803 Funds Ltd

and

Director of Buildings

[2021] HKCFI 1471

(Court of First Instance)

(Constitutional and Administrative Law List No 2215 of 2020)

Anderson Chow J

31 March, 27 May 2021

Administrative law — Building Authority — decision not to take enforcement action against unauthorised building works and unauthorised change of use — applicant's interest in promotion of law and order not sufficient in itself to give it standing

Administrative law — judicial review — locus standi — considerations

行政法 — 建築事務監督 — 不對違例建築工程及未經授權的用途變更採取執法行動的決定 — 申請人在促進法治方面的關注本身不足以賦予其訴訟資格

行政法 — 司法覆核 — 訴訟資格 — 考慮

This was an application for leave to apply for judicial review of a decision by the Director of Buildings, in his capacity as the Building Authority, not to take any enforcement action in respect of certain unauthorised building works (UBWs) and/or unauthorised change of use (UCU) in or at two spaces in the basement of a building. X was a company limited by guarantee. Its object as stated in its articles of association was "the organisation and carrying out of activities to promote law and order and civic-minded activities, on a non-profit-making basis".

Held, refusing leave to apply for judicial review, that:

(1) As to the merits of the intended application for judicial review, one of the four intended grounds put forward was reasonably arguable and its merits were fair. (See paras.38–46.)

(2) X did not have any special reputation, standing, history, knowledge or expertise regarding the taking of enforcement action against UBWs or UCU. None of its members claimed to have any personal right or interest (financial, proprietary

or otherwise) over and above that of the general public or a section thereof in the subject matter of the intended application for judicial review. They could not enhance their interest by incorporating themselves into a company. X's interest in the promotion of law and order was not sufficient in itself to give it standing in this matter. There were, *prima facie*, other potential challengers who had a more direct or immediate interest in seeing that the Building Authority took the enforcement action in question. X did not have a sufficient interest in the matter to which the present application related (*Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, *R v Secretary of State for the Environment, ex p Rose Theatre Trust Co* [1990] 1 QB 504, *R v Secretary of State of Foreign and Commonwealth Affairs* [1995] 1 WLR 386, *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, *Kwok Cheuk Kin v Commissioner of Police* [2017] 6 HKC 93, *Fishermen and Friends of the Sea v Minister of Planning, Housing and the Environment (Trinidad and Tobago)* [2017] UKPC 37, *Kwok Cheuk Kin v President of Legislative Council* [2021] 1 HKLRD 1247 applied). (See paras.29–33, 47–51.)

(3) Since the applicant was not pursuing its private interest, there would be no order as to costs. (See para.53.)

Application

This was an application for leave to apply for judicial review of a decision by the Director of Buildings, in his capacity as the Building Authority, not to take any enforcement action in respect of certain unauthorised building works and/or unauthorised change of use.

[*Editor's note*: In holding that the applicant's interest in the promotion of law and order was not sufficient in itself to give it standing in this matter, the learned Judge did refer to other factors as well. And the fact that the applicant was not pursuing any private interest did result in costs not being ordered against it.]

Mr Douglas Lam SC and Mr John Hui, instructed by Sit, Fung, Kwong & Shum, for the applicant.

Mr William Liu, Senior Assistant Law Officer (Civil Law), and Ms Jess Chan, Senior Government Counsel, for the putative respondent.

Legislation mentioned in the judgment

Buildings Ordinance (Cap.123) ss.2(1), 14, 14(1), 24, 24(1), 24C, 25, 25(1), (2)(b), 41, 41(3)

High Court Ordinance (Cap.4) s.21K(3)

Rules of the High Court (Cap.4A, Sub.Leg.) O.53 r.3(7)

Cases cited in the judgment

AXA General Insurance Ltd v HM Advocate [2011] UKSC 46, [2012] 1 AC 868, [2011] 3 WLR 871, [2012] HRLR 3

Fishermen and Friends of the Sea v Minister of Planning, Housing and the Environment (Trinidad and Tobago) [2017] UKPC 37

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, [1981] 2 WLR 722, [1981] 2 All ER 93

Kwok Cheuk Kin v Commissioner of Police [2017] 6 HKC 93

Kwok Cheuk Kin v President of Legislative Council [2021] 1 HKLRD 1247, [2021] HKCA 169

Mariner International Hotels v Atlas Ltd (2007) 10 HKCFAR 1, [2007] 1 HKLRD 413

R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd [1995] 1 WLR 386, [1995] 1 All ER 611, [1995] COD 211

R v Secretary of State for the Environment, ex p Rose Theatre Trust Co [1990] 1 QB 504, [1990] 2 WLR 186, [1990] 1 All ER 754, (1990) 59 P & CR 257

Sky Wide Development Ltd v Building Authority (HCAL 116/2008, [2008] HKEC 2390)

Technic Investment Co Ltd v Appeal Tribunal (Buildings) [2012] 3 HKLRD 245

Wong Chi Kin, Re (CACV 80/2014, [2014] HKEC 1590)

Wong Tin Chor v Appeal Tribunal (Buildings Ordinance) [2020] HKCFI 1562, [2020] HKEC 1903

Other material mentioned in the judgment

EB Division Manual Part II Section 5 Instruction No 4 (Rev Jan 2014), Appendix A

DECISION

Anderson Chow J

Introduction

1. This is an application for leave to apply for judicial review of the decision (**the Decision**) of the Director of Buildings (**the Director**), in his capacity as the Building Authority (**BA**), contained in the Building Department (**BD**)'s letter dated 4 August 2020 not to take any enforcement action in respect of certain "unauthorised building works" (**UBWs**) and/or "unauthorised change in use" (**UCU**) in or at Spaces C1 & C2 on Basement, No 98 Repulse Bay Road, Hong Kong (**the Building**).

2. For reasons which I shall endeavour to explain in this decision, I am of the view that the applicant does not have a sufficient interest in the matter to which the present application relates. Accordingly, the application for leave to apply for judicial review is dismissed.

3. In what follows, unless the context indicates otherwise, references to "Section" or "s." shall be to the Buildings Ordinance (Cap.123) (**the Ordinance**).

Basic facts

4. By an assignment dated 10 June 1985 (**the Assignment**), the property known as Flat C on 1/F, Car Parking Space No C on the Basement, Spaces C1 and C2 on the Basement, and Space C3 on the Roof, of the Building was assigned to Mr Philip Bowring.

5. Currently, Flat C on 1/F, together with Spaces C1 and C2 on the Basement (**Space C1** and **Space C2** respectively, and **the Spaces** collectively), of the Building are registered in the Lands Registry as a composite whole, with 89/540 undivided parts or shares of and in Sections A and B of Rural Building Lot No 415 being allocated to it.

6. There are no areas marked as Space C1 and Space C2 in the relevant approved building plan dated 25 August 1954 (**the Approved Building Plan**). As shown on the Approved Building Plan and a Basement Plan attached to the Assignment (**the Assignment Plan**), the area corresponding to Space C1 was designated for "laundry" and "caretaker", while the area corresponding to Space C2 was part of a covered area designated for "car port". Site inspections conducted by BD's building surveyors revealed that the laundry, caretaker room and car port shown on the Approved Building Plan corresponding to the areas marked Space C1 and Space C2 on the Assignment Plan had been enclosed by wall construction with door openings and windows, and there had been a conversion of a part of the car port into domestic use (collectively **the Conversion**).

7. According to Mr Lam Siu Kay Junkers, Chief Building Surveyor, the Conversion was carried out without fulfilling the notice requirement under s.25(1). BA took the view that under the relevant enforcement policies (which I shall further describe below), no immediate enforcement action should be taken under s.25(2)(b) to issue an order to discontinue the present use of the Spaces, mainly because the unauthorised conversion and the building works involved did not constitute any obvious structural hazard or imminent danger to life or property, or cause any serious health hazards or environmental nuisance, or give rise to imminent fire hazard.

8. Nevertheless, BA did issue advisory letters on 24 September 2010 and 22 May 2020 respectively to Mr Bowring calling on him to take steps immediately to revert the Spaces to their original use in accordance with the Approved Building Plan. Mr Bowring failed, however, to heed the Building Authority's advice.

9. On 26 May 2020, Sit, Fung, Kwong & Shum (SFKS) on behalf of the applicant wrote to the Director to lodge a complaint about the unauthorised conversion of the Spaces into domestic use by the installation of walls, windows and doors which, it was said, constituted a blatant breach of s.25(1). The letter requested BD to take appropriate enforcement action against the Conversion, failing which the applicant would "take the matter further".

10. On 4 August 2020, BA gave a substantive reply to SFKS's letter dated 26 May 2020, stating as follows:

> The Buildings Department (BD) has adopted a "risk-based" approach in determining the priority of enforcement action under the Buildings Ordinance (BO) against building safety issues. Regarding the conversion of car parking spaces into other use, in general, there may be two types of situations that need to be handled. One involves unauthorised building works (UBWs); and the other is change in use of buildings. Upon receipt of a public report, the Buildings Department (BD) will conduct inspection and take follow-up or enforcement actions based on the inspection findings. For UBWs, according to the existing enforcement policy, the BD will issue removal orders to owners under section 24 of the BO, requiring the removal of UBWs that constitute obvious hazard or imminent danger to life or property, or constitute serious health hazards or serious environmental nuisances. For cases involving unauthorised change in use of buildings, the BD will accord priority to deal with those which pose obvious hazard or imminent danger to life or property, or cause serious health hazards or serious environment nuisances. For these cases, depending on the circumstances, the BD will issue statutory order in accordance with section 25 of the BO to require the owner or occupier to discontinue such unauthorised use of a building.
>
> Recent inspections by BD revealed that the current use does not pose obvious hazard or imminent danger to life or property, or cause serious health hazards or serious environmental nuisances and no actionable UBWs requiring issue of removal are noted.

The above reply of BA constitutes the Decision complained of in the present application.

Application for leave to apply for judicial review

11. On 4 November 2020, the applicant made the present application for leave to apply for judicial review of the Decision. Three grounds of intended judicial review are raised in the Form 86:

(1) failure to apply and/or departure from BA's policy on "change of use";
(2) failure to apply and/or departure from BA's policy on UBWs; and
(3) manifest unreasonable delay.

12. On 5 November 2020, the court gave directions for an *inter partes* oral hearing of the application for leave to apply for judicial review. The court also invited that parties to deal with the question of the applicant's standing to make the application.

13. On 10 March 2021, the applicant issued a summons seeking to amend the Form 86 in order to raise an additional ground of judicial review, namely, "unlawful fetter of discretion".

14. The application for leave to apply for judicial review was heard on 31 March 2021. This is the court's decision on the application.

BA's prevailing enforcement policy on UBWs

15. The existence of UBWs has been a long-standing problem in Hong Kong. As at 2001, it was estimated that there were around 750,000 UBWs in Hong Kong. In view of the long standing problem, the large number of UBWs, and BD's tight resources, BA has issued, and revised from time to time, enforcement policies for the taking of enforcement actions against UBWs posing serious environmental nuisance or hazards.

16. Under s.2(1), the expression "building works" is widely defined to include "any kind of building construction, site formation works, ground investigation in the scheduled areas, foundation works, repairs, demolition, alteration, addition and every kind of building operation, and includes drainage works".

17. Generally speaking, BA would regard building works as UBWs in cases where:

(1) the works are carried out without the prior approval and consent of BA under s.14(1) and do not fall within the exemptions under s.41; or
(2) small-scale building works that are designated as minor works under the Building (Minor Works) Regulation (Cap.123N,

Sub.Leg.), are carried out without complying with the simplified requirements of the Minor Works Control System.

18. Under s.24(1), where any building works have been or are being carried out in contravention of any of the provisions of the Ordinance, BA may by order in writing require the demolition of the relevant building or building works, or alteration of the relevant building or building works as may be necessary to cause the same to comply with the provisions of the Ordinance, within a specified time (**Section 24 Order**).

19. As earlier mentioned, BA has issued, and revised from time to time, enforcement policies for tackling UBWs. One such policy was issued in 2001. In March 2011, upon a review of BD's 10-year programme of removal of UBWs, it was estimated that some 400,000 UBWs which constituted a higher risk to public safety or an obvious or imminent danger to life or property (such as metal cages and flower racks on external walls and illegal rooftop structures on single-staircase buildings) had been removed. BA then issued a revised enforcement policy (**the 2011 UBWs Policy**), which came into effect on 1 April 2011 and which is currently still in force.

20. Under the 2011 UBWs Policy, BA would issue Section 24 Orders to the owners concerned requiring removal of the following actionable items and register the orders against the relevant property titles:

(1) items constituting obvious hazards or imminent danger to life or property;
(2) new items (excluding statutorily exempted building works under the Ordinance) irrespective of the date of completion of the building where such items have been carried out;
(3) items on the exterior of buildings, including those on rooftops and podium, in yards and lanes and projecting from external walls (excluding projecting structures covered by the Household Minor Works Validation Scheme and the proposed Signboard Control System and other minor amenity features);
(4) items in the interior of buildings, constituting obvious hazards or imminent danger to life or property (eg building works associated with subdivided units with obstruction to means of escape, serious water seepage causing deterioration of structural members or overloading problem);
(5) items in or on buildings, constituting a serious health or environmental nuisance (eg misconnection of drainage systems);
(6) major standalone items;
(7) a specific type of UBWs, or items identified in buildings or groups of buildings, targeted for large-scale operations; and

(8) unauthorised alterations to or works in green and amenity features of a building (eg balconies, sky gardens and podium gardens) for which exemption from calculation of gross floor area has been granted by BA (collectively referred to as "**Actionable Items**").

21. For UBWs which do not fall within the list of Actionable Items, BA may, instead of issuing Section 24 Orders, issue to the owners concerned statutory notices under s.24C or advisory letters requesting them to remove the UBWs voluntarily. In general, advisory letters would be issued save and except the following, for which warning notices may be issued:

(1) existing unauthorised cocklofts on ground floor not constituting obvious hazard or imminent danger to life or property; and
(2) unauthorised internal staircases constructed prior to 2011 and not constituting obvious hazard or imminent danger to life or property.

BA's prevailing enforcement policy on UCU

22. Under s.25(1), one month's notice in the specified form shall be given to BA of any intended material change in the use of a building by the person intending to carry out or authorising the carrying out of such change.

23. Further, under s.25(2)(b), where in the opinion of BA any building is not suitable by reason of its construction for its present or intended use, he may by order in writing served on the owner or occupier require the owner or occupier to discontinue such present use of the building within one month from the service of the order (**Section 25 Order**).

24. BA's current policy regarding the issue and service of Section 25 Orders can be found in Appendix A to EB Division Manual Part II Section 5 Instruction No 4 (Rev Jan 2014) (**the UCU Policy**), the relevant parts of which state as follows:

> Although there had been increasing trend on the number of reports on existing change in use of buildings, the Buildings Department will only consider to take enforcement actions against those cases which have contravened the provisions of the Buildings Ordinance (BO) and have serious hazards identified. In this regard, immediate action will be taken by the issuance of statutory order under s 25(2)(b) of the BO to discontinue such use of the building under the following circumstances:

(a) change of use constituting obvious structural hazard or imminent danger to life or property such as structural members or parent building being overloaded, visually unstable, structural cracks or undue deformation being detected;
(b) change of use resulting in imminent fire hazard to the occupants of the building, e.g. residential use in part of the industrial building …, columbarium use at upper floor of any single staircase building, increase in population with the discharge value of the building being exceeded;
(c) change of use constituting a serious health hazard or environmental nuisance, e.g. persistent water seepage or drainage pipes discharging untreated sewage into stormwater drainage pipes; or
(d) change of use involving the existence of certain dangerous trades in domestic buildings which contravenes Building (Planning) Regulation 49(1) where serious hazards in terms of fire, structural, health or environmental has been identified …

2. Under the enforcement guidelines, immediate action should normally be justifiable where a serious problem has been identified, i.e. fire, structural, health or environmental hazard. Contraventions on other planning matters such as lighting and ventilation, plot ratio, site coverage and height should not warrant immediate action.

25. In summary, BA's current enforcement policies on UBWs and UCU are formulated based on a "risk-based" principle, and prioritised enforcement action will be taken by way of issuance of a Section 24 Order or Section 25 Order (as appropriate) where in the opinion of BA a serious problem has been identified, most notably fire, structural, health or environmental hazards.

26. Before I consider the issue of the applicant's standing and the merits of the intended application for judicial review, it should be emphasised that, as recognised and accepted by the Hong Kong courts, BA's enforcement polices in respect of UBWs (and UCU) are not policies of tolerance, but policies on priority of enforcement actions (see *Sky Wide Development Ltd v Building Authority* (HCAL 116/2008, [2008] HKEC 2390, 24 October 2008), [12], *Technic Investment Co Ltd v Appeal Tribunal (Buildings)* [2012] 3 HKLRD 245, [26]–[27]; and *Wong Tin Chor v The Appeal Tribunal (Buildings Ordinance)* [2020] HKCFI 1562, [2020] HKEC 1903, [20(1)]).

The applicant's standing to make the present application

(i) Applicable principles

27. Section 21K(3) of the High Court Ordinance (Cap.4), provides that "the court shall not grant leave to make [an application for leave to apply for judicial review] unless it considers that the applicant has a sufficient interest in the matter to which the application relates". To the same effect is O.53 r.3(7) of the Rules of the High Court (Cap.4A, Sub.Leg.).

28. It is well established that the question of an applicant's standing to mount an application for judicial review in any given case is a matter which goes to the jurisdiction of the court to entertain the application. The court has no discretion to grant leave unless the applicant can show a sufficient interest in the matter to which the application relates: see *Re Wong Chi Kin* (CACV 80/2014, [2014] HKEC 1590, 26 September 2014), [11].

29. As for the principles for determining whether an applicant has standing to apply for judicial review, I attempted to set out some of the relevant principles in *Kwok Cheuk Kin v Commissioner of Police* [2017] 6 HKC 93, [34] (which were endorsed by the Court of Appeal in its recent judgment in *Kwok Cheuk Kin v President of Legislative Council for and on behalf of the Legislative Council* [2021] 1 HKLRD 1247, [2021] HKCA 169, [25]):

(1) Where the decision affects the applicant's personal right or interest over and above that of the general public or a section of the public, the applicant should have little difficulty in showing a sufficient interest in the matter to which the application relates.

(2) Where, however, the decision does not have such effect and the applicant is effectively pursuing the application as a representative of the public interest, the court adopts a holistic approach by taking into account a host of relevant considerations including the merits of the application, the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, and the nature of the breach of duty against which relief is sought.

(3) In such a situation, the applicant is not to be regarded as having a sufficient interest merely because the issue raised by him is of public interest. As observed by Dyson LJ (as he then was) in *R (Feakins) v Secretary of State for Environment, Food and Rural Affairs* [2004] 1 WLR 1761, at para.23, "if a claimant has no sufficient private interest to support a claim to standing, then he should not be accorded standing *merely*

because he raises an issue in which there is, objectively speaking, a public interest."

(4) Equally, the applicant should not be regarded as having a sufficient interest merely because of the strong merits of the proposed challenge. As pointed out by Lord Reed in his judgment in *AXA General Insurance Ltd v HM Advocate* quoted above, "the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted".

(5) Although there has undoubtedly been a trend to liberalise the requirement of standing in judicial review, the need to show a sufficient interest in the matter to which the application relates remains, in my view, an important filter to keep judicial review within its proper bounds and to prevent abuse of the court's process, particularly having regard to the explosive increase in the number of applications for judicial review and, more importantly, the complexities of the applications seen in recent years in Hong Kong.

(6) Where the applicant does not have a personal right or interest in the subject matter of the judicial review but claims to make the application in a representative capacity, the court ought to be vigilant in examining whether he is a genuinely advancing a public interest in making the application or is motivated by other reasons. In *R (Feakins) v Secretary of State for Environment, Food and Rural Affairs*, Dyson LJ stated, immediately following the sentence quoted above, the following –

> "As Sedley J said in *R v Somerset County Council, Ex p Dixon [1997] JPL 1030*, when considering the issue of standing, the court had to ensure that the claimant was not prompted by an ill motive, and was not a mere busybody or a trouble-maker. Thus, if a claimant seeks to challenge a decision in which he has no private law interest, it is difficult to conceive of circumstances in which the court will accord him standing, even where there is a public interest in testing the lawfulness of the decision, if the claimant is acting out of ill-will or for some other improper purpose. It is an abuse of process to permit a claimant to bring a claim in such circumstances. If the real reason why a claimant wishes to challenge a decision in which, objectively, there is a public interest is not that he has a genuine concern about the decision, but

> some other reason, then that is material to the question whether he should be accorded standing."

30. In *Kwok Cheuk Kin v President of Legislative Council for and on behalf of the Legislative Council*, [26], the Court of Appeal specifically referred to the following observation of Lord Reed in *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, [170]:

> For the reasons I have explained, such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say "might", because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context.

31. The Court of Appeal went on to emphasise the importance of context and the object of the court's exercise of supervisory jurisdiction in judicial review (namely, to preserve the rule of law, in contradistinction to the object of vindication of rights in private law actions) in the assessment of an applicant's standing, and stated that the overarching question, in the court's holistic assessment on standing, was whether, in the particular context, the preservation of the rule of law required standing to be given to vindicate the issue(s) raised in the application in light of the interest that the applicant had ([27]–[28]).

32. The above principles are equally applicable where an applicant is a corporation. In addition, when assessing whether a corporation has sufficient interest in the matter to which the application relates, it is relevant to take into account the nature, reputation, standing, history, knowledge and expertise of the corporation in the relevant field (see *Fishermen and Friends of the Sea v Minister of Planning, Housing and the Environment (Trinidad and Tobago)* [2017] UKPC 37, [7], *per* Lord Carnwath; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386, 396B, *per* Rose LJ).

33. Also of relevance is the question of whether the members of the corporation have an interest in the subject matter of the application. If the members themselves do not have standing, they cannot gain standing merely by incorporating themselves into a company:

(1) "[A]n aggregate of individuals each of whom has no interest cannot of itself have an interest", *per* Lord Wilberforce in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 633D.

(2) "... I think the following propositions, to put it no higher, are not inconsistent with that case ... 3. Not every member of the public can complain of every breach of statutory duty by a person empowered to come to a decision by that statute. To rule otherwise would be to deprive the phrase 'a sufficient interest' of all meaning ... 7. The fact that some thousands of people join together and assert that they have an interest does not create an interest if the individuals did not have an interest. 8. The fact that those without an interest incorporate themselves and give the company in its memorandum power to pursue a particular object does not give the company an interest ... It would be absurd if two people, neither of whom had standing could, by an appropriately worded memorandum, incorporate themselves into a company which thereby obtained standing", *per* Schiemann J in *R v Secretary of State for the Environment, ex p Rose Theatre Trust Co* [1990] 1 QB 504, 520B–F and 521D–E.

(ii) 803 Funds Ltd

34. The applicant (803 Funds Ltd), incorporated in 2019, is a company limited by guarantee. Mr Leung Chun Ying, former Chief Executive of the HKSAR, is a founding member and one of the first directors of the applicants. Other first directors of the applicant include various members of the Legislative Council.

35. The object of the applicant, as stated in para.4 of Part A (Mandatory Articles) of its Articles of Association, is "for the organisation and carrying out of activities to promote law and order and civic-minded activities, on a non-profit-making basis".

36. According to paras.30–33 of the 2nd Affirmation of Mr Leung, for the purpose of furthering the applicant's object:

(1) It has set up and maintained a website and a hotline which allows citizens to provide information about offenders and wanted persons in exchange for rewards.
(2) It encourages citizens for reporting or providing information regarding fugitives who have committed offences under the Hong Kong National Security Law.
(3) It has prepared and maintained lists of defendants in relation to the Anti-Extradition Law Amendment Bill Movement on the said website or platform for the general public's attention.
(4) It has filed another application in HCAL 1969/2020 for judicial review of the Education Bureau's decision refusing to disclose the names of the schools and the teachers involved and the findings and results of investigation in substantiated cases of professional misconduct by teachers.

37. It seems to me to be clear that the applicant does not have any personal right or interest over and above that of the general public or a section of the public concerning BA's enforcement of the UBWs and/or UCU in or at the particular premises in this case. The question of whether the applicant has nevertheless standing to challenge the Decision by way of judicial review therefore requires a holistic assessment of all relevant circumstances.

(iii) The merits of the intended application

38. When considering the merits of an intended application for judicial review in the context of determining whether an applicant has standing at the leave stage, the court is not required, and often is not in a position, to form a definitive view. All that is required is for the court to make a provisional assessment of the merits of the intended application.

39. As earlier mentioned, the applicant intends to advance four grounds of judicial review of the Decision.

40. Ground (1) alleges that BA failed to apply and/or departed from his own policy on UCU. In particular, it is argued that BA has adopted a "two-step approach" under his policy on enforcement actions in relation to cases of infringement of s.25, namely:

(1) BA may issue orders to prohibit a change of user; and

(2) BA would accord priority to deal with certain cases of infringement.[1]

It is further argued that by the Decision letter dated 4 August 2020, BA only indicated that "the current use does not pose obvious hazard or imminent danger to life or property, or cause serious health hazards or serious environmental nuisances", which was relevant to Step 2, but he failed to address Step 1 at all, or wrongfully and/or unlawfully bypassed Step 1.[2]

41. The applicant's argument under Ground (1) is based on two statements made by Mrs Carrie Lam (then Secretary for Development) in the Legislative Council on 3 November 2010 and 15 December 2010 respectively:[3]

(1) In the 1st statement, Mrs Lam said —

> Where in the opinion of the Building Authority any building is not suitable for its present or intended use by reason of its construction, he may issue orders to prohibit such use. As in the case of handling UBWs, the Buildings Department will accord priority to deal with those cases involving changes in use of buildings which constitute serious danger to life or property, or those which constitute serious environmental nuisance.

(2) In the 2nd Statement, Mrs Lam said —

> As regards changes in use of buildings, section 25(1) of the BO requires that prior notice shall be given to the Building Authority (BA) of any intended material change in the use of a building by the person concerned. The BO stipulates that the use of a building shall be deemed to be materially changed if the carrying out of building works for the erection of a building intended for such use would have contravened the provisions of the Ordinance. Where in the opinion of the BA any building is not suitable for its present or intended use by reason of its construction, he may issue an order under section 25(2) of the BO to prohibit or discontinue such use of the building. As in the case of handling UBWs, the BD will accord priority to deal with cases involving changes in use of buildings which constitute obvious or imminent danger to life and property, or those which constitute serious environmental nuisance.

42. In my view, the two statements are entirely consistent with BA's prevailing UCU Policy referred to in [24] above. As a matter of principle, where a case comes within s.25(2)(b), BA is entitled

1 See para.22 of the Form 86.
2 See para.23 of the Form 86.
3 See paras.20 and 21 of the Form 86.

to serve a Section 25 Order on the owner or occupier concerned to require him/her to discontinue the relevant use of the building within one month from the service of the order. However, whether BA would take immediate enforcement action to serve such order is guided by the UCU Policy which, being a published policy, BA is generally expected to observe as a matter of public law unless departure from the policy can be justified in the particular circumstances of any given case. It has not been suggested that the circumstances of the present case are such as would require BA to take immediate enforcement action under the UCU Policy. I do not see that BA has failed to apply and/or departed from his own policy on UCU. Ground (1) is not, in my view, reasonably arguable.

43. Ground (2) alleges that BA failed to apply and/or departed from his own policy on UBWs. BA takes the view that the building works involved in the Conversion are exempted works under s.41(3) because they are not "in any building" and do not involve the structure of the Building, and there is no Actionable Item "on the exterior" of the Building which would attract immediate enforcement action being taken under the 2011 UBWs Policy (see [20(3)] above).[4] In this regard, it should be noted that although the Spaces are on the "Basement" of the building, it would appear from the relevant photographs produced by the applicant that the Basement is actually on ground level and the Conversion is visible from outside the Building. Mr Douglas Lam SC (for the applicant) argues that BA's view that the relevant works "are exempted works for the purpose of s.41(3) of the Ordinance and do not require prior approval and consent under s.14(1) of the Ordinance" is untenable in view of the interpretation given to s.41(3) by the Court of Final Appeal in *Mariner International Hotels v Atlas Ltd* (2007) 10 HKCFAR 1, [52]–[53], where it was held that building works *on* the roof of a building were not "in" the building for the purpose of that subsection and therefore could not be exempted works. In my view, the applicability of s.41(3) is unlikely to be critical in this case because, even if the relevant works could be regarded as being "in" the Building and are exempted works under s.41(3), they would, apparently, still be UBWs because they are not in compliance with the building standards with regard to natural lighting and ventilation laid down in the subsidiary regulations.[5] The critical issues, it seems to me, are:

(1) whether the construction of s.41(3) given by the Court of Final Appeal in relation to building works "in" any building is also applicable for determining whether the relevant items

4 See para.36 of the Affirmation of Lam Siu Kay, Junkers.
5 See para.36 of the Affirmation of Lam Siu Kay, Junkers.

are "on the exterior of buildings" for the purpose of the 2011 UBWs Policy; and

(2) whether the building works involved in the Conversion (which are under the floor slab of the 1/F of the Building) should be regarded as building works "on the exterior" of the Building for the purpose of the 2011 UBWs Policy such that immediate enforcement action should be taken in this case.

I consider Ground (2) to be reasonably arguable, and the merits of this ground to be fair.

44. Ground (3) complains about BA's unreasonable delay in taking enforcement action in the present case. Bearing in mind the huge number of cases of UBWs and/or UCU in Hong Kong and the limited resources of BD, I do not consider it unreasonable for BA to adopt policies on priority of enforcement actions. Such policies are well-known and, as earlier mentioned, have been recognised and upheld by the Hong Kong courts in many cases in the past. It would be unfair for BA to depart from his existing and published policies merely because of the position of Mr Bowring or his wife, or because the present case has somehow caught the attention of the media. The contention that the Decision is liable to be impugned on the ground of *Wednesbury* unreasonableness because of BA's delay in taking enforcement action is not, I consider, reasonably arguable.

45. The proposed additional ground of judicial review, namely, that BA has unlawfully fettered his discretion,[6] is likewise not reasonably arguable. There are no exceptional circumstances in the present case which would justify BA's departure from his existing and published policies. The applicant's allegation that by way of purported policy, "the BD is in effect creating an impermissible '*safe harbour*' which does not exist in the legislation" is inconsistent with the well-recognised distinction between an "enforcement" policy and a "toleration" policy (see [26] above).

46. In all, I consider Ground (2) to be reasonably arguable, but not the other intended grounds of judicial review. The merits of Ground 2 are, I consider, fair.

(iv) Other considerations

47. The applicant does not have any special reputation, standing, history, knowledge or expertise regarding the taking of enforcement actions against UBWs/UCU in Hong Kong. At the hearing, it was faintly suggested by Mr Douglas Lam that Mr Leung, being a surveyor by profession, possessed relevant expertise in respect of the issues raised in the present case. However, Mr William Liu (for the Director) said that Mr Leung's professional qualification is that

6 See Section C4 of the draft Form 86.

of valuation surveyor, not building surveyor. Whatever may be the position, the issues raised in the present application for judicial review concern the proper interpretation and application of BA's policies on UBWs/UCU, which are primarily issues of law and which the court can resolve without requiring any expert assistance.

48. BA's relevant policies on UBWs/UCU are well-known and recognised. The present case is just one specific instance of immediate enforcement action, not being taken, out of many hundreds of thousands of cases of UBWs/UCU in Hong Kong. I do not consider that the vindication of the rule of law, or the nature of the alleged misinterpretation/misapplication of those policies on the part of BA, requires that leave should be granted to the applicant to pursue the present application for judicial review.

49. None of the members of the applicant claims to have any personal right or interest (financial, proprietary or otherwise) over and above that of the general public or a section of the public in the subject matter of the intended application for judicial review. If (as I consider it to be the case) the members do not have a sufficient interest in the matter to which the application relates, they cannot enhance their interest by incorporating themselves into a company. The applicant's interest is the promotion of law and order in Hong Kong, but that is not sufficient in itself to give the applicant standing to make the application.

50. There are, *prima facie*, other potential challengers who have a more direct or immediate interest to see that BA takes enforcement action against the Conversion, including the neighbours and the manager of the Building.

51. Adopting a holistic assessment of all relevant circumstances, I conclude that the applicant does not have a sufficient interest in the matter to which the present application relates. For the avoidance of doubt, I should mention that I would have come to same conclusion even if I consider that all the intended grounds of judicial review (and not just Ground (2)) are reasonably arguable.

Disposition

52. The application for leave to apply for judicial review is dismissed.

53. On the question of costs, although I have ruled against the applicant on the issue of standing, I accept that the applicant makes the present application not for the purpose of pursuing its private interest. I make no order as to the costs of the application.

Reported by Kemal Bokhary