

Proposed Leave Requirement for Appeals from the Lands Tribunal

Comments of the Hong Kong Bar Association

The Bar Council has received a letter dated 27 September 2007 from the Judiciary Administrator to the Chairman of the Bar Council ("the Letter") enclosing a Note of the Steering Committee on Civil Justice Reform ("the Steering Committee") inviting comments on the Committee's proposal to introduce a leave requirement for appeals from the Lands Tribunal to the Court of Appeal.

2. The background leading up to the Steering Committee's proposal is set out in the Letter. In short, what happened was that a similar proposal which was part of the overall Civil Justice Reform package was opposed by the Hong Kong Bar Association ("the Bar") in 2006. The Bar's submission dated 19.7.2006 stated that "... *The Bar is against introducing a leave requirement [for appeals from Lands Tribunal decisions] in addition to the existing provision, which already confines the scope of appeals. Where an appeal not seeking in substance to argue a point of law is filed, the respondent (which is usually the Government or the public authority) can be relied on to act diligently to seek the striking out of the notice of appeal.*"

3. In view of the Bar's comments, the proposed enabling amendments to the Lands Tribunal Ordinance ("LTO") have not been included in the Civil Justice (Miscellaneous Amendments) Bill 2007.

4. In 德喜大廈業主立案法團與黎明光 CACV 171/2006, 30 July 2007 (**copy at Annex 1**), the Court of Appeal commented that many of the appeals from the Lands Tribunal, particularly those where the appellants were unrepresented, had not been made in accordance with the statutory ground, i.e. that the Lands Tribunal's determination or order was erroneous in point of law. The Court of Appeal pointed out that appeals from the Labour Tribunal and the Small Claims Tribunal concerning points of law required leave. The Court of Appeal commented that there was a need to consider amending the LTO to introduce a leave requirement for appeals from the Lands Tribunal, so that it could be ascertained that the appeal involved a question of law.

5. The Steering Committee has reconsidered the matter in the light of the Court of Appeal's comments in CACV 171/2006. They took into account the following considerations –

- (a) Whilst there are Lands Tribunal appeals in which the Government is the respondent (mostly compensation cases), experience has shown that there are a very substantial number of appeals in which the respondent is not the Government (particularly in building management and possession cases). These are likely to be cases in which the appellants are unrepresented litigants. There are also applications for stay of execution pending appeals (mostly possession cases);
- (b) For unmeritorious appeals not involving points of law, legal costs incurred by the respondents are very often disproportionate to the subject matter of the appeal, and in possession cases, such legal costs are probably unrecoverable due to the insolvency of the appellant; and
- (c) Unless there is a leave requirement, the objective of section 11(2) of the LTO to limit the scope of appeals to those determinations or orders which are erroneous in point of law is often defeated and such appeals become costly for the respondent.

6. In view of the above, the Steering Committee proposes that Committee Stage Amendments should be introduced to the Civil Justice (Miscellaneous Amendments) Bill 2007 to amend section 11 of LTO to introduce a leave requirement for interlocutory and final appeals from the Lands Tribunal to the Court of Appeal. Leave would only be granted where there is a reasonable prospect of success or some other compelling reason exists for an appeal. Refusal of leave by the Court of Appeal is final.

7. As noted in paragraph 2 above, the Bar's only ground of opposing the relevant amendments to the LTO in 2006 was "*Where an appeal not seeking in substance to argue a point of law is filed, the respondent (which is usually the Government or the public authority) can be relied on to act diligently to seek the striking out of the notice of appeal.*" It is true that among the ordinances under which matters may be submitted to the Lands Tribunal for determination, the Government is a party in the majority of them (land compensation, rating appeals, etc.) (see Annex 2). However, in terms of number of disputes, the Bar believes that matters under the Building Management Ordinance and, to a lesser extent, the Landlord and Tenant (Consolidation) Ordinance, in which ordinarily the Government is not a party, outnumber the matters in which the Government is a party.

8. Seen in this light, and in view of the Court of Appeal's concern expressed in CACV 171/2006, the Bar believes it cannot hold onto its 2006 position anymore. More importantly, the mischief which the proposed amendments aim to deal with is a real one affecting as it does unwary unrepresented litigants in many disputes under the Building Management Ordinance and the Landlord and Tenant (Consolidation) Ordinance.

9. Initially the Bar did not feel quite comfortable about one aspect of the proposal, namely that refusal of leave by the Court of Appeal is final. However, the Bar then found that there are similar provisions in the Small Claims Tribunal Ordinance and the Labour Tribunal Ordinance. The Bar takes it that there have been no complaints in the past about any injustice being caused by the leave requirement in these two Ordinances.

10. The Bar would, therefore, agree to the Steering Committee's proposal.

Dated: 24 October 2007

Hong Kong Bar Association

CACV 171/2006

香港特別行政區
高等法院上訴法庭
民事司法管轄權

民事上訴

案件編號：民事上訴案件 2006 年第 171 號

(原本案件編號：土地審裁處建築物管理申請 2005 年第 229 號)

申請人 德喜大廈業主立案法團

與

答辯人 黎明光

審理法官： 高等法院上訴法庭法官張澤祐
高等法院上訴法庭法官袁家寧
高等法院原訟法庭法官林文瀚

聆訊日期：2007 年 7 月 4 日

判案書日期：2007 年 7 月 30 日

判案書

上訴法庭法官張澤祐頒發上訴法庭判案書：

案情背景

1. 申請人是九龍油麻地德昌里 1 至 9 號德喜大廈的業主立案法團。答辯人為該大廈 12 字樓 C 座的業主。答辯人由 2002 年 8 月至 2003 年 11 月欠交每月 \$480 的管理費，總數為 \$7,680。
2. 申請人在小額錢債審裁處提出申索向答辯人追討有關欠款。小額錢債審裁處將案件轉介到土地審裁處審理。答辯人提交反對通知書質疑申請人的合法地位。答辯人亦提出反申索，要求申請人提供有關業主立案法團的文件及資料。
3. 土地審裁處（‘審裁處’）黃一鳴暫委法官（當時官階）在審理案件後裁定答辯人需支付申請人有關的欠款及撤銷答辯人的反申索。答辯人就該判決提出上訴。

法律論點的上訴

4. 根據香港法例第 17 章《土地審裁處條例》第 11(2) 條，訴訟任何一方均可以就審裁處的裁決有法律論點錯誤為理由向上訴法庭提出上訴。《高等法院規則》第 60(A) 號命令第 2 條規則明確說明來自審裁處的上訴通知書必須列出上訴的理由及需由上訴法庭裁定的法律問題。若上訴通知書的內容沒有根據有關條例來

作出，法庭是有權根據對方的申請撤銷上訴通知書的（見：*Chan Cheuk Tong v. Director of Lands* [1996] 3 HKC 485）。本案的上訴通知書亦沒有列出那些需由本庭裁定的法律問題。本庭亦看不到本上訴涉及任何法律問題。

黃法官的裁決

5. 答辯人反對申請人向他追討欠交的管理費的原因是他質疑申請人的法律地位。正如黃法官在判案書清楚說明，申請人已經提供了文件來證明它是正式註冊成立的。另外，就算申請人的管理委員會超過了 15 個月也沒有重選也不等於申請人或其管理委員會會變得無效（見：*Incorporated Owners of Finance Building v. Bright Hill Management Consultants Co. Ltd.*, CACV 386/2000）。

6. 答辯人承認他欠交有關的管理費，而申請人的法律地位的爭辯又已經被否決了，故此答辯人是必須向申請人支付有關的管理費。

7. 另外，有關答辯人的反申索，黃法官裁定雖然答辯人已經多次向申請人索取有關的文件，但他未能證明他的要求曾遭申請人拒絕。黃法官更裁定申請人已經多次通知答辯人它是會向答辯人提供他需要查閱的文件的及會在小額錢債審裁處的聆訊中提供會議記錄給答辯人查閱，但被答辯人拒絕。另外，申請人在業主大會上亦有展示有關文件，但答辯人未有出席該會議。黃法官裁定

答辯人唯一可向申請人索取的文件必須是香港法律第 344 章《建築物管理條例》第 27 條，及該條例附表 6 第 3 段及附表 7 第 2(5) 段所述的文件。黃法官裁定答辯人要求索取的 13 項文件之中只有兩項是符合第 27 條的要求，其餘都與第 27 條無關。無論如何，黃法官裁定答辯人未能証明他曾向申請人要求提供該兩項文件及遭拒絕。

8. 黃法官的裁決主要是涉及事實的裁決。本庭看不到這裁決涉及任何法律原則或裁決有任何不妥之處。

總結

9. 基於上述原因，本庭駁回上訴。

訟費

10. 由於答辯人上訴失敗，故此他需要向申請人支付本上訴的訟費，但這不包括申請人大律師於 2007 年 7 月 4 日出庭的費用。申請人接獲上訴通知書後是有權聘請律師尋求法律協助的，但由於事務律師無權在上訴法庭公開聆訊發言，故此，事務律師亦可轉聘大律師代表申請人反對上訴，但並不表示大律師只需要到庭，他的費用便會必然地計算在敗訴一方需向勝訴一方支付的訟費之內。律師不可以期待法庭會必然命令敗訴一方支付對方一些完全沒有實質作用的律師費用。法庭在聆訊前向申請人的代表律師查詢提交書面陳述書一事，但代表申請人的李以鴻大律師在本

上訴前沒有提交任何書面陳述書，因此法庭亦沒有讓他在庭上就本上訴作出陳詞。李大律師說他沒有提供陳述書的理由是實務指示並沒有規定上訴的另一方必須提交書面陳述書。他指答辯人本身並沒有提交書面陳述書，故此他認為無需要提交書面陳述書。他更說當他在法庭聆聽答辯人的陳詞後，如有需要他是會向法庭作出回應的。

11. 本庭認為這是一個非常狹隘的說法。雙方在聆訊時均沒有律師代表。在本上訴，答辯人亦沒有律師代表。有律師代表的一方有責任協助法庭提供書面陳述書列出上訴背景及爭議點，以便法庭及答辯人在開審時有機會瞭解這些爭議點。書面陳述書已經是屬於法庭程序中不可或缺的一部分，若大律師沒有提供書面陳述書，除非在特殊的情況之下，法庭是不會准許他向法庭作出口頭陳詞的。答辯人亦有在他的上訴通知書內說明他上訴的理由可從他所提交的文件中見到。在這情況下，就算答辯人沒有就他的上訴提交書面的陳述書，申請人的大律師對答辯人的論點並非是蒙在鼓裡，而是可以在聆訊前適當地作出書面陳述的。

12. 本庭認為由於大律師未能實質協助本庭，故此答辯人需要支付的訟費不包括申請人大律師的訟費。另外，除非代表申請人的司徒毓廷律師行在 14 天內通知本庭它不會向客戶（即申請人）收取大律師費用，否則它必須在同一時間內提交書面解釋為何它不需要親自支付有關大律師費用而可以轉介由申請人本身支付。本庭接獲有關書面陳述後就會另行作出指示或命令。

本庭建議

13. 本庭必須指出上訴法庭察覺到源自土地審裁處的上訴案件，特別是上訴人是沒有律師代表的案件，甚多是不符合法律規定必須具有法律爭議點的。有關的原因是這類上訴是不需要審裁處或上訴法庭批予許可才可進行。反觀來自其他審裁處，如小額錢債審裁處及勞資審裁處涉及法律觀點的上訴仍需要獲得許可才可進行。本庭認為有需要考慮修改《土地審裁處條例》規定該審裁處的案件亦需獲得許可，証明案件確實涉及法律問題爭議，才可以正式提出上訴，否則這類的上訴只會徒然浪費上訴法庭資源、訴訟費用及時間。

(張澤祐)
高等法院上訴法庭
法官

(袁家寧)
高等法院上訴法庭
法官

(林文瀚)
高等法院原訟法庭法
官

申請人：由司徒毓廷律師行轉聘李以鴻大律師代表。

答辯人：無律師代表，親自出席。

Schedule to Lands Tribunal Ordinance, Cap. 17

ORDINANCES UNDER WHICH MATTERS MAY BE SUBMITTED TO THE
TRIBUNAL FOR DETERMINATION

Chapter	Short title
7.	Landlord and Tenant (Consolidation) Ordinance. (Added 49 of 1982 s. 16)
116.	Rating Ordinance.
124.	Lands Resumption Ordinance. (Amended 29 of 1998 s. 8)
127.	Foreshore and Sea-bed (Reclamations) Ordinance. (Replaced 63 of 1985 s. 21)
130.	Land Acquisition (Possessory Title) Ordinance. (Added 41 of 1983 s. 14)
208.	Country Parks Ordinance. (Added 41 of 1984 s. 3)
276.	Mass Transit Railway (Land Resumption and Related Provisions) Ordinance. (Added 80 of 1978 s. 6)
283.	Housing Ordinance. (Added L.N. 18 of 1993)
301.	Hong Kong Airport (Control of Obstructions) Ordinance.
311.	Air Pollution Control Ordinance. (Added 23 of 1987 s. 19)
337.	Demolished Buildings (Re-development of Sites) Ordinance.
344.	Building Management Ordinance. (Added 27 of 1993 s. 44)
357.	Electricity Networks (Statutory Easements) Ordinance. (Added 27 of 1993 s. 44)
358.	Water Pollution Control Ordinance. (Added 42 of 1985 s. 6)
370.	Roads (Works, Use and Compensation) Ordinance. (Added 49 of 1982 s. 16)
438.	Sewage Tunnels (Statutory Easements) Ordinance. (Added 74 of 1993 s. 15)
446.	Land Drainage Ordinance. (Added 20 of 1994 s. 50)
488.	Block Crown Lease (Cheung Chau) Ordinance. (Added 97 of 1995 s. 11)
515.	Government Rent (Assessment and Collection) Ordinance. (Added 53 of 1997 s. 48)
519.	Railways Ordinance. (Added 59 of 1997 s. 46)
545.	Land (Compulsory Sale for Redevelopment) Ordinance. (Added 30 of 1998 s. 15)
577.	Tung Chung Cable Car Ordinance. (Added 20 of 2003 s. 39)
