenges against the exercise of the power to evict under housing legislations. In the present cases, the applicants faced eviction in the wake of resumption, though the purpose of the resumption is to have the land for building public housing. I can understand readily from their point of view these applicants could naturally feel that since they were relocated for public good the balance should tilt more in their favour. However, when considering the balance to be struck between the rights of an individual and that of the wider interest of the society as a whole, the observations in *Kay* as to the scarcity of resources must be apposite. The demand for public housing is Hong Kong is great. Land available for the construction of public housing is scarce. The Chief Executive in Council is entrusted by the legislature to make decisions with regard to resumption and these are difficult

decisions which have to be made. There is a mechanism in place for consultation and considering objections. Objections were considered before a decision is made. There is also avenue for judicial supervision by way of judicial review against the decision of the Chief Executive in Council.

82. If I may adapt the observations of Lord Bingham to the present context, if the applicants were allowed to remain in occupation until their claims for compensation and re-housing were all resolved, the construction of public housing would be delayed and those members of the public who have been waiting for public housing would have to wait longer than they otherwise have to.

83. Further, the nature of the Articles 29 (Basic Law) and 14 (Hong Kong Bill of Rights) right has to be borne in mind. As highlighted by Baroness Hale, the right under these Articles does not confer any **right to health** or welfare benefits or to housing. Whilst the court will take into account the availability of compensation and alternative accommodation and other welfare needs of the applicants on a macro level in the determination of the reasonableness (including the proportionality) of the interference (with a view to see the interference is arbitrary and unlawful), there is no requirement that all these needs must be met to the reasonable satisfaction of the applicants before they could be displaced. The consideration has to be applied on a macro level when the court is dealing with a challenge under these two Articles because as far as the housing and welfare needs of those suffered from resumption are concerned, there are regimes (both statutory and non-statutory) in Hong Kong. As some recent cases in our courts demonstrated, the administration of these regimes in many respects are subject to judicial review.

84. Given that the needs of the applicants are to be considered on a macro level, it would not be necessary to go into the kind of details suggested by Mr Dykes: the character and location of alternative accommodation offered, the size of the alternative accommodation and complaints about the level of rent charged for interim housing.

85. Though Mr Yu said it is not necessary in the present context to decide whether we should follow the majority view in *Kay* or that of the minority (and he is probably right), for my part I would prefer the approach of the majority. I note that Mr Dykes advocated the approach of the minority. But even on the views of the minority, Lord Bingham set out the limits to relevance of individual personal circumstances as constituting a valid defence based on Article 8 at para.38,

“I do not, however, consider that problems and afflictions of a personal nature should avail the occupier where there are public services available to address or alleviate those problems, and if under the relevant social legislation the occupier is specifically disentitled for relief it will be necessary to consider the democratic judgment reflected in that provision. Nor can article 8 avail a tenant, otherwise perhaps than for a very brief period, if he can be appropriately accommodated elsewhere (whether publicly or privately).”

86. Thus, even on Lord Bingham’s approach, the availability of public services to address or alleviate the housing and welfare difficulties of an occupier is a sufficient answer.

87. Mr Dykes also submitted that in dealing with an Articles 29 (Basic Law) and 14 (HKBOR)

challenge, the court must also consider the adequacy of compensation. I note that in *R (Pascoe) v First Secretary of State* [2007] 1 WLR 885, an argument based on inadequacy of compensation did not find favour with the court in the context of a challenge under Article 8. Since I only come across this case by my own research after hearing has been concluded and given the time constraint it is not possible to invite further submissions on it, I would just mention it for future reference. Based on what has been argued at the hearing, I would agree with Mr Dykes but only to a limited extent: like the relocation needs of the applicants, the matter is to be considered broadly on a macro level.

88. These two articles do not deal with the question of compensation. Article 105 of the Basic Law provides for the right of individuals to compensation for lawful deprivation of their property. And the compensation shall correspond to the real value of the property concerned at the time of deprivation. Thus, as a matter of law, the applicants are entitled to compensation corresponding to the real value of their properties resumed by the Government. As explained at the outset of this judgment, the predicament of the applicants stems from the doubts over the legality of their structures and the use of their land. Under the scheme in the Lands Resumption Ordinance, if the applicants do not accept the non-statutory offers from the Director, they could seek to have their claims assessed by the Lands Tribunal. They are at liberty to challenge the constitutionality of Section 12(b) of the Lands Resumption Ordinance at the Lands Tribunal but the final resolution of such arguments takes time and it may also involve dispute of facts and expert evidence on valuation. Provided that there is a scheme of fair compensation in place (statutory or otherwise), the actual resolution of disputes pertaining to the quantum of compensation must be left with the article 10 compliant forum entrusted with the function of assessment. I do not see any justification for holding that Articles 29 (Basic Law) and 14 (HKBOR) right is infringed simply because the eviction takes place before the full resolution of the quantum of compensation.

89. An argument that was made, perhaps obliquely, by Mr Pun on behalf of some the applicants was that the compensation that have been offered is not adequate to finance the purchase in the market of property comparable to the size and location of the property resumed. But counsel fails to take into account of the problems as to the legality of structure and use of the property when making the comparison. Insofar as there is any hardship arising from re-housing or other welfare needs, the evidence shows that there are measures in place to offer the necessary assistance to the applicants. In my view, it would go beyond the bounds of an Articles 29 (Basic Law) and 14 (HKBOR) challenge to require the Government to provide alternative accommodation of comparable character, size and location before eviction.

90. As the present case demonstrates, a challenge to the constitutionality of Section 6 can be properly decided by a competent, independent and impartial tribunal, viz. the court in dealing with an application for judicial review. The challenge based on *Wednesbury* unreasonableness in terms of the applicants being rushed to accept compensation can equally be properly disposed of in the present set of proceedings (see below). As observed by Lord Walker in *Doherty* at para.123,

“If the defence is focused not on the legislation but on the housing authority’s decision-making process the judge will in effect be hearing an application for judicial review on traditional review

grounds."

91. It is difficult to see how the court would approach the matter differently if Order 113 proceedings (which Mr Dykes submitted can serve as a filter for determining whether any defence based on Article 29 of the Basic Law and Article 14 of the Hong Kong Bill of Rights is seriously arguable) are resorted to by the Government in recovering possession as opposed to the use of the mechanism under Section 6.

92. Once this is appreciated, the Article 10 challenge falls to the ground. I hold that by reason of the availability of judicial review which can properly address all possible challenges based on Article 29 of the Basic Law and Article 14 of the Hong Kong Bill of Rights to a decision of the Director, the mechanism under Section 6 is not unconstitutional notwithstanding that the Director needs not come before the court to get an order for possession before issuing a clearance notice.

The conventional challenge: proportionality and Wednesbury unreasonableness

93. As pointed out by Mr Yu, there is no challenge to the decision of the Chief Executive in Council to resume the land in the present proceedings. Any challenge to such decision should have been made a long time ago. In the light of that, this court must proceed on the basis that there is a legitimate aim in eviction, viz. to serve the pressing public need in recovering possession of the land for building public housing.

94. Against such background, the issue before this court is whether it is still *Wednesbury* unreasonable or disproportionate for the Director to proceed by way of issuing the Clearance Notice on 2 July 2010 despite the fact that the compensation of the applicants and their relocation has not been resolved, thereby rendering the action of the Director arbitrary or unlawful in the context Article 29 of the Basic Law and Article 14 of the Hong Kong Bill of Rights.

95. In the preceding section, I have referred at length to the judgment of *Kay* in respect of the substance of the right to respect for one's home and the protection against arbitrary and unlawful interference. But it should be noted that the relevant law considered in *Kay* is article 8 of the European Convention on Human Rights. The wordings of article 8 is different from our Article 29 (Basic Law) and Article 14 (HKBOR). Article 8 provides,

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, of for the protection of the rights and freedoms of others."

96. In *Fok Lai Ying v Governor in Council* [1997] 1 HKLRD 810, the Privy Council considered

a challenge based on Article 14 in the context of resumption. The difference in wordings between our Article 14 and Article 8 of the European Convention is noted. At p.819 C to E, the following is said,

"While Art.14 is expressed in more positive terms than art.8 of the European Convention and does not contain the express limitations found in clause (2) of the latter, it is directed against arbitrary or unlawful interference and in determining whether an interference is to be so characterized it may be appropriate to consider, among other matters, democratic necessities such as are listed in art.8(2) of the European Convention. Both articles therefore may require a form of balancing exercise and the verbal differences should not be heavily stressed. Nevertheless a consequence of the differences is that comments and opinions of the Human Rights Committee of the United Nations on art 17 of the International Covenant are a more direct guide to the interpretation of art.14 of the Hong Kong Bill than decisions of the European Court of Human Rights and reports of the European Commission of Human Rights."

97. Further down the page, Lord Cooke referred to the interpretation to art.17 by the Human Rights Committee as follows,

"… in art 17 the term *unlawful* means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. The expression *arbitrary interference* can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."

98. Reference was made to the case of *Hugo van Alphen v The Netherlands* and Lord Cooke summarized its relevance for considering our Art 14 at p.819I,

"*arbitrariness* is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability."

99. In the context of compulsory acquisition or resumption, notwithstanding the availability of compensation, Lord Cooke identified the implication flowing from Article 14 at p.820I,

"…section 3 of the Resumption Ordinance should now be construed, at least when the compulsory acquisition of a home or part of a home is at stake, to require a fair procedure including a reasonable opportunity of objection."

100. On the facts, the Privy Council found that such opportunity was afforded and therefore Their Lordships saw nothing unfair, arbitrary or unlawful in the procedure followed in the process in that case. The claim based on Article 14 therefore failed.

101. Mr Dykes submitted that the concept of arbitrary interference in our Article 14 should be construed widely so as to cover unreasonable disproportionate interference. In substance, it

would be the same as the third element identified by Lord Hope in *Kay* at para.66,

"The final question is whether interference in pursuit of that aim is 'necessary in a democratic society'. The notion of necessity implies a pressing social need, and the measure employed must be proportionate to the legitimate aim pursued: *Blecic*, parar.59. In this context a margin of appreciation is allowed to the government of the contracting state. The scope of this margin of appreciation will depend not only on the aim of the interference but also, where the right to respect for the home is involved, the importance of that right to the individual …"

102. Given the limited scope of the arguments advanced before me, I shall assume without deciding that for our purposes there is no material distinction between the contents of the right protected under our Articles 29 (Basic Law) and 14 (HKBOR) and Article 8 of the European Convention and adopted the approach advocated by Mr Dykes.

103. As submitted by Mr Yu, in the present case, pressing social need is established by the decision of the Chief Executive in Council to resume and the lack of further challenge to the same. There is nothing to suggest that the process leading to the decision to resume was made without any fair opportunity to the applicants to raise objections. The evidence suggested otherwise. Following the Privy Council's approach in *Fok Lai Ying* the resumption cannot be said to be unlawful or arbitrary. Once this is accepted, it must be rare (if possible at all) that the steps taken pursuant to the decision to resume for the recovery of possession of the land can be challenged as an unlawful or arbitrary interference in the context of Article 14 (HKBOR) or Article 29 (Basic Law). Let me explain why by reference to the present dispute.

104. Regarding the question of proportionality, given that the legitimate aim is to have the land for building public housing, whatever means adopted by the Director to recover the possession of land would lead to the removal of the applicants from their homes. Thus, it makes no difference whether the Director proceeds by way of Order 113 application to the court for possession first.

105. It has to be remembered that the challenge under the conventional public law limb is circumscribed. In *Doherty*, at para.70 Lord Scott put the test under this limb of challenge as follows,

"The view of the majority [in *Kay*], as expressed by Lord Hope in his gateway (b), was, as I have explained, that a local authority's decision to recover possession would be open to challenge on public law grounds and that the challenge could be raised as a defence in the possession proceedings. The personal circumstances of the defendant might well be a factor to which, along with the other factors relevant to its decision, a responsible and reasonable local authority would need to have regard. The question for the court would be whether the local authority's decision to recover possession of the property in question was so unreasonable and disproportionate as to be unlawful."

106. The Section 6 route is no doubt faster as compared with an application to court for an order for possession. But it is a route mandated by the legislature and as such an option open to the Director. As observed by Lord Bingham in *Kay* at para.37,

"The public look to public authorities to preserve their land for public purposes and to bring unlawful occupation to an end …"

107. The complaint as to the length of notice has been quite properly abandoned. Given the history of the resumption and the ample opportunity given to the applicants to take steps for relocation, the point is manifestly unarguable.

108. What is left on this limb of the argument is Mr Dykes' point about the applicants being rushed to accept the unsatisfactory compensation package offered by the Government. The argument premised on the assumption that upon eviction the applicants have to accept the compensation offered because they would otherwise be deprived of places to live. But the evidence shows that as a matter of fact this would not be the case. Interim housing is offered. Ex gratia payments and provisional compensation are also offered without prejudice to the claims of the applicants in the Lands Tribunal. Mr Dykes said these are not provided for by legislation. Even so I do not see why they should not be taken into account. As long as these services and facilities are available as a matter of policy, the hardship occasioned by the dislocation is alleviated and this must have a bearing on the proportionality of the interference.

109. Further, as discussed in the above section, the right under these Articles is not a right to alternative accommodation to the satisfaction of those evicted. Provided that there is public service in place to address or alleviate the housing and welfare difficulties of those affected, the requirement of the law has been satisfied.

110. Mr Dykes invited this court to have regard to the Compensation Code in England and referred to the matters considered by the European Court in *Howard v United Kingdom* (1985) 52 DR 198 in deciding not to admit a claim for infringement of Article 8 in a compulsory purchase situation. The Commission held that the compulsory purchase constituted interference but it was nonetheless in accordance with the law. The Commission alluded to the fact that in that case alternative accommodation suitable for the requirement of the claimant in the immediate vicinity of their home was provided with full compensation for disturbance and the value of their house and land. The Commission found that the authorities have struck a balance between the individuals' interests and the interests of the community and the interference was therefore justified.

111. I do not read that ruling as deciding that in every case alternative housing of comparable size and location has to be provided to the subjects of compulsory purchase in order to be article 8 compliant. As Baroness Hale noted, the purpose of article 8 is not to give the evicted a right to housing. The public service available to alleviate the difficulties faced by those dislocated may vary from state to state, depending on the resources available and the socio-economic policy of each state.

112. Mr Dykes has not been able to show to this court any authority suggesting that compulsory acquisition can only be article 8 compliant if there is legislative prescription for the acquiring authority to provide comparable alternative accommodation. As far as I am aware, there is no such legislation in England. Neither am I aware of any legislation which provides that there cannot be any eviction until compensation has been resolved and paid. It underscores the lack of

direct correlation between the article 8 right and the final resolution of the compensation. It is not difficult to see the reason why. Disputes about quantum of compensation can take a long time to resolve. If a public housing project has to be delayed until the final resolution of such disputes, those waiting to be housed would suffer.

113. Given such analysis, I do not see how the Director's issue of the Clearance Notice in these cases can be characterized as so unreasonable or disproportionate that no reasonable authority in his position would do the same.

114. Therefore, the challenge under this limb also fails.

Results

115. Since this is a roll-up hearing and I have actually heard substantive arguments, I will give leave for the application for judicial review and dismiss the application proper.

116. On the question of costs, I will make an order *nisi* that the applicants shall pay the costs of the Director.

117. Lastly, I wish to thank all the lawyers for their diligent efforts in making it possible for the case to be heard so expeditiously. I also wish to thank counsel for their succinct submissions.

(M H Lam)
Judge of the Court of First Instance
High Court

Mr Philip Dykes, SC leading Messrs Hectar Pun, Kent Yee, Adrian Leung and Jeffrey Tam, instructed by Messrs K.C. Ho & Fong, for the Applicant in HCAL 95/2010

Messrs Hectar Pun and Jeffrey Tam, instructed by Messrs K.C. Ho & Fong, for the Applicant in HCAL 97/2010

Messrs Kent Yee and Adrian Leung, instructed by Messrs K.C. Ho & Fong, for the Applicants in HCAL 98/2010

Mr Philip Dykes, SC leading Mr Hectar Pun, instructed by Messrs K.C. Ho & Fong, for the Applicants in HCAL 99/2010

Mr Benjamin Yu, SC leading Messrs Stewart Wong and Anthony Chan, instructed by the Department of Justice, for the Respondent in HCAL 95, 97-99/2010

EX-GRATIA ALLOWANCES PAYABLE FOR LAND RESUMPTIONS AND CLEARANCES

INFORMATION FOR OWNERS, TENANTS AND OCCUPIERS

Lands Department

(This pamphlet is for general information only. It is not a legal document and has no legal effect, and must not be construed as such. Any Government policy stated herein may be subject to change.)

April 2006

1. **Introduction**

This pamphlet outlines the various types of ex-gratia allowances (EGAs) and land compensation payable by the Government. It also sets out the eligibility criteria of payment of the EGAs relating to land resumptions and clearances in the territory. EGAs are non-statutory payment to the people affected by acquisition projects and are intended to help minimize their hardship arising from land resumption and clearances. With a view to enabling speedy payment of land compensation, the Government would offer to affected eligible landowners an ex-gratia land compensation, which serves as an alternative to statutory claims under the respective Ordinances.

2. **Administration of Ex-gratia Allowances and Land Compensation**

The various EGAs listed in paragraph 4 are administered by the Lands Department (Lands D). Staff of the Lands D would carry out survey, determine the eligibility of the affected people, assess the amount payable and arrange payment as appropriate.

3. **Submission of Claim/ EGA Application**

People affected by land resumption and clearance projects who consider themselves eligible for any type of EGAs may approach the respective District Lands Offices of the Lands D or the respective Clearance Offices of Lands D for enquiry. The contact telephones of the offices are listed hereunder:-

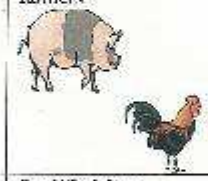
District Lands Offices of Lands D	Telephone
Hong Kong East	2835 1684
Hong Kong West & South	2835 1711
Kowloon East	2300 1764
Kowloon West	2300 1764
Islands	2852 4265
North	2675 1809
Sai Kung	2791 7019
Sha Tin	2158 4700
Tai Po	2654 1263
Tsuen Wan and Kwai Tsing	2402 1164
Tuen Mun	2451 1176
Yuen Long	2443 3573

Clearance Office of Lands D	Administrative District	Telephone
Clearance (1) Office (Kowloon Sub-office)	Kowloon and Sai Kung	2715 1057
Clearance (1) Office (Hong Kong Sub-office)	Hong Kong and Islands	2577 2525
Clearance (1) Office (Tsuen Wan Sub-office)	Tsuen Wan, Kwai Tsing and Sha Tin	2425 3821
Clearance (2) Office (Tai Po Sub-office)	Tai Po, North and Yuen Long	2664 5141
Clearance (2) Office (Tuen Mun Sub-office)	Tuen Mun	2462 3221

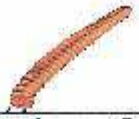
4. **Types of Ex-gratia Allowances and Land Compensation**

Type of EGA/land compensation	Item No.	Sub-Category	Eligibility	Administering Department
i) Ex-gratia compensation for private land in the New Territories (NT) and urban area	1	Private land in the NT  	The NT is divided into four compensation zones. The compensation rates for different zones are expressed in terms of varying percentages of the basic rates for agricultural and building land. The ex-gratia compensation zones are shown on a Zonal Plan for Calculation of Compensation Rates which is available for inspection at all NT District Lands Offices. i) For owners of agricultural land, compensation may be offered based on the relevant ex-gratia compensation rates in final settlement of all statutory claims under the relevant resumption ordinance. ii) For owners of building land, compensation offers may be made based on professional valuation plus an ex-gratia compensation at the relevant zonal rate. If owners are dissatisfied with the ex-gratia compensation offered by Government, they may opt for statutory compensation.	Lands D
	2	Old scheduled lots resumed in New Kowloon and on Hong Kong Island 	Owners of old scheduled agricultural lots in New Kowloon and Hong Kong Island affected by resumption are eligible for compensation at the same rate as agricultural land in New Town Development Areas in the NT. Ex-gratia compensation for old scheduled building land is based on a rate representing the value of building land in the vicinity of the resumed land.	Lands D

ii)EGA for occupiers of legal/permitted domestic properties	3	Legal occupiers of domestic properties 	This EGA is payable to legal occupiers of domestic properties resumed by Government. It takes into account rental for the period required for fitting-out, removal costs, basic fitting-out (decoration) costs as well as fees payable to agents for finding alternative premises, legal fees and stamp duty. The rates of allowance vary according to the location of the resumed properties. The EGA, if accepted by the legal occupiers, will be deemed to be in lieu of their right to claim disturbance compensation.	Lands D
	4	Home purchase allowance (HPA)/Supplementary allowance (SA) 	HPA is payable to owner-occupiers of domestic properties affected by resumption to enable them to purchase a replacement flat of about seven years age of a similar size in the locality of the resumed flat. Owners of tenanted/vacant flat or tenanted area may be entitled to SA which is a supplement to the open market value of the resumed flat.	Lands D
	5	Domestic removal allowance 	Eligible clearees of domestic structures surveyed for dwelling purpose in the 1982 Housing Department's Squatter Structure Survey (the 1982 Survey), who are genuinely affected by Government clearance operations, are eligible for this EGA to help them meet the initial cost of moving.	Lands D
	6	Permitted occupiers of licensed domestic structures and surveyed domestic squatter structures  	The following groups of clearees, who are affected by compulsory clearance, are eligible for this EGA which should be offered as an alternative to interim housing. (i) Permitted occupiers of a licensed domestic structure on private agricultural land or unleased Government land affected by clearance who are not provided with public rental housing (PRH); and (ii) Permitted occupiers of a domestic squatter structure on unleased Government land, i.e. where the structure was covered by the 1982 Survey and the occupiers were registered in the 1984/85 Squatter Occupancy Survey of HD, but who are ineligible for PRH. Domestic property owners who are ineligible for any form of rehousing will be ineligible for this kind of EGA. Clearees receiving this EGA will not be eligible for any other EGAs (including Domestic Removal Allowance) in respect of the structure and they will be ineligible to apply for any form of public housing or this kind of EGA for the next two years.	Lands D

iii) EGA for genuine farmers	7	Rehabilitation allowance 	This EGA may be payable to genuine farmers who are affected by clearance in the New Territories and are eligible for public housing but opt to continue farming elsewhere and give up their priority to public housing. The EGA payable is based on a standard rate calculated with reference to removal expenses and construction costs of a replacement temporary building.	Lands D
	8	Crop compensation 	This ex-gratia compensation may be payable to the affected cultivators for the loss of crops. The EGA payable is assessed on the basis of the market values of the crops under cultivation.	Lands D (assisted by AFCD in assessment)
	9	Disturbance allowance for cultivators 	This EGA may be payable to eligible cultivators who are cleared from government land or from land resumed for public purposes so as to assist them to re-establish elsewhere.	Lands D (assisted by AFCD in assessment)
	10	Pig and poultry farmers 	This EGA may be payable to affected pig and poultry farmers whose farm structures are registered for that purpose in the 1982 Survey or to farmers whose farm structures are not covered by the 1982 Survey but are legitimately operating on private agricultural land (i.e. with all necessary Government permissions).	Lands D
	11	Qualified farm structures on private land 	Farmers who own farm structures on private land affected by resumption may be eligible for this EGA. The EGA payable is assessed at standard rates with reference to the type and total floor area of the affected farm structures less depreciation value which makes reference to the condition of the affected farm structures.	Lands D
	12	Miscellaneous permanent improvements to farms  	This EGA may be payable to cultivators and farmers, upon resumption and clearance, for losses relating to farm installations and fixtures such as water ponds, wells, fences, irrigation pipes/ditches, boundary walls, gates, bunds and other minor annexures to land which are used principally for agricultural purposes. The EGA payable is assessed at standard rates which are based on the standard replacement rates of the items affected by resumption and clearance, less their depreciated value.	Lands D

v) EGA for village house removals in the New Territories	13	Village building land in the NT 	Indigenous villagers in the New Territories or non-indigenous villagers who owned building lot since before World War II or by succession may be provided with alternative sites or houses and/or EGA when their building lots are resumed.	Lands D
v) EGA for legal commercial properties	14	Legal owners / occupiers of commercial properties 	Owners of legal commercial properties resumed by Government will be offered the open market value of their properties and the following groups of owners/occupiers of the resumed legal commercial properties are eligible for this EGA. (i) Owner-occupiers will be offered an EGA equivalent to four times the amount of rateable value of the resumed properties. This EGA, if accepted by the owner-occupiers, will be deemed to be in lieu of their right to claim disturbance compensation; (ii) Owners of tenanted or vacant commercial properties will be offered an EGA of the amount of the rateable value of the resumed properties; and (iii) Tenants will be offered an EGA equivalent to three times the amount of rateable value of the resumed properties. This EGA, if accepted by the tenants, will be deemed to be in lieu of their right to claim disturbance compensation.	Lands D
vi) EGA for legal industrial properties	15	Legal occupiers of industrial properties 	This EGA is payable to legal occupiers of industrial properties resumed by Government. It takes into account rental for the period required for fitting-out, removal costs, basic fitting-out (decoration) costs as well as fees payable to agents for finding alternative premises, legal fees and stamp duty. The EGA payable will be assessed in accordance with the floor areas of the resumed properties. The EGA, if accepted by the legal occupiers, will be deemed to be in lieu of their right to claim disturbance compensation.	Lands D
vii) EGA for fishery undertakings	16	Pond fish farmers rearing edible fish and fish fry 	This EGA may be payable to pond fish farmers rearing edible fish and fish fry affected by resumption and clearance subject to their eligibility. The EGA payable is assessed according to standard rates which include notional loss of income and related costs arising from the resumption and clearance.	Lands D (assisted by AFCD in assessment)

vii) EGA for fishery undertakings	17	Red worm pond operators 	This EGA may be payable to red worm pond operators affected by resumption and clearance subject to their eligibility. The EGA payable is assessed with reference to the notional loss of income and related costs arising from the resumption and clearance.	Lands D (assisted by AFCD in assessment)
	18	Oyster farmers at Deep Bay 	This EGA may be payable to operators of oyster beds upon clearance subject to their eligibility. The EGA payable is assessed according to standard rates which include notional loss of income and related costs arising from clearance.	Lands D (assisted by AFCD in assessment)
	19	Mariculturists affected by public marine works project /clearance in Hong Kong waters 	Mariculturists affected by public marine works may be eligible for an EGA subject to certain prescribed proximity or water quality criteria. Eligible mariculturists are required to decide to continue, suspend or cease their operation and the EGA is assessed according to standard rates which include notional loss of income and related costs. As for mariculturists who are affected by clearance, they may decide to terminate the operation or move the operation to another fish culture zone. The EGA payable is assessed based on standard rates which include notional loss of income and related costs for termination or the costs of relocation of the operation.	Lands D as advised by the Interdepartmental Working Group (IWG)
	20	Fishermen affected by public marine works projects in Hong Kong waters 	Recognizing that affected fishermen may suffer a reduction of income as a result of loss of fishing grounds and may incur extra expenses in relocating their activities to fishing grounds elsewhere, they may be granted an EGA subject to certain eligibility criteria. The total EGA amount payable to all eligible fishermen is assessed according to notional values of fish catch in the affected area.	Lands D as advised by the IWG
viii) EGA for removal of graves, Kam Tsins and shrines	21		This EGA may be payable upon the clearance of graves and Kam Tsins belonging to indigenous villagers and locally-based fishermen in the NT. It may also be payable for clearance of shrines built and worshipped by the villagers of a pre-1898 village as a whole. The EGA payable is assessed at standard rates with reference to the types, size and materials of the affected graves and shrines.	Lands D

ix) EGA for 'Tun Fu' payment	22		This EGA may be payable to pre-1898 indigenous villages in the NT affected by public works projects to facilitate the villagers' performance of 'Tun Fu' ceremonies. The EGA payable is based on the approved itemized costs of the ceremonies to be performed.	Lands D
x) EGAs for shops, workshops, godowns, slipways, school's and churches, and ornamental fish breeding undertakings	23	  	Businesses, schools and churches conducting their activities at the time of the pre-clearance survey in a structure registered for that purpose in the 1982 Survey may be eligible for this EGA. The amount of the EGA varies according to the type of the activity and the area of the structure involved. For the purpose of calculation, the area of structure is based on the area recorded in the 1982 Survey or that recorded in the pre-clearance survey, whichever is the smaller. However, structures covered by Short Term Tenancy or Short Term Waiver but not covered by the 1982 Survey are ineligible for this EGA.	Lands D

5. **Revision of Rates**

The rates of the above EGAs are revised by Government from time to time, where appropriate.

6. **Payment of Ex-gratia Allowance and Land Compensation**

For those EGAs administered by Lands D, the current rates of the allowances may be obtained from the respective District Lands Offices of Lands D (DLOs) upon request. It should be noted that EGAs would only be released to genuine affectees upon satisfactory proof of their eligibility. Submission of false claims may lead to prosecution. If the claimant cannot be identified on site, persons affected are required to submit claims for payment of EGAs to respective DLOs. Upon satisfactory proof of their eligibility for the respective EGAs, they are required to approach the respective DLOs to sign an indemnity form to indemnify Government from and against all claims in connection with those items to be cleared as a result of land resumption and clearance before the EGA is released. Payment of ex gratia land compensation is conditional upon satisfactory proof of the legal interest in land to be resumed and execution of an Agreement as to Compensation and Indemnity in respect of such payment.

With effect from 1 April 2006, the four RGAs previously administered by HD as listed out in item nos. 5, 6, 10 and 23 in paragraph 4 of this pamphlet have been administered by Lands D. The current rates of the allowances may be obtained from the respective Clearances Offices of Lands D upon request.

7. Enquiries

The above information intends to give a brief description of the different types of RGAs and land compensation payable to eligible persons affected by resumptions and clearances. If you have further enquiries concerning the above, you may obtain advice from the respective offices mentioned in paragraph 3 or alternatively, you may also make enquiry to :-

Lands Department
Acquisition Section / Clearance (HQ) Office
19/F, North Point Govt. Offices,
333, Java Road, North Point, H.K.
Tel: 2231 3628

Lands Department

April 2006

[1] There is at least one Lands Tribunal decision where compensation was awarded on the basis of building land in respect of land held under a Block Crown Lease, see *Wong Wan Leung v Secretary for Transport* LTMR 5 & & of 1996, 31 October 1996. Since it is not a matter which has been argued before me, I express no view on this aspect of the case. Mr Dykes contended that apart from this issue, there are other defects in the compensation scheme which renders it non-Basic Law or Bill of Rights compliant. Counsel referred to the lack of compensation for loss of home. But section 10(2)(e) of the Lands Resumption Ordinance may address that, subject to the difficulty stemming from Section 12(b). In any event, all these can be canvassed in proceedings before the Lands Tribunal, if any.

[2] Mr Yu referred me to *Funco Ltd v Secretary for Justice* HCAL 106 of 1999, 6 April 2001; *Ho Sum Leung v Director of Lands* HCAL 123 of 2003, 27 May 2005. Mr Dykes accepted that *ex gratia* payments under settled government policy has to be administered fairly and may be amenable to judicial review to that extent. However, in a letter to the court on 23 September 2010 Mr Dykes contended that the *ex gratia* payments do not adequately compensate the applicants for their loss of a home and for this purpose the matter cannot be resolved by judicial review, citing *Leung Man Cheung v Secretary for Planning and Lands* HCAL 274 of 2000, 14 Sept 2000 and *Wing Hing Kong v Urban Renewal Authority* HCAL 34 of 2009, 5 Oct 2009 para.28. This does not accord with my understanding of his submission at the hearing on 22 September. Be that as it may, in my view, the relevance of the adequacy of compensation is limited for present purposes and should only be looked at broadly at this stage. The detail contentions about the level of compensation should be dealt with in the Lands Tribunal.

[3] Counsel relies on the following authorities: *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237 at paras.125-133; *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 at paras.36-59; *R (Alconbury) v Secretary of State for the Environment* [2003] 2 AC 295 at paras.87 and 116-117; *Bryan v United Kingdom* (1995) 21 EHRR 342 at paras.44-48; *R (Adlard) v Secretary of State for the Environment* [2002] 1 WLR 2525 at paras.11-32; *Chapman v UK* (2001) 33 EHRR 18 at para.124.