**FACC No. 16 of 2018**

**[2018] HKCFA 46**

**IN THE COURT OF FINAL APPEAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 16 OF 2018 (CRIMINAL)**

(ON APPEAL FROM HCMA NO. 596 OF 2016)

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BETWEEN

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|  | **HKSAR** | **Appellant** |
|  | **and** |  |
|  | **SPECIAL VIEW LIMITED**  **（優景有限公司）** | **Respondent** |

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| Before: | Chief Justice Ma, Mr Justice Ribeiro PJ,  Mr Justice Fok PJ, Mr Justice Stock NPJ and  Mr Justice Spigelman NPJ |
| Date of Hearing: | 19 October 2018 |
| Date of Judgment: | 7 November 2018 |

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|  | **JUDGMENT** |  |

Chief Justice Ma:

1. I agree with the judgment of Mr Justice Fok PJ and the orders contained in the judgment.

Mr Justice Ribeiro PJ:

1. I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Fok PJ:

1. The fish farming industry in Hong Kong is regulated and protected by the Marine Fish Culture Ordinance.[[1]](#footnote-1) This appeal is concerned with one aspect of the regulation of fish farms (or as they are more properly referred to under the Ordinance, fish culture zones), concerning the validity of a licence to engage in fish culture after its expiry date where there is an appeal concerning its cancellation. Specifically, when a licence has been cancelled and an appeal against that cancellation is instituted, does the validity of the licence automatically continue until the determination of the appeal even if that date is after the expiry date of the licence? Although, on its face, of narrow ambit, this appeal involves a question of statutory construction of relevance to other licensing regimes and hence is of some general importance.

***A. The background facts***

1. The respondent to this appeal was the holder of a licence (“the Licence”) to culture marine fish within Tiu Cham Wan, which is one of the areas of the waters of Hong Kong designated under the Ordinance as a fish culture zone. The licence was issued by the Director of Agriculture, Fisheries and Conservation (“the Director”) pursuant to section 8 of the Ordinance[[2]](#footnote-2) and was valid for one year from 17 December 2014 until 16 December 2015. It was subject to endorsements as to the size and number of structures permitted on the raft in the fish culture zone (“the Licence Restrictions”) and to printed conditions on its reverse.
2. For reasons unconnected with this appeal, a decision was taken by the Director to cancel the Licence. It seems that pisciculture may have taken a back seat to culinary pursuits: there was evidence before the Magistrate of a departure from the original use of the respondent’s raft at the fish farm in that the structures exceeded the Licence Restrictions in dimension and equipment was present not related to fish culture, such as kitchenware, large dining tables and large televisions.[[3]](#footnote-3) On 24 November 2015, the Agriculture, Fisheries and Conservation Department (“AFCD”) gave written notice to the respondent of the cancellation of the Licence with immediate effect pursuant to section 9 of the Ordinance (see below). The respondent had 28 days within which to appeal.[[4]](#footnote-4) The respondent wished to challenge that decision and, on 18 December 2015, lodged an appeal to the Administrative Appeals Board (“the Board”) against the cancellation of the Licence pursuant to section 16(1)(c) of the Ordinance (see below).
3. In the meantime, the date for application to renew the Licence had passed. This is because, under regulation 4(2) of the Marine Fish Culture Regulations,[[5]](#footnote-5) an application to renew a licence must, unless the Director permits otherwise, be made not later than one month before the date of its expiry. This was also one of the conditions printed on the reverse of the Licence. The Licence was due to expire on 16 December 2015, so the latest date on which the respondent could apply for renewal (unless otherwise permitted by the Director) was 16 November 2015. No such permission was ever given by the Director but the respondent sought the renewal of the Licence on 6 January 2016. On 11 January 2016, the Director replied to the renewal request stating that the AFCD could not process it because the Licence had already expired on 16 December 2015 and the application to renew had not been made on time. In consequence, on 28 January 2016, the respondent lodged a further appeal to the Board, this appeal being against the refusal to renew the Licence.
4. Subsequent to the proceedings giving rise to this appeal (see Section B below), by its decision handed down on 8 August 2017, the Board dismissed the respondent’s appeals against both the cancellation of the Licence and the refusal to renew the Licence.[[6]](#footnote-6)
5. In the period between 17 December 2015 and 27 January 2016, the respondent continued to cause or permit a raft to remain in the Tiu Cham Wan fish culture zone and it is that act which gave rise to these proceedings.

***B. The proceedings below***

1. The respondent was charged with causing or permitting a raft to remain in the Tiu Cham Wan fish culture zone between 17 December 2015 and 27 January 2016 otherwise than under and in accordance with a licence or permit granted by the Director, contrary to sections 13(2) [[7]](#footnote-7) and 21(3)[[8]](#footnote-8) of the Ordinance. The defence at the trial before Deputy Special Magistrate Andrew Hung was that, by virtue of the provisions of sections 8 and 16 of the Ordinance, the Licence should be deemed to have been in force during the period of the charge by reason of the respondent’s appeal lodged (on 18 December 2015) against the decision to cancel the Licence[[9]](#footnote-9) and also by reason of its appeal lodged (on 28 January 2016) against the decision to refuse renewal of the Licence.[[10]](#footnote-10)
2. On 29 September 2016, after trial, the Magistrate convicted the respondent of the offence and, on 12 October 2016, imposed a fine of HK$2,500. He rejected the defence advanced by the respondent on the basis of sections 8 and 16 of the Ordinance.[[11]](#footnote-11)
3. The respondent appealed to the Court of First Instance.[[12]](#footnote-12) The intermediate appeal was heard by Deputy High Court Judge Stanley Chan. On 24 November 2017, the Deputy Judge allowed the appeal and quashed the respondent’s conviction. The Deputy Judge’s reasoning will be examined below in the context of a consideration of the respondent’s arguments on this appeal.

***C. Relevant provisions of the Ordinance***

1. The proper construction of sections 9 and 16 of the Ordinance lies at the heart of this appeal, so it is convenient to set them out at length. Section 9, dealing with the cancellation of licences, provides as follows:

“(1) The Director may cancel a licence –

(a) on any ground specified in section 8(6) which would have entitled him to refuse to grant or renew a licence;

(b) on the ground that the licensee has –

(i) contravened any of the provisions of this Ordinance or any regulations made thereunder;

(ii) contravened his licence;

(iii) failed or is unable or incompetent to carry out the purposes of his licence; or

(iv) failed to provide adequate management or supervision of any raft or impoundment in respect of which the licence is valid.

(2) Where the Director cancels a licence under subsection (1) he shall, where practicable, send to the person who was the holder of the licence a notice of the cancellation and state in the notice the reasons for the cancellation.”

1. Section 16, dealing with the right of appeal, provides as follows:

“(1) Any person aggrieved by a decision made in respect of him by the Director to –

(a) refuse to grant or renew a licence under section 8(6);

(b) refuse to approve the transfer of a licence under section 8A(3)(b);

(c) cancel a licence under section 9(1);

(d) refuse to grant a permit under section 14(1); or

(e) cancel or refuse to renew a permit under section 14(2),

may appeal to the Administrative Appeals Board against that decision.

(2) Where an appeal is made under subsection (1) against a decision of the Director to –

(a) cancel a licence or permit, the decision shall not become effective pending;

(b) refuse to renew a licence or permit, the licence or permit (if expired) shall be deemed to continue in force according to its terms and conditions until; or

(c) refuse to approve the transfer of a licence (including a licence to which section 8A(6) applies), the licence shall continue in force pending,

the determination of the appeal by the Administrative Appeals Board.

(3) Where –

(a) an appeal has been made under this section; and

(b) the period of validity of the licence or permit to which the appeal relates would have expired but for subsection (2)(b) or (c),

then the licensee or permittee, as the case may be, shall be liable for the fee prescribed –

(c) for the period from the day the licence or permit would have expired to the day of the determination of the Administrative Appeals Board or withdrawal of the appeal, whichever first occurs; and

(d) on a pro rata basis, irrespective of the outcome of the appeal.”

1. It is also convenient, in the context of section 9(1), to set out the provisions of section 8(6), specifying specific grounds on which the Director might refuse to grant or renew a licence, namely:

“(6) The Director may refuse to grant or renew a licence if it appears to him –

(a) that, having regard to the size or location of a fish culture zone, the grant or renewal of a licence would cause overcrowding of the fish culture zone or would otherwise not be in the best interests of fish culture;

(b) that any raft or impoundment used or to be used by the applicant for the purpose of fish culture does not comply with any of the provisions of this Ordinance or any regulations made thereunder.”

***D. The certified question of law for this Court***

1. By notice of motion dated 1 December 2017, the prosecution (hereinafter referred to as “the appellant”) sought a certificate for leave to apply to the Court of Final Appeal against the Judgment of the Deputy Judge allowing the respondent’s magistracy appeal. By Judgment dated 7 February 2018, the Deputy Judge refused that application and dismissed the notice of motion.[[13]](#footnote-13) The Deputy Judge also made a costs order against the appellant in respect of that application.
2. On 15 May 2018, on the appellant’s application, the Appeal Committee[[14]](#footnote-14) granted leave to appeal to this Court in respect of the following question of law, namely:

“What is the effect, if any, on an appeal made under section 16(1)(c) of the Marine Fish Culture Ordinance, Cap 353 against a decision to cancel a licence under section 9(1) on the period of validity of a licence if as at the time the appeal was made, the date of expiry of the licence has passed and no application to renew the licence has been made?”

***E. The Deputy Judge’s reasoning in allowing the magistracy appeal***

1. The Deputy Judge’s reasoning in allowing the magistracy appeal is supported by the respondent in this appeal and so it is convenient to set out that reasoning in order to analyse the Deputy Judge’s construction of sections 9 and 16 of the Ordinance.
2. The Deputy Judge regarded it as important that the Director sought to cancel the Licence before it had expired. Had the Licence been cancelled after its expiry without the respondent having applied for a renewal, the outcome would (in his view) have been different.[[15]](#footnote-15) Instead, in this case, the Director cancelled the Licence on 24 November 2015 with immediate effect when it was still valid and so the Deputy Judge considered:

“… that the key to the case naturally freezes at the point when action was taken to cancel licence on 24 November rather than whether or not subsequent renewal application was made by the [respondent] or the [Director’s] decision to refuse renewal.”[[16]](#footnote-16)

1. The Deputy Judge took the view that, since the respondent had appealed against the cancellation of the Licence, considerations relating to its renewal were no longer material. He held:

“The reason is that under section 16(2)(a), the decision to cancel a licence shall not become effective pending the determination of the appeal by the Administrative Appeals Board. Upon my enquiry, the Administrative Appeals Board has yet to give a determination until this appeal hearing, nor will the [prosecution] be able to tell the exact date of determination. Since the [respondent] had sought to appeal against the cancellation of licence, I consider that the matters relating to renewal would naturally be set aside. Nevertheless, according to section 16(3), the licensee is still liable for the licence fee prescribed.”[[17]](#footnote-17)

1. The Deputy Judge then concluded:

“I find that since the decision to cancel licence had become ineffective by reason of the appeal made by the [respondent] to the Administrative Appeals Board, it is not tenable for the [Director], by ‘technical’ means, to insist the [respondent] had permitted the subject raft to unlawfully remain or exist in the zone when the [respondent] was unable to renew the licence within the prescribed time frame.”[[18]](#footnote-18)

1. Accordingly, the Deputy Judge allowed the respondent’s appeal, quashed the conviction and set aside the fine imposed by the magistrate.

***F. The respondent’s contentions on this appeal***

1. The above reasoning of the Deputy Judge is supported by the respondent in this appeal. Essentially, the respondent’s argument proceeds on the basis that, the Licence having been cancelled by the Director with immediate effect, before the respondent lodged an appeal against such cancellation, there was no expiry date for the Licence as it had been terminated.[[19]](#footnote-19)
2. The respondent then contends that, when it lodged its appeal against the cancellation, the effect of section 16(2)(a) was that “the Director’s decision to cancel the Licence is to [sic] ‘put on hold’ until the outcome of the appeal by the Board”.[[20]](#footnote-20) The respondent’s argument continues:

“Once the Director’s decision to cancel the Licence is ‘put on hold’, it makes the Licence still valid for the time being (as if it was not cancelled by the Director) because the Board needs to consider and rule upon the contentions to be raised by the Director and the [respondent] respectively at the appeal.”[[21]](#footnote-21)

1. The respondent contends that there was no duty on it to apply to renew the Licence after it had lodged an appeal against the cancellation. The argument seems to be that, by reason of the operation of section 16(2)(a) of the Ordinance, contrasted with section 16(2)(b), the original terms of the Licence (including its expiry date) ceased to apply, so that there was no ongoing licence which the respondent could apply to renew.[[22]](#footnote-22) Instead, it would appear to be the respondent’s contention that a new (presumably *ad hoc*) licence (devoid of terms and requiring no payment of fees) would come into existence pending the determination of the appeal to the Board against the cancellation. The respondent submits that this conclusion is supported by the provisions of section 16(3) of the Ordinance concerning payment of the fee for a licence pending an appeal to the Board.[[23]](#footnote-23)

***G. The proper construction of section 16 of the Ordinance***

1. Section 16 of the Ordinance (set out above) gives persons aggrieved by certain decisions of the Director relating to the regulation of marine fish culture in Hong Kong a right of appeal to the Board. Pursuant to section 16(1)(c), a person aggrieved by a decision made in respect of him by the Director to cancel a licence under section 9(1) may appeal to the Board against that decision. The other decisions for which section 16(1) provides an avenue of appeal are where the intended appeal is against: a refusal to grant or renew a licence under section 8(6); a refusal to approve the transfer of a licence under section 8A(3)(b); or, a refusal to grant a permit or to cancel or refuse to renew a permit under sections 14(1) and (2) respectively.
2. It is important to note that different language is used to describe the consequences flowing from the lodging of an appeal to the Board depending on the nature of the decision or action of the Director appealed against. These consequences are addressed in section 16(2) but it is also relevant to take into consideration the provisions of section 16(3) in this regard.
3. In the case of an appeal against a decision of the Director to cancel a licence or permit under section 9(1), “the decision *shall not become effective* pending … the determination of the appeal by the Administrative Appeals Board” (section 16(2)(a), emphasis added). On its face, this relates back to the cancellation decision and simply provides that the cancellation does not take effect until an appeal against that cancellation is determined but it does not say what effect the passage of time has on the licence in the meantime. In other words, in such a situation, a licence continues as if the decision to cancel it had not been made. It continues as if nothing had happened so that the original period of validity of the licence remains unaffected.
4. By contrast, the language of sections 16(2)(b) and 16(2)(c) is different in that, instead of stating that the relevant decision of the Director shall “not become effective”, those sub-sections provide that the relevant licence or permit will “continue in force”. Thus, under section 16(2)(b), if the Director refuses to renew a licence or permit (under one of the specified statutory provisions) and the aggrieved person appeals that decision, then “the licence or permit (if expired) shall be deemed to *continue in force* according to its terms and conditions until … the determination of the appeal by the Administrative Appeals Board” (emphasis added). Similarly, under section 16(2)(c), if the Director refuses to approve the transfer of a licence and that refusal is appealed, then “the licence shall *continue in force* pending, the determination of the appeal by the Administrative Appeals Board” (emphasis added). Accordingly, the original period of validity of the licence is extended, unlike the position under section 16(2)(a).
5. This difference of language is reflected in section 16(3) which deals with the liability for the fee for a licence or permit. Where an appeal is lodged and “the period of validity of the licence or permit to which the appeal relates would have expired but for subsection (2)(b) or (c)”, then the licensee or permittee is liable for a fee calculated in accordance with sections 16(3)(c) and (d).
6. These provisions are important because they acknowledge that the effect of an appeal in the case of a refusal to renew a licence or permit (section 16(2)(b)) or a refusal to approve the transfer of a licence (section 16(2)(c)) is to override the effect of the expiry date of the licence or permit as the case may be. This is borne out by:
   1. the provision that the licence or permit “continue in force” (in both sections 16(2)(b) and (c));
   2. the words “if expired” in brackets (in section 16(2)(b)); and
   3. the provision that the licensee or permittee be liable for a pro rata fee during the period from the original expiry date until the determination of the appeal, notwithstanding the fact that the licence or permit would have expired but for the appeal under those sub-sections (sections 16(3)(a) and (b)).
7. As a matter of statutory language, it is clear that the provisions in sections 16(3)(a) and (b) relate only to an appeal under section 16(2)(b) or (c) and do not relate to an appeal under section 16(2)(a). There is therefore no express statutory provision for a licence or permit that is cancelled to “continue in force” until the decision of the Board on the appeal with the fee consequences provided for in section 16(3). Instead, the contrasting statutory language shows clearly that the cancellation decision “shall not become effective” until the decision of the Board on the appeal. On its face, this contrasting statutory language suggests that a cancelled licence will in the meantime operate, subject to its terms including its expiry date, so that a licence holder can continue to operate his fish farm until the expiry of the licence as if it had not been cancelled.
8. This ability to continue to operate the fish farm does not, however, absolve the licensee from the need to apply to renew his licence if he wishes to conduct that operation beyond the expiry date of his licence. Such renewal application is governed by the requirements of the Regulations and, if aggrieved by a refusal to renew, may give rise to an appeal having the effects set out in section 16(2)(b) or (c), including the consequential fee obligation set out in section 16(3).
9. The absence of a corresponding fee obligation in section 16(3) in relation to an appeal against a cancellation of a licence under section 16(2)(a) is telling. This statutory language clearly indicates that such an appeal does not have the effect of extending the licence beyond its expiry date.
10. As is now well-established, statutory language must be construed having regard to its context and purpose and this was common ground between the parties. In relation to the Ordinance, its purpose is clear: it is designed to put in place an effective licensing regime for the regulation and protection of marine fish culture in Hong Kong waters. This statutory purpose, however, does not definitively support or undermine the Deputy Judge’s analysis and the respondent’s contentions set out above. However, that analysis and those contentions would lead to some surprising results which strongly indicate that this was not the legislative intention of the relevant provisions of the Ordinance.
11. Thus, given the fact that the appeal process before the Board typically takes many months (and in the present case the two appeals lodged by the respondent were only determined after nearly 20 months), the extension during that period of a cancelled licence without statutory power to collect any additional fee would be contrary to common sense. It would also give rise to an obvious risk of abuse. The effect of an appeal against a cancellation decision being to relate back to the date of that decision and to neutralise the effect of such a cancellation, a non-compliant licence holder could commit a breach of his licence before its expiry and then by appealing against the cancellation decision, take advantage of section 16(2)(a) (on the Deputy Judge’s construction) to secure an extension of the original licence pending the determination of the appeal. Moreover, on the construction of section 16(3) set out in paragraph [31] above, he would be in a more advantageous position to that of a licence holder appealing against the Director’s refusal to renew his licence who would have to pay a fee for the period during which section 16(2)(b) deemed his licence to continue. There is no obvious purpose to such an odd outcome and it is therefore highly unlikely to have been intended.
12. Statutory interpretation is also contextual by reference to other provisions in the same legislation and in legislation of a similar nature. Reference has already been made above to various contextual points demonstrating the difference in the statutory language between section 16(2)(a), on the one hand, and sections 16(2)(b) and (c) on the other. That difference in language is more than just a matter of form, as shown by the provision for fees in section 16(3).
13. By way of analogous example, reference may be made to the provisions of section 27 of the Road Traffic Ordinance[[24]](#footnote-24) relating to the grant of passenger service licences. Such licences for public light buses, private buses and school private light buses set out the date of commencement and expiry.[[25]](#footnote-25) Section 31 of the RTO empowers the Commissioner of Transport in certain circumstances to cancel a passenger service licence. The cancellation comes into effect 21 days from the date of notification to the licensee.[[26]](#footnote-26) The licensee is entitled to apply for a review of the Commissioner of Transport’s decision by a Transport Tribunal and, if he does, the cancellation shall not take effect pending the review.[[27]](#footnote-27) A finding in this appeal that the lodging of an appeal against cancellation extends the life of the licence until determination of the appeal, even if that date is after the expiry date of the licence, might arguably mean that an application to review cancellation of a passenger service licence would extend the life of such a licence. Since the reason for cancellation may involve a serious breach of the licence, that is unlikely to have been the intention of the legislation and this illustrates, by analogy in a different statutory context, the absurdity inherent in the respondent’s case in this appeal.
14. Both parties also referred to other ordinances to make contextual points. The respondent pointed to language in various ordinances to support the contention that when the legislature wishes to make a licence invalid notwithstanding a pending appeal against cancellation, the legislation expressly so provides: see section 30(2) of the Adoption Ordinance[[28]](#footnote-28) and section 16A(2) of the Pesticides Ordinance[[29]](#footnote-29). It is doubtful, however, whether these ordinances can be regarded as legislation of a similar nature to the Ordinance under consideration in the present appeal. In any event, these statutory provisions merely show a legislative policy, in the context of certain licensed or authorised activity (in the cited instances, for the welfare of children and in the interests of public health), which favours maintaining suspension of the licence or authorisation despite the lodging of an appeal. Whilst it is clear that policy was not adopted in the Ordinance, it does not follow from that fact that an appeal under section 16(2)(a) against cancellation of a licence to culture marine fish prolongs the licence beyond its expiry date.
15. For its part, the appellant relied on provisions in the Fisheries Protection Ordinance[[30]](#footnote-30) and the Protection of Endangered Species of Animals and Plants Ordinance[[31]](#footnote-31) to show that, in that legislation covering similar subject matters to that of the Ordinance, a distinction is drawn between the effect of a pending appeal against a cancellation of a licence and that against a renewal of a licence and, where an extension of the validity of a licence until the disposal of an appeal is intended, the legislation states this expressly.[[32]](#footnote-32)
16. It is doubtful that the wider context of other ordinances cited by the parties otherwise adds much to the arguments in support of or against this appeal. However, there is some force in the contention that express language is typically used where, because of a pending appeal, an extension to the validity of a licence is provided for notwithstanding the cancellation of the licence.

***H. Answering the certified question and determining the appeal***

1. In my view, the answer to the certified question (set out at paragraph [16] above) flows from the proper construction of section 16 of the Ordinance (addressed above) and is as follows:
   1. Where an appeal is timeously lodged against a decision to cancel a licence under the Ordinance (i.e. within 28 days of receipt of notice of the decision) and within the validity of the licence, the cancellation does not become effective pending the determination of the appeal notwithstanding that the cancellation may on its face state that it takes immediate effect. Nevertheless, the expiry date and other terms of the licence remain applicable and, if no application to renew the licence is made, the licence will expire on the expiry date when that date arrives.
   2. If a cancellation is made during the currency of a licence but an appeal is only lodged against the cancellation decision after the expiry date of the licence, the licence will have run its original course and expired before the lodging of the appeal. In those circumstances, the lodging of the appeal (within the 28-day time limit) will have the effect of nullifying the cancellation. However, as indicated in sub-paragraph (1) above, the licence will have continued to run and will have expired on its expiry date. If the licensee continued to operate a fish farm after the cancellation, there would be no offence until the expiry date of the licence. Thereafter, however, the continued operation of a fish farm would be an offence since there would no longer be a valid licence in place.
   3. Although for the reasons explained in Section I below this is not a matter before the Court in this case, it is necessary to mention in this context the contrasting consequences of an appeal under section 16(2)(b) or (c). Where, for example, an application for renewal is refused under section 8(6) and that refusal is appealed, the effect of section 16(2)(b) is that the licence will be deemed to continue in force according to its terms and conditions until the determination of the appeal. This applies even if the licence has expired as at the date of the institution of the appeal. In that event, the appeal will relate back to the expiry date of the licence and the licence is deemed to continue in force thereafter. The continuation of the licence is on its original terms so a breach of the licence conditions thereafter will render it liable to enforcement action by the Director (including cancellation, which may in turn give rise to the consequences of section 16(2)(a)).
2. With respect to him, the Deputy Judge’s conclusion that the position was frozen by the Director’s decision to cancel the respondent’s licence so that the subsequent appeal against that decision had the effect of maintaining the validity of the licence until the determination of the appeal and regardless of the absence of any application to renew the licence was wrong and based on a misconstruction of section 16 of the Ordinance. The Deputy Judge placed an erroneous construction on section 16(2)(a) by holding that, once an appeal against a cancellation decision is lodged, the other provisions of the Ordinance relating to the renewal of the licence were “set aside”.
3. On the contrary, it was open to the respondent to apply to renew its licence in accordance with the Regulations. Had it done so, and had renewal been refused under section 8(6) and that refusal timeously appealed, then the provisions of section 16(2)(b) might, subject to arguments based on the effect of a supervening cancellation decision under section 9(1), have led to the licence continuing in force pending the determination of the appeal. However, those facts are not this case (see Section I below).
4. The facts of this case are clear. The respondent’s licence was cancelled. No application to renew the licence was made within time. No appeal against the cancellation was lodged until after the expiry date of the licence. The provisions of section 16(2)(a) operated to suspend the coming into effect of the cancellation decision but did not affect the original period of validity of the licence (or indeed any of its other terms). Accordingly, since not renewed, the licence expired on its expiry date (i.e. 16 December 2015). Thereafter, without a valid licence, the respondent admittedly caused or permitted its raft to remain in the Tiu Cham Wan fish culture zone for the period between 17 December 2015 and 27 January 2016 and so it was properly convicted by the Magistrate of the offence charged.

***I. A point not argued in this appeal***

1. As indicated in paragraph [43] above, the facts of this case are *not* that the respondent made a timely application to renew its licence which was then refused pursuant to section 8(6) of the Ordinance and which refusal the respondent then appealed pursuant to section 16(1)(a) of the Ordinance (thereby engaging section 16(2)(b)). In this regard, it is to be noted that the reason for refusal of renewal was not one of the grounds listed in section 8(6) of the Ordinance and thus not a decision within section 16(1)(a) of the Ordinance giving rise to a right to appeal. Instead, the refusal was on the basis of the inability to process the application for renewal because the original licence had expired and was no longer valid.[[33]](#footnote-33) So there is some question as to whether an appeal under section 16(1)(a) was open to the respondent in this case. If no such appeal was available, the provisions of section 16(2)(b) would not have any application here in any event. That was certainly the view of the Magistrate.[[34]](#footnote-34)
2. Although there was an appeal against the Director’s refusal to renew the licence, that appeal was lodged on 28 January 2016, after both the expiry date of the licence and the cancellation notice and the lodging of an appeal against that decision. The analysis of the Deputy Judge below proceeded on the basis that the subsequent application to renew the licence and the Director’s refusal of that application were irrelevant[[35]](#footnote-35) and he allowed the appeal on the basis of his analysis of the effect of the cancellation notice and the appeal against that cancellation. The certified question for which leave to appeal was granted (see paragraph [16] above) is accordingly limited to the point decided by the Deputy Judge, namely the effect of an appeal against cancellation and thus the effect of section 16(2)(a) of the Ordinance, and the submissions in the parties’ respective printed cases and at the hearing before this Court were directed to this point alone.
3. The question of whether an out of time application for renewal of a licence which was then refused by the Director under section 8(6) and which refusal was then appealed would, because of the provisions of section 16(2)(b) of the Ordinance, result in the continuation in force of the licence is not before us. I would expressly leave that question open for another occasion on which it might arise. However, it should be noted that there are at least three permutations of the facts that might give rise to a consideration of that question:
   1. First, where an application for renewal was made at least one month before expiry of the licence and, on refusal, was subject to an appeal lodged within the validity of the licence.
   2. Second, where an application for renewal was not made until less than one month before expiry of the licence and, on refusal, was subject to an appeal lodged outside the validity of the licence.
   3. Third, where an application for renewal was not made until after expiry of the licence and, on refusal, was subject to an appeal necessarily also lodged outside the validity of the licence.
4. The effect of section 16(2)(b) of the Ordinance might well be different in each of the above three scenarios and, as I have said, consideration of those questions should await some other case in which they are properly before the Court. Nothing in this judgment concerning the effect of section 16(2)(a) of the Ordinance should be taken to determine the answer to those questions as to the effect of section 16(2)(b) of the Ordinance (or indeed section 16(2)(c)) or analogous statutory appeal provisions in the context of similar licensing regimes.
5. A further point that does not arise is where an application for renewal of a licence is refused but not under section 8(6) (for example, as in this case where the Director refused the renewal because the application was out of time). In that event, it is an open question whether an appeal lies under section 16(1) and, if not, whether the only recourse to a dissatisfied licence holder would be an application for judicial review. If so, there would then be questions as to the availability of interim relief and the consequences in terms of fees during any interim period of operation pending the judicial review. These potentially difficult questions are not before the Court and should be left for determination in another case in which they may be material.

***J. Disposition***

1. For the above reasons, I would allow the appeal against the Deputy Judge’s judgment, reinstate the respondent’s conviction in KTS 7639/2016 and the fine imposed by the Magistrate. I would also set aside the Deputy Judge’s order for costs against the appellant on the application for certification of a question of law.

Mr Justice Stock NPJ:

1. I agree with the judgment of Mr Justice Fok PJ.

Mr Justice Spigelman NPJ:

1. I agree with the judgment of Mr Justice Fok PJ.

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| (Geoffrey Ma)  Chief Justice | (R A V Ribeiro)  Permanent Judge | (Joseph Fok)  Permanent Judge |

|  |  |
| --- | --- |
| (Frank Stock)  Non-Permanent Judge | (James Spigelman)  Non-Permanent Judge |

Ms Vinci Lam SADPP and Ms Hermina Ng SPP, of the Department of Justice,  
for the Appellant

Mr Henry LW Fung, instructed by Francis Kong & Co., for the Respondent

1. (Cap.353), hereinafter referred to as “the Ordinance”. [↑](#footnote-ref-1)
2. Section 8(1) provides: “Subject to this Ordinance, the Director may grant to any person, a licence, and renew such licence, to engage in fish culture within a fish culture zone”; section 8(7) provides: “Where the Director refuses to grant or renew a licence under subsection (6) he shall send to the applicant a notice of the refusal and state in the notice the reasons for the refusal.” [↑](#footnote-ref-2)
3. KTS 7639/2016, Reasons for Verdict, 4 November 2016 (“RV”) at [42]. [↑](#footnote-ref-3)
4. Section 9(b) of the Administrative Appeals Board Ordinance (Cap.442). [↑](#footnote-ref-4)
5. (Cap.353A), hereinafter referred to as “the Regulations”. Section 4(2) provides: “Application for renewal of a licence or permit shall, except where the Director otherwise permits in any particular case, be made to the Director not later than 1 month before the date of the expiry thereof.” [↑](#footnote-ref-5)
6. AAB 62/2015 & 6/2016, Reasons for Determination dated 8 August 2017. [↑](#footnote-ref-6)
7. Section 13(2) provides: “Subject to subsection (3)(b) [relating to cases of emergency or stress of weather], any person who causes or permits any raft or impoundment to enter or remain or to be constructed in a fish culture zone otherwise than under and in accordance with a licence or permit granted to him commits an offence.” [↑](#footnote-ref-7)
8. Section 21(3) provides: “Any person who commits an offence under section 12, 13 or 20 is liable to a fine at level 4 and to imprisonment for 6 months.” [↑](#footnote-ref-8)
9. RV at [49] and [54] to [58]. [↑](#footnote-ref-9)
10. RV at [49] and [50] to [53]. [↑](#footnote-ref-10)
11. See the references at FN9 and FN10 above. [↑](#footnote-ref-11)
12. In HCMA 596/2016, Judgment dated 24 November 2017 (“CFI Judgment”). [↑](#footnote-ref-12)
13. [2018] HKCFI 242. [↑](#footnote-ref-13)
14. [2018] HKCFA 25 (Ribeiro PJ, Tang PJ & Stock NPJ). [↑](#footnote-ref-14)
15. CFI Judgment at [28]. [↑](#footnote-ref-15)
16. CFI Judgment at [29]. [↑](#footnote-ref-16)
17. CFI Judgment at [30]. [↑](#footnote-ref-17)
18. CFI Judgment at [31]. [↑](#footnote-ref-18)
19. Respondent’s Printed Case at [37]. [↑](#footnote-ref-19)
20. *Ibid.* at [40] (emphasis in original). [↑](#footnote-ref-20)
21. *Ibid.* at [41] (emphasis in original). [↑](#footnote-ref-21)
22. *Ibid.* at [42]. [↑](#footnote-ref-22)
23. *Ibid.* at [43]. [↑](#footnote-ref-23)
24. (Cap.374) (“RTO”). [↑](#footnote-ref-24)
25. Road Traffic (Public Service Vehicles) Regulations (Cap.374D), section 7. [↑](#footnote-ref-25)
26. RTO, section 32(1). [↑](#footnote-ref-26)
27. RTO, sections 33(1) and 32(2). [↑](#footnote-ref-27)
28. (Cap.290), which provides: “A decision referred to in subsection (1) shall have immediate effect, or have effect from a date specified in the decision (if applicable), notwithstanding any appeal against the decision.” [↑](#footnote-ref-28)
29. (Cap.133), which provides: “Subject to section 13(4), a decision referred to in subsection (1) has immediate effect, or has effect from a date specified in the decision (if applicable), despite any appeal against the decision.” [↑](#footnote-ref-29)
30. (Cap.171). [↑](#footnote-ref-30)
31. (Cap.586). [↑](#footnote-ref-31)
32. See: sections 33(a), 33(d), 34(a) and 34(b) of (Cap.171); and sections 46(2) and 46(4) of (Cap.586). [↑](#footnote-ref-32)
33. Letter from AFCD to the respondent dated 11 January 2016 (Exhibit P6 at trial). [↑](#footnote-ref-33)
34. RV at [51] to [53]. [↑](#footnote-ref-34)
35. CFI Judgment at [29]. [↑](#footnote-ref-35)