

FACV No. 14 of 2003

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

FINAL APPEAL NO. 14 OF 2003 (CIVIL)
(ON APPEAL FROM HCAL NO. 19 OF 2003)

Between:

TOWN PLANNING BOARD

**Appellant
(Respondent)**

and

**SOCIETY FOR THE PROTECTION OF
THE HARBOUR LIMITED**

**Respondent
(Applicant)**

Court: Chief Justice Li, Mr Justice Bokhary PJ,
Mr Justice Chan PJ, Mr Justice Ribeiro PJ and
Sir Anthony Mason NPJ

Dates of Hearing: 9-12 December 2003

Date of Judgment: 9 January 2004

J U D G M E N T

Chief Justice Li :

1. This is the unanimous judgment of the Court.
2. The harbour is and has throughout the history of Hong Kong been a central part of its identity. The Protection of the Harbour Ordinance, Cap. 531 (“the Ordinance”) is a unique piece of legislation. As stated in its preamble, it was enacted to protect and preserve the harbour by establishing a presumption against reclamation. The essential question in this appeal concerns the proper interpretation of the Ordinance. This is a question of law of great general and public importance. The proper interpretation of the Ordinance affects not only the decisions of the Town Planning Board (“the Board”) that are the subject matter of the present judicial review challenge but applies to any reclamation proposal in the harbour.

The Ordinance

3. At the outset, s.3, the crucial provision of the Ordinance, should be set out. This provides:
 - “(1) The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour.
 - (2) All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them.”
4. The harbour protected and preserved by the Ordinance is popularly known as Victoria Harbour. It is defined by s.3 of the Interpretation and General Clauses Ordinance, Cap. 1 to mean the waters of Hong Kong within the boundaries specified in Schedule 3 of that Ordinance. Reclamation means any works carried out or intended to be carried out for the purpose of forming land from the sea-bed or foreshore:

s.2 of the Ordinance. It should be immediately observed that reclamation is practically irreversible. Once land is formed by reclamation, it cannot be undone and part of the harbour is lost forever.

History of the Ordinance

5. The Ordinance first came into force on 30 June 1997. It resulted from a private member's bill proposed in 1996 by the Society for Protection of the Harbour through its Deputy Chairperson at that time (Ms Christine Loh) who was then a Legislative Councillor. The Society had been formed in 1995 as an unincorporated body with the object of protecting the harbour. In 1998, the respondent was incorporated to take over its activities. It is a company limited by guarantee and has been recognised as a charitable institution under the Inland Revenue Ordinance, Cap. 112. It will be convenient to refer to the respondent as "the Society".

6. The bill, as modified in the course of the legislative process, was enacted as the original Ordinance in June 1997. Its application was limited to the central harbour, that is, the central part of Victoria Harbour. Shortly after 1 July 1997, Government proposed a bill to suspend its operation but this was not supported. Instead, legislation was passed in 1998 to amend the original Ordinance to cure minor drafting deficiencies. In December 1999, the Ordinance was further amended to its present form by expanding its scope to cover the whole of Victoria Harbour. The 1999 Ordinance had also originated as a private member's bill proposed by Ms Loh but was taken over by the Government and made a Government bill. It can be seen from this brief account of the history that the efforts of the respondent and its unincorporated predecessor were responsible for getting the Ordinance onto the statute book.

The decisions challenged

7. In the present judicial review proceedings, the Society challenged the decisions of the Town Planning Board made on 6 December 2002 and 14 February 2003 with regard to Draft Wan Chai North Outline Zoning Plan No. S/H25/1 (“the draft plan”). The grounds of challenge are that the decisions in question, which included proposals for reclamation in the harbour, were unlawful and/or unreasonable and irrational.

The facts

8. The Board is a statutory board established by the Town Planning Ordinance, Cap. 131. It consists of official and unofficial members appointed by the Chief Executive : s.2(1). At present it has 40 members comprising 7 official and 33 unofficial members. With a view to the promotion of the health, safety, convenience and general welfare of the community, the Board has the responsibility of undertaking the systematic preparation of draft plans, including draft plans for the lay-out of such areas of Hong Kong as the Chief Executive may direct, as well as for the types of building suitable for erection therein: s.3(1)(a). The Board’s draft plans may provide for matters such as streets and other main communications; zones set apart for specified uses such as residential or commercial; reserves for Government, institution or community purposes; open spaces; zones for undetermined uses; and comprehensive development areas: s.4(1).

9. The Town Planning Ordinance sets out the procedure that the Board must follow in dealing with a draft plan: ss. 5 to 8. The statutory procedure includes the lodging of written objections and the opportunity for objectors to be heard by the Board before decisions are

made on the objections. After considering objections, the Board may amend the draft plan. Further objections may then be lodged and considered at a hearing. After considering such further objections, the Board is required to submit the draft plan with such amendments as the Board thinks fit to the Chief Executive in Council for approval: s.8. The Chief Executive in Council may approve it, refuse to approve it or refer it to the Board for further consideration and amendment: s.9. Plans approved by the Chief Executive in Council must be used by all public officers and bodies as standards for guidance in the exercise of any powers vested in them: s.13.

10. The practice has been adopted of showing reclamation proposals on draft plans prepared by the Board so that the statutory procedure applies to such proposals. The statutory procedure was followed in the present case. Pursuant to the direction given by the Chief Executive in Council in July 2001, the Board prepared the draft plan. On 19 April 2002, it was exhibited for public inspection. The draft plan covers an area of about 76.54 hectares in Wan Chai North (“the draft plan area”) and designates uses for various parts of the area. This case concerns the proposed reclamation which covers an area of about 26 hectares shown on the draft plan.

11. The land to be formed by the proposed reclamation would serve the following purposes, with parts of it serving more than one purpose:

- (1) The provision of roads, namely a trunk road and a road complex designated as Road P2. The trunk road would be part of a strategic through road starting from the Rumsey Street Flyover to the west, outside the draft plan area, and

joining up with the existing Island Eastern Corridor to the east, also outside the draft plan area. Road P2 would be part of the surface road system providing road connections between the trunk road and the existing road network in Wan Chai.

- (2) The provision of a waterfront promenade.
- (3) The elimination of “dead corners” in the harbour and the provision of an intercepting box culvert to enable stormwater to be discharged outside the typhoon shelter, both of which would have the effect of improving water quality.
- (4) The provision of a harbour park.
- (5) The reprovisioning of various facilities.

12. The Explanatory Statement attached to the draft plan refers to the various studies relating to reclamation in Central and Wan Chai prior to the direction to the Board to prepare the draft plan in July 2001, commencing with the Study on Harbour Reclamations and Urban Growth in 1983. The Explanatory Statement notes that the reclamation proposed in the draft plan is the fifth phase of reclamation in Central and Wan Chai (known as Wan Chai Development Phase II). It states that the latest feasibility study has given due regard to the Ordinance and the Board’s “Vision Statement” for Victoria Harbour. The latter, published in 1999, had included the statement that reclamation has to be compatible with the principle of a presumption against reclamation.

13. A substantial number of written objections to the draft plan were lodged. On 29 November 2002, the Board held a meeting to hear the objectors, including the Society. On 6 December 2002, the Board decided to propose five amendments to the draft plan to meet some of the

objections and to reject the others. Subsequently, the Board approved the documentation relating to such amendments. On 3 January 2003, the proposed amendments were gazetted. Two further objections were received. On 14 February 2003, the Board held a meeting to hear the further objectors and also some original objectors, including the Society. It decided to make one further amendment and to submit the draft plan incorporating the earlier amendments and the further amendment (“the draft plan as amended”) to the Chief Executive in Council for approval. By letter of the same date, the Society was informed of the Board’s decision.

14. In summary, on 6 December 2002 and 14 February 2003, the Board decided (a) to make limited amendments to the draft plan to meet some objections; (b) not to amend the draft plan to meet other objections; and (c) to submit the draft plan as amended to the Chief Executive in Council for approval (“the Board’s decisions” or “the decisions in question”). These are the decisions challenged by the Society. The amendments made did not affect the extent of the reclamation proposed in the draft plan. In essence, the Society’s challenge is to the Board’s decisions not to modify the proposed reclamation.

The Board’s approach

15. In making the decisions in question, the Board adopted the following approach to the interpretation of the Ordinance on the basis of the advice of Queen’s Counsel in London (“the Board’s approach”) :

- (1) The decision-maker must have regard to all relevant considerations. The statutory presumption creates a compulsory material consideration to which he must pay due regard.

- (2) He is required to undertake a weighing exercise for the purpose of deciding whether the public benefits of the proposed reclamation would outweigh the need to preserve the harbour. If so, the presumption would be rebutted.

Commencement of judicial review proceedings

16. On 27 February 2003, the Society commenced the present judicial review proceedings. This was just under two weeks after the Board's decision of 14 February 2003 to submit the draft plan as amended to the Chief Executive in Council for approval, which was communicated to the Society by a letter dated the same day.

Stay

17. On 14 March 2003, Hartmann J ordered a stay of the submission to the Chief Executive in Council of the draft plan as amended pending the final determination of the judicial review proceedings.

The judgment below

18. The Society's judicial review challenge succeeded before Chu J. She held that the Board had misinterpreted the Ordinance. Applying a purposive construction of the Ordinance, the Judge held that the presumption will only be rebutted where three tests are satisfied :

- (1) There is a compelling, overriding and present public need for reclamation;
- (2) There is no viable alternative to reclamation; and
- (3) The proposed reclamation involves minimum impairment to the harbour.

She also held that these matters must be demonstrated by clear cogent and objective evidence. (See paras. 55, 60-62 and 95 of the judgment).

19. The Judge declared that the Board's decisions with regard to the draft plan were made in contravention of the Ordinance and were *Wednesbury* unreasonable. She granted an order of certiorari to quash the decisions in question and ordered that the cause be remitted to the Board to reconsider the draft plan and the objections according to law, in particular the judgment, as to the proper interpretation of the Ordinance. As far as the declaration that the Board's decisions were *Wednesbury* unreasonable is concerned, the only finding of irrationality was in relation to the proposed reclamation for the harbour park (see para. 105 of the judgment). In relation to the proposed reclamation for the waterfront promenade, the Judge's finding that the decisions in question were unreasonable, properly understood, meant that the Board had failed to direct itself properly in law as it had misinterpreted the Ordinance (see para. 109 of the judgment).

The harbour park

20. The idea of a harbour park was much debated by the Board. There had been little public support for it and the paper presented to the Board did not include it. But at the end, the Board decided to include it (see paras. 100 and 101 of the judgment). As has been noted, the Judge found that the Board's decisions were irrational in relation to the proposed reclamation for the park. Subsequent to the judgment, the Board announced that the harbour park would be removed from the draft plan and that an amendment would be made in due course. Accordingly, the reclamation intended for the harbour park is no longer an issue in this appeal.

Leap-frog appeal

21. The Board invoked the procedure enacted in 2002 to appeal to this Court directly under Part II Division 3 of the Hong Kong Court of Final Appeal Ordinance, Cap. 484. The Judge granted the required certificate and the Court granted leave for the appeal to be brought directly. This is the first time that the leap-frog procedure has been used.

The question

22. The question in this appeal is whether the Board's approach to the interpretation of the Ordinance was correct in law. If the approach was a misinterpretation of the Ordinance, then the Board would have erred in law and the decisions in question must be quashed.

The submissions

23. The primary submission of Mr Robert Tang SC for the Board was that its approach to the interpretation of the Ordinance was correct in law. The decision-maker must pay due regard to the presumption which is a compulsory material consideration and he is required to perform a weighing exercise to decide whether the public benefits of the proposed reclamation outweigh the need to preserve the harbour. He accepted that there must exist a substantial reason in favour of the reclamation. But it was for the decision-maker to consider whether such a substantial reason exists and whether it is of sufficient weight to rebut the presumption. On Mr Tang's primary argument, the presumption is no more than a material consideration, albeit a compulsory one.

24. In argument, Mr Tang advanced the alternative submission that the presumption was not merely a material consideration but that the

presumption is a strong one or one of special weight. But he argued that it was for the decision-maker to decide whether there are substantial reasons to rebut it. Compared to the primary submission, the alternative submission, recognising the strength of the statutory presumption, is closer to the interpretation advanced by the Society and adopted by the Judge.

25. It is important to appreciate that, however the argument was put by counsel for the Board before the Court, the critical question that has to be answered is whether the Board's approach to the interpretation of the Ordinance was correct in law.

26. Mr Neoh SC for the Society argued that the interpretation adopted by the Judge was plainly correct for the reasons set out in her judgment.

27. We are indebted to both leading counsel and their respective teams for the thorough written materials and oral arguments presented in this important appeal.

The approach to interpretation

28. The interpretation of statutes is of course an essential part of the judicial function and is ultimately a matter for the courts. In interpreting a statute, the function of the courts is to ascertain the intention of the legislature as expressed in the legislation. The statute must be considered as a whole. Any statutory provision must be understood in its context taken in its widest sense : *Attorney General v. Prince Ernest Augustus of Hanover* [1957] AC 436 at 461.

29. A purposive approach should be adopted. In construing a statute, the courts should adopt an interpretation which is consistent with and gives effect to the legislative purpose. An interpretation which is inconsistent with and does not serve that purpose should be avoided. The mischief rule is an early example of the purposive approach to statutory interpretation: see generally *Bennion : Statutory Interpretation* (4th ed) p.809 ff, on purposive construction. In Hong Kong, the purposive approach (including the mischief rule) has been reflected in s.19 of the Interpretation and General Clauses Ordinance which provides :

“An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.”

The legislative purpose

30. In applying a purposive approach to interpretation, the legislative purpose must first be identified. It is sometimes not easy to discern the purpose of a statute or a particular provision. In the present case, there is no difficulty in identifying the legislative purpose. It is referred to in the preamble to the Ordinance and is spelt out in s.3(1) itself. The preamble states that the purpose is “to protect and preserve the harbour by establishing a presumption against reclamation in the harbour”. As succinctly and powerfully stated in the explanatory memorandum to the bill, the legislative purpose is “to *ensure* that [the harbour] *will* be protected against *excessive* reclamation”. (emphasis added). The purpose is to make sure that the harbour will be so protected.

31. With limited land resources, reclamation of the harbour was for many decades used as a convenient source of land supply. It must be appreciated that the context of the Ordinance was that, by the time it was enacted in 1997, nearly half of the harbour had been reclaimed and

extensive further areas in the harbour were planned for reclamation. The extent of reclamation that had already taken place renders what remains of the harbour even more precious. And it makes the need to protect and preserve what remains of the harbour all the more important and compelling.

The statutory principle of protection and preservation of the harbour

32. Section 3(1) establishes a statutory principle recognising the harbour as a special public asset and a natural heritage of Hong Kong people and prescribing that it is to be protected and preserved as such an asset and such a heritage. This principle was enacted in general terms.

33. As was observed at the outset, the harbour is undoubtedly a central part of Hong Kong's identity. It is at the heart of the metropolis both physically and metaphorically. The statute characterises this in the most distinctive terms. It is recognised not merely as a public asset but as a "special" one. It is something extraordinary. The recognition does not stop there. It is further acknowledged to be a natural heritage. "Natural" in that it was not created artificially by man but is part of nature. A "heritage" in that it is inherited as a legacy from previous generations and is to be transmitted from generation to generation. The harbour as a special public asset and natural heritage is declared to belong to Hong Kong people. This reinforces its character as a "public" asset. It is a community asset and as such, is to be enjoyed by the people of Hong Kong. By representing the harbour in such special terms in the statute, the legislature was giving legal recognition to its unique character.

34. It is because of its unique character that the harbour must be protected and preserved. The meaning of these words in the statutory

principle is plain. There must be protection, that is, it must be kept from harm, defended and guarded. And there must be not merely protection. There must also be preservation. Preservation connotes maintenance and conservation in its present state. What must be emphasised is that under the principle, what is to be protected and preserved is the harbour as a special public asset and a natural heritage of Hong Kong people.

35. It is manifest that in enacting the statutory principle, the legislature was giving legal recognition to the great public need to protect and preserve the harbour having regard to its unique character. The principle is expressed in clear and unequivocal language. The legislative intent so expressed is to establish the principle as a strong and vigorous one. By prescribing such a principle, the legislature has accorded to the harbour a unique legal status.

The statutory presumption against reclamation

36. Having established the principle, s.3(1) provides that “for that purpose, there shall be a presumption against reclamation in the harbour”. “That purpose” of course refers to the purpose of protection and preservation of the harbour as a special asset and a natural heritage of Hong Kong people.

37. Reclamation would result in permanent destruction and irreversible loss of what should be protected and preserved under the statutory principle. The statutory presumption was therefore enacted to implement the principle of protection and preservation. It is a legal concept and is a means or method for achieving protection and preservation. Its legal effect is not to impose an absolute bar against any

reclamation. It does not prohibit reclamation altogether. As a presumption, it is capable of being rebutted.

The statutory duty

38. Section 3(2) provides that all public officers and public bodies “shall have regard to the principle stated in s.3(1) for guidance in the exercise of any powers vested in them”. In its context, the reference in s.3(2) to “the principle stated in s.3(1)” should be construed to include not only the principle that the harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people established by s.3(1), but also the presumption which is the method for achieving protection and preservation provided for in s.3(1).

39. Section 3(2) is expressed in mandatory terms with the phrase “shall have regard to the principle ... for guidance”. The words “for guidance” do not dilute the mandatory nature of “shall have regard to” but are part of the mandatory instruction. In other words, public officers and public bodies must have regard to the principle to guide them in exercising their powers. The effect of s.3(2) is to impose on them the statutory duty, not only to have regard to the principle of protection and preservation, but also to have regard to the presumption against reclamation in exercising their powers.

Rebutting the statutory presumption

40. The presumption is against reclamation. It is however rebuttable. It can be displaced. The critical question is: as a matter of statutory interpretation, what should be regarded as sufficient to rebut it?

41. This question of interpretation is to be approached, bearing in mind that considerable reclamation has already taken place and that the need to protect and preserve the harbour is therefore all the more important and compelling.

42. The presumption was expressly enacted for the purpose of implementing the explicit principle of protection and preservation of the harbour and must be interpreted so as to implement that principle. That being so, the legislative intent behind the principle is of fundamental importance in considering what, as a matter of statutory interpretation, should be regarded as sufficient to rebut the presumption against reclamation. As has been discussed, the legislature gave statutory recognition to the great public need to protect and preserve the harbour, having regard to its unique character. The legislative intent was to confer a unique legal status on the harbour by enacting a strong and vigorous principle that it is to be protected and preserved as a special asset and a natural heritage of Hong Kong people, a principle that all public officers and public bodies must have regard to in exercising their powers.

43. Having regard to the strong and vigorous statutory principle of protection and preservation, it would plainly be wrong to interpret the presumption against reclamation merely as a compulsory material consideration to which the decision-maker must pay due regard in undertaking a weighing exercise for the purpose of deciding whether the public benefits of the proposed reclamation would outweigh the need to preserve the harbour. This was essentially the Board's approach and it must be rejected. On this approach, the presumption against reclamation is relegated to no more than a planning consideration required by statute to be taken into account. And the strong public need to prevent

permanent destruction and irreversible loss of the harbour is demoted to the same level as any other town planning need. Such an approach is clearly inconsistent with the statutory principle of protection and preservation and the legislative intent behind it.

Overriding public need

44. In order to implement the strong and vigorous statutory principle of protection and preservation, the presumption must be interpreted in such a way that it can only be rebutted by establishing an overriding public need for reclamation. This can conveniently be referred to as “the overriding public need test”. The statute, in conferring on the harbour a unique legal status, recognises the strong public need to protect and preserve it. The statute envisages that irreversible loss to the extent of the reclamation would only be justified where there is a much stronger public need to override the statutory principle of protection and preservation.

45. Public needs would of course be community needs. They would include the economic, environmental and social needs of the community.

46. A need should only be regarded as overriding if it is a compelling and present need. The need has to be compelling so that it has the requisite force to prevail over the strong public need for protection and preservation. And it has to be a present need in the sense that taking into account the time scale of planning exercises, the need would arise within a definite and reasonable time frame. If the need would not arise over such a time frame, it would not have the strength to displace the presumption.

47. A compelling and present need goes far beyond something which is “nice to have”, desirable, preferable or beneficial. But on the other hand, it would be going much too far to describe it as something in the nature of the last resort, or something which the public cannot do without.

48. Where there is a reasonable alternative to reclamation, an overriding need for reclamation would not be made out. There would be no such overriding need since the need could be met by the alternative means. In considering what is a reasonable alternative, all circumstances should be considered. These would include the economic, environmental and social implications of each alternative. The cost as well as the time and delay involved would be relevant. The extent of the proposed reclamation should not go beyond the minimum of that which is required by the overriding need. If it does, the overriding need for the proposed reclamation could not be established, since there would be no need for the reclamation to the extent proposed. It is necessary that each area proposed to be reclaimed must be justified.

49. What the legislation contemplates is the imperative that there shall not be any reclamation unless the overriding public need test is satisfied. The test as explained above should be regarded as a single test. It is by its nature a demanding one.

Cogent and convincing materials

50. In considering the exercise of any power in relation to any reclamation proposal, a public officer or a public body must apply the overriding public need test and decide whether it is satisfied. It would

obviously not be sufficient for the decision-maker to incant the test and assert that the test has been met. This would only be paying lip service to the test. There must be materials before the decision-maker to satisfy him that there is an overriding public need for reclamation so as to rebut the presumption against it.

51. To enable him to be so satisfied, the materials in the case in question must be cogent and convincing. If they do not have this quality, they would not be of sufficient weight to enable the decision-maker to be satisfied that the test is fulfilled. The requirement that the materials must be cogent and convincing flows from the demanding nature of the test.

The burden

52. Having regard to the demanding nature of the overriding public need test and the requirement that there must be cogent and convincing materials to satisfy the test, the burden on those seeking to rebut the presumption is a heavy one. That this is so is entirely commensurate with what is at stake: the irreversible loss to the extent of the reclamation of a special asset and a natural heritage belonging to the people of Hong Kong.

Analogy

53. In arriving at the overriding public need test as a matter of statutory interpretation, assistance has been derived by way of analogy from the approach adopted by the Supreme Court of Canada in interpreting a constitutional presumption.

54. Section 1 of the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out therein “subject only to such

reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Section 11(d) guarantees that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

55. In *R. v. Chaulk* (1990) 62 CCC (3d) 193, the question was whether s.16(4) of the Criminal Code which provides that everyone shall, until the contrary is proved, be presumed to be and to have been sane, is inconsistent with the Charter. The Supreme Court of Canada by a majority held that the statutory presumption of sanity is inconsistent with the constitutional presumption of innocence. In dealing with the question which then arose as to whether the statutory presumption of sanity is a justified limitation on the constitutional presumption of innocence under s.1 of the Charter, the Court followed the test laid down for dealing with such a question in *R. v. Oakes* (1986) 24 CCC (3d) 321, 26 DLR (4th) 200, as follows:

- “1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
 - (a) be “rationally connected” to the objective and not be arbitrary, unfair or based on irrational considerations;
 - (b) impair the right or freedom in question as “little as possible”, and
 - (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.”

It was held that the statutory presumption of sanity satisfied the *Oakes* test and was therefore a justified limitation on the constitutional presumption of innocence.

56. Mr Neoh for the Society rightly accepted that the Ordinance does not give rise to any constitutional or fundamental right. One is here concerned with a statutory presumption and not a presumption guaranteed in a constitutional instrument. The *Chaulk* case was concerned with the presumption of innocence at the constitutional level. Nevertheless, its adoption of the *Oakes* test, as a matter of constitutional interpretation, in dealing with a possible limitation on the constitutional presumption of innocence is a helpful analogy in the present case for dealing with the question of interpretation at the statutory level as to what should be regarded as sufficient to rebut the statutory presumption against reclamation; and in developing the overriding public need test in that regard.

The Town Planning cases

57. In defending the Board's approach to statutory interpretation, Mr Tang relied on town planning cases decided in the United Kingdom.

58. In *South Lakeland District Council v. Secretary of State for the Environment* [1992] 2 AC 141, where any area has been designated as a conservation area, the statute required "special attention to be paid to the desirability of preserving or enhancing its character or appearance in the exercise, with respect to any buildings or other land in that area, of the relevant statutory powers". The House of Lords held that the specified objective was given a high priority and there would be a strong presumption against the grant of planning permission of any proposed development that conflicted with that objective, though in exceptional cases, the presumption may be overridden in favour of development

which is desirable on the ground of some other public interest (see p.146 F-G).

59. In *City of Edinburgh Council v. Secretary of State for Scotland* [1997] 1 WLR 1447, the statute was held to create a presumption in favour of the development plan: the statute provided that any determination under the legislation shall be made in accordance with that plan unless material considerations indicate otherwise. The House of Lords held that the only questions for the court are whether the decision-maker had had regard to the presumption, whether the other considerations considered were relevant considerations and whether the decision was irrational (see p.1450 E-G, 1458C-1459A).

60. These cases were decided in the context of the relevant town planning statutes. But the Ordinance, in conferring a unique legal status on the harbour, is entirely different in nature from the town planning legislation engaged in those cases. The town planning cases do not assist in the interpretation of this unique piece of legislation.

Comparison with the judgment

61. The Judge's judgment was thorough and helpful. The overriding public need test as adopted and explained by this Court bears similarities to the approach in that judgment. However, there are certain differences. The Judge's judgment could be read as holding that the presumption could only be rebutted by a need which the community cannot do without (see para. 80 of the judgment). As explained above, this would be going too far. Further, there are differences in formulation which may or may not have significance. It would not be fruitful to conduct a detailed comparison of the differences. In future, public

officers and public bodies should refer to the formulations adopted in this judgment for the proper interpretation of the Ordinance.

The Board erred in law

62. As held above, on the true interpretation of the Ordinance, the presumption against reclamation could only be rebutted by establishing an overriding public need for reclamation as explained above. The Board in failing to adopt such an interpretation erred in law. It follows that the decisions in question must be quashed and that the matter must be remitted to the Board for reconsideration in accordance with law.

63. In approaching the matter in the way it did, the Board of course acted in good faith, as has been acknowledged by the Society. The Board had obtained leading counsel's advice on the interpretation of the Ordinance and it is clear from the relevant minutes of the Board that it went about its task in a conscientious manner. The dispute between the Board and the Society turned on the correct interpretation of the Ordinance. It was envisaged at the time of the enactment of the Ordinance that litigation on this matter was likely to ensue.

64. It should be noted that the position of the Society is that it accepts that the proposed roads, being essential infrastructure, may satisfy the overriding public need test for rebutting the presumption. Further, the Society does not as a matter of principle object to the provision of a promenade along the waterfront but maintains that the extent of the proposed reclamation for this purpose is excessive. The promenade is regarded by the Board to be necessary for the better presentation of the harbour to the public. On the matter being remitted to it, the Board would have to consider, applying the public overriding need test, whether the

presumption is rebutted in relation to the various parts of the proposed reclamation shown on the draft plan as amended.

Standard of judicial review

65. With the matter remitted to it, the Board is bound to reconsider the matter in accordance with law. It will be obliged to proceed in accordance with the interpretation of the statute as laid down in this judgment and to apply the overriding public need test in considering whether the statutory presumption against reclamation is rebutted.

66. Any decision made by the Board would of course be subject to judicial review by the courts. The courts' jurisdiction in this regard is a supervisory one. Where it cannot be seen that the decision-maker has erred in law, or has failed to take into account the relevant considerations or has taken into account irrelevant considerations, the traditional view has been that the courts will only interfere on the ground that the decision is shown to be an irrational one.

67. With the dynamic development of the common law, whilst the courts' jurisdiction on judicial review remains a supervisory one, a real question exists as to whether there is a sliding scale of review, with the intensity of review depending on the subject matter of the decision. On this approach, the standard of review would be most intensive where a fundamental human right is in question: see *R. (Mahmood) v. Home Secretary* [2001] 1 WLR 840 paras. 16 to 19 (Laws LJ), paras. 37 to 40 (Lord Phillips M.R.); and *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1985-6) 162 CLR 24 at 41-2 (Mason J). That question does not arise in the present case and full arguments have not been

addressed on it. It is an important question which has yet to be resolved in this jurisdiction.

68. Specifically, in relation to a decision of the Board in relation to any reclamation proposal, although as was accepted by counsel for the Society and as noted above, the Ordinance does not give rise to any fundamental or constitutional right, what is the appropriate standard of judicial review remains for future consideration: whether the standard should only be the traditional standard of irrationality or whether, having regard to the unique legal status of the harbour, the standard should be a more intensive one.

Timing of judicial review challenge

69. The present judicial review challenge was instituted promptly within two weeks of the Board's decision on 14 February 2003 to submit the draft plan as amended to the Chief Executive in Council.

70. There was accordingly no delay in the present case, but it should be emphasised that there must not be any undue delay in applying for judicial review: s.21K(6) of the High Court Ordinance, Cap. 4 and Order 53 r.4 of the Rules of the High Court. With any reclamation proposal, substantial public funds and third parties rights would be involved. It is of obvious importance and in the interests of good public administration that all concerned should know where they stand as soon as possible so that the earliest opportunity for any challenge should be promptly taken. If not, the courts have the discretion to refuse relief.

Result

71. Accordingly, the appeal is dismissed. The Judge's order of remittal to the Board to reconsider the matter in accordance with law contained a reference to her judgment. The reference to her judgment should now be deleted.

Costs

72. As far as the costs of the appeal are concerned, an order nisi for costs of the appeal is made in favour of the Society. Any party seeking any other order or any related order (such as involving the basis of taxation) should lodge written submissions, copied to the other party within 28 days of the handing down of this Judgment.

73. As far as the costs below are concerned, the Judge made an order nisi in her judgment awarding costs in favour of the Society with a certificate for two counsel. By a judgment handed down on 5 December 2003, the Judge, after hearing submissions, varied the order nisi to the extent that the Society's costs be taxed and paid on an indemnity basis with a certificate for three counsel. She also awarded the Society the costs of the application to vary the order nisi on the same basis.

74. Subject to any submissions which the parties may make, it is considered that, in the context of the leap-frog procedure, the Court has the jurisdiction to and should deal with any challenge to the costs orders made by the Judge. If the Board wishes to challenge such costs orders, or to maintain that the Court has no jurisdiction or should not deal with such a challenge, it should lodge written submissions, copied to the Society within 28 days from handing down and the Society should lodge written submissions in response within 14 days thereafter.

(Andrew Li)
Chief Justice

(Kemal Bokhary)
Permanent Judge

(Patrick Chan)
Permanent Judge

(R.A.V. Ribeiro)
Permanent Judge

(Sir Anthony Mason)
Non-Permanent Judge

Mr Robert Tang SC and Mr Nicholas Cooney (instructed by the
Department of Justice) for the appellant

Mr Anthony Neoh SC, Mr Johannes Chan SC and Mr Jin Pao (instructed
by Messrs Winston Chu & Co.) for the respondent